INTRODUCTION

Constitutionalism and Criminal Justice

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1 It gives us great pleasure to pen the introduction to this set of essays which discusses the impact of constitutionalism or human rights on the shape of the criminal justice system. The common law legal tradition developed in the absence of enforceable constitutional or human rights. With the advent of constitutionalism in the common law world, common law jurisdictions have had to come to terms with the need to assess the rules surrounding the criminal justice system according to constitutional or human rights norms. Two recent examples of a judiciary placing limits on legislative power to create criminal offences are:

(a) *Naz Foundation v Government of NCT of Delhi*,[1] where the Delhi High Court struck down s 377 of the Indian Penal Code[2] to the extent that it criminalised private homosexual conduct between consenting adults on the basis that it infringed Arts 14 (equal protection), 15 (prohibition of discrimination on grounds of religion, race, caste, sex and place of birth) and 21 (protection of life and personal liberty) of the Indian Constitution.

1 2010 Cri LJ 94. The Indian Supreme Court has heard appeals challenging the decision but no verdict has been released yet, "Verdict Reserved on Appeals in Gay Sex Case" *The Hindu* (27 March 2012). See also Shubhankar Dam, "Criminal Wrongs and Constitutional Rights: A View from India" in this volume at pp 714–735.

2 Section 377 of the Indian Penal Code prohibits "carnal intercourse against the order of nature" which is interpreted to mean anything other than heterosexual penile-vaginal intercourse. The same or similar provision can be found in many Commonwealth nations, including Singapore until it was deleted by legislative amendment in 2007. See Douglas E Sanders, "377 and the Unnatural Afterlife of British Colonialism in Asia" (2009) 4 *Asian Journal of Comparative Law* 163.

(b) *Mwenda v Attorney-General*,[3] when the Constitutional Court of Uganda struck down the offence of sedition for infringing the right to freedom of speech and expression, and freedom of the press and other media.

2 Concurrently, the decades since the Second World War have seen the rise of various United Nations conventions and regional human rights treaties which influence ideas about international "best practices" not only in that sphere but also at the level of domestic substantive criminal law, criminal investigation, procedural requirements for trials, sentencing of offenders, and treatment of prisoners. The discourse can no longer be confined within the jurisdiction of each state. Few, if any, states deny the need to comply with the Universal Declaration of Human Rights 1948,[4] which became the foundation for subsequent regional instruments such as the European Convention on Human Rights, and these together inspired the constitutional provisions on human rights in many Commonwealth countries.

3 What seems to be emerging is a broad international consensus on what a civilised system of criminal justice ought to look like. The first set of essays examines the development of rights consciousness in criminal justice in selected Commonwealth countries (Canada, Hong Kong, India, South Africa and the UK) as well as in the field of transnational and international criminal law.

4 The use of Commonwealth judicial precedent in domestic litigation is likely to continue to increase.[5] This is not surprising as Commonwealth precedent is highly relevant to Singapore. First, many Commonwealth jurisdictions, like Singapore, have justiciable human rights provisions found in their Constitutions such that any inconsistent law may be held to be invalid. Even the UK's traditional approach of parliamentary sovereignty had to change with the enactment of the Human Rights Act 1998[6] which made the European Convention of Human Rights domestically applicable. The courts in the UK are now given a power to declare a law enacted by Parliament as being incompatible with the European Convention.

5 Secondly, Commonwealth jurisdictions share a common law heritage and their decisions may be traced to a similar understanding of

3 [2011] 1 LRC 198.

4 A periodic review of the human rights records of all countries of the United Nations was instituted by the creation of the United Nations Human Rights Council in 2006.

5 See, for example, *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 and *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 where Privy Council cases decided on the mandatory death penalty were argued.

6 Human Rights Act 1998 (c 42) (UK).

the nature and function of the criminal law. Although there is perhaps greater affinity between Commonwealth jurisdictions which share very similar criminal legislation – an example being the almost identical Penal Codes and Evidence Acts in Singapore and India – even those which have a substantially different code, like Canada, or those which kept to an essentially common law system of criminal law – examples being the UK and Hong Kong – often speak the same language. Commonwealth experience from similarly situated or culturally more similar jurisdictions like Hong Kong have a particular resonance. Even those who subscribe to some sort of "Asian values" exceptionalism would be hard put to dismiss the persuasive value of developments there.[7] These jurisdictions, in particular, face similar challenges as Singapore in navigating the perceived trade-offs between law and order on the one hand and human rights on the other.

