1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

THIO Li-ann
BA (Oxford) (Hons), LLM (Harvard), PhD (Cambridge);
Barrister (Gray's Inn);
Associate Professor, Faculty of Law, National University of Singapore.

Introduction

1.1 In the field of administrative law, the cases related primarily to the generally more robust role of the High Court in statutory appeals emanating from the disciplinary committees of medical and accountancy professional bodies as provided under the Medical Registration Act (Cap 174, 1998 Rev Ed) and the Accountants Act (Cap 2, 2001 Rev Ed) in *Chia Yang Pong v Singapore Medical Council* [2004] 3 SLR 151 and *Ling Uk Choon v Public Accountants Board* [2004] 3 SLR 517 respectively. Other issues examined included the limits to judicial review as not every actor or every decision made in the course of an administrative action is subject to judicial review. The actor must be under a decision-making duty which produces the "substantive" administrative action; after identifying this, it is necessary to ascertain whether more appropriate legal remedies, like appeal processes, are available. Whether the medical certification of the fitness of a convicted person to receiving caning as a punishment raised a judicially-reviewable question was discussed in *Tan Eng Chye v The Director of Prisons* [2004] 2 SLR 640 and *Tan Eng Chye v The Director of Prisons (No 2)* [2004] 4 SLR 521. A challenge to the finding that there had been a misuse of discretion on substantive grounds of unreasonableness was upheld in *AG v Ng Hock Guan* [2004] 3 SLR 253.

1.2 The chief constitutional issue judicially determined pertained to the constitutionality of the mandatory death sentence or capital punishment in *PP v Nguyen Tuong Van* [2004] 2 SLR 328 and *Nguyen Tuong Van v PP* [2005] 1 SLR 103. This implicated the scope of the equal protection clause and the requirement that the deprivation of life should be "in accordance with law", as enshrined in Arts 12 and 9 of the Constitution of the Republic of Singapore (1999 Rev Ed) ("the Constitution"). The cases are instructive not merely for interpreting the scope of these constitutional liberties, but for the broad range of sources resorted to in interpreting the Constitution, including foreign case law and international human rights sources. The cases also addressed the inter-relationship between domestic law and international law in terms of which field assumes primacy before the national courts. This is helpful, as the Singapore Constitution does not contain explicit provisions

which address the status of international law within the municipal context. Subsidiary issues discussed included understandings of the separation of powers principle and the scope of presidential pardoning powers under Art 22P in relation to the Art 93 judicial power clause. In another case, the scope of prosecutorial discretion was examined, as was the appropriate judicial check for allegations of executive malpractice.

ADMINISTRATIVE LAW

Judicial review

Scope of judicial review and the role of the High Court in the context of statutory appeals

1.3 The issue of the legitimate scope and function of judicial review arose in various cases. Judicial review traditionally extends not to the substantive merits of a decision but its legality, that is, the process by which the decision was arrived at. This is to preserve the autonomy of decision-making bodies. Typically, courts are more ready to review errors of law as this falls within the scope of their competence, to ensure that decision-making power is exercised on the correct legal basis, and to quash relevant errors of law which affected the decision itself: *Page v Hull University Visitor* [1993] AC 682. Factual findings based on insufficiency of evidence may also constitute a justiciable legal error, although judicial scrutiny of a mixed error of law and fact may not be as intense as that accorded errors of law, out of deference to the fact-finding role and capabilities of lower tribunals and other administrative actors.

1.4 When an appeal is made to the High Court to review the decision of a disciplinary body constituted by a statutory source, the role of the High Court is not to be confined to ascertaining whether natural justice rules have been breached or whether the decision of the disciplinary body has been honestly reached. In this context, the scope of review is enlarged by the right of appeal pursuant to which the High Court is empowered on appeal to hold a rehearing according to O 55 rr 1 and 2 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed), as noted in *Ling Uk Choon v Public Accountants Board* [2004] 3 SLR 517 on the basis of s 36 of the Accountants Act (Cap 2, 2001 Rev Ed). Here, two accountants were found guilty by an inquiry committee of improper conduct under s 34(1)(*c*) of the Accountants Act. Under the terms of the Act, s 34(1)(*c*) provides that upon considering the report of an inquiry committee, where the Public Accountants Board ("the Board") is satisfied that a public accountant is guilty of improper conduct which, in the Board's

opinion, "renders him unfit to be a public accountant or would bring the profession … into disrepute", the Board is entitled, after affording a reasonable opportunity of being heard, to exercise certain powers provided for in s 34(2).

1.5 Affirming the UK case of *Fox v General Medical Council* [1960] 1 WLR 1017, which supports the view that judicial powers in relation to statutory appeals transcend procedural *ultra vires*, Woo Bih Li J agreed that some "measure of precedence" should be accorded to the tribunal of first instance which had seen and heard the witnesses, as opposed to an appellate court which was confined to studying the record of evidence: at [33]. He noted that rehearing was not a matter of hearing a case afresh but rather a rehearing based on documents where the court reviews the official transcript of the evidence, the judge's notes and the grounds of the decision: at [29].

