DETENTION DURING THE PRESIDENT'S PLEASURE: A FOREGONE SENTENCE FOR A YOUNG PERSON CONVICTED OF MURDER?

Set against the case of *PP v Anthony Ler Wee Teang*, this article relies on provisions of the Children and Young Persons Act (Cap 38, 2001 Rev Ed), *viz*, the guiding principle of "welfare" in s 28(1) and the sentencing discretion that s 38(1) affords, to defend the view that detention during the President's pleasure is not and should not be a foregone sentence for young persons convicted of murder. However, relying on the Children and Young Persons Act thus is only a temporary stopgap measure in lieu of legislative reform. Ultimately, the sentencing provisions governing young persons convicted of murder should be clarified so that it is put beyond doubt that discretion as to whether or not to impose the sentence of detention during the President's pleasure exists for courts sentencing such young persons.

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Introduction

1 The Singapore High Court decision of *PP v Anthony Ler Wee Teang*[1] is the latest contribution to the jurisprudence pertaining to the sentencing of young persons[2] convicted of murder. Regrettably, it affirms the practice of sentencing young persons convicted of murder to be detained during the President's pleasure.[3] Notwithstanding this, I

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[1] [2001] SGHC 361 ("*Anthony Ler*").

[2] This article adopts the definition of a "young person" in the Children and Young Persons Act, *infra*, n 5, s 2(1). As such, all references to a "young person" or "young persons" in this article refer to a person or persons who is or are 14 years of age or above and below the age of 16 years.

[3] There are at least five previous occasions where the sentence of detention during the President's pleasure was imposed. *Mohd Iskandar bin Mohd Ali v PP* Criminal

argue in this article that detention during the President's pleasure is not and should not be a foregone sentence for a young person convicted of murder.

2 Section 213 of the Criminal Procedure Code ("CPC")[4] is the oft-cited provision where the sentencing of young persons convicted of murder is concerned. It says that a person, who is under 18 years old, "shall" be sentenced to be detained during the President's pleasure in lieu of the death sentence. To say that detention during the President's pleasure is a foregone sentence implies that the court has no sentencing discretion and has to impose that sentence on young persons convicted of murder. This is wholly consistent with the mandatory wording of s 213 of the CPC. However, there is also s 38(1) of the Children and Young Persons Act ("CYPA").[5] It says that the court "may", not must, sentence a young person convicted of murder to be detained either for a fixed or indefinite period as a last resort. Detention during the President's pleasure as a foregone sentence is inconsistent with the discretionary wording of s 38(1) of the CYPA. As between the two provisions, s 38(1) of the CYPA can, by means of statutory interpretation, prevail over s 213 of the CPC.

3 I not only argue that the two provisions can be interpreted such that s 38(1) of the CYPA prevails, but also that this *should* be done. This is because s 28(1) of the CYPA requires any court that deals with a young person to have regard to his or her "welfare". Sentencing is arguably one way of "dealing" with a young person. Welfare in sentencing entails the court meting out individualised sanctions, which are tailored to the perceived needs of the young person appearing before the court, with the aim of improving his or her future overall well-being. Section 213 of the CPC dictates that it is mandatory to impose detention during the President's pleasure on a young person convicted of murder. This implies that the sentence is to be imposed regardless of whether or

Appeal No 7 of 1995 (22 May 1995), CA, which affirmed *PP v Mohd Iskandar bin Mohd Ali* Criminal Case No 45 of 1994 (28 March 1995), HC, is directly relevant since the accused was a young person (being a 14-year-old boy) convicted of murder. *PP v Gwee Siew Kuan* [1996] SGHC 4 is also relevant in that the first accused was also a young person (being a 15-year-old girl). However, it should be noted that she was convicted not for the capital offence of murder but for the capital offence of drug trafficking. The other three decisions are of comparative value. They involve youths, who are not young persons, but are below 18 years old, convicted for the capital offences of murder or drug trafficking, and sentenced to be detained during the President's pleasure: *Ng Beng Kiat v PP* [1995] 3 SLR 335, CA, which affirmed *PP v Ng Beng Kiat* [1995] SGHC 62; *Ong Chee Hoe v PP* [1999] 4 SLR 688, CA, which affirmed *PP v Ong Chee Hoe* [1999] SGHC 162; *PP v Poon Yuen Chung* [1993] SGHC 269. For a further discussion of these cases, see *infra*, paras 48–51.

4 Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC").

5 Children and Young Persons Act (Cap 38, 2001 Rev Ed) ("CYPA").

not it will meet his or her individual needs. This does not accord with having regard to the welfare of the young person, which s 28(1) of the CYPA demands of a court sentencing that young person.

