NO PUNISHMENT WITHOUT FAULT

Kindling a Moral Discourse in Singapore Criminal Law

This article argues that serious consideration should be given to the moral foundations of the criminal law in Singapore by lawyers, judges and legislators, in particular the principle of *mens rea* and the principle of autonomy, in shaping the extent of criminal liability. It is only then that we can achieve a better understanding of when and how the criminal law and criminal penalties should be used.

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I. Introduction

1 Although Macaulay, the drafter of the Indian Penal Code (which is the progenitor of the Singapore Penal Code), may have been greatly influenced by utilitarian ideals espoused in 19th century England at the time on criminal law reform,[1] it is recognised that the infliction of punishment on the individual in Singapore needs to be justified beyond just balancing the costs and benefits of punishment. Condemnation of wrongful conduct via the criminal law[2] and determining the appropriate sentence to be imposed,[3] require proof of the offender's moral culpability. Punishment is not imposed regardless of individual fault for the sake of social protection or general deterrence.[4] In the case of *Tan Kay Beng v Public Prosecutor*[5] ("*Tan Kay Beng*"), it was said that: "Deterrence must always be tempered by proportionality in relation to

1 Barry Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles" in *Codification, Macaulay and the Indian Penal Code* (Wing-Cheong Chan, Barry Wright & Stanley Yeo eds) (Ashgate Publishing, 2011).

2 *Public Prosecutor v Kwong Kok Hing* [2008] 2 SLR(R) 684 at [38] ("every sentence communicates society's aversion and the proper degree of censure for the offending behaviour").

3 *Public Prosecutor v Lee Cheow Loong Charles* [2008] 4 SLR(R) 961 at [25] ("[sentencing] must be based on the law, the factual circumstances (including the accused's moral culpability) and the public interest").

4 See, for example, Douglas Husak, *Overcriminalization* (Oxford University Press, 2008) for the argument that individuals have a right not to be punished.

5 [2006] 4 SLR(R) 10.

the severity of the offence committed as well as by the moral and legal culpability of the offender."[6]

2 In the case of *Tan Chong Koay v Monetary Authority of Singapore*[7] ("*Tan Chong Koay*"), the Court of Appeal noted that:[8]

> In the realm of criminal law, it is *prima facie* objectionable to penalise a person for doing a criminal act which he did not intend to do or did not know would be a criminal act. The criminal law punishes or penalises persons with guilty minds. If the law makes it an offence to do a negligent, rash or reckless act (which causes harm to the interests protected by criminal law, namely, life, liberty and property), it should say so expressly.

3 The statement in *Tan Kay Beng* recognises an individual's inherent dignity and autonomy not to be punished even if it will have a deterrent effect in preventing further crimes. Deterrent theories may justify use of the criminal law in general, but the principle of autonomy requires proof of individual liability and punishment depends on personal culpability.[9]

4 The statement in *Tan Chong Koay* endorses the principle of *mens rea* accepted in the common law world, which emphasises the importance of treating persons as rational and autonomous individuals.[10] Criminal liability is imposed only on those who are aware of what they are doing and the result of their actions such that they can be said to have chosen to act in that way and accept its consequences. Andrew Ashworth and Jeremy Horder note that:[11]

> [S]ome element of *mens rea* is needed in order to give fair warning, which would be absent if offences could be committed accidentally … [and] the incidence and degree of criminal liability should reflect the choices made by the individual.

5 There are two main arguments in support of this principle of *mens rea* expressed in the above quotation. The first is the "rule of law" argument that it is wrong to punish anyone who does not intend or know there is a risk of causing a prohibited harm. A fair opportunity must be given for individuals to tailor their conduct to avoid running

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6 *Tan Kay Beng v Public Prosecutor* [2006] 4 SLR(R) 10 at [31].
7 [2011] 4 SLR 348.
8 *Tan Chong Koay v Monetary Authority of Singapore* [2011] 4 SLR 348 at [47].
9 Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th Ed, 2013) at p 23.
10 Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th Ed, 2013) at pp 74 and 155–156.
11 Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th Ed, 2013) at p 74.

foul of the criminal law and the individuals must have the capacity to do so.

6 The second argument is that the criminal law is about expressing the community's condemnation of the wrongdoing. It is therefore intrinsically unjust to censure a person for conduct which was committed without fault. The injustice is particularly glaring if the punishment imposed is harsh.

7 An important illustration of the principle of autonomy is the principle of correspondence:[12] namely, that in relation to each conduct element of an offence, there must exist a requirement of fault at the equivalent level. Thus, the offence of "causing hurt" in the Penal Code[13] requires the fault element of intention or knowledge that the act will cause hurt and not some other lesser degree of harm.[14]

8 It is argued that these two core principles of criminal law (the principle of autonomy and the principle of *mens rea*) are very much part of Singapore criminal law.[15] Recognition of these basic principles of the criminal law can be seen in operation in various aspects of the Singapore criminal law, for example:[16]

(a) Despite the absence of specific statutory provisions in Singapore law, cases have devised ways to avoid punishment for acts which are involuntary.[17]

(b) A person cannot be punished for infringing a law which he does not have means of finding out what is prohibited.[18]

12 Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th Ed, 2013) at p 75. For discussion of this principle, see Jeremy Horder, "A Critique of the Correspondence Principle in Criminal Law" [1995] *Criminal Law Review* 759; Barry Mitchell, "In Defence of a Principle of Correspondence" [1999] *Criminal Law Review* 195; and Jeremy Horder, "Questioning the Correspondence Principle – A Reply" [1999] *Criminal Law Review* 206.

13 Penal Code (Cap 224, 2008 Rev Ed) s 321.

14 See Neil Morgan, "The Fault Elements of Offences" in *Codification, Macaulay and the Indian Penal Code* (Wing-Cheong Chan, Barry Wright & Stanley Yeo eds) (Ashgate Publishing, 2011).

15 It is not the intention of this article to consider the arguments for or against these principles or the scope of these principles. The intention is to assess to what extent Singapore criminal law complies with these principles as they are generally understood. For discussion of other principles in the criminal law, see Andrew Ashworth & Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th Ed, 2013).

16 Singapore criminal law is, of course, not entirely consistent, but these inconsistencies are exceptional in nature.

17 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century* (Academy Publishing, 2013) at para 3.2.19.

18 *Lim Chin Aik v R* [1963] AC 160.

(c) The *mens rea* must coincide with the *actus reus* for the offence.[19]

(d) Reluctance to hold a person liable for a result which was unforeseeable.[20]

(e) The fault element for each offence is generally set out in the definition of the offence itself.[21]

(f) The general sentencing scheme followed is that those who act intentionally are punished more severely than those who act negligently – reflecting the individual blameworthiness of the conduct and not just the result caused.[22]

(g) Rejection of the unlawful act-murder rule.[23]

(h) Absolute liability (in the sense that a person can be punished despite not behaving intentionally, knowingly or negligently with regards to the blameworthy aspect of the offence) is seen with disfavour.[24]

(i) Persons who do not have the normal capacity to obey the law's requirements are excused from liability, such as persons who are below the age of criminal responsibility,[25] unsound in mind[26] or acting under duress.[27]

(j) Liability for group crimes under the doctrine of common intention requires proof of intent to commit the collateral offence.[28]

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19 *Wang Wenfang v Public Prosecutor* [2012] 4 SLR 590.