1.6 Woo J, as a matter of statutory construction, found that the inquiry committee had incorrectly read s 34(1)(*c*) of the Accountants Act. This was because the inquiry committee assumed that if the appellants were not entitled to retain the documents, despite their mistaken but genuine belief they were under a duty of disclosure regarding account irregularities, that this was *ipso facto* improper conduct tantamount to the statutory requirement of bringing "the profession of public accountancy into disrepute". Under s 34(1)(*c*) itself, the Public Accountants Board rather than the inquiry committee was charged with the function, after considering the inquiry committee's report, of exercising disciplinary powers over errant accountants whose actions contravene the Act. Firstly, the Board, by merely adopting the views of the inquiry committee, had committed an error by not exercising its statutory discretion. Secondly, the approach of the inquiry committee was flawed as it had failed to ask whether this instance of improper conduct necessarily brought the profession into disrepute. In Woo J's words, the Board, in adopting the inquiry committee's report, "did not address its mind to the second requirement": at [64]. The decision-making process was *ultra vires* because of the Board's non-exercise of discretion, and an illegality as the decision it adopted was based on an incorrect understanding of the relevant law that regulated the decision-making power under s 34. The Board had not taken into account a relevant consideration stipulated in the governing statute, committing a clear and relevant legal error which affected the substance of the decision it adopted. For good measure, Woo J considered that the appellant's conduct had not brought the profession into disrepute: at [65].

1.7 Where a statute regulating the conduct of disciplinary proceedings of a professional body like the Singapore Medical Council provides for an appeal to the High Court with respect to its findings, the High Court in deference to that body's expertise is statutorily required to accept as final and conclusive its findings on matters related to medical ethics or professional standards of conduct unless this is unsafe, unreasonable or contrary to evidence: *Chia Yang Pong v Singapore Medical Council* [2004] 3 SLR 151 ("*Chia Yang Pong*") at [7]. The High Court affirmed Lord Hailsham's observations in *Libman Julius v General Medical Council* [1972] AC 217 at 221 that findings of disciplinary committees should not be easily contested unless it could be shown that something was "clearly wrong" on one of three grounds: the conduct of the trial itself; the application of legal principles; or a demonstration that the committee's findings were sufficiently "out of tune" with the evidential basis, thus indicating with reasonable certainty that it had been misled. These are all legal enquiries and do not entail interference with matters falling with the expertise of the disciplinary committee. In *Chia Yang Pong* itself, the High Court confined itself to finding that the Disciplinary Committee had misconstrued its statutory powers in so far as it had imposed a fine beyond its power, contravening s 45(2)(*d*) of the Medical Registration Act (Cap 174, 1998 Rev Ed) which provided for a maximum $10,000 fine, in contrast with the $65,000 fine imposed in addition to an order to strike Chia's name from the Register of Medical Practitioners. Fines were, from a statutory construction of the penalties section of the Act, meant to be "an intermediate penalty to address the wide gap between a mere censure and a removal of a medical practitioner's name from the Register": at [14]. The improper exercise of statutory power is par excellence within the scope of judicial review on the grounds of illegality for statutory misconstruction, as the orthodox rationale of judicial review is to ensure fidelity to the purpose of an Act.

Availability of judicial review

1.8 Judicial review, an aspect of supervisory jurisdiction, is exercisable only by the High Court, not an inferior district court: Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), s 18, First Schedule. It is also a remedy of last resort, and where there are available statutory procedures for redressing a grievance with an administrative order these should generally first be pursued. If the appeal procedure is exhausted, an aggrieved person may then make an application for judicial review: *PP v Chiam Heng Hsien* [2004] SGDC 125 at [55], following *Tan Gek Neo Jessie v Minister for Finance* [1991] SLR 325.

1.9 As a discretionary remedy, applications for judicial review must be granted leave in order to proceed. In order to grant leave, the court must find the existence of a proper public law issue and available grounds of review. The function of the leave requirement is to weed out "misguided or trivial complaints of administrative error": *per* Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643, cited approvingly by L P Thean JA in *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR 644 and by Kan Ting Chiu J in *Tan Eng Chye v The Director of Prisons* [2004] 2 SLR 640 at [40]–[41]. The clear issue, as framed by Kan J in *Tan Eng Chye v The Director of Prisons* in relation to an offender found guilty of robbery under the Penal Code (Cap 224, 1985 Rev Ed), was whether the protection afforded by s 232 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC") was satisfied by minimal medical certification or required more. Robbery is a crime which carries a mandatory sentence of not less than 12 strokes of the cane, although s 232 of the CPC requires that the offender must be certified fit for caning prior to administration of this sentence. Kan J found that the medical report appeared inadequate as it disregarded Tan's medical history of having Marfan's Syndrome and the possible effects of caning on someone currently having this condition. Indeed, Kan J found a *prima facie* arguable case that the leave stage requires on the ground that omitting to consider Tan's medical history and current condition amounted to *Wednesbury* unreasonableness: at [38]. He seemed to utilise the *Wednesbury* test (see *Associated Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223) in its umbrella sense of covering a range of review grounds, such as not taking into account relevant considerations in the decision-making process. Thus, Kan J found that "the medical assessment to be made in compliance with s 232(1) of the CPC, to ensure that an offender is sufficiently fit to be caned, is susceptible to judicial review": at [49].

1.10 However, in *Tan Eng Chye v The Director of Prisons (No 2)* [2004] 4 SLR 521 ("*Tan Eng Chye (No 2)*"), Choo Han Teck J, in dismissing the application for *certiorari* to challenge the medical assessment conducted prior to sentencing by the district court as insufficiently thorough, found this was "not a judicial review case at all": at [10]. Choo J noted that the argument that the medical officer had come to his assessment without taking into account relevant considerations was "misconceived", as it rested on "the mistaken belief that every act or conduct of a public servant is justiciable by way of a judicial review": at [7]. He noted Lord Diplock's observations in the seminal case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 that the subject of judicial review is a decision made by a "decision-maker". Such a decision must have legal consequences, affecting the

rights or duties of the aggrieved applicant or depriving him of some legitimate expectation. Furthermore, the decision-maker must be empowered by public law to make decisions which "will lead to administrative action or abstention from action by an authority endowed by law with executive powers". Choo J noted that the medical doctor who reported on the offender's fitness for caning took a decision but pursuant to a "non-decision making" duty: at [8]. Not all errors committed in an administrative action were susceptible to judicial review as other legal remedies might be available and should be pursued.