4 Granted that s 38(1) of the CYPA can and should prevail, what is an appropriate case for the court to invoke it? Surely, there can be no hard and fast rule in determining appropriateness; it all depends on the facts and circumstances of each individual case. I am of the view that *Anthony Ler* was arguably an appropriate case for the court to have invoked s 38(1) of the CYPA so as either to exercise the discretion afforded therein not to impose a detention sentence on 15-year-old Z or, if indefinite detention was thought to be the most suitable way to dispose of the case, to detain the boy as such then under s 38(1) of the CYPA rather than imposing the very severe sentence of detention during the President's pleasure under s 213 of the CPC. If the court did not wish to pass sentence on Z, it was also open to the court to exercise its power to remit the case to the Juvenile Court of Singapore for the Juvenile Court to invoke s 38(1) of the CYPA to dispose of the case. The High Court's numerous favourable concessions about 15-year-old Z could have justified invoking s 38(1) of the CYPA. It was unfortunate that the High Court chose to pass sentence on Z according to s 213 of the CPC, which compelled it to sentence the boy to be detained during the President's pleasure.

5 This article is structured thus: Part II sets the background for the article, where I identify and briefly discuss the dominant principles of sentencing in Singapore, before examining the court's particular obligation to have regard to the "welfare" of a young person when sentencing him or her. Part III then examines three possible responses to the clash in mandatory and discretionary wordings of s 213 of the CPC and s 38(1) of the CYPA respectively. In particular, I explain how s 38(1) of the CYPA can prevail by means of statutory interpretation, and also why it should prevail in the light of the court's obligation to have regard to the welfare of the young person whom it sentences. Part IV proceeds to analyse the *Anthony Ler* case. I show why *Anthony Ler* is an appropriate case for the court to have invoked s 38(1) of the CYPA, by distinguishing it from other previous cases where the court had imposed that sentence. I appreciate that relying upon the technicalities of statutory interpretation to argue that s 38(1) of the CYPA prevails over s 213 of the CPC is only a stopgap measure. Hence, in Part V, I recommend legislative reform of certain provisions so that it will become patently clear that there is discretion whether or not to sentence a young person convicted of murder to be detained.

Sentencing in Singapore

6 This part sets the background for my article, where I briefly introduce the principles and practice of sentencing in Singapore. I begin

by looking at the classic principles of sentencing that form the theoretical framework of sentencing law in Singapore, and identifying which of these principles are dominant in practice. I then focus on the sentencing of young persons, and discuss the court's duty to have regard to their "welfare" when sentencing them. I explain how the notion of "welfare" impinges on the sentencing process by discussing how the court is envisaged to discharge its sentencing duty under the "welfare model" of juvenile justice.

General principles and practice of sentencing in Singapore

7 The High Court, the District Courts, and the Magistrates' Courts are responsible for administering criminal justice within Singapore,[6] and are required to pass sentence according to law.[7] Passing sentence according to law essentially means, *inter alia*, to pass a sentence in accordance with "established judicial principles".[8] The classic principles of sentencing espoused in the English Court of Appeal case of *R v Sargeant* have become such "established judicial principles" that inform local sentencing law.[9] In that English case, Lawton LJ expressed:

> What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply those facts the classic principles of sentencing. Those classical principles are summed up in four words: *retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.*[10]

6 CPC, *supra*, n 4, s 6.

7 *Ibid*, s 180(n)(ii) ("[I]f the court finds the accused guilty or a plea of guilty is recorded against him, it shall record a conviction and pass sentence according to law either forthwith or on such day as the court may appoint"), and s 192(2) ("If the court finds the accused guilty or if a plea of guilty has been recorded and accepted the court shall pass sentence according to law"). The former provision applies to the District Courts and the Magistrates' Courts, whereas the latter provision applies to the High Court.

8 *PP v Tan Fook Sum* [1999] 2 SLR 523 at [14], HC ("*Tan Fook Sum*").

9 Peter English envisaged this in 1981. See Peter English, "Sentencing in Singapore" (1981) 23 Mal LR 1 at 19: "*R v Sargeant* … may come to occupy [a] pre-eminent position … in the reserves of judicial wisdom drawn upon by sentencers in Singapore". Contemporary cases have proved him correct: see, *eg*, *Tan Fook Sum, ibid* at [15]; *PP v Ng Bee Ling Lana* [1992] 1 SLR 635 at 637F–G, HC; *Lee Hong Lim v PP* [1992] 1 SLR 902 at 904A, HC. See also *Amir Hamzah bin Berang Kuty v PP* [2003] 1 SLR 617 at 634A, HC; *Chua Tiong Tiong v PP* [2001] 3 SLR 425 at [31], HC. See generally District Judge Jasvender Kaur *et al*, *Sentencing Practice in the Subordinate Courts* (Singapore: Butterworths, 2000) ch 3 at pp 48–50.

10 *R v Sargeant* (1974) 60 Cr App R 74 at 77, CA [emphasis added].