20 *Public Prosecutor v AFR* [2011] 3 SLR 653 at [34]: "a person cannot be imputed to intend all consequences, no matter how remote, of an act done by him on another".

21 Chan Wing Cheong, Stanley Yeo & Michael Hor, *Criminal Law for the 21st Century* (Academy Publishing, 2013) at para 5.1.8.

22 See, for example, the graduated sentencing scheme for homicide: ss 302, 304 and 304A of the Penal Code (Cap 224, 2008 Rev Ed).

23 See the former illustration (*c*) to s 299 of the Penal Code. Its deletion by the Penal Code (Amendment) Act 2007 (Act 51 of 2007) was not meant to effect any substantive changes to the law but only to remove references which were unsuitable for modern day Singapore.

24 *MV Balakrishnan v Public Prosecutor* [1998] SGHC 169. In *Buergin Juerg v Public Prosecutor* [2013] SGHC 134 at [3], it was said:

> [T]here is a presumption that Parliament would not intend to make criminals of persons who were not blameworthy. Generally, the courts accept that *mens rea* is a requisite factor in all criminal offences unless it is clear from the legislation that the offence (as legislated) did not require proof of *mens rea*.

25 Penal Code (Cap 224, 2008 Rev Ed) s 82.

26 Penal Code (Cap 224, 2008 Rev Ed) s 84.

27 Penal Code (Cap 224, 2008 Rev Ed) s 94.

28 *Daniel Vijay s/o Katherasan v Public Prosecutor* [2010] 4 SLR 1119.

(k) "Impossibility" of an attempted crime is generally not a bar to conviction, but the *actus reus* of the attempt must have proceeded such that the person can be said to have "embarked on the crime proper".[29]

9 Even though the principle of autonomy and the principle of *mens rea* cannot be found explicitly in the local law, it does not mean that they are inapplicable. Implicit principles found within the structure of the criminal law itself can be recognised. For example, despite the fact that a "presumption of innocence" is not expressly found anywhere within Singapore law, it has been said that "[i]t is axiomatic that the presumption of innocence is a central and fundamental moral assumption in criminal law".[30] Another example is the requirement of concurrence between the *actus reus* and *mens rea* for an offence to be established. This has been described as a "fundamental principle of criminal law" despite the fact that it is not explicitly stated anywhere in the Penal Code.[31]

10 It is submitted that greater attention should be given to underlying principles which are in fact already encapsulated in Singapore criminal law. Three areas of the criminal law are selected to illustrate what difference an adherence to the principle of autonomy and the principle of *mens rea* will make in each of these areas.[32] Each of these areas has been considered by courts in other jurisdictions, often basing their decisions on that jurisdiction's entrenched human rights protections in their constitutions. While these precedents emerge from jurisdictions with legal texts and circumstances which might be different from our own, it is hoped that the Legislature and the Judiciary will engage in a wider discourse based on the nature and function of the criminal law as it is commonly understood.

II. Minimum fault required for murder

11 The offence of murder is defined under s 300 of the Penal Code. Of the four subsections to s 300, (*a*), (*b*) and (*d*) require a degree of subjective intent or foresight of the death of the victim. Subsection (*c*) is

29 *Chua Kian Kok v Public Prosecutor* [1999] 1 SLR(R) 826.
30 *Jagatheesan s/o Krishnasamy v Public Prosecutor* [2006] 4 SLR(R) 45 at [59].
31 *Wang Wenfeng v Public Prosecutor* [2012] 4 SLR 590 at [45].
32 The main focus of this article is on the substantive criminal law, so other aspects of the criminal justice system such as criminal procedure, evidence and the treatment of convicted offenders in prison will not be considered. See the other articles in this volume for a discussion on Singapore criminal procedure and evidence law.

highly unusual[33] and this has caused the local legal community much grief in that it does not require the offender to foresee death of the victim, but only an intent to cause a bodily injury which in fact causes death.[34] This provision states that an act which causes death can be murder "if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death".

12 An argument in support of this approach comes from "moderate constructivism" which points out that by intentionally inflicting the bodily injury, offenders change their normative position such that they may fairly be held liable for more serious consequences that occur, even if they had no subjective awareness that those further consequences may result.[35] The crucial question is whether the causing of bodily injury, as a criminal threshold, is morally too distant from the resulting death such that it cannot be fairly imputed to the accused since it violates the principle of autonomy and the principle of *mens rea* described earlier.

13 The operation of s 300(*c*) is very similar to the felony-murder rule in English common law where the "malice" required for murder was implied from the commission of a felony at the time when the murder took place.[36] Under this rule, a person can be convicted for murder even if he had killed accidentally in the course of committing a felony.

14 A version of the felony-murder rule was codified in the Canadian Criminal Code. In striking the provision down, the Supreme Court of Canada in *R v Martineau*[37] said:[38]

33 The subsection sits uneasily with the rest of the homicide provisions since the other constructive liability device at common law, the unlawful act-murder rule was expressly departed from, see para 8 limb (g) above.

34 *Virsa Singh v State of Punjab* AIR 1958 SC 465; *Public Prosecutor v Lim Poh Lye* [2005] 4 SLR(R) 582.

35 See, for example, John Gardner, "On the General Part of the Criminal Law" in *Philosophy and the Criminal Law* (Antony Duff ed) (Cambridge University Press, 1998). This approach has been criticised by Andrew Ashworth, "A Change of Normative Position: Determining the Contours of Culpability in Criminal Law" (2008) 11 *New Criminal Law Review* 232.

36 In its early manifestation, it was an unlawful act-murder rule which was subsequently restricted to the felony-murder rule. See Edward Coke, *The Third Part of the Institutes of the Law of England* (E & R Brooke, 1797) at p 52 and J M Kaye, "The Early History of Murder and Manslaughter" (1967) 83 *Law Quarterly Review* 365 and 569. Since a murder and the underlying felony were both punishable with death in England at the time, it did not make any practical difference having murder defined in this way.

37 [1990] 2 SCR 633.

38 *R v Martineau* [1990] 2 SCR 633 at 645–648.

> A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. The principles of fundamental justice require, because of the special nature of the stigma attached to a conviction for murder, and the available penalties, a *mens rea* reflecting the particular nature of that crime. The effect of s 213 [of the Canadian Code] is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender … the principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally. The rationale underlying the principle that subjective foresight of death is required before a person is labelled and punished as a murderer is linked to the more general principle that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result … In my view, in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death. The essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender …
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> … it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight of death … since s 213 of the Code expressly eliminates the requirement for proof of subjective foresight, it infringes ss 7 and 11(d) of the Charter.[39]

15 What is significant is that, in the eyes of the Supreme Court of Canada, it is the stigma and penalty attached to murder which single out this offence. There would have been no difficulty if the Legislature had labelled unintended killings as manslaughter instead and gave the court the discretion to punish the offence as appropriate. In the earlier case of *R v Vaillancourt*,[40] the Supreme Court of Canada held:[41]

> The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme. In addition, murder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there

39 The Canadian Charter of Rights and Freedoms 1982 provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
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> …
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> 11. Any person charged with an offence has the right … (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ….

