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Case Note

AGGREGATED CANING AND THE RISK OF DOUBLE OR DISPROPORTIONATE PUNISHMENTS

Yuen Ye Ming v Public Prosecutor [2020] SGCA 80

In *Yuen Ye Ming v Public Prosecutor* [2020] 2 SLR 970, the Court of Appeal dismissed an application for leave to bring a criminal reference under s 397 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) on the question of whether a sentencing judge had the power to direct that multiple sentences of caning be imposed concurrently. This article considers whether the Court of Appeal was right to conclude that it is "settled law" that strokes of the cane *must* be ordered consecutively and that no further analysis is needed. The article also advances that there is a critical need for judges to impose concurrent sentences of caning, whether through development of the common law or statutory amendment, in order to avoid aggregated mandatory minimum strokes of the cane being disproportionate.

Amanda **CLIFT-MATTHEWS**
LLB (University College London), MJ (University of Hong Kong); Barrister (England and Wales); In-house Counsel, The Death Penalty Project, London.

I. Introduction

1 The pertinent facts of *Yuen Ye Ming v Public Prosecutor*[1] ("*Yuen*") are as follows: Yuen had pleaded guilty to a set of offences committed in 2017. These included two counts of trafficking a quantity of cannabis. He had sold half of the cannabis to a friend and the other half was discovered on him when he was arrested. Since these offences were the second set of offences for which he was due to be sentenced, Yuen was liable to enhanced punishments under the Misuse of Drugs Act[2] ("MDA") of

1 [2020] 2 SLR 970.
2 Cap 185, 2008 Rev Ed.

a minimum of ten years' imprisonment and ten strokes of the cane on each charge.[3]

2 Yuen received terms of 12 years' imprisonment and ten strokes for each of the trafficking offences. Though distinct in law, the two offences were closely related so that the sentences of imprisonment were imposed to run concurrently. But while the terms of imprisonment for those offences were imposed as concurrent sentences, the mandatory minimum of ten strokes of the cane Yuen received for each trafficking charge were aggregated in accordance with the usual practice.

3 However, if the judge found that sentencing Yuen to two consecutive terms of 12 years' imprisonment would be either a form of double punishment or disproportionate to Yuen's total offending, it surely follows that the aggregate of 20 strokes of the cane was also either a double punishment or disproportionate. By aggregating the number of strokes for each offence – in other words, ordering them to be carried out consecutively – the judge had imposed a total sentence that was excessive to Yuen's overall criminality.

4 The Court of Appeal dismissed the application for leave, thereby dismissing an inquiry into whether those sentences of caning could have been imposed concurrently in order to avoid the sentence being a disproportionate one. The first reason given was the judgment in *Public Prosecutor v Chan Chuan*[4] ("*Chan Chuan*"), which held that there was no statutory power under the Criminal Procedure Code[5] ("CPC") to impose sentences of caning concurrently and, therefore, no power at all for the court to make the sentences concurrent. Furthermore, the Court of Appeal declined Yuen's invitation to revisit *Chan Chuan* and hear fresh arguments on the issue. The second reason given by the Court of Appeal for dismissing Yuen's application was that, by omitting an express reference in the CPC to the power to order concurrent sentences of caning, Parliament must have *intended* that all sentences of caning be consecutive.

5 Concurrent and consecutive sentencing is an important judge-made tool designed to ensure that the principle of proportionality in sentencing is not transgressed. This article seeks to demonstrate that *Yuen* was a missed opportunity for the Court of Appeal to give serious consideration to the possibility of concurrent sentences of caning and

3 Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 33(4A).
4 [1991] 1 SLR(R) 14.
5 Cap 68, 2012 Rev Ed (Cap 68, 1985 Rev Ed at the time of the judgment in *Public Prosecutor v Chan Chuan* [1991] 1 SLR(R) 14).

to reassert a hallowed principle of criminal justice that the punishment should fit the crime. Whether the courts are, in fact, prevented from imposing concurrent sentences of caning gives rise to interesting questions of law. The Court of Appeal may wish to consider conducting a deeper analysis at some point in the future, when not restricted by the jurisdictional thresholds of s 397 of the CPC.

II. Origin of concurrent and consecutive sentencing

6 Concurrent terms of imprisonment are the *default* under common law, because sentences of imprisonment imposed during a single session of the court, or "quarter session", were deemed to take effect on the first day of that session.[6] This was to guard against double punishment in the event that multiple charges faced by an offender were divided up between judges and heard separately.[7] The power to order a sentence of imprisonment to commence immediately after another sentence of imprisonment, *ie*, to be consecutive, developed alongside the default position in order to ensure the offender did not, effectively, escape punishment for a different offence by a concurrent sentence in circumstances where it would have been unjust for him to do so.[8]

7 Determination as to when a sentence of imprisonment should be ordered to run concurrently or consecutively is generally made through using the "one transaction rule" and the "totality principle". The "one transaction rule" guides a court's assessment as to whether an offender should be doubly punished for offences that have been committed simultaneously or close together in time.[9] The "totality principle" reminds judges to consider whether the global sentence imposed remains proportionate to the offender's overall criminal behaviour.[10]

8 In these ways, the common law ensures that the sentences imposed for multiple offences are proportionate.

A. Concurrent and consecutive sentencing in Singapore

9 When rules of criminal procedure became codified in Singapore during colonial times, judicial discretion to order sentences to run