8 However, it transpires that in practice, retribution and deterrence have been and are the dominant sentencing principles. In 1961, Professor Tommy Koh wrote:

> [T]he dominant penal philosophy of Singapore's judiciary is a retributionist one … our judges generally *give greater emphasis to retaliatory and quantitative retribution and deterrence than to other objectives* such as the needs of the individual offender and how best to reform him.[11]

In contemporary times, the practitioners' guide, *Sentencing Practice in the Subordinate Courts*, expressed that "it is plain that the principal sentencing philosophy of the courts is to *give paramount consideration to the public interest*".[12] As to how the public interest can be served, the Singapore High Court in *PP v Tan Fook Sum* cited[13] the following passage from the English High Court case of *R v Ball*:

> In deciding the appropriate sentence, a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. *A proper sentence, passed in public, serves the public interest in two ways.* It might *deter others who may be tempted to try crime* as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also *deter the particular criminal* from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.[14]

In *R v Ball*, serving the public interest was framed in terms of general deterrence (deterring like-minded offenders other than the particular offender at hand) and specific deterrence (deterring the particular

11 Tommy Koh, "The Sentencing Policy and Practice of the Singapore Courts" (1965) 7 Mal LR 291 at 294 [emphasis added].

12 Kaur, *supra*, n 9 at p 51 [emphasis added], citing *Tan Fook Sum*, *supra*, n 8 (the court, in turn, quoted a passage from *R v Ball* and expressed that the passage "emphasise[s] the judicial role in sentencing which is based on advancing the public interest": see *infra*, n 14 at 533E–G and the accompanying text), and *Sim Gek Yong v PP* [1995] 1 SLR 537 at [19], HC ("The first and foremost consideration in this balancing process, however, must be the public interest"). The Singapore Court of Appeal subsequently endorsed the "public interest principle" in *Sim Gek Yong*: see *PP v Quek Loo Ming* [2003] 1 SLR 315 at [13], CA. The "public interest principle" espoused in *Sim Gek Yong* and *Tan Fook Sum* was subsequently followed: see, *eg*, *Balasubramanian Palaniappa Vaiyapuri v PP* [2002] 1 SLR 314 at [46], HC; *Leaw Siat Chong v PP* [2002] 1 SLR 63 at [10], HC.

13 *Tan Fook Sum*, *supra*, n 8 at 544E–G.

14 *R v Ball* (1951) 35 Cr App R 164 at 165–166, HC [emphasis added].

offender at hand).[15] This explains why "the sentencing principle which is *most often used* in advancing the public interest is the *deterrence principle*".[16] In *Tan Fook Sum*, the court also expressed that advancing the public interest can also sometimes mean quelling the sense of outrage felt by the community towards the commission of particular types of crime.[17] The court continued by saying that, in that sense, the public interest principle is the retributive principle[18] since punishing the offender to reflect the court's disapproval, on behalf of the community, of certain types of criminal conduct, is an aspect of the retributive principle.[19] Evidently, the principles of retribution and deterrence maintain a contemporary stronghold over sentencing practice in Singapore. Whilst that may be true for the sentencing of adult offenders in our criminal justice system, retributive and deterrent considerations generally do not feature as strongly where the sentencing of young

[15] See *Lim Sin Han Andy v PP* [2000] 2 SLR 818 at [18], HC ("The deterrence of the individual offender, and others who might be tempted to commit the offence, is therefore necessary to advance the public interest"); *Tan Fook Sum*, *supra*, n 8 at [19] ("[T]hus stated the public interest principle is the deterrence principle"). The deterrence principle is commonly associated with the utilitarian theory of criminal law. The utilitarian theory of criminal law focuses on the prevention of harm, and is typically achieved through deterrence. For a discussion of the utilitarian theory of criminal law, see generally Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (J H Burns & H L A Hart eds) (London: Athlone Press, 1970), ch 13 at pp 158–164. For a modern rendition of the classic utilitarian theory, see Richard Posner, "An Economic Theory of the Criminal Law" (1985) 85 Colum L Rev 1193.

[16] Kaur, *supra*, n 9 at 51 [emphasis added]. See also Yong Pung How CJ, "Anchoring Justice", keynote address to the 12th Subordinate Courts Workplan Seminar (May 2003)<http://www.supcourt.gov.sg/supcourt/upload/speeches/2003/ DOC222.pdf> at para 9 ("The Government recognises that deterrence remains the cornerstone of our penal philosophy. Our sentencing policies must continue to reflect the importance of public order and discipline").

[17] *Tan Fook Sum*, *supra*, n 8 at [20].

[18] *Ibid*.

[19] *Ibid* at [16], citing *R v Davies* (1978) Cr App R 207 at 210, CA ("Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct"), and *R v Sargeant*, *supra*, n 10 at 77 ("[S]ociety, through the courts, must show its abhorrence of particular types of crime and the only way in which the courts can show this is by the sentences which they pass"). See also *Moey Keng Kong v PP* [2001] 4 SLR 211; and *Chia Kah Boon v PP* [1999] 4 SLR 72 at [11], [15], HC ("The fines imposed have to be fixed at a level which would be sufficiently high to achieve [*inter alia*, the objective of] retribution, in the sense of reflecting society's abhorrence of the offence"). It should be noted that the courts are using the term "retribution" or "retributive principle" loosely. Strictly speaking, the retributive theory of criminal law does not take into account the feelings of the community or society when punishing the offender; it punishes the offender on the sole basis of desert: see Michael Moore, *Placing Blame* (Oxford: Clarendon Press, 1997), ch 2 at p 89. An offender deserves to be punished only if, and to the extent that, the offence is culpable in that it reflects the offender's will. Retributive theory therefore insists on the culpability of the offender, and that punishment is proportionate to the degree of culpability: see Victor V Ramraj, "Murder Without an Intention to Kill" [2000] Sing JLS 560 at 585.

persons is concerned. Instead, considerations of "rehabilitation" and "welfare" are more typical.