1.11 In this case, the relevant decision-maker was the district judge who had ordered the caning – this was the "substantive" administrative action: at [8]. The remedy therefore lay not in judicial review but the appeals process. In relation to the duty of the medical officer who reports on fitness for caning under s 232(1) of the CPC after sentencing but prior to the administration of the sentence, the "substantive" administrative action with the decision-making function was exercised by the prison authority which was able to stop the caning. Failure to exercise this function gave rise to a remedy in the form of an action against the prison authority for non-exercise of a statutory duty. Thus, any inadequacy in the pre-sentencing medical report was not a relevant issue or one susceptible to judicial review.

1.12 If indeed the district court judge had accepted a deficient report, the remedy would be to appeal on the ground that judges should not act on flawed reports: at [11]. However, since the district judge had no discretion not to impose caning as this was a mandatory sentence, judicial review of whether the doctor authoring the report for the trial judge had acted unreasonably in the *Wednesbury* sense was "a pointless and unwarranted exercise": at [11]. Otherwise, someone unhappy with the trial judge's decision might seek to impugn it by attacking a "secondary source" such as the evidence of witnesses or medical experts, arguing that grounds of review were available on the basis of illegality or for failure to take relevant considerations into account, thus rendering the decision unreasonable. Only the relevant decision-maker performing "substantive administrative action" is susceptible to judicial review: in the case of *Tan Eng Chye (No 2)*, this was either the decision-maker who had ordered the caning or stopped it. Thus, judicial review applications will not succeed where the appropriate channel of legal redress is through a statutorily-provided appeal process.

Substantive grounds of judicial review

1.13 Absolute discretion is anathema to the rule of law. Most administrative law cases tend to relate primarily to challenging administrative action on the basis of illegality or procedural impropriety. The High Court, in exercising its powers of judicial review, not only ensures that discretion is exercised in a manner consistent with the statutory purpose and in observance of statutory safeguards, but it also ensures that a decision-making process which deviates from substantive common law principles may be challenged on the grounds of irrationality.

1.14 The Court of Appeal in *AG v Ng Hock Guan* [2004] 3 SLR 253 dismissed the AG's appeal and affirmed the decision of the High Court (reported as *Ng Hock Guan v AG* [2004] 1 SLR 415) which related to a successful challenge against the dismissal of the respondent from the Singapore Police Force on the grounds that the decision of the authorised officer who recommended the dismissal of the respondent was irrational and unreasonable.

1.15 Ng, then a Senior Staff Sergeant attached to the Anti-Vice Branch of the Criminal Investigation Department, was accused of committing assault against several detained Filipinas who were being interviewed pursuant to a vice investigation. Lai Kew Chai J in the High Court found that the authorised officer charged with the conduct of the disciplinary proceedings under the Police Regulations, though not expected to produce "a report of a similar standard as that of a professional judge", was nevertheless expected to "demonstrate fairness" in the process of adjudication: [2004] 1 SLR 415 at [19]. Generally, all public officials exercising judicial or quasi-judicial functions are under a duty to act fairly. Lai J found that the authorised officer's jaundiced perception of the witnesses called by the respondent, which had caused him to discount the weight of their testimony on the perception of "a tendency in collegiate cover-up and perjury", constituted a denial of a "fair and reasonable consideration" of Ng's defence: at [20].

1.16 The Court of Appeal rejected the Attorney-General's contention that the judge had gone beyond the supervisory bounds of judicial review by effectively substituting his own finding of fact for that of the authorised officer. Instead, it found that the trial judge's treatment of the evidence did not extend to an examination of the sufficiency of evidence. Rather, the High Court had displayed consciousness that in exercising supervisory jurisdiction, it should not interfere even though on the facts it could have arrived at a decision different from that of the original decision-maker. Lai J

stated that his concern was not with the substantive merits of the case but the decision-making process. Although the Police Regulations did not stipulate that the authorised officer should give written grounds for his recommendations, the Regulations themselves contemplated some form of report to aid the Commanding Officer. In this case, the authorised officer had authored a report setting out his thought processes which the court had pragmatically considered. It was evident from this record that phrases contained therein indicated "a prejudiced mind which was both irrational and unreasonable": [2004] 3 SLR 253 at [27]. The Court of Appeal found a breach of natural justice, in the form of the biased view of the authorised officer that the respondent's colleagues could not be relied on to tell the truth, which constituted an error in law and an unfair hearing as the evidence adduced by both sides was not "accorded due consideration without any preconceived notion that the evidence of one side or the other is less likely to be truthful": at [27]. Thus, Lai J had drawn no false inference in finding that the report contained evidence indicative of "a state of mind which would have the proceedings vitiated". This clearly evinced a "fundamental error": at [29].