40 [1987] 2 SCR 636.

41 *R v Vaillancourt* [1987] 2 SCR 636 at 653.

> must be some special mental element with respect to the death before a culpable homicide can be treated as murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction.

16 In line with the Canadian decisions, a faithful following of the principle of autonomy and the principle of *mens rea* demands that murder is not simply whether the act which causes death was done deliberately but whether the offender meant to bring about the death of the victim through his or her act or at least knows of the great risk of doing so.[42] However, a literal reading of s 300(*c*) of the Singapore Penal Code does not allow this result. Under the latest Court of Appeal ruling on s 300(*c*), so long as the injury inflicted on the deceased is intended, the offender does not need to realise the extent and consequences of that injury.[43] It is a purely objective, medical enquiry if the bodily injury inflicted was sufficient in the ordinary course of nature to cause death. Thus, even if the offender inflicted what he thought was not a life-threatening injury, which in fact turns fatal, the offender can still be convicted of murder even though death was unforeseen and unintended. It therefore becomes no more than a matter of chance whether the offender is charged with murder (if the victim dies from the act) or grievous hurt (if the victim survives).[44]

17 However, there have been several cases in the corpus of Singapore criminal law where the accused charged with murder arguably had the intent to injure, but did not have the intent to kill the victim. Ways were found to hold that the accused did not have the intent to cause "bodily injury" and therefore was not liable for murder. This result is rather surprising considering the low threshold that must be met for s 300(*c*) and that the cases involved an aggressor inflicting injuries on a vulnerable victim.[45] The approach of these cases was finally rationalised by the High Court in *Public Prosecutor v AFR* ("*AFR*").[46]

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42 In Hong Kong, the *mens rea* for murder may be proved by either intent to cause death or intent to cause grievous bodily harm which leads to death. An argument was made in *Lau Cheong v HKSAR* [2002] HKCFA 31, following the Canadian cases, that the latter form of *mens rea* amounted to arbitrary imprisonment since it did not involve contemplation of death as a consequence of the accused's conduct. The Hong Kong Court of Final Appeal rejected the argument on a very narrow basis that the Canadian Criminal Code was worded differently.

43 *Wang Wenfang v Public Prosecutor* [2012] 4 SLR 590.

44 For discussion on the concept of moral luck, see, for example, *Action and Value in Criminal Law* (Stephen Shute, John Gardner & Jeremy Horder eds) (Clarendon Press, 1993) and Jeremy Horder, "A Critique of the Correspondence Principle in Criminal Law" [1995] *Criminal Law Review* 759.

45 See, for example, *Public Prosecutor v Ow Ah Cheng* [1992] 1 SLR(R) 307; *Tan Chee Hwee v Public Prosecutor* [1993] 2 SLR(R) 493; and *Public Prosecutor v Astro bin Jakaria* [2010] 3 SLR 862.

46 [2011] 3 SLR 653. Similarly, in *Public Prosecutor v Thamayanthi* [2001] SGHC 374 at [9], although the court found that the accused intended to cause hurt to the

(*cont'd on the next page*)

18 In *AFR*, a father was charged with murdering his two-year-old daughter by hitting her with his bare hands and feet that unexpectedly led to a ruptured vein in her heart. The judge drew a distinction between the rupturing of the vein in this case (which even an experienced pathologist could not be certain how it was caused) and other cases where the death was caused by dangerous weapons like hammers, knives and spears, or drowning in water. If the death were the "ordinary and natural consequences" of the accused's acts and "well within the contemplation of any normal person", the law will "infer an intention … to cause the fatal injuries".[47] In this case, the rupturing of the vein was said by the forensic pathologist to be known to occur in car crashes or falls from heights. Considering the background of the accused and the circumstances that led to the accused using violence on the daughter, the High Court held that the accused did not have the intention to cause an injury on her.[48] The development in this case is summarised to be:[49]

> [W]here the deceased dies from an unusual injury which would not be within the contemplation of any ordinary person to result from the acts of the accused, the Prosecution is additionally required to prove that the accused intended to inflict that precise fatal injury.

19 We can see in *AFR* a shift away from the literal, positivist, interpretation of s 300(*c*) such that it is important to assess whether an ordinary person would have contemplated death of the victim from the injury and not just whether the injury would, medically speaking, in fact lead to death. Although this stance does not fully adopt the principle of correspondence that a person can only be held liable for *murder* if he intended to bring about, or realised the conduct would bring about, the *death* of the victim, it comes closer to bridging the gap in moral culpability by requiring that a reasonable person would foresee the risk of death as assessed by common experience. It will not be a case of murder if the possibility of the death occurring from the act of the accused is statistically very low. In this way, culpability for murder is at

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deceased by hitting her on the head with a plastic telephone set, she did not "form an intention to cause the injury which caused death within the meaning of ss 299 and 300". This is despite the finding by the pathologist of eight lacerations on the skull of the deceased, one of which caused a fracture which in turn caused subdural haemorrhage leading to the death of the deceased. The accused was convicted of causing grievous hurt under s 322 of the Penal Code instead. For comment, see Chan Wing Cheong, "Criminal Law" in *Annual Review of Singapore Cases 2001* (Singapore Academy of Law, 2002) at paras 10.47–10.53.

47 *Public Prosecutor v AFR* [2011] 3 SLR 653 at [36].

48 *Public Prosecutor v AFR* [2011] 3 SLR 653 at [42] and [43]. The accused was convicted of culpable homicide instead as he knew that his act was likely to cause death.

49 Chan Wing Cheong, "Criminal Law" in *Annual Review of Singapore Cases 2010* (Academy Publishing, 2011) at para 12.82.

least linked to the probability of death, assessed by an ordinary person, arising from the offender's act.

20 If the offender's act will not lead an ordinary person to contemplate death to the victim, the Prosecution is required to prove intent to cause the precise fatal injury, which would be little different from proving an intention to cause death under s 300(*a*), the paradigm case of murder. Further development along this approach to s 300(*c*) liability – especially when something is or is not within contemplation of death – is needed in order to cement the acceptance of this modified form of principle of correspondence in Singapore law.

III. Absolute liability offences

21 The term "absolute liability" offence is used here to mean offences where there is at least one objective element of the offence which does not require a corresponding *mens rea* for conviction and that a mistaken belief as to that objective element is no defence. While s 300(*c*) murder may be a form of constructive liability in that the offender's *mens rea* is based on a related element of fault (bodily injury) and not the death that occurs, the world of absolute liability is even more unfair in that it imposes punishment on those who may not even be at fault with regard to the material element of the offence.[50]

22 Where an offence enacted by the Legislature does not state that the conduct must be done "knowingly" or "intentionally", the courts in the common law world nevertheless require the Prosecution to prove presence of *mens rea* unless this "presumption" is "necessarily" rebutted. For example, in *Brend v Wood*,[51] it was held that:[52]

> It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication, rules out *mens rea* as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind.