6 *R v Gilbert* [1975] 1 WLR 1012.
7 For a detailed history of concurrent and consecutive sentencing under English law see *Paul v R* [1982] 1 RCS 62.
8 *R v Wilkes* (1770) 19 How St Tr 1075; *R v Greenberg* [1943] KB 381; *R v Salmon* [2003] 1 Cr App R 85 at [11].
9 *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [27]–[46].
10 *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [47]–[64].

consecutively or concurrently was first embodied in s 15 of the Straits Settlements Criminal Procedure Code Ordinance of 1900 ("Straits Settlements CPC Ordinance").[11] That section reflected the position at common law by giving judges the power to determine whether or not multiple sentences of imprisonment should be served at the same time or be cumulative.[12] The fact that s 15 reflects the common law appears to be confirmed by s 4 of the Straits Settlements CPC Ordinance,[13] which preserved all powers of judges in matters of criminal procedure.[14]

10 Section 15 of the Ordinance (and s 4) was replicated in 1955 in what became the first post-colonial criminal procedure code after independence.[15] Section 17 of the 1955 code is identical in substance to ss 306(1)–306(3) of the present CPC, s 306(2) of which reads:

> Subject to section 307 and subsection (4), where these punishments consist of imprisonment, they are to run consecutively in the order that the court directs, or they may run concurrently if the court so directs.

The only limit to this discretion is prescribed by s 307(1) of the CPC, which mandates that a minimum of two consecutive sentences must be imposed where the offender is to be sentenced to three or more terms of imprisonment.

11 As to how a judge should exercise his discretion when sentencing the offender to multiple terms of imprisonment, both the "one transaction

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11 Ordinance 21 of 1900. An earlier version of the 1900 ordinance was passed in 1890 but never came into force: see Kevin Y L Tan, "The Development of Criminal Law and Criminal Justice" *Singapore Academy of Law* <https://www.sal.org.sg/Resources-Tools/Legal-Heritage/The-Development-of-Criminal-Law-and-Criminal-Justice> (accessed 1 October 2020). There had been two previous ordinances in 1870 (Ordinance 5 of 1870) and 1873 (Ordinance 6 of 1873) regulating specific aspects of criminal procedure adapting certain rules of criminal procedure in England to the Straits Settlements, but neither of them dealt specifically with punishments of imprisonment or whipping.

12 Courts and judges in the Straits Settlements possessed equivalent jurisdiction and powers to those possessed by courts and judges in England: see ss 8, 10 and 28 of Ordinance 3 of 1878. Examples of other jurisdictions where the original common law power of a judge to order either concurrent or consecutive sentences has now been embodied in statute include ss 55–60, Pt IV, Div 2 of the New South Wales Crimes (Sentencing Procedure) Act 1999; and s 154 of the UK Power of Criminal Courts (Sentencing) Act 2000 (c 6).

13 "Nothing in this Code shall be construed as derogating from the powers or jurisdiction of the Supreme Court or of the Judges thereof or of the Attorney General or of the Solicitor General."

14 See also, for comparison, cl 17 of the English Code of Criminal Procedure of 1879 Bill set out in *Paul v R* [1982] 1 RCS 62, which was drafted expressly to reflect the common law.

15 Criminal Procedure Code (Ordinance 13 of 1955).

rule" and the "totality principle" are firmly embedded in Singaporean jurisprudence.[16] Thus far, the "totality principle", but not the one-transaction rule, has been found in Singapore to be applicable to fines and caning.[17]

III. Whipping as a punishment

12 Whipping as a punishment has considerable heritage at common law as a penalty for misdemeanours. In England the punishment was extended to some felonies by statute in the early 1800s[18] until it became exclusively a statutory penalty for a limited number of offences in 1914.[19]

13 Similarly, in Singapore, whipping was widely used as a judicial punishment throughout its colonial history but became limited to mainly theft and sexual offences by the enactment of the Straits Settlements Penal Code Ordinance.[20] In every case the penalty was discretionary and the judge determined the number of strokes to be given, save for the fact that the maximum number of strokes that could be imposed for multiple offences following a trial was 24.[21] Apart from this restriction, sentences of whipping, when available, were limited only by principles of proportionality.

14 Having exported whipping to its colonies, in England whipping as a judicial punishment for adults declined from the mid-1800s[22] and was finally abolished in 1948,[23] thus ending the development of English jurisprudence on the issue. There does not appear to be any English case which considered whether concurrent sentences of caning may be imposed. It may be that the issue did not directly arise as whipping was never mandatory and always a discretionary punishment ordered in addition to, or in lieu of, another prescribed penalty.[24]

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16 See, for example, *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998; *Seng Foo Building Construction Pte Ltd v Public Prosecutor* [2017] 3 SLR 201; and *Public Prosecutor v Raveen Balakrishnan* [2018] 5 SLR 799.

17 *Seng Foo Building Construction Pte Ltd v Public Prosecutor* [2017] 3 SLR 201 at [63]–[68]. For an example of the application of the totality principle to caning see *Ho Sheng Yu Garreth v Public Prosecutor* [2012] 2 SLR 375.

18 *Report of the Departmental Committee on Corporal Punishment* (March 1938) at para 1.