1.17 Thus the Court of Appeal found that the authorised officer's "general prejudicial perception" concerning the reliability of the police evidence lacked "a rational basis": at [30]. The clear error of law committed by the authorised officer resulting in a finding of guilt thus vitiated the decision taken by the Commanding Officer to dismiss Ng. Lai J had demonstrated the basis for his finding that the evaluation of the evidence by the authorised officer was flawed, as the authorised officer had ignored contrary medical evidence as well as witness testimony casting doubt on the allegations of assault. This buttressed the finding that the authorised officer's prejudicial preconceived notions of police witnesses covering up for their colleagues had coloured the way he had viewed the evidence. Such an examination did not constitute a substitution of factual findings but demonstrated the flawed decision-making process and, hence, its illegality.

CONSTITUTIONAL LAW

Judicial review of fundamental liberties

Constitutionality of the mandatory death penalty in relation to Articles 9 and 12

1.18 The constitutionality of the mandatory death sentence under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA") has received some extra-judicial attention (see, *eg,* K S Rajah, "The Unconstitutional Punishment" [2003] 3 MLJ cxlviii) and was judicially considered by the High Court and Court of Appeal in *PP v Nguyen Tuong Van* [2004] 2 SLR 328 and *Nguyen Tuong Van v PP* [2005] 1 SLR 103 respectively ("*Nguyen*"). The reasoning of the Privy Council in *Ong Ah Chuan v PP* [1980–1981] SLR 48 ("*Ong Ah Chuan*") on this point was essentially upheld as its particular application under the MDA scheme did not violate the equal protection norm under Art 12 of the Constitution. Furthermore, the Court of Appeal agreed with the High Court's finding that death by hanging did not contravene any customary international human rights law, as it fell beyond the accepted scope of the recognised customary norm prohibiting cruel and inhumane treatment or punishment. This argument was raised in relation to Art 9 of the Constitution which prohibits the deprivation of life and liberty "save in accordance with law" in an attempt to read a substantive standard into the interpretation of what the "law" requires.

1.19 The High Court's reasoning in *Nguyen* in relation to whether the death penalty imposed by the MDA violated the Art 12 equal protection clause was affirmed and adopted by Tay Yong Kwang J in *PP v Chew Seow Leng* [2004] SGHC 227 at [54]. The relevant facts and constitutional issues raised in *Nguyen* before the High Court and Court of Appeal are discussed thematically below.

Facts of the case and constitutional arguments raised

1.20 Nguyen, an Australian national of Vietnamese descent, was arrested at Singapore Changi Airport where he was found with two packets of heroin. He was charged and convicted under s 7 of the MDA for importing a controlled drug without authorisation. The MDA imposes a mandatory death sentence for trafficking more than 15g of diamorphine; Nguyen was found with 396.2g of the drug. In appealing against his conviction and death sentence, Nguyen raised three primary constitutional arguments in relation to the imposition of the death sentence in general and in his particular case:

first, that imposition of the death sentence in his case violated Art 12 of the Constitution; second, that the mandatory death sentence violated Art 9 of the Constitution as it was arbitrary punishment not in accordance with law; third, that it violated the separation of powers principle enshrined in Art 93 of the Constitution, which vests judicial power in the courts.

Interpreting the Constitution: Domestic and international sources of law

1.21 Generally, when interpreting Part IV of the Constitution which enshrines fundamental liberties, a "generous interpretation" is to be accorded to give individuals "the full measure" of these liberties: Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* [1980] AC 319 at 329, quoted by Lord Diplock in *Ong Ah Chuan* (*supra* para 1.18) at 61, [23]. There, his Lordship noted that the meaning of the word "law" in the formulations "in accordance with law" or "equality before the law" in Westminster-based Constitutions provisions referred to "a system of law which incorporates those fundamental rules of natural justice" integral to the common law of England in operation in Singapore at the commencement of the constitution: at 61–62, [26]. The Privy Council in *Haw Tua Tau v PP* [1980–1981] SLR 73 considered whether a particular rule of evidence allowing the court to draw adverse inferences from an accused unwilling to give evidence at his trial was a fundamental rule of natural justice or fairness which it would be unconstitutional to breach. In informing their decision, the Privy Council drew from a broad palette of references beyond English practice, such as the Universal Declaration of Human Rights, European Convention on Human Rights and the experience of inquisitorial systems, before concluding such a rule was not a fundamental rule of natural justice.

1.22 In *Nguyen,* the High Court and Court of Appeal considered and weighed arguments drawn from foreign cases stemming from India, Hong Kong, the United States and recent Privy Council cases which had considered international human rights standards in relation to "the right to life and the right not to be subjected to cruel, inhuman or degrading treatment or punishment": *Watson v The Queen* [2005] 1 AC 472 (PC on appeal from Jamaica) at [30], cited by the Court of Appeal at [59]. It would appear that Singapore courts will consider transnational jurisprudence in interpreting the constitutional text, and that recognised customary law norms are directly applicable, supporting a monist view of the relationship between customary international law and domestic law.

1.23 This clarifies the ambiguity left by the approach of the High Court in *Chan Hiang Leng Colin v PP* [1994] 3 SLR 662 towards the reception of

international human rights norms within the domestic legal system. This case related to the scope of religious liberty which was implicated by the de-registration of the Jehovah Witnesses and a ban on their publications flowing from their refusal to perform compulsory military service as a matter of conscience under the Undesirable Publications Act (Cap 338, 1985 Rev Ed) ("UPA") and the Societies Act (Cap 311, 1985 Rev Ed). There, the Chief Justice asserted that the Constitution was primarily to be interpreted "within its own four walls" rather than from analogies drawn from other countries: at 681, [51]. Arguments that the administrative orders violated not only constitutional rights but human rights in international declarations were summarily dismissed, with the declared preference being to focus on local laws: "I think that the issues here are best resolved by a consideration of the provisions of the Constitution, the Societies Act and the UPA alone": at 681–682, [54]. This terse treatment of relevant legal sources to be considered in the adjudicatory process conveyed the impression of a dualistic approach towards customary international law, implying that the latter needs to be formally incorporated into the domestic system before being applicable.