50 Defences such as involuntary conduct and unsoundness of mind may be available, but the fact remains that a person who committed an offence of absolute liability will be punished even if it was done by mistake or by accident.

51 (1946) 62 TLR 462.

52 *Brend v Wood* (1946) 62 TLR 462 at 463.

23 The High Court of Australia has also pointed out that "[t]he requirement of *mens rea* is … a humane protection for persons who unwittingly engage in prohibited conduct".[53] In *B (a minor) v Director of Public Prosecutions*,[54] the House of Lords said that:[55] "The more serious the offence, the greater is the weight to be attached to the presumption [of *mens rea*], because the more severe is the punishment and the graver the stigma which accompany a conviction."

24 These statements show the importance of the principle of *mens rea* in the criminal law which has been noted in the Singapore context, even for offences relating to state secrets where national security may be at stake.[56] A further development in Singapore is the adoption of the threefold classification of offences used in *R v Sault Ste Maria*[57] ("*Sault Ste Maria*") by the High Court in *MV Balakrishnan v Public Prosecutor*.[58] In *Sault Ste Maria*, the Supreme Court of Canada recognised three categories of criminal offences. The first category comprised "true crimes" where a conviction will result only if the Prosecution establishes that the accused committed the prohibited act with a blameworthy mental element. At the other extreme is the third category of "absolute liability" offences where an accused may be convicted merely on proof that he committed the *actus reus* of the offence. In this category where few offences are to be found, the accused could be morally blameless and yet he will be subjected to criminal penalties on conviction. In the second category, no burden is put on the Prosecution to show fault, but the accused may put forward the defence that he took all reasonable care (such offences are termed "strict liability" offences). If he succeeds in showing that he took due care on a balance of probabilities, the accused cannot be convicted of the offence.

25 The great change brought about by *Sault Ste Maria* in Canadian law was to put all public welfare offences *prima facie* in the second category. It has been commented that this approach is in fact the one mandated by the Penal Code where the burden is put on the accused to prove a defence (usually one of mistake of fact) on a balance of probabilities.[59]

53 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 568.
54 [2000] 2 AC 428.
55 *B (a minor) v Director of Public Prosecutions* [2000] 2 AC 428 at 464, *per* Lord Nicholls.
56 *Bridges Christopher v Public Prosecutor* [1997] 1 SLR(R) 156 at [71]; *Public Prosecutor v Bridges Christopher* [1997] 3 SLR(R) 467 at [45].
57 [1978] 2 SCR 1299.
58 [1998] SGHC 169.
59 Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2012) ch 7.

26 Subsequent developments in Canada have "modernised" the hitherto statutory presumption into a constitutional imperative to reflect the human rights concerns brought about by the Canadian Charter of Rights and Freedoms after it was enacted. Under the present Canadian law, it is constitutionally beyond the power of the Legislature to impose absolute liability for an offence which may be punished with imprisonment,[60] including the possibility of imprisonment in default of payment of a fine.[61] The basis of the constraint on the Legislature may be specifically s 7 of the Canadian Charter of Rights and Freedoms, but a wider basis for it has also been noted in the foundation of the criminal law itself. In *Re BC Motor Vehicle Act*,[62] it was said that:[63]

> It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognised as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and not on the rule of law. It is so old that its first enunciation was in Latin: *actus non facit reum nisi mens sit rea*.

27 The injustice of absolute liability offences can be seen in the offence of sex with an underage prostitute under s 376B(1) of the Singapore Penal Code. This provision reads: "Any person who obtains for consideration the sexual services of a person, who is under 18 years of age, shall be punished with imprisonment for a term which may extend to 7 years, or with fine, or with both."

28 By s 377D of the Penal Code, the defence of a reasonable mistake as to the age of the person is expressly removed, save for those accused persons who are under 21 years of age at the time of the offence and not previously charged for certain sexual offences.[64]

29 In *Buergin Juerg v Public Prosecutor*[65] ("*Buergin Juerg*"), the appellant was one of more than 50 men who were charged in 2012 for having sex with a prostitute who went by the name "Chantelle" who was

60 *Re BC Motor Vehicles Act* [1985] 2 SCR 486.
61 *Pontes* (1995) 41 CR (4th) 201.
62 [1985] 2 SCR 486.
63 *Re BC Motor Vehicles Act* [1985] 2 SCR 486 at 513.
64 This provision is a mirror image of ss 140(4) and 140(5) of the Women's Charter (Cap 353, 2009 Rev Ed) which also restrict the defence of reasonable mistake as to the age of the girl for "carnal connection with a girl below the age of 16 years" under s 140(1)(i) of the Women's Charter. The origin of the Women's Charter offence is undoubtedly s 5(1) of the English Criminal Law Amendment Act 1885 (c 69) as amended by s 2 of the English Criminal Law Amendment Act 1922 (c 56). There are two salient differences between the offences under the Penal Code (Cap 224, 2008 Rev Ed) and the Women's Charter. The Penal Code offence is subject to higher penalties and it also criminalises female offenders who have commercial sex with underage boys.
65 [2013] SGHC 134.

under 18 years of age at the time. He was 37 years old at the time and she was 17 years and 6 months old on the first occasion and 17 years and 9 months old on the second occasion when they had sex. Like the other men charged with the same offence, he came across Chantelle's particulars on a website called "The Vie Model" where she was described as an 18-year-old polytechnic student with a false birth date.

30 There appears to be some discrepancy between the District Court and High Court accounts as to whether the appellant asked for Chantelle's identification, but the High Court accepted that Chantelle showed the appellant her elder sister's identity card so the appellant did not know that she was underage.[66] Despite this, the High Court ruled that, by virtue of s 377D(1) of the Penal Code, the appellant was not allowed to raise the defence that he did not know that the person he had paid sex with was underage. In another case involving paid sex with Chantelle, it was said that "[i]t is an offence even if it can ever be objectively and unanimously agreed that the minor appeared and behaved as if she was indeed older than 18".[67] In *Tan Chye Hin v Public Prosecutor*,[68] it was said that even if the accused had "checked the age of the minor but was given a good forgery of an identity document that showed that he or she was over 18 years old", the accused would still be guilty of the offence but the circumstances of the offence would mean that he would only suffer a light punishment such as a fine.

31 What the appellant in *Buergin Juerg* – and others like him – did may be distasteful, but there is a moral gap between what he did and what he is held liable for. He and others like him were not looking for someone under 16 years old.[69] What the appellant did was have paid sex with a girl he did not suspect was under 18 years old. Since prostitution is not illegal *per se* in Singapore, and the age of consent for sexual relations is 16 years,[70] he cannot be said to have changed his normative

66 *Buergin Juerg v Public Prosecutor* [2013] SGHC 134 at [2]. Compare with *Public Prosecutor v Buergin Juerg* [2013] SGDC 143 at [24] of the grounds of decision in respect of sentence.

67 *Public Prosecutor v Shaw Chai Li Howard* [2012] SGDC 319 at [20].

68 [2009] 3 SLR(R) 873 at [12].

