Mohammad Faizal bin Sabtu *v* Public Prosecutor
[2012] SGHC 163

Case Number : Special Case No 1 of 2012

Decision Date : 10 August 2012

Tribunal/Court : High Court

Coram : Chan Sek Keong CJ

Counsel Name(s) : S K Kumar (S K Kumar Law Practice LLP) for the petitioner; Tan Ken Hwee, Andre Jumabhoy, Kwek Chin Yong, Seraphina Fong and Jeremy Yeo Shenglong (Attorney-General's Chambers) for the respondent; Paul Ong Min-Tse as amicus curiae.

Parties : Mohammad Faizal bin Sabtu — Public Prosecutor

Constitutional Law – Equal protection of the law

Constitutional Law – Executive

Constitutional Law – Judicial power

Constitutional Law – Legislature

Criminal Law – Statutory offences – Misuse of Drugs Act

Criminal Procedure and Sentencing – Sentencing

10 August 2012

Chan Sek Keong CJ:

Introduction

1 This Special Case (*viz*, Special Case No 1 of 2012 ("Special Case No 1")) and Special Case No 2 of 2012 (see the companion grounds of decision in *Amazi bin Hawasi v Public Prosecutor* [2012] SGHC 164) state two separate questions of law for the court's determination as to the constitutionality of certain provisions in s 33A of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("the MDA"). Section 33A of the MDA (also referred to hereafter as "s 33A" for short where appropriate) prescribes mandatory minimum (and enhanced) punishments for convicted drug offenders who have previously consumed specified drugs (as defined in s 2 of the MDA). The material provisions in s 33A for the purposes of this Special Case are as follows:

> **Punishment for repeat consumption of specified drugs**
>
> 33A.—(1) Where a person who has not less than —
>
> (*a*) 2 previous admissions;
>
> (*b*) 2 previous convictions for consumption of a specified drug under section 8(*b*);

(*c*) 2 previous convictions for an offence of failure to provide a urine specimen under section 31(2);

(*d*) one previous admission and one previous conviction for consumption of a specified drug under section 8(*b*);

(*e*) one previous admission and one previous conviction for an offence of failure to provide a urine specimen under section 31(2); or

(*f*) one previous conviction for consumption of a specified drug under section 8(*b*) and one previous conviction for an offence of failure to provide a urine specimen under section 31(2),

is convicted of an offence under section 8(*b*) for consumption of a specified drug or an offence of failure to provide a urine specimen under section 31(2), he shall on conviction be punished with —

(i) imprisonment for a term of not less than 5 years and not more than 7 years; and

(ii) not less than 3 strokes and not more than 6 strokes of the cane.

…

2 Section 33A(5)(*c*) of the MDA defines "admission" as an admission to an "approved institution" (in essence, a drug rehabilitation centre ("DRC")) for rehabilitation pursuant to s 34(2) of the MDA. Under s 34(1) of the MDA, the Director of the Central Narcotics Bureau ("the CNB Director") may direct "any person whom he reasonably suspects to be a drug addict" to be medically examined or observed by a Government medical officer or a medical practitioner. Under s 34(2) of the MDA, if, as a result of such medical examination or observation, it appears to the CNB Director that it is necessary for the person examined or observed:

(*a*) to be subject to supervision, the [CNB] Director may make a supervision order requiring that person to be subject to the supervision of an officer of the [Central Narcotics] Bureau for a period not exceeding 2 years; or

(*b*) to undergo treatment or rehabilitation or both at an approved institution, the [CNB] Director may make an order in writing requiring that person to be admitted for that purpose to an approved institution.

3 The specific provisions in s 33A which are in issue in this Special Case are ss 33A(1)(*a*), 33A(1)(*d*) and 33A(1)(*e*) (collectively, "the impugned s 33A MDA provisions"). In summary, pursuant to these provisions, the court has to impose the minimum enhanced punishments in s 33A(1) in cases where the offender has had not less than:

(a) two previous admissions to a DRC (see s 33A(1)(*a*)); or

(b) one previous DRC admission coupled with one previous conviction for the offence under s 8(*b*) of the MDA ("s 8(*b*) offence") of consuming a specified drug (see s 33A(1)(*d*)); or

(c) one previous DRC admission coupled with one previous conviction for the offence under s 31(2) of the MDA ("s 31(2) offence") of failure to provide a urine specimen (see s 33A(1)(*e*)).

4 The stated questions in this Special Case and Special Case No 2 of 2012 raise a fundamental

issue of constitutional law in the context of the principle of separation of powers as to the role of the Legislature, the Executive and the Judiciary in the punishment of offenders under our criminal justice system. Specifically, the issue in this Special Case is whether the impugned s 33A MDA provisions constitute an impermissible legislative intrusion into the judicial power and accordingly violate the principle of separation of powers embodied in the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("the Singapore Constitution"). The stated question in this Special Case also raises additional issues as to whether the impugned s 33A MDA provisions violate Arts 9 and/or 12 of the Singapore Constitution. I should point out at this juncture that although ss 33A(1)(*d*) and 33A(1)(*e*) were raised in addition to s 33A(1)(*a*) in this Special Case, the submissions of the petitioner, Mohammad Faizal bin Sabtu ("the Petitioner"), dealt primarily with s 33A(1)(*a*) only. The analysis and discussion in these grounds of decision will therefore centre on s 33A(1)(*a*). My findings and rulings, however, apply equally to ss 33A(1)(*d*) and 33A(1)(*e*) as well.

Background to Special Case No 1

5 The Petitioner was charged on 1 April 2011 with a number of offences under the MDA, including one count of consumption of morphine under s 8(*b*)(ii) of the MDA. Section 33A(1)(*a*) of the MDA was applicable to him as he had two previous DRC admissions dated 29 August 2007 and 21 October 2008 respectively. If convicted of the consumption charge preferred against him, he would have to suffer the enhanced punishment of a minimum of five years' imprisonment and three strokes of the cane under ss 33A(1)(i) and 33A(1)(ii) respectively of the MDA. The Petitioner pleaded guilty to the charges brought against him, and applied to the High Court for leave to state a Special Case for determination by the High Court after a similar application to the District Court was rejected. On 3 February 2012, I directed the District Court to state the following question of law ("the Stated Question") for determination by the High Court:

> Does s 33A(1)(a), (d) and/or (e) of the [MDA] violate the separation of powers embodied in the Constitution of the Republic of Singapore in requiring the court to impose a mandatory minimum sentence as prescribed thereunder, with specific reference to "admissions" as defined in s 33A(5)(c) of the MDA?

6 Although the Stated Question was asked in the context of the principle of separation of powers, the Petitioner also argued, in the course of his submissions, that the impugned s 33A MDA provisions (in particular, s 33A(1)(*a*)) violated Arts 9 and/or 12 of the Singapore Constitution. After hearing the submissions of the parties and also those of the *amicus curiae* (to whom I now express my gratitude for the very comprehensive brief which he submitted in these proceedings), I answered the Stated Question in the negative. I now give the reasons for my decision, as well as my rulings on the specific arguments canvassed by the parties.

The arguments on the constitutionality of s 33A(1)(*a*) of the MDA

The Petitioner's arguments

7 The Petitioner's case that s 33A(1)(*a*) of the MDA is unconstitutional may be summarised as follows:

> (a) Section 33A(1)(*a*) directs the court to treat DRC admissions (which are executive orders) as convictions (which are judicial orders) in order to impose the enhanced minimum punishments in s 33A(1) on an offender. This legislative direction as to the effect of prior executive acts in the sentencing process intrudes into the sentencing function, which is part of the judicial power, and therefore violates the principle of separation of powers [note: 1] (citing *Kable v The Director of*

Public Prosecutions for the State of New South Wales (1996) 189 CLR 51 ("*Kable*"), *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311 ("*Dato' Yap Peng*"), *Moses Hinds and Others v The Queen* [1977] AC 195 ("*Hinds*"), *Don John Francis Douglas Liyanage and Others v The Queen* [1967] 1 AC 259 ("*Liyanage*"), *Lim Keng Chia v Public Prosecutor* [1998] 1 SLR(R) 1 ("*Lim Keng Chia*"), *Public Prosecutor v Boon Kiah Kin* [1993] 2 SLR(R) 26 and *United States v Klein* 80 US 128 (1871)).