Customary international law and the domestic court

1.24 In *Nguyen,* it is clear that customary norms are directly applicable without further action. This is evident with respect to the treatment of Art 36(1) of the Vienna Convention on Consular Relations, to which Singapore is not a state party. Kan Ting Chiu J in the High Court noted that Singapore subscribed to the established practice for an arresting state to inform the consular officers of the state of the accused person, as reflected in a directive forming part of the Central Narcotics Board's standard operating procedures ([2004] 2 SLR 328 at [34]–[35]). Thus, it was reasonable to infer that other enforcement agencies in Singapore followed similar directives, which "suggests the acceptance of the obligations set out in Art 36(1)": at [36]. No evidence to the contrary was presented by the Prosecution which was "in a good position to have knowledge of Singapore's position on this issue": at [37]. The Court of Appeal agreed with Kan J that the relevant norm was universally binding customary international law and that "Singapore does conform with the prevailing norms of the conduct between States such as those set out under Art 36(1)": [2005] 1 SLR 103 at [24].

Does death by hanging violate a customary human rights norm against cruel and inhuman punishment?

1.25 A distinct argument raised in *Nguyen* before the High Court ([2004] 2 SLR 328 at [105]) and the Court of Appeal ([2005] 1 SLR 103 at [80]) was

that death by hanging, provided for by s 216 of the CPC, violated the customary international human rights norm prohibiting cruel, inhuman treatment and punishment, contrary to Art 5 of the Universal Declaration of Human Rights ("UDHR") which reads: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". It was contended that the "in accordance with law" aspect of Art 9 should be read informed by this human rights norm.

1.26 Kan J in the High Court doubted whether the UDHR codified customary international law as there was no consensus on this; further, the terms of the UDHR did not expressly mention death by hanging: [2004] 2 SLR 328 at [106]. In support of the view that there was a lack of international consensus on this point, he noted that the majority in the decision of the US Ninth Circuit Court of Appeals in *Campbell v Woods* 18 F 3d 662 (1994) held that hanging did not violate the US constitutional prohibition against cruel and unusual punishments: at [107]. The Court of Appeal affirmed this as a right observation: [2005] 1 SLR 103 at [93]. The Court of Appeal, drawing from juristic writings in the form of the Third US Restatement of US Foreign Relations Law (1987), did not find contentious the argument that the prohibition against cruel and inhuman treatment or punishment constituted a binding customary international rule, the Prosecution raising no objection in this respect: at [91]. However, it found a lack of state practice which indicated that execution by hanging breached this norm, let alone sufficient international consensus that there was a customary norm prohibiting the death penalty in general. In support of this, the Court of Appeal referred to a 2003 UN Commission on Human Rights report (UN Doc E/CN.4/2003/106) which noted that there was no universal consensus over the status of the death penalty worldwide, with the number of countries retaining the death penalty (primarily effected by hanging or shooting) roughly equal to the number of abolitionist countries: at [92]. Thus, the putative customary international norm failed the test of being "clearly and firmly established" which was required before Singapore courts would adopt it: at [88].

1.27 Thus in adjudicating fundamental liberties issues, where human rights arguments are raised the court will look to foreign cases and international practice to ascertain whether there is an applicable customary human rights norm. In weighing potential material sources of customary law like UDHR norms or even non-binding statements lacking conventional force like the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region signed by Asia Pacific Chief Justices ([2004] 2 SLR 328 at [99]–[101]), the court resists a tendency towards

parochialism by acknowledging foreign cases or international standards as possible influences on the development of Singapore public law. Nevertheless, the Court of Appeal underscored that "the common law of Singapore has to be developed by our Judiciary for the common good": at [88].

International human rights law – weighing sources

1.28 The Court of Appeal in *Nguyen* found that there was no international consensus that death by hanging as required by s 216 of the CPC fell within the terms of the established customary legal prohibition against cruel and inhumane punishment: [2005] 1 SLR 103 at [91]. It followed the British approach in adjudging that even if the provisions of the MDA violated an established customary norm, following Kan J in the High Court ([2004] 2 SLR 328 at [108]), the statute would prevail as customary law is incorporated into domestic law "so far as it is not inconsistent with rules enacted by statutes or finally declared by … tribunals", *per* Lord Atkin in *Chung Chi Cheung v The King* [1939] AC 160 at 168. The Court of Appeal affirmed that unambiguous statutes take precedence even where inconsistent with international law, asserting the supremacy of domestic law over international norms: *Collco Dealings Ltd v Inland Revenue Commissioners* [1962] AC 1, cited at [94].

Article 12 (equal protection)

The constitutionality of the 15g differentia: Section 7 of the MDA

1.29 The appellant in *Nguyen* challenged the constitutionality of s 7 of the MDA which mandates a death penalty for trafficking in more than 15g of diamorphine (heroin), alleging that it violated the Art 12 equal protection clause which reads: "All persons are equal before the law and entitled to the equal protection of the law." The appellant contended that *Ong Ah Chuan* (*supra* para 1.18), where the Privy Council held that s 7 of the MDA did not violate Art 12, was decided wrongly. Alternatively, it would be decided differently today given recent Privy Council decisions. Cases cited included *Watson v The Queen* (*supra* para 1.22), *Boyce v The Queen* [2005] 1 AC 400 (PC on appeal from Barbados), *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433 (PC on appeal from Trinidad and Tobago) and *Reyes v The Queen* [2002] 2 AC 235 (PC on appeal from Belize).