69 In the case of the appellant in *Buergin Juerg v Public Prosecutor* [2013] SGHC 134, his other bookings with the pimp were for all for older women between 20 to 43 years old: *Public Prosecutor v Buergin Juerg* [2013] SGDC 143 at [6] of the grounds of decision in respect of sentence. Even if he were specifically looking for sexual services from a girl between the ages of 16 and 18 years old, such as the appellant in *Tan Chye Hin v Public Prosecutor* [2009] 3 SLR(R) 873, it is submitted that this does not change his moral culpability since the age of consent is at 16 years of age.

70 *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at col 2175 (Associate Professor Ho Peng Kee, Senior Minister of State, Ministry of Law and Ministry of Home Affairs) (Second Reading of the Penal Code (Amendment) Bill (Bill 38 of 2007)).

position such that he should be liable for an offence which he did not intend. Are there any special features of commercial sex that should alert a person that he might be infringing the criminal law by having sex with a minor between 16 to 18 years of age? It is submitted that there are none: the clear line drawn in Singapore law for sexual relations is at 16 years of age[71] and it will not be apparent to men in Singapore that sex with a prostitute is only legal at a higher age.[72] If such offenders are asked to exercise "a higher standard of care",[73] or take the risk that the age of the prostitute is stated falsely,[74] there must be something to alert them to the need for such diligence. There was nothing to indicate that seeking commercial sex with a minor they thought was an 18-year-old is "skating on thin ice".[75]

32 Even if the Legislature wanted to create an offence to give greater protection to those who are aged 16 and 17 years old owing to their immaturity, this can be done by using a negligence standard: namely, did the accused know, or have reasonable grounds for believing, that the minor was under 18 years of age. The burden of proving such a standard may be placed on the Prosecution or even on the accused. The earlier incarnation of the offence as s 4 of the Women and Girls Protection Ordinance 1888[76] provided that "reasonable cause to believe" that the girl was of or above the relevant age[77] was deemed to be "a sufficient defence". This structure continued till the Women and Girls Protection Ordinance was superseded by the passing of the Women's

71 The offence under s 376A of the Penal Code (Cap 224, 2008 Rev Ed) ("sexual penetration of minor under 16 years") was newly enacted in 2007 but the age limit of 16 years for sexual consent has been in place since 1937 via the Women and Girls Protection (Amendment) Ordinance 1937 (Ord No 13 of 1937). See also Jeremy Horder, "How Culpability Can, and Cannot, be Denied in Under-age Sex Crimes" [2001] Crim LR 15 at 22 where the age of 16 is one described as having "moral resonance" in the UK. The pimp did try to assert a belief that it was lawful to have commercial sex with a girl if she was at least 16 years old, but there was evidence contradicting this belief: *Public Prosecutor v Tang Boon Thiew* [2013] SGDC 52.

72 Although other jurisdictions may also have criminalised commercial sex at an age higher than the age of sexual consent, Singapore does so on the basis of an absolute liability offence.

73 *Public Prosecutor v Shaw Chai Li Howard* [2012] SGDC 319 at [17] and [19].

74 *Public Prosecutor v Shaw Chai Li Howard* [2012] SGDC 319 at [16]; *Public Prosecutor v Buergin Juerg* [2013] SGDC 143 at [24] and [25] of the grounds of decision in respect of sentence.

75 *Knuller v Director of Public Prosecutions* [1973] AC 435 at 463, *per* Lord Morris that "those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in".

76 Ord No 14 of 1888.

77 In the Women and Girls' Protection Ordinance 1888, it was an offence only if the girl was under 14 years old. This was subsequently raised to 15 (Women and Girls Protection Ordinance 1896 (Ord No 17 of 1896)) and then to 16 years of age (Women and Girls Protection (Amendment) Ordinance 1937 (Ord No 13 of 1937)).

Charter in 1961[78] where it attained its current form: reasonable cause to believe that the girl is above the relevant age was no longer a defence except for men below a certain age[79] charged with the offence for the first time. There was no explanation for the change except for a very brief statement that the existing law on offences against women and girls was re-enacted in the Women's Charter, with "the provisions of the law … strengthened and the punishments … increased".[80]

33 It is submitted that none of the calls in Parliament for greater protection for minors and curbing of the demand for underage sex at the time the Women's Charter or the Penal Code offence was passed go against the possibility of imposing the burden of proving a reasonable mistake as to the minor's age on the accused.[81] This is in fact the structure of the defence of mistake under s 79 of the Penal Code and other defences in general.[82] Where the accused did not do anything to satisfy himself of the age of the minor other than to rely on what was stated on the website and the pimp's word, it is highly unlikely that the mistake in age will be found to be "in good faith", meaning made with "due care and attention".[83] However, if the accused had not only asked the minor for her age but also asked to see her identification document,

78 Ord No 18 of 1961. The Women and Girls Protection Ordinance was not amended in line with the changes to the UK law brought about by s 2 of the English Criminal Law Amendment Act 1922 (c 56).

79 Section 128(4) of the Women's Charter (Ord No 18 of 1961) originally stipulated that the man had to be of or under 24 years of age and this was subsequently lowered to under 21 years of age by the Women's Charter (Amendment) Act 1996 (Act 30 of 1996).

80 *Singapore Legislative Assembly Debates, Official Report* (6 April 1960) vol 12 at col 442 (Mr K M Byrne, Minister for Labour and Law).

81 Excerpts from the parliamentary speeches are given in *Public Prosecutor v Buergin Juerg* [2013] SGDC 143 at [23] and [24]. See the approach in the UK and various Australian jurisdictions listed in *Public Prosecutor v Buergin Juerg* [2013] SGDC 143 at [27]–[35].

82 The burden of proof of defences is on the accused: s 107 of the Evidence Act (Cap 97, 1997 Rev Ed).

83 Penal Code (Cap 224, 2008 Rev Ed) s 52. Hence, the accused in cases like *Public Prosecutor v Lee Lip Hong* [2012] SGDC 231; *Public Prosecutor v Shaw Chai Li Howard* [2012] SGDC 319; *Public Prosecutor v Sim Choon Wee Kenny* [2013] SGDC 82; and *Public Prosecutor v Ng Guan Mean* [2013] SGDC 212 would still be convicted of the offence if it were structured in this way. In the last case, it was said (at [41] and [42]):

> Representations made by vice operators as to the appearance or age, whether made graphically or verbally, must be taken with a large proverbial pinch of salt. The usual *caveat emptor* rule would also apply in these commercial sex transactions.
>
> … If the escorts are indeed underage, it would reasonably be expected that there would be some form of misrepresentation of their true age so as to avoid the notice of law enforcement officers who may be trawling the internet. It would also be reasonable to expect a minor to lie about her true age if the client were to casually ask for her age. …

then the accused had arguably taken all reasonable precautions that could be asked for and he should not be liable for the offence at all. There is no evidence, other than the anecdotal kind, that removing this possibility has a *greater* deterrent effect than a negligence standard. International treaties which call for protection of children from commercial sexual exploitation such as the Convention on the Rights of the Child 1989, the Stockholm Declaration and Agenda for Action 1996, and the Worst Forms of Child Labour Convention 1999 do not require removal of reasonable mistake of the age of the minor as a defence.[84]

34 In order the take the principle of *mens rea* seriously, there must be a fair opportunity for the accused to raise their lack of awareness that the criminal law is about to be broken. As can be seen in the situation of underage commercial sex, absolute liability is not restricted to offences which are trivial in nature. The offence in Singapore is punishable with imprisonment of up to seven years' duration, with the usual sentences meted out to be between nine to 13 weeks' imprisonment.[85] Expediency cannot justify absolute offences which dispense with the requirement of fault – and certainly not those which carry sentences of imprisonment. Taking the principle of *mens rea* seriously leads to two possibilities. First, the Canadian approach should be followed: absolute liability can only be allowed where there is no possibility of imprisonment on conviction for the offence. Secondly, if imprisonment is to be used, those charged with this offence should be given at least the chance to argue that they made a reasonable mistake as to the age of the minor.