Sentencing young persons: "welfare" as obligatory consideration

9 Generally speaking, there is an axiomatic difference between the nature of offenders, who are young persons, and that of adult offenders. This was judicially recognised by the Singapore High Court in *PP v Mok Ping Wuen Maurice*, where Yong Pung How CJ expressed:

> Young offenders [who are 21 years old and below][20] are in their formative years and chances of reforming them into law-abiding adults are better. The corrupt influence of a prison environment and the bad effects of labelling and stigmatisation may not be desirable for young offenders. *Compassion is often shown to young offenders on the assumption that the young "don't know any better" and they may not have had enough experience to realise the full consequences of their actions on themselves and on others. Teens may also be slightly less responsible than older offenders, being more impressionable, more easily led and less controlled in their behaviour.*[21]

Professor Barry Feld stated the difference between the natures of juveniles[22] and adults in some detail:

> Developmental psychological research suggests that while minors may be abstractly aware of "right from wrong", they are less capable than adults of making sound judgments or moral distinctions. Relative to adults, juveniles are less able to form moral judgments, less capable of controlling their impulses, and less aware of the consequences of their acts. Juveniles are less responsible, hence less blameworthy, than adults; their diminished responsibility means that they "deserve" a lesser punishment than an adult who commits the same crime. In part, this lessened capacity stems from a lower appreciation of the consequences of their acts. Moreover, the crimes of children are seldom their fault alone; society shares at least some of the blame for their offenses as a result of their truncated opportunities to learn to make correct choices. Indeed, to the extent that the ability to make

20 By this definition, an offender, who is a young person (*supra*, n 2), is also rightfully a young offender.

21 *PP v Mok Ping Wuen Maurice* [1999] 1 SLR 138 at [21], HC ("*Mok Ping Wuen Maurice*"). Yong CJ earlier expressed similar sentiments, albeit extra-judicially, in his address to the 8th Subordinate Courts Work Plan Seminar in 1999: see Yong Pung How CJ, "Justice 21 @ Subordinate Courts: Administering Justice in the Knowledge Academy", keynote address to the 8th Subordinate Courts Workplan Seminar (April 1999) <http://www.ejustice.gov.sg/archives/ cj990410.pdf> at para 22 ("Young offenders are easier to rehabilitate, and they are often not fully aware of the seriousness of their callousness").

22 A juvenile is a person who is seven years of age or above and below the age of 16 years: see the CYPA, *supra*, n 5, s 2(1). By this definition, a young person (*supra*, n 2) is also rightfully a juvenile.

> responsible choices is learned behavior, the dependent status of youth systematically deprives them of opportunities to learn to be responsible. Finally, even where a youth is aware of the general criminal prohibition, juveniles are more susceptible to peer group influences and group process dynamics than their older counterparts.[23]

Professor Tan Yock Lin also wrote[24] that juvenile offenders are generally not beyond help and rehabilitation, and there are more than reasonable possibilities of re-educating them in proper and lawful social habits and conduct. Moreover, they have the prospect of life before them, and this should not be destroyed because they commit crimes out of mere indiscretion and folly of youth. As such, special care ought to be exercised when deciding upon what sanctions to apply to them.

10 Such is the nature of offenders who are young persons that justifies exercising especial caution when deciding what sentence to mete out to them, if not to treat them differently from adult offenders. However, this does not mean that the dominant principles governing the sentencing of adult offenders are rendered wholly inapplicable in the case of offenders who are young persons. Advancing the public interest may be a consideration that is more commonly associated with adult offenders.[25] However, this is unlikely to be totally disregarded by the court when sentencing young persons. It is just that "advancing the public interest" is given a much narrower interpretation. In *PP v Mok Ping Wuen Maurice*, Yong CJ cited[26] with approval the following passage from the English Court of Appeal case of *R v Smith*:[27]

> In the case of a young offender there can hardly ever be any conflict between the public interest and that of the offender. The public have no greater interest than that he should become a good citizen. The difficult task of the court is to determine what treatment gives the best chance of realizing that object. That realization is the first and by far the most important consideration.

23 Barry C Feld, "The Juvenile Court Meets the Principle of Offense: Punishment, Treatment and the Difference it Makes" (1998) 68 B U L Rev 821 at 899–900. Similar sociological, philosophical, and psychological or psychiatric arguments are put forth in defence of an offender who is a child (a person who is below the age of 14 years: see the CYPA, *ibid*, s 2(1)): see, *eg*, Chris Jenks, "Sociological Perspectives and Media Representations of Childhood", David Archard, "Philosophical Perspectives on Childhood", and Quetin Spender & Alexandra John, "Psychological and Psychiatric Perspectives" in Julia Fionda, *Legal Concepts of Childhood* (Oxford: Hart, 2001) at pp 19, 43 and 57 respectively.