19 Criminal Justice Administration Act 1914 (c 58) (UK) s 36(2).

20 Ordinance 4 of 1871.

21 Straits Settlement Penal Code Ordinance 4 of 1871 s 278.

22 *Report of the Departmental Committee on Corporal Punishment* (March 1938) at paras 3 and 5.

23 Criminal Justice Act 1948 (c 58) (UK) s 2.

24 For example, s 2 of the UK Larceny Act 1916 (c 50); s 1 of the UK Act for the More Speedy Trial and Punishment of Juvenile Offenders 1847 (c 82); s 72A of the Straits

15 Since then, the penalty has become widely regarded in other jurisdictions as amounting to inhuman and degrading treatment or punishment and has been found to be a breach of the International Covenant on Civil and Political Rights,[25] the European Convention on Human Rights[26] and the American Declaration on the Rights and Duties of Man.[27] Where it has not been removed from the statute books of domestic jurisdictions, some of their respective courts have declared it unlawful.[28] Whilst whipping is still practised in some former colonies, its abandonment in many means that Commonwealth jurisprudence is also scarce.

A. Development of caning as a punishment in Singapore

16 In Singapore whipping as punishment remained relatively unchanged for decades, except that from 1954 onwards, whipping could only be carried out using a rattan cane.[29] But from 1967 the number of offences liable to caning dramatically increased and minimum numbers of strokes began to be prescribed for many offences,[30] including drug offences after the enactment of the MDA in 1973. The number of drug offences liable to caning increased in 1998 to provide for "enhanced" sentences for repeat drug consumers,[31] and the severity of sentences rose in 2013 for repeat drug traffickers, such as Yuen.[32] In 2015, in *Yong Vui Kong v Public Prosecutor*,[33] the Court of Appeal dismissed a challenge that a sentence of caning constituted torture in violation of Art 9(1) of the Constitution of the Republic of Singapore[34] ("the Constitution"). The

Settlements Penal Code Ordinance; and ss 3 and 4 of the Indian Whipping Act 1909. Furthermore, by virtue of s 2 of the Whipping Act 1862, whipping could only be imposed once for an offence, save for garrotting. Later, that restriction applied to all offences carrying a penalty of whipping: s 36(1) of the UK Criminal Justice Administration Act 1914 (c 58) (*Report of the Departmental Committee on Corporal Punishment* (March 1938) at para 5).

25 999 UNTS 171 (16 December 1966; entry into force 23 March 1976).

26 Eur TS No 5; 213 UNTS 221; 1953 UKTS No 71 (4 November 1950; entry into force 3 September 1953).

27 April 1948; entry into force 2 May 1948. *Osborne v Jamaica* 15 March 2000, CCPR/C/68/D/759/1997; *Tyer v United Kingdom* (1978) 2 EHRR 1; *Caesar v Trinidad and Tobago*, Judgment of 11 March 2005, Inter-Am Ct HR (Ser C) No 123 (2005).

28 See, for example, *R v Pinder* [2003] 1 AC 620 and *State v Chokuramba*, Judgment No CCZ 10/19 Constitutional Court of Zimbabwe.

29 Criminal Justice (Punishment Amendment) Ordinance 20 of 1954.

30 See World Corporal Punishment Research, "Singapore: Judicial and Prison Caning – Table of Offences for Which Caning Is Available" (updated to mid-2011) <https://www.corpun.com/sgjur2.htm> (accessed 1 October 2020).

31 Misuse of Drugs (Amendment) Act (Act 20 of 1998).

32 Misuse of Drugs (Amendment) Act (Act 30 of 2012).

33 [2015] 2 SLR 1129.

34 1999 Reprint.

reasons given for this conclusion were that it was a prescribed penalty in Singapore with safeguards as to its imposition and enforcement, such as a statutory limit under s 328 of the CPC on the number of strokes that can be inflicted at any one time and the presence of a medical doctor when the punishment is carried out. Cumulatively these were said to save the punishment from amounting to torture.[35]

17 These days, courts are often confronted with *multiple* offences that each carry *mandatory* minimum penalties of caning. In those cases, there is no power for the judge to adjust the number of strokes for each offence below the mandatory minimum, so as to ensure that the global sentence remains proportionate to the overall criminal behaviour. Nor is there the possibility of the judge revising the total number of strokes imposed to a number less than the aggregated mandatory minimum, if none of the offences for which the offender is due to be sentenced carries a discretionary penalty of caning. Thus, the practice of multiple charging, particularly in drug cases, coupled with intentionally severe enhanced mandatory minimum penalties, means that, when more than one offence liable to mandatory strokes of the cane has been committed, there is risk of a disproportionate sentence being imposed.

18 By contrast, disproportionality is usually avoided when it comes to multiple terms of imprisonment – even with mandatory minimum sentences – because the courts will order some of the sentences of imprisonment as concurrent sentences if the circumstances justify it. If judges were also able to order concurrent sentences of caning where the justice of a case demanded it, the risk of disproportionate sentences would be significantly ameliorated. Given judges are well versed in the various factors which influence whether a sentence should be a concurrent or consecutive one, in practical terms there appears to be no good reason why sentences of caning could not operate in the same way as terms of imprisonment.