(b) Section 33A(1)(*a*) also violates Art 12 of the Singapore Constitution in subjecting an offender with two prior DRC admissions to the same treatment as an offender with two prior court convictions [note: 2] (citing *Yong Vui Kong v Public Prosecutor and another matter* [2010] 3 SLR 489 ("*Yong Vui Kong*")).

(c) The prescribed mandatory minimum sentence of five years' imprisonment and three strokes of the cane under ss 33A(1)(i) and 33A(1)(ii) respectively offends Art 9 of the Singapore Constitution as it is manifestly excessive, disproportionate and arbitrary, given that an offender who has two prior DRC admissions is effectively a first-time offender [note: 3] (citing *Ong Ah Chuan and another v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan*")).

The Prosecution's arguments

8 The Prosecution's arguments in response to the Petitioner's arguments may be summarised as follows:

(a) Section 33A(1)(*a*) of the MDA is not a legislative or executive usurpation of the judicial power. Punishment is Parliament's prerogative, and must be distinguished from the sentencing discretion, which is the province of the courts. Parliament is entitled to set upper and/or lower limits on the punishment to be meted out for an offence, while the courts may only impose the sentences which they are authorised by law to impose [note: 4] (citing *Hinds* and *State of South Australia v Totani and Another* (2010) 242 CLR 1 ("*Totani*")).

(b) Section 33A(1)(*a*) does not transfer or have the effect of transferring judicial power to the Executive as the CNB Director does not, when making a DRC admission order, exercise a judicial function (citing *Lim Keng Chia*). The prior DRC admissions and prior convictions stated in s 33A(1) are merely the prescribed conditions that serve to trigger the imposition of the enhanced minimum punishments under the s 33A(1) sentencing scheme (citing *Hinds* and *Totani*).

(c) Parliament is entitled to enact legislation which provides for harsher punishment for a particular class of offenders in furtherance of a societal object as long as there is a rational relation between the legislative classification and that object. The enhanced punishment of drug offenders who have been shown to have a sustained drug dependency is an intelligible differentia that bears a rational relation to a valid social object [note: 5] (citing *Ong Ah Chuan* and *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103).

The submissions of the amicus curiae

9 The *amicus curiae*'s brief asserts the following principles as being applicable to the Stated Question:

(a) The judicial power includes the power to determine the measure of punishment [note: 6] (citing *Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic*

Affairs and Another (1992) 176 CLR 1 ("*Chu Kheng Lim*") and *Kok Wah Kuan v Public Prosecutor* [2007] 5 MLJ 174 ("*Kok Wah Kuan*")).

(b) In the absence of a strict separation of powers between the various constitutional organs in a State, the Executive is not precluded from having a role in the imposition and administration of punishment so long as its role in this regard does not usurp or interfere with the Judiciary's exercise of the judicial power to determine the measure of punishment [note: 7] (citing *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (7 March 1938, unreported) and *S v Dodo* [2001] 5 BCLR 423 (CC) ("*Dodo*")).

(c) The Legislature cannot, consistently with the principle of separation of powers, enact laws which have the effect of vesting in the Executive the judicial power to determine the punishment to be imposed in a particular case [note: 8] (citing *Hinds*, *Reginald Deaton v The Attorney General and the Revenue Commissioners* [1963] IR 170 ("*Deaton*"), *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 ("*Muktar Ali*") and *Kok Wah Kuan*).

(d) While the Legislature may prescribe the jurisdiction to be conferred on the courts, the legislative powers of the Legislature do not extend to the enactment of laws which have the effect of directing the courts as to the manner and outcome of the exercise of their discretion [note: 9] (citing *Liyanage* and *Chu Kheng Lim*).

10 On the basis of these principles, the *amicus curiae* submitted that the Stated Question ought to be answered in the negative for the following reasons:

(a) In ordering a DRC admission, the CNB Director is not exercising a judicial function [note: 10] (citing *Fraser Henleins Proprietary Limited v Cody* (1945) 70 CLR 100 and *Lim Keng Chia*).

(b) The impugned s 33A MDA provisions do not have the effect of vesting in the CNB Director the power to determine the measure of punishment to be imposed in a particular case [note: 11] (citing *Hinds* and *Palling v Corfield* (1970) 123 CLR 52 ("*Palling*")).

(c) The impugned s 33A MDA provisions also do not have the effect of directing the courts as to the manner and outcome of the exercise of their sentencing powers under the MDA [note: 12] (citing *Liyanage*, *Chu Kheng Lim*, *Totani* and *Public Prosecutor v Taib bin Ibrahim* (District Arrest Case No 19762 of 1998)).

The constitutional framework in Singapore

The Westminster model of constitutional government

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

whether conceived as a sharing or a division of sovereign power between these three organs of state, is therefore part of the basic structure of the Singapore Constitution. Article 38 of the Singapore Constitution vests the legislative power of Singapore in the Legislature consisting of the President and Parliament. Article 23(1) of the Singapore Constitution vests the executive power (or authority) of Singapore in the President, which power is "exercisable subject to the provisions of this Constitution by him or by the Cabinet or any Minister authorised by the Cabinet". Article 93 of the Singapore Constitution vests the judicial power of Singapore in "a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force" (in this regard, see [16] below *vis-à-vis* the two different sources of judicial power set out in this Article).

12 All Constitutions based on the Westminster model incorporate the principle of separation of powers as part of their constitutional structure in order to diffuse state power among different organs of state. It is for this reason that Lord Diplock stated in *Hinds* in relation to such Constitutions (at 212D–212E):

> It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government [*viz*, the Legislature, the Executive and the Judiciary]. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature.

The same point is made in Thio Li-ann, *A Treatise on Singapore Constitutional Law (*Academy Publishing, 2012) ("*Thio*") at paras 1.177–1.178.

13 In *Jeyaretnam Joshua Benjamin v Attorney-General* [1987] SLR(R) 472, F A Chua J observed at [9] that the then equivalent of the Singapore Constitution (*viz*, the Constitution of the Republic of Singapore (1985 Rev Ed)) had "adopt[ed] and codifie[d] most, if not all, of the laws, customs, conventions and practices of the British constitutional and parliamentary system" (see also *Thio* at paras 5.001–5.005). However, there are nonetheless fundamental differences between the UK's version of the Westminster model ("the UK's Westminster model") and Singapore's version of the Westminster model ("Singapore's Westminster model"). Two such differences will be mentioned below.

Differences between the UK's Westminster model and Singapore's Westminster model

The supremacy of the Singapore Constitution

14 The first fundamental difference is that the UK's Westminster model is based on the supremacy of the UK parliament, under which the UK parliament is supreme, with the result that the UK courts have no power to declare an Act of the UK parliament unconstitutional and, hence, null and void. In contrast, Singapore's Westminster model is based on the supremacy of the Singapore Constitution, with the result that the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void. Article 4 of the Singapore Constitution expresses this constitutional principle in the following manner:

> This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

15 It should be noted that Art 4 of the Singapore Constitution states that any law inconsistent with "this Constitution", as opposed to any law inconsistent with "any provision of this Constitution", is void. The specific form of words used in Art 4 reinforces the principle that the Singapore parliament

may not enact a law, and the Singapore government may not do an act, which is inconsistent with the principle of separation of powers to the extent to which that principle is embodied in the Singapore Constitution.