24 Tan Yock Lin, *Criminal Procedure* (Singapore: Butterworths, 1996) vol 2, ch 21 at para 1.

25 *Supra*, para 8.

26 *Mok Ping Wuen Maurice*, *supra*, n 21 at [23].

27 *R v Smith* (1964) Crim LR 70, CA.

In *R v Smith*, advancing the public interest is aligned to treating the offender so that he or she can ultimately be rehabilitated to become a good citizen of society. As such, rehabilitation[28] and reintegration into society[29] should be the dominant considerations or motives when sentencing young persons. Correction, help, and guidance are to be emphasised wherever possible when dealing with young persons to reflect their special needs.[30]

11 Section 28(1) of the CYPA imposes a specific duty on every court in dealing with such offenders to have regard to their "welfare". This duty applies to the court when it sentences young persons since sentencing is one way a court "deals with" them.[31] The welfare of the young person is an obligatory, though not the paramount,[32] consideration that the court is bound to take into account. In practice, though, it is difficult to determine whether a court has discharged its duty to take into account welfare in sentencing. This is because s 28(1) of the CYPA has not received active and specific consideration by the Singapore courts.[33] The superior courts in Singapore rarely cite the

28 *Mok Ping Wuen Maurice*, *supra*, n 21 ("Rehabilitation is the dominant consideration where the offender is 21 years and below"); Yong, *supra*, n 21 ("[W]e have traditionally been concerned with the rehabilitation and reintegration of the juvenile back into society. These must, of course, remain our dominant motives").

29 Yong, *ibid*.

30 Tan, *supra*, n 24 at para 1402.

31 *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407 at 496D, HL ("*Venables*"), *per* Lord Browne-Wilkinson ("It is clear from the statutory direction [of s 44 (1)] that in dealing with children [or young persons] (whether *by sentencing* or otherwise) a court is bound to take into account the welfare of the child [or young person]") [emphasis added].

32 *Quaere* whether this should be so. See the United Nations *Convention on the Rights of the Child*, GA Res 44/25, Annex, UN GAOR, 44th Sess, Supp No 49, UN Doc A/44/49 (1989) 167 ("CRC"), Art 3 ("In all actions concerning children (persons under 18 years old: see the *Convention on the Rights of the Child*, article 1) … undertaken by … courts of law, the best interests of the child *shall be a primary consideration*") [emphasis added]. See also the concluding observations of the United Nations Committee on the Rights of a Child to Singapore's initial report submitted to the Committee (an obligation under article 44 of the CRC) following Singapore's accession to the CRC on 5 October 1995 (CRC/C/51/Add 8 (17 March 2003) <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/43c387b0490beea5c1256d36002a591e/$FILE/G0340780.pdf>): CRC/C/15/Add 220 (27 October 2003) <http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/3a6b2cf41b35df45c1256df0005b1332/$FILE/G0344634.pdf> at para 26 ("The Committee is concerned that [Art 3 of the Convention] is not fully reflected in [Singapore's] legislation"). It recommends (at para 27) that Singapore "review[s] [her] legislation… to ensure that article 3 of the Convention is duly reflected… and that [it] is taken into account when… judicial… decisions are made". *Contra* the Guardianship of Infants Act (Cap 122, 1985 Rev Ed), s 3 (welfare of infant to be paramount consideration).

33 This situation is not peculiar to Singapore. Caroline Ball wrote that it was possible to note what little active and specific consideration the UK courts had been given to s 44(1) of the UK Children and Young Persons Act 1933, *infra*, n 67 (in *para*

section. The Juvenile Court, a lower court, did so in several juvenile arrest cases.[34] Yet, even on those occasions, the court merely cited the section without interpreting it. One should be careful not to treat the Juvenile Court's discussion[35] about the concept of "restorative justice" as shedding any light on s 28(1) of the CYPA. This is because "restorative justice" is the Juvenile Court's own unique guiding philosophy of administering juvenile justice,[36] and therefore, one should not confuse the notion of "welfare" in s 28(1) of the CYPA with the separate and distinct concept of restorative justice. The notion of "welfare" largely remains as an abstract concept. Notwithstanding this, one can seek to understand how welfare impinges on the sentencing of young persons by referring to how a court is envisaged to sentence under the "welfare model" of juvenile justice.

Understanding the notion of "welfare": recourse to the "welfare model" of juvenile justice

12 Different theories of juvenile justice have developed throughout the history of juvenile justice.[37] The theories of juvenile justice are often understood and represented in terms of conceptual "models". These models function as convenient "intellectual shorthand"[38] embodying various ideologies of and approaches to criminal justice for juveniles. I briefly discuss how a court is envisaged to exercise its sentencing duty under the welfare model.

materia with s 28(1) of the CYPA, *supra*, n 5): see Caroline Ball *et al*, *Young Offenders: Law, Policy and Practice* (2nd Ed) (London: Sweet & Maxwell, 2001) at para 11.26.