IV. Mandatory minimum sentences

35 If it is unjust to impose punishment in the absence of blameworthiness, it is also unjust to impose punishment in *excess* of the individual's blameworthiness. Mandatory minimum sentences, unfortunately, risk doing so since it requires a judge to impose a minimum severity of the particular type of sentence on all offenders convicted of that offence regardless of the personal circumstances of the offender or the facts of the case. There is an implicit assumption that even the least culpable offender convicted of the same offence nonetheless deserves the same minimum punishment.[86] The use of

84 See the law in other jurisdictions listed in *Public Prosecutor v Buergin Juerg* [2013] SGDC 143 at [27]–[35].

85 *Public Prosecutor v Sim Choon Wee Kenny* [2013] SGDC 82 at [26] and [27].

86 In *Public Prosecutor v Tan Kei Loong Allan* [1998] 3 SLR(R) 679, the Prosecution urged the court to adopt a guideline or benchmark for sentencing offenders convicted of culpable homicide. The Court of Appeal responded (at [33]):

> We are of the view that it is not desirable … to set a benchmark for culpable homicide. The range of circumstances in which such offences are committed is extremely varied … They are not easily classified, and there is no such thing

(*cont'd on the next page*)

mandatory minimum imprisonment sentences is deplorable since the deterrent rationale for such sentences (namely, it is not just that imprisonment sentences will have an effect on crime since any imprisonment sentence will inevitably do so, but *increased* sentences of imprisonment will influence criminal behaviour *more*) has not been satisfactorily proven in published empirical studies.[87]

36 One clarification that must be made at the outset is that the argument against mandatory minimum sentences is not that the particular sentence is improper and should never be imposed, but rather that it is the severity of the sentence in relation to the seriousness of the crime that makes it improper.[88] Hence, a particular sentence could be proportionate for a certain crime but not for another less serious crime. The argument against mandatory minimum sentences is based on the principle of autonomy that an offender should not be treated as an object for purposes of deterrence, incapacitation or rehabilitation rationales in excess of what his culpability and harmfulness of his offence deserves. An example of the blunderbuss approach of mandatory sentences comes from Namibia where the law obliged a court to impose a minimum sentence of three years' imprisonment for a

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as a 'typical' homicide … Sentencing for culpable homicide should remain as a matter within the trial judge's discretion … and should be determined on the facts of each particular case.

87 Paul H Robinson & John M Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24 *Oxford Journal of Legal Studies* 173; Paul Gendreau, Claire Goggin & Francis T Cullen, *The Effects of Prison Sentences on Recidivism* (Canada: Public Works and Government Services). Local studies, if any, are not in the public domain. Parliamentary statements usually claim that the deterrent rationale works based on anecdotal claims, see, for example:

(a) *Singapore Parliamentary Debates, Official Reports* (16 February 1973) vol 32 at col 416 (Mr Chua Sian Chin, Minister for Health and Home Affairs): "To act as an effective deterrent, the punishment provided for an offence of this nature must be decidedly heavy. We have, therefore, expressly provided minimum penalties and the rotan for trafficking."

(b) *Singapore Parliamentary Debates, Official Report* (26 July 1984) vol 44 at col 1882 (Mr Chua Sian Chin, Minister for Home Affairs): "Enhanced punishment enacted by law has proved to be an effective deterrent against crime in the past."

(c) *Singapore Parliamentary Debates, Official Report* (30 August 1993) vol 61 at col 420 (Professor S Jayakumar, Minister for Law and Minister for Home Affairs): "[T]he signal must go out clearly and loudly to all criminals, foreign and local, that we will take a very tough stand in Singapore. Otherwise, Singapore will not be spared from a rise in violent offences such as robberies, involving the use of firearms. Therefore, we need to amend the Arms Offences Act to provide greater deterrent effect."

88 The arguments against the mandatory death penalty which raises different issues owing to the finality of the sentence, and the sentences of corrective training and preventive detention which significantly enhance the sentences of certain offenders will not be considered here.

second or subsequent conviction of stock theft.[89] This provision was triggered in *State v Vries*[90] ("*Vries*") where the offender was convicted of a second offence in 1995 and was previously convicted for stock theft 26 years earlier in 1969. The Full Bench of the High Court declared the provision to be unconstitutional in part because it failed to consider the number of years that may elapse between the date of the previous offence and the present one; and that it failed to distinguish between different kinds of stock (for example, poultry is worth much less than goats or sheep, and cattle is worth five to six times more than sheep).

37 A recent case illustration of the requirement of proportionality is one decided by the Privy Council on appeal from Mauritius. In *Aubeeluck v State*,[91] a minimum sentence of three years' imprisonment for drug trafficking was held to be contrary to the principle of proportionality enshrined in s 7 of the Constitution of the Republic of Mauritius.[92] It was held that:[93]

> Although convicted as a drug trafficker, he was dealing in a small way in small quantities of gandia (*ie* cannabis). He was a person of good character and it is noteworthy that he would not now be charged as a trafficker under the [revised law]. Having full regard to the fact that the legislature regarded trafficking in drugs, including gandia, as a serious matter, the Board has nevertheless concluded that to disregard all mitigation, including the fact that these were first offences by the appellant, and to impose a minimum sentence of three years' penal servitude would be grossly disproportionate.

38 Although a narrow reading of this case can focus on the constitutional protection against torture, inhuman or degrading punishment or treatment found in the Mauritius Constitution, which has no counterpart in the Singapore Constitution,[94] it is submitted that a wider reading should be taken of this and other cases which focus on the principle of autonomy and recognises the underlying human dignity

89 Stock Theft Act 1990 s 14.

90 [1997] 4 LRC 1.

91 [2011] 1 LRC 627 at [38].

92 This provided that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other such treatment". In *R v Smith* [1987] 1 SCR 1045, the Canadian Supreme Court also found that grossly disproportionate punishment imposed by a mandatory minimum sentence contravened s 12 of the Canadian Charter of Rights and Freedom's protection against cruel and unusual treatment or punishment. On the other hand, a constitutional protection against disproportionate punishment has not been endorsed by a majority of the US Supreme Court justices outside of the death penalty, see Dirk van Zyl Smit & Andrew Ashworth, "Disproportionate Sentences as Human Rights Violations" (2004) 67 *Modern Law Review* 541.

93 *Aubeeluck v State* [2011] 1 LRC 627 at [38].