IV. Case law and the meaning of "concurrent"

19 As stated earlier, case law on whipping as a punishment is relatively scarce. However, two jurisdictions outside Singapore have considered whether a sentence of caning can be ordered concurrent to another sentence of caning or must be ordered to be consecutive. In *King Emperor v Yenkataswamy*[36] ("*Yenkataswamy*") from Rangoon, then part of India, the court found sentences of caning could not be ordered to run

35 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [89]–[93].
36 AIR 1937 Rangoon 286.

concurrently. The main basis for this was that the courts had interpreted India's Whipping Act 1909 as permitting only one sentence of whipping to be imposed on a single occasion, no matter how many offences had been committed.[37] Since two sentences of whipping could not be ordered on a single occasion, there was no place for concurrent sentences of whipping. Spargo J held:[38]

> It is clear then that double sentences of whipping are illegal and concurrent sentences of whipping are illegal for this reason and also because as pointed out by Twomey J in *KE v Eng Gyaung* the word concurrent properly applies only to sentences of imprisonment.

20 *Yenkataswamy* was heavily relied upon by the Malaysian Court of Appeal in *Public Prosecutor v Peter Ting Chiong King*[39] ("*Ting Chiong King*") as authority for concluding that sentences of caning may only be imposed consecutively. *Ting Chiong King* was, in turn, relied upon in *Yuen*. However, the Malaysian judgment only cited the second part of the reasoning in *Yenkataswamy*, that is, the opinion that the word "concurrent" could only properly apply to terms of imprisonment. The court failed to acknowledge that the decision was equally predicated on the fact that, in that jurisdiction, only one sentence of whipping could be imposed at any one time. In fact, the court in *Yenkataswamy* also said that sentences of caning could *not be imposed consecutively either* – for exactly the same reason.[40] In Malaysia, as in Singapore, it is plain that more than one sentence of caning can be imposed at a single sitting. Therefore, in Malaysia and Singapore, an important part of the reasoning for the judgment in *Yenkataswamy* has no application.

21 As to the second aspect of the reasoning, it was posited in *Ting Chiong King* that a "literal" meaning of concurrent sentences of caning would mean that the offender received two sets of strokes at the same time – a greater punishment because of the increased pain and suffering. However, since the time of *Yenkataswamy*, the term "concurrent" has been used to apply to a much broader range of sentences, such as community-based penalties[41] and reformative training.[42] Where two community work orders are made concurrently the offender does not undertake two lots of community work at once. Nor is an offender detained in prison as well as in a Reformative Training Centre, which would be the literal result of "concurrent" in s 305(10) of the CPC, where the two types of punishment

37 *King Emperor v Yenkataswamy* AIR 1937 Rangoon 286 at 367–368.
38 *King Emperor v Yenkataswamy* AIR 1937 Rangoon 286 at 367.
39 [1987] 1 MLJ 42.
40 *King Emperor v Yenkataswamy* AIR 1937 Rangoon 286 at 367–368.
41 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 344(9) and 346(5).
42 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 305(10).

must be imposed to run at the same time. "Concurrent" when it comes to sentencing cannot have a "literal" meaning. Rather, it is, or has become, a legal construct.

22 It is true that the word "concurrent" implies a temporal aspect and that best makes sense in the context of terms of imprisonment. It is because of the lack of temporal aspect that punishments of caning are often linked with the imposition of fines.[43] But there are three important distinctions to be made between fines and caning as penalties. The first is that multiple punishments of fines were always aggregated at common law. The second is that a punishment by way of fine does not appear to engage Art 9(1) of the Constitution unlike a punishment of caning, which does engage Art 9(1), because it involves bodily invasion and the infliction of pain.[44] The third distinction is that there are provisions in the CPC which allow for payments of fines to be deferred or paid by instalments (s 319(1)(*b*)), in order to prevent even fixed penalty or minimum fines being oppressive. On the other hand, sentences of caning may not be carried out in instalments (s 330(1) of the CPC). Therefore, there are significant differences between penalties of fines and strokes of the cane historically,[45] qualitatively and in the manner in which they are implemented.

23 In any event, the potential temporal aspect of "concurrent" appears to be down to terminology rather than substance. If sentences had been historically described as "consecutive" or "non-consecutive", then the temporal argument is significantly diminished. In fact, Andrew Ashworth appears to suggest that the temporal aspect in the use of the word "concurrent" derives as much from the concurrency of the *offences*, as it does from the sentences.[46]

24 In Brunei, for example, the courts do not follow the Malaysian approach and have had no difficulty applying the word "concurrent" to strokes of the cane. Sentences of caning are regularly imposed concurrently or "non-cumulatively".[47]

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43 *Seng Foo Building Construction Pte Ltd v Public Prosecutor* [2017] 3 SLR 201 at [68].

44 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [13]–[23].

45 Until the mid to late 1980s and *Public Prosecutor v Peter Ting Chiong King* [1987] 1 MLJ 42, no examples of multiple sentences of caning have been found by the author.

46 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge, 6th Ed, 2015) at p 280.