34 See, *eg*, *Y (a minor) v PP* Juvenile Arrest Case Nos 1710–1711 of 2002 (18 February 2003) at [5]; *Muhammad Yusaffendi bin Mohd Yusoff v PP* [2001] SGMC 29 at [8]; *Pereira Denise Esther v PP* [2001] SGMC 25 at [6].

35 See *Y (a minor) v PP*, *ibid* at [6]–[7]; *Muhammad Yusaffendi bin Mohd Yusoff v PP*, *ibid* at [9]–[10]; *Pereira Denise Esther v PP*, *ibid* at [7]–[8].

36 For more information about the Juvenile Court of Singapore's "restorative justice" model of juvenile justice, see <http://www.subcourts.gov.sg/Juvenile/abt_JJ_philosophy.htm>. For a discussion of restorative justice, see generally John Braithwaite, "Restorative Justice" in *The Handbook of Crime & Punishment* (Michael Torny ed) (New York: Oxford University Press, 1998) ch 12 at pp 322–344.

37 It is beyond the scope of this paper to examine these theories in any great detail. It may suffice, though, to generally point out that the history of juvenile justice is generally characterised as a periodic oscillation between the "welfare" and "justice" theories or models of juvenile justice. For further discussion, see Allison Morris & Henri Giller, *Understanding Juvenile Justice* (London: Croom Helm, 1987) chs 1 and 3; Andrew Rutherford, *Growing Out of Crime: The New Era* (Waterside: Winchester, 1992) chs 2 and 3. See also Thomas J Bernard, *The Cycle of Juvenile Justice* (Oxford University Press: London, 1992) ch 1.

38 Ngaire Naffine, "Philosophies of Juvenile Justice" in F Gale *et al*, *Juvenile Justice: Debating the Issues* (New South Wales: Allen & Unwin, 1993) at p 2.

13 Under the welfare model, the court does not judge the juvenile offender through the critical eyes of an impartial and harsh punisher. It normally does not perceive the juvenile offender as having exercised autonomous, conscious, and deliberate choice to commit crime, after weighing committing crime and obedience to law, and deciding that committing crime is more advantageous in the circumstances.[39] Instead, the court as *parens patriae*, or the "stern but caring parent"[40] sees the juvenile offender as falling unwittingly in trouble with the law, and in need of help, guidance, encouragement and correction. The court appreciates that juvenile offenders are to be understood in terms of the circumstances in which they are found.[41] These offenders do not determine their circumstances; circumstances largely determine what they do.[42] Often, their parents have either failed to alleviate or remove negative influences present in the juveniles' circumstances, or they have failed to remove the juveniles from such negative influences.[43] On a broader note, society has failed to provide them with adequate opportunities to learn to make correct choices and decisions in the circumstances.[44] Coupled with the susceptibility of adolescent nature, such parental and societal failures are contributory factors as to why juveniles act out of character and commit crime. The court therefore acknowledges that juveniles are not wholly responsible for the crimes they commit.

14 As such, the court is less concerned with punishing juvenile wrongdoers according to the seriousness of their crimes. Instead, it is committed to diagnose the underlying problems of juveniles who commit crime, and to treat these problems in some therapeutic way.[45] In other words, the court focuses more on the nature of the *actor* (the juvenile) than on that of the *act* (the crime committed); it is more concerned with the offender's perceived needs that the particular

39 Julia Fionda, "Youth and Justice" in Fionda, *supra*, n 23, p 77 at 78.

40 *Ibid* at 77.

41 Naffine, *supra*, n 38 at p 3. This is consistent with the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, Annex, UN GAOR, 96th Plen Mtg, UN Doc A/RES/40/33 (1985) ("Beijing Rules"), Art 5.1 ("The juvenile justice system… shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence") and Art 17.1(a) ("The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of society").

42 Naffine, *ibid*.

43 There is even a suggestion that homicidal behaviour can run in the family, and can pass from one generation to the next: see Bong Fortin, "Can Homicidal Trait Run in the Family?" *Los Angeles Times*, republished in *The Straits Times* (29 June 2003) at p 15.

44 Feld, *supra*, n 23.

45 Michael King & Christine Piper, *How the Law Thinks About Children* (2nd Ed) (England: Arena, 1995) at p 5.

criminal conduct manifests, than on the criminal conduct *per se*.[46] Sanctions are meted out based on the perceived needs and interests of each individual juvenile offender, bearing in mind the ultimate goal of improving the young person's future overall well-being.[47] However, this does not mean showing undue compassion or leniency to the juvenile and excusing him totally from responsibility of, or accountability to, his offending conduct.[48] The special needs of the juvenile may be a legitimate consideration and a good enough reason to treat the juvenile with kindness.[49] However, the court's role is ultimately in dispensing justice, not in providing social services or in child reform.[50] It is not necessarily the case that the sanctions imposed have to be entirely rehabilitation-centric. The court may well impose a sanction that has a punitive element if it feels that it is in the young person's benefit and best interest to do so. Having said that, it is appropriate to discuss detention during the President's pleasure as a sanction.