1.30 The basis of the Art 12 challenge was that the mandatory death sentence removed from the individual, as defence counsel before the High Court argued, the protection of the criminal justice system by taking away

"the protection of a judicial sentence": [2004] 2 SLR 328 at [73]. The court thus could not differentiate between the moral blameworthiness of offenders. Further, defence counsel argued that in criminal justice systems deriving from English law, justice connoted "fairness and equity. It may mean moral rightness. Justice is also usually required to conform to developing community standards". Rather than being a comparative for the punishment imposed on an offender, equal protection was better characterised as "an entitlement to be protected from injustice in the form of a disproportionate sentence": at [73]. This invited the court to consider, on its own merits, whether a particular sentence imposed on an individual was disproportionate on specific case facts and to discount the fact that everyone falling within this category would incur the same sentence. In *Ong Ah Chuan* (*supra* para 1.18) at 63, [39], Lord Diplock considered and rejected the argument that the court was unable to differentiate between the moral blameworthiness of offenders. Article 12 only required that individuals in similar circumstances within a legal class were entitled to equal treatment; discrimination between classes was not prohibited: at 64, [39]. Kan J held that the *Ong Ah Chuan* decision in relation to Art 12(1), being concerned with "equal punitive treatment for similar legal guilt" rather than "equal punitive treatment for equal moral blameworthiness", was binding on him: [2004] 2 SLR 328 at [76]. Further, moral blameworthiness was a factor that could be taken into account in the sentencing process where the sentence was not fixed: at [84]. Where the Legislature had exercised its powers and enacted laws providing for a mandatory death sentence, this was a proper exercise of legislative power so long as the differentiating factors employed for the death sentence were not arbitrary and were reasonably related to the Act: at [83]–[84]. In such cases, punishment was imposed without hearing mitigation pleas and there was no breach of the equal protection clause: at [84].

1.31 The appellant challenged the legislative judgment behind the quantitative differentiation of drug trafficking offences and the imposition of the death penalty for cases where a certain quantity of addictive drugs was involved. It was argued that the Art 12(1) equal protection guarantee was "afforded by the intervention of an independent judge", and that the trial judge had presumed wrongly that the legislative power in relation to the 15g differentia had been exercised properly: [2005] 1 SLR 103 at [71].

1.32 The current judicial approach towards scrutinising the constitutionality of legislative classifications in relation to equal protection is minimal. The Privy Council in *Ong Ah Chuan* recognised that the determination of appropriate punishments for classes of offenders was a matter of "social policy", something that fell within the province of the

Legislature under the separation of powers principle. Nevertheless, the court would apply the constitutional test of "reasonable classification" which required the classification would be based on an intelligible differentia which bore a "rational relation" to the legislative object. The "rational nexus" test has been consistently applied in Singapore in cases like *Kok Hoong Tan Dennis v PP* [1997] 1 SLR 123, and was affirmed by the court in *Nguyen* which applied it. The Court of Appeal in *Nguyen* accepted it would be wrong to decide the issue of the constitutionality of a differentiating trait on "a blind acceptance of the legislative fiat" and it was the judicial duty to ascertain "the proper weight that ought to be ascribed to the views of Parliament encapsulated in the impugned legislation": at [73]. Following the approach in *Ong Ah Chuan*, the court would entertain "plausible reasons" that a particular differentia was "purely arbitrary"; this test is generally deferential to legislative determination but does not treat it as definitive.

1.33 The Court of Appeal in *Nguyen* rejected the bare contention that it was "axiomatic" that gravity of an offence could not be gauged by the quantity of drugs involved, requiring material and argument that would warrant such conclusion. It noted that the Indian Supreme Court in *Mithu v State of Punjab* AIR 1983 SC 473, cited by the appellant, had evidence, including sociological data, upon which to base its decision that there was no rational justification for treating life convicts who commit murder from other murderers. In ascertaining the constitutionality of the MDA, the Court of Appeal found it helpful to refer to the contextual approach adopted by the Hong Kong Court of Final Appeal in *Lau Cheong v HKSAR* [2002] 2 HKLRD 612 which dealt with whether a mandatory life sentence for murder infringed constitutional guarantees against arbitrary punishment and unequal treatment: at [75]. It singled out various factors which rendered it judicially appropriate from the perspective of the Hong Kong court to "give particular weight to the views and policies adopted by the legislature", the conclusions of which had an objective basis in being founded on an examination of the legislative history, legislative debates and construction of the relevant statutory regime, rather than any subjective judicial ideological preferences. First, it noted (*ibid*) that the issue of calibrating an appropriate punishment for the most serious crime "is a controversial matter of policy involving different views on the moral and social issues involved". Correctly rejecting the posture of the final arbiter of social policy, the Hong Kong Court of Final Appeal noted that the 1993 amendment that promulgated mandatory life sentences in place of a mandatory death penalty, which was thus abolished, was the product of a legislative compromise. Second, there was in place a comprehensive statutory regime enacted in conjunction with the mandatory

life sentence which provided for individualised review of each sentence imposed: at [76].

1.34 No "comparable material" was presented before the Court of Appeal in *Nguyen* to enable it to decide whether the legislative judgment in s 7 of the MDA and its Second Schedule (offences punishable on conviction) was insupportable; in the absence of "full arguments" the 15g differentia was upheld and the Art 12 argument dismissed: at [77]. Nevertheless, the decision indicates that the court will consider full arguments and evidence challenging the rational basis for a legislative classification, providing some measure of control over the exercise of legislative power.