47 See, for example, *Azman bin Morni v Public Prosecutor* [2009] MLJU 1616; *Sumardey bin Hj Jaidin v Public Prosecutor* [2010] 6 MLJ 54; *IIham Syarif v Public Prosecutor* [2010] 5 MLJ 382; *Yong Nai Yung v Public Prosecutor* [2012] 1 MLJ 816; and *Topan Sulaeman v Public Prosecutor* [2010] MLJU 1920. There is no special statutory provision for concurrent or "non-cumulative" sentences of caning in the Brunei Criminal Procedure Code (Cap 7, 2001 Rev Ed), only a general provision under

25 Thus, it is advanced that "concurrent" in the legal sense simply means that one punishment is deemed to be occurring at the same time as another, so that the implementation of a punishment will represent or fulfil more than one sentence. Applying the legal meaning, there is no reason why sentences of caning cannot be "concurrent".

A. Chan Chuan

26 Whether sentences of caning may be imposed concurrently was first considered in Singapore in 1991 in *Chan Chuan*. This High Court decision held that the absence of any special provision in the CPC permitting concurrent sentences of caning meant that all strokes imposed on an offender at any one time must be aggregated up to a maximum of 24:[48]

> My view that the sentences for caning for two or more distinct offences resulting in convictions at one trial do not merge but instead aggregate is supported by s 17 of the CPC. Section 17 enables a court in convictions in identical circumstances to direct the sentences of imprisonment to run concurrently. Where the Legislature has made provision for concurrence or merger with regard to sentences of imprisonment but is silent on caning except to impose a limit of 24 strokes, it can only mean that subject to the specified maximum, the number of strokes for one offence shall be aggregated to the number of strokes for another.

27 *Chan Chuan* never reached the Court of Appeal and while the decision has been followed in subsequent judgments, no court until *Yuen* had reviewed its reasoning.

B. Yuen*'s application*

28 Furthermore, while the decision in *Chan Chuan* was based on the absence of a statutory power to order concurrent sentences, the Court of Appeal in *Yuen* went further and suggested that the express provision in the CPC for the imposition of concurrent sentences of imprisonment, when combined with the absence of a similar provision in respect of caning, demonstrated a *positive parliamentary intent* that sentences of caning must be ordered as consecutive sentences.[49] Though such statements are unhelpful to any future invitation to the Court of Appeal to review the law on concurrent and consecutive sentences of

s 13(1) that all punishments may be imposed "one after the expiration of the other" or "concurrently", according to judicial discretion.

48 *Public Prosecutor v Chan Chuan* [1991] 1 SLR(R) 14 at [41].

49 *Yuen Ye Ming v Public Prosecutor* [2020] 2 SLR 970 at [26].

caning, they do not preclude it, since the Court of Appeal in *Yuen* was not deciding the issue on the merits.

V. Problems with the analysis in *Chan Chuan* and *Yuen*

29 The first point to be made is that the court in *Chan Chuan* approached the issue from the wrong starting point. The court does not require express authorisation from Parliament to impose concurrent sentences of imprisonment. The default position is that a sentence should "take effect on the day that it is imposed" (s 318(1) of the CPC). Therefore, unless the judge makes an order that a sentence of imprisonment is to run *consecutively*, all sentences of imprisonment imposed at a single hearing, or at a separate hearing but while a prisoner is serving another sentence of imprisonment, will *automatically* run concurrently.

30 Secondly, even if there was no provision in the CPC giving discretion to the trial judge to impose concurrent or consecutive sentences of imprisonment, that power would nonetheless have existed at common law.[50] For, as has been noted above, the Straits Settlements CPC Ordinance preserved the common law powers of the judge with regard to criminal procedure.[51] That savings provision has been retained throughout the history of the code and forms s 5 of the CPC,[52] and confirms that where there are aspects of criminal procedure that have not been covered by the statute, the common law applies.

31 Thus, the court's finding that judges in Singapore are reliant on the CPC for an express power to permit sentences of imprisonment to run concurrently is simply incorrect. It further means that if direct comparisons of sentences of caning with sentences of imprisonment are to be made, the proper starting point for the court was not "does the CPC permit strokes of the cane to be awarded concurrently" but "does the CPC *compel* strokes of the cane to be imposed consecutively"?

32 Once the issue is correctly understood, the arguments that were levelled at the absence of an express power *to permit* concurrent sentences of caning made in *Chan Chuan* and in *Yuen* apply with equal force when the question is reversed – that is, if Parliament had intended *to forbid* concurrent sentences of caning, or interfere with whether they

50 See para 6 above.
51 See paras 9–10 above.
52 "Nothing in this Code shall derogate from the jurisdiction or powers of the Court of Appeal or the High Court or the Judges thereof, or the Attorney-General, a Deputy Attorney-General or the Solicitor-General."

are concurrently or consecutively imposed, one would have expected Parliament to say so expressly and in unambiguous terms.[53]

A. The finding that Parliament intended to prohibit concurrent sentences of caning

33 This leads to the second feature which is problematic in *Yuen* and that is the Court of Appeal's divination of a positive parliamentary intent to exclude concurrent sentences of caning from its silence on the issue. Whilst it is true that legislative silence can sometimes amount to a positive intention, this is only where it can be shown that the statutory provisions had been intended by Parliament to prevent the development of the common law in a particular area.[54] Any intention to oust the application or development of the common law must be clear.[55] That principle was affirmed in *Goldring Timothy Nicolas v Public Prosecutor*[56] ("*Goldring (HC)*"):[57]

> A crucial axiom that underlies my reasoning is the fundamental presumption of statutory interpretation that Parliament would not have removed rights pre-existing in common law if there was no express provision or clearly evinced intention to that effect.