The exclusiveness of judicial power

16 The second fundamental difference between the UK's Westminster model and Singapore's Westminster model is that under the former, the judicial power of the UK vests in the UK courts either at common law or by statute. In contrast, under Singapore's Westminster model, the judicial power of Singapore is vested (by Art 93 of the Singapore Constitution) in the Supreme Court and "in such subordinate courts as may be provided by any written law for the time being in force". The Singapore Constitution thus provides for two different sources of judicial power. The first and much more significant source is the Singapore Constitution itself. The judicial power of the Supreme Court is a constitutional power derived directly from Art 93 and, hence, may be said to be co-equal in constitutional status with the legislative power and the executive power, subject only to the limitations expressed in the Singapore Constitution. The second source of judicial power, which applies to courts subordinate to the Supreme Court, is, in contrast, statutory in nature (see the words "any written law for the time being in force" in Art 93).

17 Although Art 93 of the Singapore Constitution sets out two different sources of judicial power, what is important to note for present purposes is that the specific wording used in this Article has the effect of vesting the judicial power of Singapore *exclusively* in the Supreme Court and the Subordinate Courts, and not in any entity which is not a "court", a "court" being, at common law, an entity with certain characteristics. The reference to "[c]ourt" in Art 93 would include any statutory body or tribunal having the characteristics of a court. All Commonwealth Constitutions appear to follow this practice of vesting the judicial power exclusively in the courts. Reference may be made to the decision of the Privy Council in *Hinds*, where ss 8 and 22 of Jamaica's Gun Court Act 1974 (No 8 of 1974) were declared unconstitutional as being contrary to the principle of separation of powers implicit in the Jamaican Constitution, and therefore void, because they purported to transfer the power to determine the severity of the punishment to be inflicted on a specific class of offenders from the Jamaican judiciary to a review board. As the majority of the members of the review board were laymen and, thus, not qualified to exercise judicial power, the Privy Council held that the review board was not a "court" since it did not have the characteristics of a court. In the Singapore context, the exclusivity of the judicial power is safeguarded by the provisions in Part VIII of the Singapore Constitution, which are designed to secure the independence of our judiciary.

The scope and nature of the judicial power *vis-à-vis* the punishment of offenders

18 The Stated Question which I have to answer in this Special Case is a narrow one. It is whether the impugned s 33A MDA provisions (which set out the conditions that, upon being satisfied, subject an offender to the enhanced minimum punishments prescribed in s 33A(1)) constitute an impermissible legislative or executive intrusion into the judicial power. As mentioned at [6] above, I answered this question in the negative. Before I give my reasons for coming to this conclusion, it is necessary that I first address a more fundamental question as to the meaning of "judicial power" and the scope and nature of this power *vis-à-vis* the punishment of offenders.

The meaning of "judicial power"

19 The Singapore Constitution does not define "judicial power". It assumes that this expression has a core meaning since the Singapore courts had been exercising judicial functions for about 150 years prior to the introduction of the Singapore Constitution. Case law would thus have identified certain

hallmarks that, historically or jurisprudentially, would distinguish the judicial power from the legislative power and the executive power. Such a distinction is essential to separate one constitutional power from the other constitutional powers functionally. This is important as the principle of separation of powers requires that each constitutional organ should act within the limits of its own powers. This entails, in so far as the judicial branch is concerned, that the legislative and the executive branches of the State may not interfere with the exercise of the judicial power by the judicial branch. This total separation between the exercise of the judicial power on the one hand and the exercise of the legislative and the executive powers on the other hand is based on the rule of law (see *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 at [13]).

20 In the Australian High Court case of *Huddart, Parker and Co Proprietary Limited v Moorehead* (1909) 8 CLR 330 ("*Huddart*"), Griffith CJ provided what is now regarded as the classic definition of "judicial power" as follows (at 357):

> … [T]he words "judicial power" as used in sec. 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.

21 In *The Queen v The Trade Practices Tribunal and Others; Ex parte Tasmanian Breweries Proprietary Limited* (1970) 123 CLR 361 ("*Tasmanian Breweries*"), Kitto J endorsed and expanded upon Griffith CJ's definition in *Huddart*, opining that (see *Tasmanian Breweries* at 374–375):

> … [J]udicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. …

22 In a separate judgment, Windeyer J observed (at 394 of *Tasmanian Breweries*) as follows:

> The concept [of judicial power] seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis. It inevitably attracts consideration of predominant characteristics and also invites comparison with the historic functions and processes of courts of law.

23 In *Chu Kheng Lim*, Brennan, Deane and Dawson JJ opined in their joint judgment (at 26–27):

> The Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers. Chapter III gives effect to that doctrine in so far as the vesting of judicial power is concerned. Its provisions constitute "an exhaustive statement of the manner in which the judicial power of the Commonwealth [of Australia] is or may be vested … No part of the judicial power can be conferred in virtue of any other authority or otherwise than in accordance with the provisions of Chap. III" [citing *Reg v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 *per* Dixon CJ, McTiernan, Fullagar and Kitto JJ]. Thus, it is well settled that the grants of legislative power contained in s. 51 of the Constitution, which are expressly "subject to" the provisions of the Constitution as a whole, do not permit the conferral upon any organ of the Executive Government of any part of the judicial power of the Commonwealth [of Australia].

24 In *Nicholas v The Queen* (1998) 193 CLR 173, Gaudron J defined "judicial power" as follows (at

[70]):

> In general terms, … it is that power which is brought to bear in making binding determinations as to guilt or innocence, in making binding determinations as to rights, liabilities, powers, duties or status put in issue in justiciable controversies, and, in making binding adjustments of rights and interests in accordance with legal standards. It is a power which is exercised in accordance with the judicial process and, in that process, many specific and ancillary powers are also exercised.

25 The US Supreme Court has also provided a neat formulation, opining in *Prentis v Atlantic Coast Line Co* 211 US 210 (1908) that the holder of judicial power (at 226):

> … investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.

26 In the UK, a formulation of the judicial function was offered by the Donoughmore Committee in "Report of the Committee on Ministers' Powers" (Cmnd 4060, 1932) in section III, as follows:

> A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites:
>
> (1) the presentation (not necessarily orally) of their cases by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and the application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law.

27 It can be seen from the above quotations that despite the definitional difficulties apropos the term "judicial power", a reasonably clear judicial consensus as to the nature of the judicial function has emerged from case law. In essence, the judicial function is premised on the existence of a controversy either between a State and one or more of its subjects, or between two or more subjects of a State. The judicial function entails the courts making a finding on the facts as they stand, applying the relevant law to those facts and determining the rights and obligations of the parties concerned for the purposes of governing their relationship for the future. I note, however, that none of the above quotations touch on the question of whether the power to impose punishments on offenders is part of the judicial power. I now turn my attention to this question.

The judicial power to impose punishments

28 In *Chu Kheng Lim*, McHugh J observed (at 67 of his minority judgment) that the classification of the *exercise* of a power as legislative, executive or judicial was incapable of an exhaustive or a more precise definition because it:

> … frequently depends upon a value judgment as to whether the particular power, having regard to the circumstances which call for its exercise, falls into one category rather than another. …

29 Nevertheless, all common law courts, including the Singapore courts, have consistently accepted, or at least assumed, that the punishment of offenders is part of the judicial power. For example, in *Dato' Yap Peng*, the Supreme Court of Malaysia held that the court (at 313D):

… possesses the judicial power to try a person for an offence committed by him and to *pass sentence against him* if he is found guilty. [emphasis added]

30 Similarly, the Malaysian Court of Appeal in *Kok Wah Kuan* observed (at [11]):

… [T]he power to pass sentence and the power to determine the measurement of punishment are both part of the judicial power. …

31 The above statement from *Kok Wah Kuan* seems to differentiate between passing a sentence and determining the measure of punishment to impose. It is not clear that there is a difference in substance between these two actions. In my view, they are both integral to the function of imposing punishment on an offender.