94 Constitution of the Republic of Singapore (1999 Rev Ed). See *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489.

of the offender. The Constitutional Court of South Africa in *Dodo v State*[95] said:[96]

> Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth …, they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its deterrent effect on others, bears no relation to the gravity of the offence … the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits.

39 Similarly, the Constitutional Court of Seychelles in *Simeon v Attorney-General*[97] noted that: "An inquiry into the proportionality between the nature and seriousness of the offence and personal circumstances of the offender to the length of the punishment lies at the very heart of human dignity."

40 In contrast, the prevailing approach in Singapore hitherto appears to be a positivist one in which no room is left for judicial consideration of the legality of a mandatory minimum sentence. Perhaps it is feared that judicial consideration of this issue will lead to all mandatory minimum sentences being struck down. In *Mohammad Faizal bin Sabtu v Public Prosecutor*[98] ("*Mohammad Faizal*"), it was said that:[99]

> 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 … Whether 'the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime' … is a matter of legislative policy and not of judicial power. The courts must impose the legislatively-prescribed sentence of an offender even if it offends the principle of proportionality. [emphasis added]

95 [2001] 4 LRC 318.
96 *Dodo v State* [2001] 4 LRC 318 at [38].
97 [2011] 2 LRC 411 at [36].
98 [2012] 4 SLR 947.
99 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [60].

41 Even in *Ong Ah Chuan v Public Prosecutor*,[100] described by Professor Michael Hor as "perhaps the Privy Council's greatest legacy for Singapore",[101] it was said that:[102]

> There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not … If it were valid the argument for the appellants would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital – an extreme position which counsel was anxious to disclaim.

42 An illustration of the positivist approach of the Singapore court may be seen in *Public Prosecutor v Adnan bin Kadir*[103] ("*Adnan bin Kadir*"). The respondent pleaded guilty to importing 0.01g of diamorphine, an offence under s 7 of the Misuse of Drugs Act.[104] He argued in his mitigation that he imported the drugs for his own consumption. This was ruled by the District Court to be irrelevant and he was sentenced to the mandatory minimum punishment of five years' imprisonment and five strokes of the cane on the basis of his lack of antecedents, his early plea of guilt, and the small amount of drugs involved. On appeal to the High Court, it was held that in order to be convicted of the importation offence, the Prosecution had to prove, beyond a reasonable doubt, that the drugs were imported for the purpose of trafficking and not mere importation alone.[105] Hence, if the drug was for personal consumption, it would undermine the Prosecution's case that the drug was meant for trafficking. The Public Prosecutor reserved a question of law of public interest for decision by the Court of Appeal.

43 With regard to the defence counsel's argument that the mandatory minimum sentence for drug importation, irrespective of the amount imported, was unfair and at odds with the lower punishment for drug possession of a similar quantity of drugs, the Court of Appeal

100 [1979–1980] SLR(R) 710.

101 Michael Hor, "Death, Drugs, Murder and the Constitution" in *Developments in Singapore Law Between 2001 and 2005* (Singapore Academy of Law, 2006) at p 499, para 29.

102 *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 at [33]. However, as the case of *Aubeeluck v State* [2011] 1 LRC 627 shows, there appears to be a change of stance by the Privy Council. *Ong Ah Chuan v Public Prosecutor* has also been rejected in other Privy Council cases on the mandatory death penalty. In the UK, the coming into effect of the Human Rights Act 1998 (c 42) means that mandatory sentences must conform to the European Convention on Human Rights ("ECHR"), see, for example, *Offen (No 2)* [2001] 1 Cr App R 372 where it was noted that an automatic life sentence may be arbitrary and disproportionate in contravention of Art 5 of the ECHR.

103 [2013] SGCA 34.

104 Cap 185, 2008 Rev Ed.

105 [2013] 1 SLR 276.

held that this was a matter for statutory interpretation. If the meaning of the words is plain and unambiguous, a literal interpretation will be followed. The Court of Appeal concluded:[106]

> We do not think that the court should rewrite the law just because the sentence imposed on the Respondent on account of the regime of minimum sentence may appear harsh on the present facts (as the quantum of the drugs imported was so minute) … Parliament … would have appreciated that the minimum sentence would be applied even where the importation was in relation to a minute quantity of drugs … if it was Parliament's intention for trafficking to be a necessary element for the offence of importation under s 7, it could easily have so provided …

44 It is argued that the approach in *Mohammad Faizal* and *Adnan bin Kadir* will mean – at its extreme – that no sentence, no matter how harsh, for any crime, no matter how trivial, can be reviewed. This cannot be right if it will allow the Legislature to treat individuals as totally expendable. In the recent Court of Appeal case of *Vellama d/o Marie Muthu v Attorney-General*,[107] we learn that the court is prepared to subject even "polycentric" matters such as the Prime Minister's discretion on when to call for a by-election to fill a seat vacated by a Member of Parliament to judicial review. However, it is true that a degree of latitude should be given to the Legislature to pursue the aims of deterrence and rehabilitation in sentencing of offenders, but this is so long as the punishment does not breach a limit set by the offender's individual culpability. Furthermore, the requirement of individualised determination of the offender's moral blameworthiness has been consistently recognised by the courts; see for example the statements made in the following cases:[108]

(a) *Ho Sheng Yu Garreth v Public Prosecutor*:[109]

> The courts have noted Parliament's implacable resolve to combat all manner of illegal moneylending activities. This has been emphatically manifested through a series of legislative changes that have robustly enhanced the punitive consequences of such offending conduct. The sentences meted out by the courts for moneylending

106 *Public Prosecutor v Adnan bin Kadir* [2013] SGCA 34 at [64].

107 [2013] SGCA 39.

108 Special concern has also been consistently shown for those who are mentally unstable or cognitively impaired such that they are not punished out of proportion to their individual culpability, see *Ng So Kuen Connie v Public Prosecutor* [2003] 3 SLR(R) 178 at [58]; *Goh Lee Yin v Public Prosecutor* [2006] 1 SLR(R) 530 at [29]; *Public Prosecutor v Chee Cheong Hin Constance* [2006] 2 SLR(R) 707 at [29]; *Public Prosecutor v Law Aik Meng* [2007] 2 SLR(R) 814 at [22]; and *Public Prosecutor v Aniza bte Essa* [2009] 3 SLR(R) 327 at [34] and [40].

109 [2012] 2 SLR 375 at [137].

> offences have, to date been severe, and are underpinned by the desire to signal that there will be no judicial tolerance for such conduct. The principal sentencing consideration has been that of general deterrence, with specific deterrence always being an added consideration for repeat offenders. Nevertheless, the sentences, while severe, must also always remain proportionate to the totality of the *particular* offending conduct being assessed. Care must be taken to assiduously calibrate the punishment against the offending conduct. In every case, the punishment must fit the crime and the principle of proportionality remains a cardinal determinant in this area of sentencing. [emphasis in original]

(b) *Public Prosecutor v Loh Soon Aik Andrew*:[110]

> In the present case, the accused is very young and thus, without treatment, the only way to ensure that society is safe is to keep him in prison until he is old and grey, but that is hardly a just punishment.