Separation of powers and Article 93

1.35 Kan J in *Nguyen* had occasion to distinguish between judicial and legislative power in relation to the punishment of offenders, in response to two arguments which were united by the underlying theme that the judiciary as an independent tribunal ought to be involved in the process of deciding whether the accused should have the death sentence imposed on him, as this essentially involves a sentencing function based on an individualised determination of the merits of the particular case, and is "fundamentally justiciable": [2004] 2 SLR 328 at [100].

1.36 First, it was argued that s 7 of the MDA, specifying an offence punishable with death, breached the separation of powers principle. Article 93 of the Constitution vests judicial power "in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force". Borrowing the reasoning of the Supreme Court of Ireland in *Deaton v The Attorney General and the Revenue Commissioners* [1963] IR 170 at 182, a distinction was drawn between a prescribed fixed penalty (which as a general rule was characteristic of legislation) and the selection of a penalty for a particular case, which was integral to the administration of justice and not to be committed to the Executive: at [93]. Kan J found nothing objectionable with the MDA scheme.

1.37 The second argument related to s 220 of the CPC which operates after sentencing has taken place. This requires the trial judge, who has no choice but to pronounce a mandatory sentence, to give reasons in a report to be sent to the Minister and the Court of Appeal as to whether or not such sentence should be imposed. This necessarily relates to the power of clemency which is vested in the hands of the Executive, as embodied in Art 22P of the Constitution. Defence counsel argued that s 220 of the CPC

evinced a breach of the separation of powers doctrine, being "a legislative requirement on a judicial officer to take part in the administrative process of the executive". Furthermore, the accused had no role in the said process where the Executive made its decision without reference to "accessible criteria" and without any requirement to give reasons. Counsel questioned whether the individualised post-sentencing consideration of the accused's case vested in the hands of the Executive, which effectively determined which condemned person "actually deserves to suffer death", was compatible with the separation of powers, as the Executive was effectively wielding a sentencing function which is an aspect of judicial power. Without going into a substantive analysis of the nature of executive or judicial power, Kan J was content to note that s 220 of the CPC was to be read in conjunction with Art 22P which regulates the clemency procedure for confirmed death sentences. That is, the prerogative power of the Executive co-exists with the Art 93 judicial power vested in courts and "a power conferred by the Constitution cannot be considered unconstitutional": at [98]. The post-sentencing provisions were thus considered to fall within the province of executive power; this argument was raised but not fully argued before the Court of Appeal.

1.38 Before the Court of Appeal, it was further argued that the Legislature had breached the separation of powers principle by enacting a mandatory death sentence as this arguably trespassed into the realm of judicial power by assuming to itself a judicial power in the form of a discretionary power to determine the severity of the punishment to be inflicted on individual members of a class of offenders: at [96]. This was not accepted.

Article 9

1.39 In relation to the Art 9 due process guarantee, the appellant in *Nguyen* raised an argument, not addressed in *Ong Ah Chuan*, that this was breached as the mandatory death sentence constituted arbitrary punishment and a deprivation of life not "in accordance with law". This was because it contravened the second limb of Art 12(1) in removing the "equal protection of the law" which individual convicted persons enjoyed by dint of the discretion inherent in the judicial sentencing process, as opposed to a stipulated penalty. The mandatory sentence precluded proportional and individualising sentencing, thus breaching the prohibition against cruel and inhuman treatment or punishment; this prohibition found no express expression in Part IV of the Constitution as a recommendation by the 1966 Wee Chong Jin Constitutional Commission to include it was rejected.

1.40 In interpreting Art 9, the Court of Appeal in *Nguyen* eschewed a bare legalistic approach in affirming that "in accordance with law" went beyond "just Parliament-sanctioned legislation" to include, as declared by Lord Diplock in *Ong Ah Chuan* (*supra* para 1.18) at 61–62, [26], "fundamental rules of natural justice" forming part of the English common law in operation when the Constitution commenced. Kan J in the High Court noted that the Court of Appeal in the "death row phenomenon" case of *Jabar v PP* [1995] 1 SLR 617 at 631, [53], had made the formalistic assessment that any law depriving a person of life was "valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well". This minimises the scope of judicial review unduly. Notably, Kan J recognised there was "room for debate" in ascertaining the meaning of "so long as it is validly passed by Parliament", as the court was concerned both with procedural compliance in relation to the passage of legislation as well as ensuring that the Act was valid and did not "contravene the Constitution", that is, substantive values or principles contained therein: at [77].

1.41 In seeking to argue that "in accordance with law" imported the prohibition against cruel and inhuman treatment or some notion of "proportionality" with respect to moral guilt and legal punishment, the appellant, drawing from recent Privy Council decisions, including *Watson v The Queen* (*supra* para 1.29) and *Reyes v The Queen* (*supra* para 1.29) ("*Reyes*"), argued that the mandatory death sentence constituted arbitrary punishment and violated the prohibition against cruel or inhuman treatment or punishment. The High Court distinguished the *Reyes* case where the mandatory death penalty for murder by shooting was held unconstitutional since this denied 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" which s 7 of the Belize Constitution protects: at [89]. This provides that no person "shall be subjected to torture or to inhuman or degrading punishment or treatment": at [84]. In evaluating whether a punishment was inhumane or cruel, the Privy Council in *Reyes* said that "evolving standards of decency that mark the progress of a maturing society" were to be considered: at [88].