32 In *Chu Kheng Lim*, Brennan, Deane and Dawson JJ stated in their joint judgment (at 27):

There are some functions which, by reason of their nature or because of historical considerations, have become established as *essentially and exclusively judicial in character*. The most important of them is the adjudgment and *punishment of criminal guilt* under the law of the Commonwealth [of Australia]. That function appertains exclusively to and "could not be excluded from" [citing *Reg v Davison* (1954) 90 CLR 353 at 368 and 383] the judicial power of the Commonwealth [of Australia]. [emphasis added]

33 In my view, in using the words "punishment of criminal guilt" in their joint judgment in *Chu Kheng Lim*, Brennan, Deane and Dawson JJ did not mean to suggest that the sentencing function of the courts extended beyond determining the measure of punishment to impose in each case before the courts. These words do not imply that the prescription of the kind and range of punishments to be imposed for a specific offence or a specific class of offences is part of or integral to the judicial power, which is distinct and separate from the legislative power. If a contrary interpretation of the words "punishment of criminal guilt" in *Chu Kheng Lim* is adopted (*ie*, if these words are interpreted as including the prescription of the kind and range of punishments as part of the judicial power), that would be inconsistent with the earlier decision of the Australian High Court in *Palling*, where it was held that the fixing or prescription of punishments for offences was *not* part of the judicial power.

34 In *Palling*, the issue before the court was whether s 49(2) of the National Service Act 1951–1968 (Cth) ("the Australian National Service Act") infringed the principle of separation of powers in providing that a person convicted of an offence of failing to respond to a national service notice was liable to pay a fine of between A$40 and A$200 and, on the request of the prosecutor, to serve a mandatory sentence of seven days' imprisonment if he (the offender) refused to comply with the requirements of the national service scheme. In a unanimous judgment, Barwick CJ (with whom McTiernan, Menzies, Windeyer, Owen, Walsh and Gibbs JJ agreed) opined (at 58–59):

It seems to me that the argument supporting the applicant's submission as to [the] invalidity [of s 49(2) of the Australian National Service Act] was founded on a basic misconception as to the exercise of judicial power in relation to the imposition of penalties or sentences for the commission of offences created by statute. *It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty*. *The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor, in my opinion, is*

there any judicial power or discretion not to carry out the terms of the statute. Ordinarily the court with the duty of imposing punishment has a discretion as to the extent of the punishment to be imposed; and sometimes a discretion whether any punishment at all should be imposed. It is both unusual and in general, in my opinion, undesirable that the court should not have a discretion in the imposition of penalties and sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. *But whether or not such a discretion shall be given to the court in relation to a statutory offence is for the decision of the Parliament*. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment. If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed.

Also *it is within the competence of the Parliament to determine and provide in the statute a contingency on the occurrence of which the court shall come under a duty to impose a particular penalty or punishment.* The event or the happening on which a duty arises or for that matter a discretion becomes available to a court in relation to the imposition of penalties or punishments may be objective and necessary to have occurred in fact or it may be the formation of an opinion by the court or, in my opinion, by some specified or identifiable person not being a court. The circumstance that on this happening or contingency, the court is given or is denied as the case may be any discretion as to the penalty or punishment to be exacted or imposed will not mean, in my opinion, that judicial power has been invalidly invaded or that judicial power is attempted to be made exercisable by some person other than a court within the Constitution. The fact that the happening of the event or the formation of the opinion is in reality determinative of the penalty or imprisonment to be ordered does not make the bringing about of the event or the formation or communication of the relevant opinion by some person or body other than a court an exercise of judicial power. There may be limits to the choice of the Parliament in respect of such contingencies but the nature of the contingency in this case does not require any examination or discussion as to the existence and, if they exist, the nature of such limits.

Further, the Parliament may leave it to the executive to choose one of two alternative procedures for the prosecution of an offence, the penalty or punishment being determined either absolutely or within prescribed limits by the process of prosecution. Instances were given during the course of the argument where a choice has been left by Parliament with some person or body other than a court as to the procedure to be followed in a criminal prosecution with resultant difference in the permissible penalty or punishment. The obvious case is that of an offence triable summarily or upon indictment with differing penalties according to the manner of prosecution (see ss. 12 and 16 of the Crimes Act 1914–1960 (Cth)) …

[emphasis added]

35 In a separate judgment, Walsh J said (at 68 of *Palling*):

It could not be disputed, and was not disputed, that the Parliament may make a valid law by which no discretion is given to the court as to the punishment of a person convicted of an offence. The Parliament may itself specify what sentence is to be imposed. When an Act requires a court, upon an offence being proved, to pass a mandatory sentence this does not involve any unconstitutional intrusion by the legislature into the field of judicial power. The relevant exercise of judicial power, when there is a prosecution for an offence against a law of the Commonwealth

> [of Australia], consists of the application of the law by the court, according to the terms of the law. If the Act provides for a mandatory sentence, the only power of sentencing which the court has in that case is the power to impose that sentence.
>
> If the Parliament may fix unconditionally a fixed sentence for a specified offence, I am not aware of any principle which would preclude it from providing that there shall be a fixed sentence for a particular offence when some stated condition is satisfied, e.g., the condition that the person convicted had been previously convicted of a similar offence. …

36 Indeed, legal scholarship has shown that there exists little historical and doctrinal support for the proposition that the sentencing power – *ie*, the discretion to determine the measure of punishment to impose on an offender – is essentially and/or exclusively a judicial power.

The historical treatment of the sentencing power

37 In his study "Judicial Independence and Judicial Functions" in ch 2 of *Sentencing, Judicial Discretion and Training* (Sweet & Maxwell, 1992) (Colin Munro & Martin Wasik eds) ("*Sentencing, Judicial Discretion and Training*"), Colin Munro ("Munro") pointed out that when Montesquieu expounded and espoused the principle of separation of powers in 1748 in his book *L'Esprit des Lois*, he did not consider the sentencing function to be a facet of the judicial power. Munro noted (at p 27 of *Sentencing, Judicial Discretion and Training*):

> … [I]t is clear that [Montesquieu's] conception of the judicial function (including the role of juries, to which he gave prominence) is drawn in terms of finding facts and adjudicating on law. *He did not consider decisions concerning the sentence for an offence to be part of the judicial function*, as is evident from a passage in *L'Esprit des Lois*: "In England, juries decide whether the accused is guilty or not … and, if he is declared guilty *the judge pronounces the punishment that the law inflicts for that act*; and, for this, he needs only to open his eyes" [quoting from *L'Esprit des Lois* (tr. Nugent, 1949) Book 6, ch 3]. For Montesquieu, *le pouvoir de juger*, the power of judging, merely involved announcement of the law. … [emphasis added]

38 Munro also examined other classic texts on the principle of separation of powers (such as Blackstone's *Commentaries* and *The Federalist* papers) and noted that they likewise omitted any reference to the sentencing function as a facet of the judicial power (see *Sentencing, Judicial Discretion and Training* at p 27). The discretion to determine the measure of punishment to impose on an offender was thus not a birthright that accompanied the creation of the Judiciary as a separate organ of state. On the contrary, it was initially assumed that the role of the judge was simply, to paraphrase Montesquieu's words, to pronounce the punishment that the law inflicted for the offence in question. This state of affairs is not surprising. At common law, all capital sentences were mandatory (see *Ong Ah Chuan* at [33], *Sentencing, Judicial Discretion and Training* at p 27 and D A Thomas, *Principles of Sentencing* (Heinemann, 2nd Ed, 1979) at p 6). In the UK, the first half of the 19th century was also characterised by minutely-detailed offences tailored to address a myriad of fact situations importing different degrees of culpability, coupled with legislatively-prescribed fixed or maximum and minimum sentences for each offence. This practice was imported into the criminal legislation of British colonies by British draftsmen (see, for example, the carefully-calibrated range of punishments enacted in the Indian Penal Code (Act No 45 of 1860) to cover the different degrees of culpability with which an offence may be committed).