(c) *ADF v Public Prosecutor*:[111]

> [A]n accused should *not* be punished *excessively*, even if the wider or broader societal concerns might suggest otherwise. As I have mentioned above, the court has to *balance* the factors from *both* the individual *as well as* the societal perspectives. This concern – that the accused should not receive excessive punishment – is often reflected in that time-honoured adage that "the punishment should fit the crime". Nevertheless, this particular adage *cannot* be viewed *solely* from the *individual* accused's point of view but must also take into account the relevant *societal or public* context. On occasion, in fact, the *societal* concerns are so important that they must be given predominant (even conclusive) effect. This brings us back to the principle of *balance*, always bearing in mind that the entire process must be applied by the court in *as holistic and integrated a fashion as possible*. [emphasis in original]

45 It is suggested that the courts should consider the principle of autonomy seriously and recognise the possibility of review of sentences based on proportionality. Such an approach does not necessarily lead to *all* mandatory minimum sentences being found in violation of human

110 [2013] SGHC 16 at [6].
111 [2010] 1 SLR 874 at [222].

rights concerns.[112] The case law from other jurisdictions show that human rights concerns will only be raised when the sentence is "grossly disproportionate",[113] "shocking",[114] "startlingly or disturbingly inappropriate",[115] or will "outrage the standards of decency",[116] such that it is "so excessive that no reasonable man would have imposed it".[117] The test for determining whether a sentence is disproportionately long has also been described as "stringent and demanding".[118]

46 In *Vries*, the court decided that it was not the sentence of imprisonment *per se* that was unconstitutional but only the minimum prescribed period of imprisonment. The sentence was therefore read down such that the period of imprisonment for a second or subsequent conviction would be in the discretion of the court.

47 On the part of the Singapore legislature, there is some recognition that "mandatory sentences are and should be the exception" and that sentencing discretion can be returned to the judges "where it does not substantially impact … crime control …".[119] There is no better time than the present for the Legislature to re-examine the appropriateness of mandatory imprisonment sentences: in 2012, Singapore's crime rate was 581 *per* 100,000 population,[120] reportedly "the lowest in the past two decades".[121] This is a considerable achievement, bearing in mind the rapid increase in the population of Singapore over the same period: between 2012 and 1990, the Singapore population increased by 74.3%.[122] There is a role for both the Legislature and the

112 See, for example, the cases cited in Kent Roach, "Canada's Experience with Constitutionalism and Criminal Justice" at p 676, in fn 69.

113 *R v Smith* [1987] 1 SCR 1045 at 1072.

114 *State v Vries* [1997] 4 LRC 1 at 9.

115 *State v Vries* [1997] 4 LRC 1 at 9.

116 *R v Smith* [1987] 1 SCR 1045 at 1072.

117 *State v Vries* [1997] 4 LRC 1 at 10.

118 *Steele v Mountain Institution* [1990] 2 SCR 1385 at 1417.

119 *Singapore Parliamentary Debates, Official Report* (14 November 2012) vol 89 (Mr K Shanmugam, Minister for Foreign Affairs and Minister for Law).

120 Singapore Police Force, *Singapore Police Force Annual Report 2012* (Singapore Police Force, 2013) at p 95. This figure is based on the total number of cases recorded *per* 100,000 of the total population comprising Singapore residents and foreigners staying in Singapore for at least one year. The present crime rate can be compared with the crime rate of 1,635 *per* 100,000 population in 1983, *Singapore Parliamentary Debates, Official Report* (26 July 1984) vol 44 at col 1861 (Mr Chua Sian Chin, Minister for Home Affairs). For a comparison of Singapore's crime rates with other countries for selected crimes, see <http://www.unodc.org/unodc/en/data-and-analysis/statistics/data.html> (accessed 1 October 2013).

121 Singapore Police Force, *Singapore Police Force Annual Report 2012* (Singapore Police Force, 2013) at p 95.

122 Department of Statistics, *Population Trends 2012* (Department of Statistics, 2012). The increase came mainly from permanent residents and those on work or study permits. Singapore citizens increased by only 25.2% over the same period. One would have expected that with a larger population, more housing units and greater

(*cont'd on the next page*)

Judiciary to review the appropriateness of mandatory minimum sentences of imprisonment.

V. Conclusion

48 In future, it is hoped that the Legislature in passing legislation, and the courts in interpreting such legislation, will consider the fundamental underpinnings of the criminal law. On the part of defence counsel, they may want to rethink their strategy of making arguments on human rights alone, which are usually based on cases decided on the European Convention on Human Rights, the Constitution of the United States, the Canadian Charter of Rights and Freedoms or a bill of rights found in other constitutions. These arguments may be seen as importing "Western" values which do not suit local circumstances. It is submitted that an alternative approach which focuses on the principles of Singapore's criminal law may have a greater chance of being recognised to be universal *and* applicable in the Singapore context.[123]

49 The principle of autonomy and the principle of *mens rea* have been encompassed under the broad title to this article as "no punishment without fault". It is hoped that the seeds for a moral discourse about criminal liability in Singapore can be planted which will take time to germinate and grow. It is by no means suggested that considerations of these principles will be easy to apply or will be endorsed by all, but this approach may be the start to asking the right questions.

50 In an article published in 1979, Professor David Richards noted:[124]

> [The US] is in the midst of a major jurisprudential paradigm shift from the legal realist-legal positivist paradigm of the legal official as a managerial technocrat ideally seeking the utilitarian goal of the greatest happiness of the greatest number, to a natural law paradigm of rights … The jurisprudence of rights transforms and illuminates our critical understanding of the moral foundations of the substantive

affluence, the opportunities for crime and therefore the crime rate would be greater.

123 Parallels can also be seen in debates on the Universal Declaration of Human Rights (1948) (GA Res 217A) where its "universality" has been questioned on the basis that it reflects predominantly Western thought and traditions or, more sophisticatedly, core human rights are accepted but differing on its interpretation, see Melanie Chew, "Human Rights in Singapore: Perceptions and Problems" (1994) 34 *Asian Survey* 933 and Thio Li-ann, "The Universal Declaration of Human Rights at 60: Reflecting on the 'Magna Carta for All Mankind'", *Singapore Law Gazette* (December 2008) at p 19.

124 David A J Richards, "Human Rights and the Moral Foundations of the Substantive Criminal Law" (1979) 13 *Georgia Law Review* 1395 at 1395–1396.

criminal law in a way which American legal realist utilitarianism does not and cannot.

51 While the extent and the success of this paradigm shift in the US may not have been as great as it was hoped for at the time, it did spawn an assessment of the nature and function of the criminal law in the US on normative principles.[125] It is time that Singapore does the same.

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125 Louis D Bilionis, "Process, the Constitution, and Substantive Criminal Law" (1998) 96 *Michigan Law Review* 1269; Richard Singer & Douglas Husak, "Of Innocence and Innocents: The Supreme Court and *Mens Rea* Since Herbert Packer" (1999) 2 *Buffalo Criminal Law Review* 859; Claire Finkelstein, "Positivism and the Notion of an Offense" (2000) 88 *California Law Review* 335; Markus Dirk Dubber, "Toward a Constitutional Law of Crime and Punishment" (2004) 55 *Hastings Law Journal* 509.