6 The judicial approach in Singapore towards human rights arguments in the criminal justice sphere has been highly restrained so far. Despite the pronouncement by the Privy Council in decisions such as *Ong Ah Chuan v Public Prosecutor*[8] and *Haw Tua Tau v Public Prosecutor*,[9] that legislation must conform to "fundamental rules of natural justice"[10] and "must not be obviously unfair"[11] in order to be constitutionally valid in Singapore, frontal attacks on criminal law and procedure based on these grounds have been, thus far, rebuffed. Interpretation of constitutional rights takes place "within its own four walls and not in the light of analogies from other countries";[12] and domestic legislation has been held to override rules of customary international law.[13]

7 A further stumbling block is the lack of provisions in the Constitution of the Republic of Singapore[14] ("Singapore Constitution") such as one prohibiting cruel, inhuman or degrading punishment. In

7 See the "Asian values" debate in the 1990s used to shield Singapore from a "Westernised" concept of human rights and the critical reviews by Kim Dae Jung, "Is Culture Destiny?" (1994) 73(6) *Foreign Affairs* 189; Surain Subramaniam, "The Asian Values Debate: Implications for the Spread of Liberal Democracy" (2000) 27 *Asian Affairs* 19; and Mark R Thompson, "Pacific Asia after 'Asian Values': Authoritarianism, Democracy and 'Good Governance'" (2004) 25 *Third World Quarterly* 1079.

8 [1979–1980] SLR(R) 710.

9 [1981–1982] SLR(R) 133.

10 *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 at [26].

11 *Haw Tua Tau v Public Prosecutor* [1981–1982] SLR(R) 133 at [8].

12 *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355; *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 at [51] and [52].

13 *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103; *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489.

14 1999 Rev Ed.

Yong Vui Kong v Public Prosecutor,[15] one of the arguments raised was that the mandatory death penalty amounted to inhuman punishment. Even though such a provision can be found in the Universal Declaration of Human Rights[16] and many other international human rights treaties and domestic constitutions, the Singapore Court of Appeal pointed out that not only was such a provision missing from the Singapore Constitution, but also that such a provision was suggested by the 1966 constitutional commission and rejected by the Government. Hence, it was held that it was not legitimate for a court to "read in" a right which was rejected by the Government and, consequently, there is no *constitutional* right to freedom from inhuman punishment in Singapore.[17]

8 When both of these limitations are considered together, the human rights protections offered by the Singapore Constitution are limited indeed. Only those protections that are expressly found in the Constitution will be considered, and a narrow interpretation is given to what is found there. Article 9(1) of the Singapore Constitution, which is most capable of bearing an expansive meaning, can be used as an illustration. Article 9(1) reads: "No person shall be deprived of his life or personal liberty save in accordance with law."

9 In *Tan Eng Hong v Attorney-General*,[18] the Court of Appeal agreed with earlier case law[19] that the terms "life" and "personal liberty" should not be interpreted widely to include aspects such as privacy, human dignity and individual autonomy; and "personal liberty" referred "only to the personal liberty of the person against unlawful incarceration or detention".[20] In comparison, Art 5(1) of the Constitution of Malaysia, which is exactly the same as our Art 9(1), has been interpreted very differently. It has been held that:[21]

> … life appearing in Art 5 of the Federal Constitution [includes not only] the mere existence of life but also incorporating all those aspects of life which goes to form the quality of life …
>
> … And it is the fundamental right of every person within the shores of Malaysia to live with common human dignity.

15 [2010] 3 SLR 489.

16 Universal Declaration of Human Rights Art 5. Substantially the same formulation can be found in other human rights treaties such as Art 7 of the International Covenant on Civil and Political Rights and Art 3 of the European Convention on Human Rights.

17 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at [72] and [74].

18 [2012] 4 SLR 476 at [120].

19 *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754.

20 *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754 at [6].

21 *Kanawagi a/l Sperumaniam v Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495 at [22]. See also *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261.

10 It is with these challenges in mind that the second set of essays looks at the situation in Singapore in terms of its criminal law, sentencing, criminal evidence and criminal procedure. A common theme running through these essays, as well as the first set of essays on the experience of the Commonwealth countries, is that the process of reform cannot be judge-driven alone. There must, at least eventually, be support from the public, the executive government and the lawmakers as well to realise constitutionalism's full potential.

11 Each and every one of the jurisdictions described in this collection of essays demonstrate that rethinking criminal justice along the lines of constitutional values is a continuing and painstaking task. Developments are neither wholly in favour of "law and order", nor of "individual rights".[22] Nonetheless we sense an implicit affirmation that it is a task which pushes the criminal justice system in the right direction. It is certainly not the purpose of this collection to dictate or prescribe. It is in the spirit of being inspired by the experience of others, and of being informed by our own, to nurture a vibrant Singaporean discourse on fundamental values in the criminal process that we commend these essays to the reader.

12 Finally, we would like to thank Justice Judith Prakash and the Publications Committee of the Singapore Academy of Law for giving us the opportunity to edit this volume of essays and the very efficient and cheerful assistance of Ms Elizabeth Sheares and her team at Academy Publishing.

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22 See the analysis in Johannes Chan, "Constitutional Protection of the Right to be Presumed Innocent and the Right against Self-incrimination: The Hong Kong Experience" in this volume (at pp 679–713) about the stance adopted by different members of the Hong Kong judiciary on balancing fundamental rights against competing societal interests.