34 In *Goldring (HC)*, Rajah JA warned that the intention of Parliament should not be inferred too broadly:[58]

> [T]he common law principles which pertain to the same subject are impliedly repealed, the court's reference to 'particular subject' should not be read too widely. Much would depend on the level of generality with which the term 'subject' is viewed. At the highest level of abstraction, it could be said that since the CPC 2010 or the Evidence Act … deal with the subjects of criminal procedure and evidence, all common law rules of criminal procedure and evidence are thereby impliedly repealed. However, to adopt this approach would be to ascribe omniscience to Parliament. This would sometimes be an unreasonable assumption. The case law is replete with examples of the common law providing interstitial support or rules in the interests of justice where the statutory language or purpose is silent …

35 As far as the CPC is concerned, it has been recognised by the courts on several occasions that the code is not comprehensive, and the

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53 *Yuen Ye Ming v Public Prosecutor* [2020] 2 SLR 970 at [26].

54 See, for example, *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279.

55 *Goldring Timothy Nicolas v Public Prosecutor* [2013] 3 SLR 487 at [51]–[54]; *Public Prosecutor v Goldring Timothy Nicolas* [2014] 1 SLR 586 at [82].

56 [2013] 3 SLR 487.

57 *Goldring Timothy Nicolas v Public Prosecutor* [2013] 3 SLR 487 at [51].

58 *Goldring Timothy Nicolas v Public Prosecutor* [2013] 3 SLR 487 at [62].

courts have stepped in on those occasions to supply a procedure which best serves the interest of justice.[59]

36 Furthermore, there was no evidence that the issue as to whether sentences of caning should always be aggregated had ever been considered by Parliament. The rules of criminal procedure have evolved organically since their first codification in 1900, with Parliament gradually revising the code according to contemporary needs and societal aims. One development was the introduction of s 307(1) in 1984,[60] which requires a judge to impose at least two consecutive sentences when an offender is sentenced to three or more terms of imprisonment. Another example would be the introduction of community service orders as alternative penalties in 2010,[61] which includes a judicial discretion to impose community service orders concurrently or consecutively. In the author's view it would be unsound to conclude that Parliament's piecemeal interference with judicial discretion to order concurrent or consecutive sentences in the case of other penalties means that it must also have positively and definitively intended to prohibit sentences of caning from being imposed concurrently.

37 Moreover, statutory provision for concurrent sentences of imprisonment has existed in more or less identical terms for 120 years. The relevant parliamentary intention that the court must discern is the intention at the time the law was enacted or, in some cases, when Parliament subsequently reaffirms the particular statutory provision in question.[62] That means one would have to examine the intention of the colonial legislature in 1900 and be satisfied that the lack of a similar provision in respect of sentences of caning clearly signalled that the colonial legislature meant for concurrent sentences of caning to be prohibited. Alternatively, it could be said that the relevant intention is that of the legislative assembly in 1955 when the judge's statutory power to order concurrent or consecutive sentences of imprisonment was word for word repeated; or even in 1967, when the code was re-enacted after adoption of the present Constitution. But the likelihood in each instance is that the legislators never actively considered the issue, because until 1967, sentences of caning were always an *optional* addition to another form of punishment, and the number of strokes purely discretionary. This meant there was little risk of the total sentence becoming disproportionate, because the judge was not obliged to impose a sentence of whipping for

59 For example, *Public Prosecutor v Goldring Timothy Nicolas* [2014] 1 SLR 586 at [85]–[86] and *Chia Kah Boon v Public Prosecutor* [1999] 2 SLR(R) 1163 at [16]–[18].

60 Act 24 of 1984.

61 Act 15 of 2010.

62 *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 at [44].

every (or indeed any) offence of which the offender had been convicted, or could adjust the total number of strokes ordered accordingly.

38 Perhaps one might argue that the relevant intention of Parliament is to be found in 2010, when the latest incarnation of the CPC was enacted and at a time when multiple sentences of caning had become familiar. But the difficulty is that there is no evidence at this time either that the possibility of concurrent sentences of caning was ever considered.[63]

39 In any event, the point being made is that there appears to be an absence of evidence to indicate that Parliament positively intended to prohibit concurrent sentences of caning. At present, the highest that can be said is that Parliament's intent can be divined by the fact that Parliament has not stepped in to change current practice by expressly providing for the concurrent sentences of caning in the CPC.[64] But that may equally signify apathy as much as intent. As was observed in *Goldring (HC)*, there is a distinction to be made between a definite and specific enactment and allowing things to pass,[65] just as there is between positive regulation and non-interference. The former is sufficient to override a common law right, the latter is not. Given that the fundamental right to fair and proportionate sentences is at stake, arguably the Court of Appeal should have given the benefit of the doubt to Yuen, bearing in mind that Parliament is always free to legislate subsequently should it disagree with the approach taken by the court.

B. Mandatory minimum punishments do not signal Parliament's intention to forbid concurrent sentences

40 The other argument that seemed to find favour in *Yuen* was that by ordering sentences of caning as concurrent sentences, which in effect means that the offender escapes the punishment for the concurrent offence, that this would undermine Parliament's express intention to impose mandatory penalties. Tay JA, giving the judgment of the court, said that:[66]

> Where Parliament has expressed its intention clearly in the form of mandatory caning or a mandatory number of strokes while setting only the specified limit

63 From 2010, s 328 of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) clarified that the court could only order a maximum of 24 strokes of the cane during a single sitting, even if the offender was not convicted of the offences during the same trial, but there is no indication that concurrent sentences of caning were ever mooted.