39 In Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 5th Ed, 2010) ("*Ashworth*"), it is noted (at p 52):

> If one looks at the history, then one finds that wide judicial discretion has only been a characteristic feature of English sentencing for the last hundred years or so. In the first half of the nineteenth century, there were two factors that considerably restricted judicial discretion. There were maximum and minimum sentences for many offences, and several statutes provided a multiplicity of different offences with different graded maxima. For much of the nineteenth century, judges were left with less discretion than their twentieth and twenty-first century counterparts, and *any claim that a wide sentencing discretion 'belongs' to the judiciary is without historical foundation*. It gains its plausibility only from the legislature's abandonment of minimum sentences in the late nineteenth and early twentieth century, and from the trend at one time to replace the plethora of narrowly defined offences, each with its separate maximum sentence, with a small number of 'broad band' offences with fairly high statutory maxima. [emphasis added]

Summing up the development outlined in the above extract from *Ashworth*, Munro observed in *Sentencing, Judicial Discretion and Training* (at p 28) that "perhaps two generations of judges had become accustomed to think of sentencing policy as being entirely their concern".

40 It can be seen from the foregoing discussion that the judicial discretion to determine the sentence to impose on an offender is a relatively modern *legislative* development. It was the Legislature that, through statute, vested the courts with the discretionary power to punish offenders in accordance with the range of sentences prescribed by the Legislature. Historically, the sentencing power was neither inherent nor integral to the judicial function as the measure and range of punishments to be imposed for a specific offence or a specific class of offences was determined by legislation. This can be seen from, *inter alia*, *Ex parte United States* 242 US 27 (1916), where the US Supreme Court emphasised that it was "indisputable" that (at 42):

> … *[T]he authority to define and fix the punishment for crime is legislative* and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority … [emphasis added]

41 Similarly, in the US Supreme Court decision of *Mistretta v United States* 488 US 361 (1989), Blackmun J held (at 364):

> Historically, federal sentencing – the function of determining the scope and extent of punishment – never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. Congress, of course, has the power to fix the sentence for a federal crime, *United States* v. *Wiltberger*, 5 Wheat. 76 (1820), and the scope of judicial discretion with respect to a sentence is subject to congressional control. *Ex parte United States*, 242 U.S. 27 (1916).

Likewise, in *Mutart v Pratt, Warden of State Prison* 51 Utah 246 (1917), the Supreme Court of Utah said (at 250):

> That the Legislature of this state has the sole power to fix the punishment to be inflicted for a particular crime, with the limitation only that it be not cruel or excessive will not be questioned. That it may fix any punishment, subject to the above limitation, and leave no discretion whatever in the courts as to the extent or degree of punishment is a well-recognized and universally accepted doctrine, and under a statute fixing a definite period the court has no more discretion as to the punishment than the police officer whose duty it is to carry the punishment into effect …

42 It is against this historical backdrop that Commonwealth courts have consistently rejected arguments that a reduction in the Judiciary's sentencing discretion in itself constitutes an unconstitutional derogation from the core of the judicial function. They have repeatedly held that in the absence of any constitutional provisions to the contrary, the Legislature may prescribe whatever punishment it thinks fit and proper for the offences that it creates. The exercise of such power involves policy considerations which are "beyond the scope of judicial authority" (see *Ex parte United States* at 42 (quoted at [40] above)) or, indeed, judicial competence. Hence, the prescription of the death penalty, whether as a mandatory or a discretionary punishment, has never been held to be outside the legislative power, except in States where capital punishment is expressly prohibited by the Constitution. For example, the Privy Council has held the mandatory death penalty to be unconstitutional under the Constitutions of some West Indian States on the ground that the Constitutions concerned prohibit punishments which are cruel, unusual or inhumane (see the cases discussed in *Yong Vui Kong*). In the Singapore context, the Court of Appeal in *Chew Seow Leng v Public Prosecutor* [2005] SGCA 11 took it for granted that the prescription of punishments for offences (and of the mandatory death penalty in particular) was part of the *legislative* power when it said (*per* Lai Kew Chai J at [40]):

> The mandatory death penalty imposed under the MDA [*ie*, the Misuse of Drugs Act (Cap 185, 2001 Rev Ed), as opposed to the MDA as defined at [1] above] reflects our society's abhorrence of drug trafficking, and counsel presented nothing before this court to show that society's views have changed on this issue. Furthermore, any changes to the MDA to reflect changing social attitudes towards drug offences, if indeed a change has taken place, is a matter that is, more appropriately, within the purview of Parliament.

The source of the legislative power to prescribe punishments

43 The power to prescribe punishments is an integral part of the power to enact the offences for which the prescribed punishments are to apply. An offence serves no social purpose without punishment for its commission. In *Hinds*, Lord Diplock located the source of both powers (*viz*, the power to enact offences and the power to prescribe punishments for enacted offences) in s 20(1) of the Jamaican Constitution and said (at 225–227):

> In the field of punishment for criminal offences, the application of the basi[c] principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power. ***The power conferred upon the Parliament to make laws for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law*** : see Constitution, Chapter III, section 20(1). The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out. In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence – as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.

Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders. Whilst none would suggest that a Review Board composed as is provided in section 22 of the Gun Court Act 1974 would not perform its duties responsibly and impartially, the fact remains that the majority of its members are not persons qualified by the Constitution to exercise judicial powers. A breach of a constitutional restriction is not excused by the good intentions with which the legislative power has been exceeded by the particular law. If, consistently with the Constitution, it is permissible for the Parliament to confer the discretion to determine the length of custodial sentences for criminal offences upon a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion upon any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution, to open the door to the exercise of arbitrary power by the executive in the whole field of criminal law. In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in *Deaton* v. *Attorney-General and the Revenue Commissioners* [1963] I.R. 170, 182–183, a case which concerned a law in which the choice of alternative penalties was left to the executive.

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case. … The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts … the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive …"

This was said in relation to the Constitution of the Irish Republic, which is also based upon the separation of powers. In their Lordships' view it applies with even greater force to constitutions on the Westminster model. They would only add that under such constitutions the legislature not only does not, but it *can* not, prescribe the penalty to be imposed in an individual citizen's case: *Liyanage* v. *The Queen* [1967] 1 A.C. 259.

[emphasis in original in italics; emphasis added in bold italics]

44 Under the Singapore Constitution, the power to make laws is set out in Art 38 (which provides that the legislative power of Singapore shall be vested in the Legislature, which shall consist of the President and Parliament) and Art 58 (which provides that the power of the Legislature to make laws shall be exercised by Bills passed by Parliament and assented to by the President). That the Legislature has the power to prescribe punishments of any kind for a defined offence (whether the punishment be mandatory or discretionary, and whether it be fixed or within a prescribed range) is implicit in Art 9(1) of the Singapore Constitution, which provides that "[n]o person shall be deprived of his life or personal liberty *save in accordance with law*" [emphasis added]. As defined in Art 2(1) of the Singapore Constitution, the word "law" includes the common law, but since all offences in Singapore are statute-based (including criminal contempt of court, although our courts have unlimited power to punish any contemnor), Art 9 takes it for granted that Parliament may enact criminal laws

and prescribe punishments that will affect the life or personal liberty of any person convicted by a court of a defined offence (subject only to the constitutional protections set out in Part IV of the Singapore Constitution and the principle of separation of powers to the extent to which it is embodied in the Singapore Constitution). Having regard to Art 9, there is no legal basis to argue that the death penalty, whether as a mandatory or a discretionary punishment, is unconstitutional (see *Yong Vui Kong*, where the Court of Appeal held that the mandatory death penalty did not violate the Singapore Constitution as there was no constitutional prohibition against the prescription of the mandatory death penalty for any offence).

45 Since the power to prescribe punishments for offences is part of the legislative power and not the judicial power (as Commonwealth and US case law shows), it must follow that no written law of general application prescribing any kind of punishment for an offence, whether such punishment be mandatory or discretionary and whether it be fixed or within a prescribed range, can trespass onto the judicial power. On the contrary, it is the duty of the courts to inflict the legislatively-prescribed punishments on offenders, exercising such discretion as may have been given to them by the Legislature to select the punishments which they think appropriate. As Yong Pung How CJ said in *Public Prosecutor v Tan Fook Sum* [1999] 1 SLR(R) 1022 ("*Tan Fook Sum*") at [14]:

> It is axiomatic that the court must pass sentence according to law: ss 180(*n*)(ii) and 192(2) of the [Criminal Procedure Code (Cap 68, 1985 Rev Ed)]. A "sentence according to law" means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles: *PP v Jafa bin Daud* [1981] 1 MLJ 315 at 316. Leaving aside for the moment the ambit of the relevant "punishable section" in the present case, the application of the "established judicial principles" really requires the court, where the Legislature's prescriptions as to punishment are open-ended, to balance the diverse and often competing policy considerations.