1.42 No similar law exists in the Singapore context, and Kan J said that *Reyes* would have been relevant if there were an equivalent provision in the Singapore Constitution: at [90]. The Court of Appeal noted that the Privy Council in *Reyes*, in interpreting what fundamental standards of humanity required, had been heavily influenced by international human rights law

(considering standards derived from the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, American Declaration of the Rights and Duties of Man and American Convention on Human Rights) and the jurisprudence of foreign courts. It noted that essential components of the prohibition against cruel and inhuman treatment were proportionality and individualised sentencing: [2005] 1 SLR 103 at [85]. Thus, what was required to maintain respect for humanity was for there to be consideration of an accused individual's circumstances, character and record before the ultimate sanction of death was imposed. The Privy Council in *Watson v The Queen*, showing its greater receptivity to international human rights norms in formulating its decisions, doubted the authority of *Ong Ah Chuan* and its assumption that there was "nothing unusual in a death sentence being mandatory", considering that *Ong Ah Chuan* was made "at a time when international jurisprudence on human rights was rudimentary", echoing Lord Bingham's observations in *Reyes* that the death penalty for murder "long predated any international arrangements" for human rights protection: *Watson v The Queen* at [29]–[30].

1.43 Further, the Court of Appeal noted that the Privy Council in *Reyes* did not consider mandatory death sentences "absolutely unconstitutional": at [98]. In apparently accepting that standards of humanity conditioned the interpretation of "in accordance with law" in Art 9, the Court of Appeal found that within the context of the MDA the mandatory death sentence prescribed was "sufficiently discriminating to obviate any inhumanity in its operation": at [87]. This would seem to be a departure from the observation of the Court of Appeal in the "death row phenomenon" case of *Jabar v PP* (*supra* para 1.40 at 631, [53]) where it stated that laws depriving a person of life or personal liberty would be "valid and binding" in so far as they were "validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well". In refusing to apply substantive tests of fairness, justice or humanity in *Jabar v PP,* the role of the judicial guardian was limited to ascertaining if a law derogating from fundamental liberties was correctly enacted; if so, it would be valid, even if its content was noxious or unethical. In contrast, in *Nguyen*, the court appeared to apply substantive standards of humanity in evaluating the operation of the law and adjudging its constitutionality.

Miscellaneous: Scope of prosecutorial discretion and appropriate judicial check for allegations of executive malpractice

1.44 It may be noted that with respect to allegations of inappropriate exercises of prosecutorial discretion, which is constitutionally vested in the

Attorney-General by virtue of Art 35(8) of the Constitution which confers discretion "to institute, conduct or discontinue any proceedings for any offence", the District Court in *PP v Ong Chin Keat Jeffrey* [2004] SGDC 130 rejected counsel's suggestion that the power to stay proceedings be assumed and exercised as a check against alleged executive malpractice.

1.45 District Judge Aedit Abdullah considered the development of the stay power utilised in English courts to enable the Judiciary to preserve the rule of law by staying proceedings which would otherwise allow the Executive to take advantage of an abuse of executive power, as developed by the House of Lords in *R v Horseferry Road Magistrates' Court* [1994] 1 AC 42 and applied in the entrapment case *of R v Latif* [1996] 1 WLR 104. There, a balancing approach was advocated for cases where there were allegations of executive impropriety through offering inducements to commit a crime. The district judge noted that a trial judge was required "to balance the need to try those accused of serious crimes with a competing public interest to ensure that the courts did not endorse malpractice by the executive": at [79]. In particular, Lord Steyn conditioned any judicial exercises of the power to stay by requiring trial judges to ascertain whether there had been "an abuse of power which amounts to an affront to the public conscience". This is a negotiation of the boundary line between executive and judicial exercises of power and the role of the Judiciary in upholding the rule of law. However, while the English approach was influenced by developments within the European Convention on Human Rights regime, the district judge noted "these developments within Europe are not replicated in Singapore": at [81]. This demonstrates a wariness towards the wholesale importation of foreign judicial approaches, consistent with the insistence that public law in Singapore must meet "local conditions" and preserve the "fundamental values of Singapore society": see *AG v Wain* [1991] SLR 383 at 394, [34], and *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689 issued on 11 July 1994 respectively.

1.46 Thus, the district judge considered that such a balancing approach would be inapt in the local context given Art 35(8) and the vesting of discretion in the Public Prosecutor. This affirms a trust in the discharge of functions by the Public Prosecutor. This would seem consistent with the observation by Hashim Yeop A Sani SCJ in the Malaysian Supreme Court decision of *PP v Dato' Yap Peng* [1987] 2 MLJ 311 that the Public Prosecutor is not an "ordinary public officer" but is constitutionally mandated "to play a vital role in the administration of justice", including powers to initiate, control and direct criminal proceedings. Consequently, as the district judge noted, the Public Prosecutor acts as "appropriate guardian of propriety in

enforcement matters": at [77]. This affirms the broad discretion vested in the Public Prosecutor. Nevertheless, in cases where executive power allegedly was exercised without power or constituted malpractice, the apt judicial remedy was not for a district-level court to stay proceedings based on executive malpractice as this would effectively absolve the accused person from guilt: at [80]. Rather, remedy should be sought through the High Court's exercise of supervisory jurisdiction in the form of "judicial review of the executive decision or of criminal proceedings against the enforcement personnel guilty of unlawful acts": at [80]. This decision clarified the appropriate nature of the judicial check with respect to inappropriate abuses of discretion by the holder of the office of Public Prosecutor, located not in the power to stay but in an application for judicial review.