64 *Yuen Ye Ming v Public Prosecutor* [2020] 2 SLR 970 at [26].

65 *Goldring Timothy Nicolas v Public Prosecutor* [2013] 3 SLR 487 at [52], referring to *Leach v R* [1912] AC 305.

66 *Yuen Ye Ming v Public Prosecutor* [2020] 2 SLR 970 at [26].

> of 24 strokes for adult offenders in s 328 of the CPC, it is impermissible for the court to qualify or even to nullify such intention by the subtle use of non-statutory powers in a supposed quest for proportionality.

41 However, the fact that Parliament has enacted mandatory minimum punishments of caning has little bearing on the issue as to whether those sentences should be imposed consecutively or concurrently. Parliament has also enacted mandatory minimum sentences of imprisonment for a number of offences, yet largely left it to the court's discretion to determine whether those sentences of imprisonment should be concurrent or consecutive.[67] Parliament's approach makes sense: since although it may prescribe the basic rules, the reality is that it cannot possibly legislate for all scenarios for all offenders for all combinations of offences. Neither can it, in the words of Andrew Ashworth, account for "the vagaries of prosecutorial discretion" when it comes to the number and type of offences the Prosecution decides to charge.[68] This factor is particularly important in drug offences where there is often a multiplicity of charges and care must be taken to avoid double or disproportionate punishments.[69]

42 At the end of the day, only the judge can determine what is the fair and proportionate penalty in cases of multiple offending, depending on the facts of any given case. Concurrent and consecutive sentencing allows for mandatory minimum penalties to be respected, yet, at the same time, provide a safeguard against disproportionate penalties.

C. The relevance of section 328 of the CPC to multiple sentences of caning

43 The court in *Yuen* also placed some reliance on the existence of s 328 of the CPC as reflecting Parliament's intention on the limits of caning. Section 328 of the CPC limits the total number of strokes imposed on an offender at any one time to 24. The provision first appeared in the Straits Settlements Ordinance[70] and such limitations are common where whipping is a statutory punishment.[71] It may be assumed that this total of

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67 One exception being s 307(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed), which mandates that where there are at least three sentences of imprisonment, two of the terms must run consecutively.

68 Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge, 6th Ed, 2015) at pp 276–277.

69 *Mohamed Shouffee bin Adam v Public Prosecutor* [2014] 2 SLR 998 at [40].

70 Section 278(1) of the Straits Settlements Criminal Procedure Code (Ordinance 21 of 1900) provided for a maximum imposition of 24 strokes "at any one trial".

71 In England, statutory limitations on the total number of strokes that could be imposed were included in, *eg*, s 1 of the Garrotters Act 1863 and s 37(6) of the

24 indicates the upper limit of the number of strokes that may be inflicted on an offender at any one time before Parliament considers the suffering incurred to be unacceptable – even torture. There is also the prohibition on carrying out penalties of caning in instalments[72] in order to prevent the offender having to face the prospect of the punishment repeatedly.

44 But s 328 does not always prevent multiple sentences of caning being disproportionate. This is best understood by using examples: Parliament has prescribed a minimum of ten and a maximum of 15 strokes of the cane for a repeat offender trafficking in cannabis of an amount between 330g and 500g.[73] Therefore, a proportionate sentence for the offence is between ten and 15 strokes of the cane. Where two offences form part of the same transaction and there is no or minimal increase in harm or culpability such that the subsequent offence would attract a concurrent sentence of imprisonment, a penalty of between 20 and 30 strokes, even if capped at 24, remains plainly disproportionate. Similarly, where the two offences are quite distinct and there is significantly increased culpability or harm, such that any accompanying term of imprisonment is imposed consecutively, 20–30 strokes may not be regarded as disproportionate. However, a cap at 24 strokes could bring the total *under* the amount that might have otherwise been prescribed. This sentence too is disproportionate, since it does not reflect the level of harm or the degree of culpability of the offender. But it is justified because s 328 is not intended to ensure proportionality of sentences,[74] rather it represents the maximum permissible amount of suffering that is acceptable on a single occasion, regardless of the gravity of the offence or offences committed. It is clear from these examples, therefore, that s 328 cannot be relied upon as a proxy measure for ensuring that every offender receives a proportionate punishment.

45 So, a question remains, if the reasoning in *Chan Chuan* is flawed and Parliament has not concerned itself with the issue as to whether concurrent sentences of caning are possible, what then?

Larceny Act 1916 (c 50), and were capped at 50 for an adult male, although it was noted that by the early 1900s, the maximum number imposed in practice tended to be 24: *Report of the Departmental Committee on Corporal Punishment* (March 1938) at pp 51–52. Other examples include Brunei, which has an upper limit of 24 strokes for adult males (s 257 of the Criminal Procedure Code), whilst Grenada caps the total number of strokes at 12 (s 75(3) of the Criminal Code).

72 Criminal Procedure Code (Cap 68, 2012 Rev Ed) s 330.

73 Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 4A(*b*)(i).