Putting detention during the President's pleasure in Singapore in perspective: appreciating the severity of the sentence

15 Detention during the President's pleasure is a form of indefinite detention. This means there is no prescribed legal minimum or maximum period of detention. At first sight, indefinite detention seems to rob the offender of the benefit of certainty, because the offender has no idea as to the length of the detention at the end of his or her trial. The offender is thus less able to arrange his or her affairs accordingly. On the other hand, although a fixed period of detention ordered at trial may be certain, the period so ordered is likely to be unrealistic in that it will either be too short or too long. This is because offenders are released according to the court's postulation at trial as to the rate at which they may progress and improve during detention. This means that the fixed detention regime is inapt to accommodate future changing circumstances, that is, where the offender's rate of rehabilitation and improvement is different from that which is previously postulated by the court at trial. In the case of indefinite detention, certainty is traded off for flexibility. To the extent that offenders are released according to the rate at which they actually

46 Naffine, *supra*, n 38 at p 3.

47 This is also consistent with the *Beijing Rules*, *supra*, n 41, Art 5.1 ("The juvenile justice system shall emphasize the well-being of the juvenile …") and Art 17.1(d) ("The well-being of the juvenile shall be the guiding factor in the consideration of her or his case").

48 Yong Pung How CJ, keynote address to the Youth Justice Conference 2000: Managing a World in Transit (September 2000) <http://www.ejustice.org.sg/archives/cjspeechyj2k.doc> at para 7.

49 Tan, *supra*, n 24 at para 1404.

50 *Ibid*.

progress and improve during detention, the indefinite detention regime is able to respond better to the changing needs and interests of offenders while they are in it.

16 One can sing praises of the indefinite detention regime in general, but has to take stock when the regime comes in the form of detention during the President's pleasure. The flexibility that exists in an indefinite detention regime is fettered in the case of detention during the President's pleasure. Singapore's initial report to the United Nations Committee on the Rights of the Child described what the sentence entails in these terms:

> They [the detainees] are eligible for consideration for release after *serving about 13 years of imprisonment.* There is no legal minimum or maximum period of detention. The cases of prisoners detained during the President's Pleasure are reviewed internally *every four years* and the report is forwarded to the Minister for Home Affairs and the President. After the tenth year of detention, the review is carried out on an annual basis. Recommendations for release is made by the Prisons Department and forwarded to the Minister. The prisoner will be released upon an Order from the President.[51]

Although the report stated that there is no legal minimum period of detention, it acknowledged that in practice, detainees are eligible for consideration for release after serving about 13 years of imprisonment. Even if it were accepted that 13 years is only an average figure, it is also noted that the first internal review conducted by the Prisons Department to make recommendations for release takes place four years after the offender is first detained. Arguably, this means that an offender has to be detained for at least four years, if not longer, before he is considered for release. Unwittingly, this translates into a minimum period of detention, albeit an unofficial and informal one. I explained earlier that certainty is traded off in an indefinite detention regime. The trade-off may be worthwhile because of the considerable flexibility that can be gained out of an indefinite detention sentence, which develops in tandem with the changing needs and interests of the offender. However, where detention during the President's pleasure is concerned, the trade-off does not appear enticing. This is because flexibility may be curtailed by an unfortunate minimum period of detention, which arises out of practice or how the system of releasing detainees is structured. Meanwhile, nothing is being said about a maximum period of detention.

[51] Singapore's Initial Report to the United Nations Committee on the Rights of the Child, CRC/C/51/Add 8, *supra*, n 32, ch 4 at p 50, para 217. See also ch 3 at p 25, para 101.

17 It must also be appreciated that the sentence of detention during the President's pleasure is imposed in lieu of the death sentence. The death sentence, which deprives a person of the right to live, is regarded as a very severe sentence. This is because it curtails a right that has constitutional sanctity,[52] and enjoys international stature.[53] As detention during the President's pleasure is the alternative to the death sentence, it is difficult to dispute that it, too, is a very severe sanction. It is also a sanction with a punitive element.[54] The court is entitled to impose sanctions with a punitive element while still keeping true to its welfare mandate if it thinks those sanctions will benefit the offender's future overall well-being. This has to be right if "welfare" is not to be abused as an excuse for untrammelled leniency towards offenders who are young persons. However, it means having to accept to some extent that the court can justify the punitive element in the sanction thus: it is still looking out for the juvenile's welfare, despite punishing him or her because it is of the opinion that punishment is for his or her own good. This justification already does not sit well with some.[55] The justification is likely to attract further detractors when applied to detention during the President's pleasure. This is because it involves taking the justification one step further, and to say that severe, and not just mere, punishment is for the juvenile's own good.