Reasons for rejecting the Petitioner's arguments on the impugned s 33A MDA provisions

The arguments concerning the principle of separation of powers

46 For the reasons stated above, there can be no question of the impugned s 33A MDA provisions being in violation of the principle of separation of powers. The impugned s 33A MDA provisions prescribe the conditions which, upon being satisfied, will result in the imposition of the mandated enhanced punishments set out in s 33A(1). These mandated enhanced punishments are a minimum sentence. Parliament has merely prescribed, via the impugned s 33A MDA provisions, the conditions (*viz*, previous convictions for a s 8(*b*) offence and/or a s 31(2) offence and previous DRC admissions) which are to be treated as aggravating factors for the purposes of subjecting offenders to the enhanced minimum punishments set out in s 33A(1). The rationale for introducing these enhanced punishments was explained by Mr Wong Kan Seng, the then Minister for Home Affairs, as follows when he moved the Misuse of Drugs (Amendment) Bill 1998 (Bill 17 of 1998) to introduce these punishments (see *Singapore Parliamentary Debates*, *Official Report* (1 June 1998) vol 69 at col 43):

> … [L]ong term-imprisonment and caning for hardcore addicts … serves a number of objectives. Firstly, by putting these addicts out of circulation for a long time, it will help to protect the public from them, especially as a majority of these addicts turn to crime to feed their habit. Secondly, it is also aimed at deterring drug addicts from persisting in their drug addiction by making the consequences of continued addiction very severe. In the long run, the long-term imprisonment and caning should help to reduce the relapse rate of drug addicts and deter potential drug abusers from falling into the drug trap. …

47 The impugned s 33A MDA provisions, in prescribing the conditions which, when satisfied, trigger the application of the enhanced minimum punishments in s 33A(1), do have the effect of directing the courts to inflict, at the very least, the mandatory minimum punishments when the conditions are satisfied. But, this form of legislation is not constitutionally objectionable because it is in substance no different from s 33 of the MDA read with the Second Schedule thereto, which (*inter alia*) prescribe the mandatory death penalty for certain drug trafficking offences involving controlled drugs of or exceeding a specified quantity. The only distinction is that s 33A(1) fixes the *minimum* punishment, whereas s 33 read with the Second Schedule to the MDA stipulates a *fixed* punishment. Further, the impugned s 33A MDA provisions do not have the effect of prescribing the punishment to be imposed on particular individuals or of directing the outcome of pending criminal proceedings, unlike the legislation in cases such as *Kable* and *Liyanage*, with which the Petitioner erroneously drew an analogy. The enhanced punishments under s 33A(1) apply generally to all offenders who fulfil the prescribed conditions set out in the impugned s 33A MDA provisions.

48 The Petitioner also argued, in relation to s 33A(1)(*a*) of the MDA specifically, that this provision had the effect of treating or deeming a previous DRC admission as a previous conviction for the purposes of imposing the enhanced punishments in s 33A(1) on an offender, thereby changing a previous DRC admission into a previous conviction. In my view, this argument has no merit. Section 33A(1)(*a*) neither says that a previous DRC admission is a previous conviction nor achieves such an effect; it also does not treat a previous DRC admission as an antecedent, *ie*, as if it were a previous conviction. All that s 33A(1)(*a*) does is to treat a previous DRC admission as an aggravating factor in the same way that a previous conviction for a s 8(*b*) offence and/or a s 31(2) offence is treated as an aggravating factor under ss 33A(1)(*b*)–33A(1)(*f*). Section 33A(1)(*a*) does not convert a previous DRC admission into a previous conviction for any purpose whatsoever. In this regard, the fact that a DRC admission is an executive decision is irrelevant and does not amount to the Executive interfering with the sentencing function of the courts. As the High Court of Australia held in *Totani* (at [71] *per* French CJ):

> It has been accepted by this Court that the Parliament of the Commonwealth [of Australia] may pass a law which requires a court exercising federal jurisdiction *to make specified orders if some conditions are met even if satisfaction of such conditions depends upon a decision or decisions of the executive government or one of its authorities* [citing *Palling*]. The Parliament of a State may enact a law of a similar kind in relation to the exercise of jurisdiction under State law. It is also the case that "in general, a legislature can select whatever factum it wishes as the 'trigger' of a particular legislative consequence" [citing *Baker v The Queen* (2004) 223 CLR 513 at 532]. [emphasis added]

49 In so far as s 33A(1)(*a*) of the MDA directs that previous DRC admissions are to be treated as an aggravating factor in determining whether the mandatory minimum punishments in s 33A(1) are applicable, Parliament is doing no more than what the courts could have done if s 33A(1)(*a*) had not provided for this particular aggravating factor. Consistent with the sentencing policy of the courts, there would be nothing to prevent a court from treating a previous DRC admission as an aggravating factor for the purposes of punishing an offender. Indeed, in my view, the courts would be fully justified in doing so for the reason which I stated during the hearing of this Special Case, namely: a DRC admission is designed to rehabilitate a drug addict for his personal benefit and in the larger societal interest. Before an order for admission to a DRC is made, the fact that the individual concerned is a drug addict would have been conclusively determined by scientific evidence (see s 34 of the MDA). It is inaccurate to characterise a DRC admission as inflicting punishment on an individual who would otherwise not have suffered any punishment because, as a drug addict, the individual concerned could have been convicted of illegal consumption of a controlled drug had he been charged. In being subject to a DRC admission instead of a criminal charge for drug consumption, the

individual concerned has also been spared a criminal record. In these circumstances, a court would be fully justified in treating (pursuant to s 33A(1)(*a*)) the fact that an individual is a drug addict who has already had two DRC admissions as an aggravating factor in meting out the appropriate punishment for his subsequent s 8(*b*) offence or s 31(2) offence. In this respect, I reiterate that although the courts have long assumed that it is part of the judicial function to impose punishments, the imposition of punishments is always subject to the power of the Legislature to prescribe the applicable punishments. In other words, the courts' sentencing function must be exercised in accordance with the kinds and range of punishments prescribed by the Legislature. The sentencing power of our courts is derived from legislation, although our courts have the discretion to decide, within the range of legislatively-prescribed punishments, what the appropriate sentence in a particular case would be (see *Tan Fook Sum* at [14]). Hence, the legislative prescription of factors for our courts to take into account in sentencing offenders cannot and does not intrude into the judicial power.

50 In this connection, it is interesting to note the views of the Constitutional Court of South Africa on this issue apropos the South African Constitution. In *Dodo*, the South African Constitutional Court stated (at [22]–[25]):

> 22 There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the State play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished. Even here the separation is not complete, because this function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.
>
> 23 Both the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its natureand its severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment. The availability and cost of prisons, as well as the views of these arms of government on custodial sentences, legitimately inform policy on alternative forms of non-custodial sentences and the legislative implementation thereof. Examples that come to mind are the conditions on, and maximum periods for which sentences may be postponed or suspended.
>
> 24 The executive and legislative branches of State have a very real interest in the severity of sentences. The executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.
>
> 25 In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society. The legislature's objective of ensuring greater consistency in sentencing is also a legitimate aim and the legislature must have the power to legislate in this area. …

51 Although the legislative prescription of factors for the courts to take into account in sentencing offenders does not intrude into the judicial power, there have nonetheless been cases where

Commonwealth courts have held that the legislative provisions in question gave the Executive powers which trespassed onto the sentencing function of the courts and were thus unconstitutional. These cases may be divided into three classes:

(a) first, cases involving legislation which enabled the Executive to actually *select the sentence* to be imposed in a particular case *after* the accused person was convicted by a court of law;

(b) second, cases involving legislation which enabled the Executive to make *administrative decisions which were directly related to the charges brought against a particular accused person*, and which had an impact on the actual sentence eventually imposed by a court of law; and

(c) third, cases involving legislation which enabled the Executive to make *administrative decisions which were not directly related to any charges brought against a particular accused person at the time of those decisions, but which had an impact on the actual sentence eventually imposed by a court of law* pursuant to legislative directions that the Executive's administrative decisions were a condition which limited or eliminated the court's sentencing discretion.