74 Save to the extent that a *grossly* disproportionate sentence might be regarded as an inhuman one: see *R v Smith* [1987] 1 SCR 1045 and *De Boucherville v Mauritius* [2008] UKPC 38 at [15] and [23].

VI. How the lacuna in the law could potentially be filled

46 Naturally, the power to order concurrent sentences of caning could be provided for by legislative amendment to the CPC in the way of an express power, as it has been confirmed for other sentences. Of course, any power to order concurrent sentences of caning could also be expressly prohibited by Parliament through legislative amendment. In the author's view, that would not serve the interests of justice since it disregards the importance of proportionality in sentencing.

47 However, as observed earlier, while there is a legislative gap, the common law applies. Not only does the common law apply but it remains open to development.[75] In fact, it has been said that there is a *duty* on the courts to develop the common law where there is a statutory gap in an area within judicial expertise. The position has been summarised as follows:[76]

> In so far as legislative non-gaps are concerned, the question is whether Parliament intended to oust the concurrent development of the common law. Unless there is some clear indication of this, the courts should be very slow to find that this is the case. Factors indicative of such an intention, short of an express stipulation, may be a comprehensive code.
>
> This is in line with the judicial duty to develop the common law. Thus, it is respectfully suggested that the fact that Parliament has touched on a matter generally does not preclude the courts from developing the common law in this regard. Indeed, even if Parliament has dealt with a matter specifically, that does not, without more, preclude the development of the common law.

48 There is nothing unusual in judges developing the common law where there is scope to do so.[77] An example would be the Court of Appeal's recent developments in the common law doctrine of wilful blindness in the context of the MDA:[78] the criteria by which a court determines whether or not an offender has been "wilfully blind", either to the thing found in the offender's possession or to the nature of the drugs, are entirely judge-made. These developments are a judicial extension to the statutory requirement that the offender must have "knowledge".

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75 See, for example, *Chia Kah Boon v Public Prosecutor* [1999] 2 SLR(R) 1163 at [16]–[18] and *WX v WW* [2009] 3 SLR(R) 573 at [15]–[17].

76 Goh Yihan, "Where Judicial and Legislative Powers Conflict: Dealing with Legislative Gaps (and Non-gaps) in Singapore" (2016) 28 SAcLJ 472 at 501–502, paras 73 and 74.

77 *Lim Meng Suang v Public Prosecutor* [2015] 1 SLR 26 at [78]–[81], confirming that this does not make judges "mini legislators".

78 *Adili Chibuike Ejike v Public Prosecutor* [2019] 2 SLR 254; *Gobi a/l Avedian v Public Prosecutor* [2020] SGCA 102 respectively.

49 Therefore, given that Parliament has not spoken on the issue as to whether judges may or may not impose sentences of caning as concurrent sentences, and that tailoring punishments to individual cases to ensure proportionality in sentencing is well within the expertise of judges (who were the original architects of concurrent and consecutive sentencing), it would appear to be open for judges to regulate the imposition of caning by developing the common law.

A. Power under statute

50 In any event, in respect of matters where there is no "special provision" in the CPC, the courts have power under s 6 of the CPC to adopt a procedure "as the justice of the case may require". Importantly, it has been held that "silence" in the CPC does not amount to a "special provision":[79]

> Where the first stage is concerned, it is only the absence of a provision on a particular, specific issue which will indicate that 'no special provision has been made' for that particular issue. Silence cannot, *ex hypothesi*, mean that special provision has been made. It is only where a provision expressly dealing with that particular issue exists that 'special provision has been made' …

51 If Parliament simply has not definitively indicated whether sentences of caning must be imposed consecutively, then it is open to the courts to determine the fairest outcome for the case. Surely, it would seem, where the aggregate number of strokes for multiple offences would be disproportionate to the overall degree of an offender's culpability, the only just approach is for the judge to make adjustments by imposing some of those sentences of caning as concurrent sentences.

52 The important point to remember, however, is that the courts need not wait for Parliament to speak before imposing concurrent sentences of caning, for judges already possess sufficient power to take charge of the issue.

VII. Conclusion

53 In rejecting Yuen's application, the Court of Appeal in *Yuen* claimed to rely on "consistent and established jurisprudence" that sentences of caning must be imposed consecutively.[80] But when subjected to scrutiny, it appears that neither the decision in *Chan Chuan*, nor the Malaysian case of *Ting Chiong King*, provides a particularly credible basis

79 *Goldring Timothy Nicolas v Public Prosecutor* [2013] 3 SLR 487 at [65].
80 *Yuen Ye Ming v Public Prosecutor* [2020] 2 SLR 970 at [26].

as to why multiple mandatory sentences of caning should be approached differently to multiple mandatory terms of imprisonment (or indeed other types of penalties that are imposed concurrently). There are also clear weaknesses in the reasoning that Parliament positively *intended* to prohibit concurrent sentences of caning.

54 In fairness to the court, Yuen's application was not an ordinary appeal but an application for leave to appeal on a point of law of public interest, which has strict criteria to meet in order to be successful. Therefore, the fact that the court did not delve fully into these issues is perhaps understandable. However, the principle that the punishment should fit the crime is one of *the* fundamental foundations of the criminal justice system and it is advanced that, at a time when multiple sentences of caning are the norm, principles of proportionality demand that concurrent sentences of caning are permissible.