5 2 *Deaton*, *Hinds* and *Palling* fall within the first category of cases. In *Deaton*, for instance, the impugned legislation empowered the Revenue Commissioners of Ireland to elect which of two penalties prescribed in the relevant provisions was to be imposed by the court. The Irish Supreme Court held that this was a violation of the principle of separation of powers because it effectively left the choice of alternative penalties to the Executive when that choice should have been left to the courts (see *Deaton* at 182–183).

5 3 *Muktar Ali*, which was an appeal to the Privy Council from a decision of the Supreme Court of Mauritius, falls within the second category of cases. In *Muktar Ali*, the impugned legislation gave the Director of Public Prosecutions of Mauritius ("the Mauritian DPP") the discretion to prosecute an individual for drug trafficking either: (a) in an Intermediate Court or a District Court; or (b) in the Supreme Court before a judge sitting without a jury. The Mauritian DPP's choice of the latter option led to the imposition of the mandatory death penalty on the offender when he was convicted. The Privy Council affirmed that the prosecutorial discretion was wide enough to enable the Mauritian DPP to decide whether a person should be charged with one offence rather than another. However, the Privy Council struck down the impugned legislation because it effectively allowed the Mauritian DPP, by his selection of the court of trial, to select the sentence which would be imposed should the accused be convicted. The Privy Council noted (at 104F–104H):

> … The vice of the present case is that the [Mauritian DPP's] discretion to prosecute importation [of drugs] with an allegation of trafficking either in a court which must impose the death penalty on conviction with the requisite finding or in a court which can only impose a fine and imprisonment *enables him in substance to select the penalty to be imposed in a particular case*.
>
> As their Lordships have observed, a discretion vested in a prosecuting authority to choose the court before which to bring an individual charged with a particular offence is not objectionable if the selection of the punishment to be inflicted on conviction remains at the discretion of the sentencing court. Here one of the courts before which the [Mauritian DPP] might choose to prosecute the offence, namely a judge without a jury, was given no such discretion. …
>
> [emphasis added]

5 4 *Muktar Ali* is different from the ordinary case in Singapore (in the context of the offence of drug trafficking) where the Public Prosecutor elects to charge an accused with a non-capital drug trafficking charge (*eg*, by reducing the quantity of drugs stated in the charge such that the amount of controlled drugs involved falls below the threshold quantity for which the mandatory death penalty is prescribed (see *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam*") at [65], *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 ("*Yong Vui Kong (Prosecutorial Discretion)*" at [17] and *Quek Hock Lai v Public Prosecutor* [2012] 2 SLR 1012 at [30]–[31]). The exercise of the prosecutorial discretion in such cases would not intrude into the judicial power. The question would instead simply be whether the exercise of the prosecutorial discretion breached Art 12 of the Singapore Constitution because it was tainted by bias or was based on irrelevant considerations (see *Yong Vui Kong (Prosecutorial Discretion)* at [34]–[39] and *Ramalingam* at [69]–[71]). In *Muktar Ali*, the prosecutorial decision was based on legislation under which a prosecution for trafficking in exactly the same quantity of drugs would result in two very different punishments – one capital and the other, non-capital – depending on which court the Prosecution chose to prosecute the accused in. The legislation in question did not stipulate any threshold quantity of drugs for the purposes of determining whether or not a prosecution should take place in a court which, upon convicting the accused, had to impose the death penalty.

5 5 *Totani* falls within the third category of cases. In *Totani*, the impugned legislation (referred to in the quotation below as "the SOCC Act") compelled the court to impose control orders on individuals upon a finding that they were members of organisations declared by the Executive to be a risk to public safety and order. The control orders were to be made notwithstanding that the members of those organisations were not convicted of any offence by a court of law. The High Court of Australia held (by a majority of 6:1) that the impugned legislation was unconstitutional. The court said (*per* French CJ):

> 4 … Section 14(1) [of the SOCC Act] requires the Magistrates Court to make a decision largely pre-ordained by an executive declaration for which no reasons need be given, the merits of which cannot be questioned in that Court and which is based on executive determinations of criminal conduct committed by persons who may not be before the Court. The SOCC Act thereby requires the Magistrates Court to carry out a function which is inconsistent with fundamental assumptions, upon which Ch III of the Constitution is based, about the rule of law and the independence of courts and judges. …
>
> …
>
> 75 Section 14(1) of the SOCC Act confers upon the Magistrates Court the obligation, upon application by the Commissioner [of Police], to make a control order in respect of a person by reason of that person's membership of an organisation declared by the Attorney-General [to be a risk to public safety and order]. The declaration rests upon a number of findings including, in every case, a determination by the Attorney-General that members of the organisation, who need not be specified, have committed criminal offences, for which they may never have been charged or convicted. The findings, of which the Magistrates Court may be for the most part unaware and which in any event it cannot effectively or readily question, enliven, through the declaration which they support, the duty of the Court to make control orders against any member of the organisation in respect of whom the Commissioner [of Police] makes an application. That is so whether or not that member has committed or is ever likely to commit a criminal offence. …
>
> …
>
> 77 Submissions made by the State of South Australia identified findings which the Magistrates

> Court would have to make before issuing a control order under s 14(1). … It was submitted, having regard to [those] matters, that the Court, exercising its power under s 14(1), undertakes a genuine adjudicative process free from any interference from the executive. Reliance was also placed upon the availability of the objection procedure and the Court's discretion in framing a control order in that context.
>
> 78 The fact that the impugned legislation provides for an adjudicative process does not determine the question whether it impairs the institutional integrity of the Magistrates Court by impairing the reality or appearance of judicial decisional independence. …
>
> …
>
> 82 Section 14(1) represents a substantial recruitment of the judicial function of the Magistrates Court to an essentially executive process. It gives the neutral colour of a judicial decision to what will be, for the most part in most cases, the result of executive action. … Section 14(1) impairs the decisional independence of the Magistrates Court from the executive in substance and in appearance in areas going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function. …

56 In other words, *Totani* was a case in which the Australian legislature disguised what was in substance an executive decision as a judicial decision. At the hearing before me, the *amicus curiae* referred to this case as an example of the application of the integrity principle (which assesses whether a certain executive function is inconsistent with the integrity of the judicial function) in determining whether the principle of separation of powers has been violated.

57 In the present case, the scheme of enhanced punishments in s 33A(1) does not fall within any one of the above-mentioned categories. Unlike the impugned legislation in *Deaton*, *Hinds* and *Palling*, s 33A(1)(*a*) of the MDA does not empower the CNB Director to directly or indirectly select the sentence to be imposed on an individual who, after having had two previous DRC admissions, is subsequently convicted of either a s 8(*b*) offence or a s 31(2) offence; rather, it is the trial court which determines the length of the custodial sentence and the number of strokes of the cane to impose, subject to the mandatory minimum punishments set out in s 33A(1). Section 33A(1)(*a*) also does not empower any member of the Executive to choose the court in which to try an offender so as to obtain a particular sentencing result on the facts, unlike the legislation in issue in *Muktar Ali*. The closest analogy to the present case is *Totani*. However, unlike the scheme in *Totani*, the scheme in s 33A does not involve the imposition of a sentence absent a judicial finding of guilt. Furthermore, unlike the scheme in *Totani*, the Executive's exercise of discretion in ordering a DRC admission under s 34 of the MDA is not directed at achieving a particular sentencing outcome, but, rather, is directed at the limited, legislatively-prescribed objective of rehabilitation. The fact that the Legislature has prescribed that previous DRC admissions constitute an aggravating factor under s 33A(1)(*a*) for the purposes of punishing an offender for his subsequent and separate s 8(*b*) offence or s 31(2) offence has no bearing on the CNB Director's exercise of discretion under s 34 of the MDA.

The arguments concerning Art 12 of the Singapore Constitution

58 As mentioned at [6] above, the Petitioner also argued that s 33A(1)*(a*) of the MDA violated the right to equal protection under Art 12 of the Singapore Constitution on the ground that it subjected an individual with two prior DRC admissions to the same treatment as an individual with two prior court convictions. In my view, this argument has no merit. It turns Art 12 on its head because, in fact, the Petitioner has enjoyed the benefit of two previous rehabilitation programmes when the same drug consumption conduct which he engaged in could well have attracted criminal prosecution.

Upholding the Petitioner's argument on Art 12 would effectively compel the State to prosecute drug addicts like the Petitioner without giving them a chance to rehabilitate themselves and become useful and productive members of the community. In *Yong Vui Kong*, an analogous argument was rejected by the Court of Appeal. In this regard, the following statement of Lord Diplock in *Ong Ah Chuan* (at [37]), although made in a different context, is apt:

> The questions whether this 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. … [T]hese 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 Art 12(1) of [the Constitution of the Republic of Singapore (1980 Reprint)]. [emphasis added]

The arguments concerning Art 9 of the Singapore Constitution

59 With regard to the Petitioner's arguments on Art 9 of the Singapore Constitution, it was not clear to me what the precise thrust of his arguments was. The gist of his arguments appeared to be that the minimum mandatory sentence of five years' imprisonment and three strokes of the cane prescribed under ss 33A(1)(i) and 33A(1)(ii) respectively was manifestly excessive, disproportionate and arbitrary, and, hence, not "in accordance with law" for the purposes of Art 9(1) of the Singapore Constitution. In essence, the Petitioner's arguments were based on the principle of proportionality, which received support from the Constitutional Court of South Africa in *Dodo* (at [26]) as follows:

> The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. *In the field of sentencing, however, it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime*. This would be inimical to the rule of law and the constitutional State. It would a fortiori be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights. The clearest example of this would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused's right not to be sentenced to a punishment which was cruel, inhuman or degrading as envisaged by section 12(1)(e) of the Constitution, or to a fair trial under section 35(3). [emphasis added]

60 As far as the position in Singapore is concerned, the prescription of punishments for offences falls under the legislative power and not the judicial power (see [43]–[45] above). The principle of proportionality, as a principle of law (as opposed to a principle of good government), has no application to the legislative power to prescribe punishments. If it were applicable, then all mandatory fixed, maximum or minimum punishments would be unconstitutional as they can never be proportionate to the culpability of the offender in each and every case. That said, although the principle of proportionality is inapplicable to the legislative power to prescribe punishments, the courts should have regard to this principle when sentencing offenders and should observe it as a general sentencing principle unless there are other policy considerations which override it, such as the need to impose a deterrent sentence. Whether "the legislature ought not to oblige the judiciary to impose a punishment

which is wholly lacking in proportionality to the crime" (see *Dodo* at [26]) is a matter of legislative policy and not of judicial power. The courts must impose the legislatively-prescribed sentence on an offender even if it offends the principle of proportionality. In this connection, the following extra-curial observation of Lord Bingham of Cornhill in "The Courts and the Constitution" (1996) 7 KCLJ 12 is apt (at p 25):

> There is room for rational argument whether it is desirable to restrict the judges' sentencing discretion … But … this is not a constitutional argument. As Parliament can prescribe a maximum penalty without infringing the constitutional independence of judges, so it can prescribe a minimum. This is, in the widest sense, a political question – a question of what is benefical for the polity – not a constitutional question.

61 For the above reasons, I held that the impugned s 33A MDA provisions did not violate Art 9 of the Singapore Constitution.

Observations

62 The judicial function is (and has always been) essentially that of making a finding on facts and applying the law to the relevant facts to reach a decision in accordance with law. *Ashworth* and Munro's study in *Sentencing, Judicial Discretion and Training* show that historically and doctrinally, the judicial function did not include the sentencing function. Munro's analysis of the essential characteristics of the judicial function provides no support for the proposition that sentencing is an inherently judicial task (see *Sentencing, Judicial Discretion and Training* at pp 27–28). The courts have the power to punish only if and when the Legislature has vested them with the power to do so. It is only in those circumstances and to that extent that the courts are free to take into account the relevant policy considerations, gleaned from the express or implied intentions of the Legislature, in order to impose a punishment which fits the offence and/or the offender, or which promotes some other social objective that is consistent with the policy of the particular legislation in question. As a result of the long-standing legislative practice of delegating to the courts the discretion to impose punishments on offenders, the belief has arisen that sentencing is an "essential" function of the courts. However, it remains the case that in determining the appropriate sentence to impose on an offender, judges are not finding facts or applying legal rules, but are instead engaged in a different kind of exercise altogether (see *Sentencing, Judicial Discretion and Training* at p 26). In his lecture "The Discretion of the Judge" [1990] Denning Law Journal 27, Lord Bingham described the sentencing function thus:

> … [A]n issue falls within a judge's discretion if, being governed by no rule of law, its resolution depends on the individual judge's assessment (within such boundaries as have been laid down) of what it is fair and just to do in the particular case. He has no discretion in making his findings of fact. He has no discretion in his rulings on the law. But when, having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies, he then exercises a discretion … *the imposition of criminal penalties [is a] pre-eminently discretionary field*. [emphasis added]

63 If, as Lord Bingham observed, the imposition of criminal penalties involves a discretionary determination of what is fair and just in a particular case, that function need not be performed exclusively by judges, but can be performed by non-judges. Legalised punishment of offenders is merely society's counter-measure or remedy to check or curb criminal acts in order to maintain law and order. Whether other persons (*eg*, penologists, psychologists, medical practitioners or social workers) may perform the task of sentencing equally well is likely to be controversial. It may be that the long-established practice of the Legislature in prescribing punishments for the courts to inflict on

offenders shows that judges are ultimately still the persons best qualified to undertake the task of sentencing offenders.

64 Based on Munro's and *Ashworth*'s theses on the sentencing power of the courts, no punishment prescribed by the legislative branch can intrude into the sentencing function of the courts (since that function is itself derived from a delegated legislative power). In other words, the principle of separation of powers has no application to the sentencing function because, in constitutional theory, it is a function delegated by the legislative branch to the judicial branch. The sentencing power is not inherent to the judicial power (except, perhaps, where it is ancillary to a particular judicial power, *eg*, to punish for contempt of court). Instead, the courts' power to punish is derived from legislation. The fact that judges have exercised the power to sentence offenders for such a long time reflects more the functional efficiency of this constitutional arrangement, rather than the principle of separation of powers.

[note: 1] See the Petitioner's Submissions dated 17 November 2011 at paras 21–22 and 33; see also the Petitioner's Submissions dated 9 December 2011 at paras 5 and 10–22.

[note: 2] See the Petitioner's Response dated 30 November 2011 at paras 33–39.

[note: 3] See the Petitioner's Submissions dated 17 November 2011 at para 38.

[note: 4] See the Respondent's Submissions ("RS") dated 20 April 2012 at paras 44–50.

[note: 5] See RS dated 20 April 2012 at paras 17–28; see also the Prosecution's Written Submission dated 17 November 2011 at paras 36–44.

[note: 6] See the *Amicus Curiae*'s Submissions ("ACS") dated 30 April 2012 at paras 17–23.

[note: 7] See ACS dated 30 April 2012 at paras 24–35.

[note: 8] See ACS dated 30 April 2012 at paras 36–49.

[note: 9] See ACS dated 30 April 2012 at paras 50–70.

[note: 10] See ACS dated 30 April 2012 at paras 74–79.

[note: 11] See ACS dated 30 April 2012 at paras 80–84.

[note: 12] See ACS dated 30 April 2012 at paras 85–91.

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