18 In summary, the principles of retribution and deterrence largely inform the sentencing of adult offenders in Singapore. However, where the sentencing of young persons is concerned, rehabilitative and reintegration considerations are more dominant. In fact, the court is obliged to take into account the welfare of the young person when sentencing him or her. To this end, individual-based sanctions, rather than crime-based sanctions should be imposed on offenders who are young persons. However, such sanctions do not need to be wholly rehabilitative in nature; they can possess a punitive element if this is in the young person's benefit and best interests. Detention during the President's pleasure is a punitive sentence; it is also a very severe one, since it is imposed in lieu of the death penalty. There is already some difficulty in convincing some that the court is keeping faithful to its welfare mandate when punishing young person offenders by arguing that punishment is for the offender's own good. This is *a fortiori* the case when it is argued that severe, and not just mere, punishment is for the

[52] Constitution of the Republic of Singapore (1999 Rev Ed), Art 9(1).

[53] *Universal Declaration of Human Rights*, GA Res 217 (III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71, Art 3.

[54] For judicial recognition of this see, *eg*, *Venables*, *supra*, n 31, Lord Goff (at 481C–E), Lord Browne-Wilkinson (at 503C), Lord Lloyd (at 509E-G), Lord Steyn (at 519D–F) and Lord Hope (at 530B–C).

[55] See, *eg*, Winston Gordon *et al*, *Introduction to Youth Justice*, (2nd Ed) (Winchester: Waterside Press, 1999) at p 98, where this justification has been labelled as "dubious".

offender's own good. Certainty is traded off for flexibility in indefinite detention regimes. However, in the case of detention during the President's pleasure, flexibility is curtailed by an informal or unofficial minimum period of detention, which arises out of practice or how the system of releasing detainees is structured. With this background put in place, I next proceed to examine the provisions that pertain to the sentencing of young persons convicted of murder.

Sentencing young persons convicted of murder

19 Section 213 of the CPC and s 38(1) of the CYPA are relevant to the sentencing of young persons convicted of murder. In this part, I discuss three possible responses to s 213 of the CPC which says that detention during the President's pleasure is mandatory on the one hand, and s 38(1) of the CYPA which says that detention is discretionary on the other.

20 When discussing about how persons convicted of murder are to be sentenced, the general starting point is s 302 of the Penal Code. Section 302 of the Penal Code unequivocally prescribes death as the mandatory punishment for murder.[56] However, one exception is where a person convicted of murder is found to be below 18 years old at the time when he committed murder. In such cases, s 213 of the CPC applies to prohibit the court from imposing the death sentence. A mandatory sentence of detention is also substituted for the mandatory death sentence:

> Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years but instead of that the court shall sentence him to be detained during the President's pleasure …

A person convicted of murder, who is found to be below 18 years old at the time when he committed murder, can also be a young person, provided he is below 16 years old when he committed murder. This means that, apart from s 213 of the CPC, s 38(1) of the CYPA also potentially applies:

> Where a … young person is convicted of murder … and the court is of opinion that none of the other methods by which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period as may be specified in the sentence.

[56] Penal Code (Cap 224, 1985 Rev Ed), s 302 ("Whoever commits murder shall be punished with death"). The elements that have to be proved for a murder charge to be properly made out are found in s 300.

A difficult situation thus arises. As Professor Tan aptly expressed in *Criminal Procedure*, it appears that where a young person is convicted of murder, the CPC says that he "shall" but the CYPA says that he "may" be detained.[57] Clearly, s 213 of the CPC is at odds with s 38(1) of the CYPA because of the clash in mandatory and discretionary wordings.[58]

21 There are three possible responses to this: firstly, one may dismiss the inclusion of murder in s 38(1) of the CYPA as an unintended and accidental drafting error, thus suggesting that s 38(1) of the CYPA does not really intend to afford discretion to the court as to whether or not to sentence a young person convicted of murder to be detained. Secondly, one may acknowledge the clash in mandatory and discretionary wordings but argue that it is insignificant because s 213 of the CPC and s 38(1) of the CYPA does not operate contemporaneously to bind the court. Technically, the High Court and the Juvenile Court are the only two courts that can try a young person who commits murder.[59] Only s 213 of the CPC and not s 38(1) of the CYPA binds the High Court, whereas only s 38(1) of the CYPA, and not s 213 of the CPC, binds the Juvenile Court. Thirdly, one may take the view that both s 213 of the CPC and s 38(1) of the CYPA bind the High Court, whereas only the latter provision binds the Juvenile Court. The clash in mandatory and discretionary wordings will become an issue when the High Court chooses to pass sentence, in which case I suggest that the issue can be resolved in favour of s 38(1) of the CYPA.

22 Before discussing each of these responses in turn, I find it helpful to briefly state the general approach to statutory interpretation in Singapore. Section 9A of the Interpretation Act[60] is instructional on

57 Tan, *supra*, n 24 at para 2154.

58 Singapore made no apology for and further perpetuated this mandatory-discretionary conundrum in her initial report to the United Nations Committee on the Rights of a Child: see *supra*, n 32 at p 49, para 215 ("However, for certain grave offences such as murder… [a young person] *may* be ordered to be detained in a place of detention"). *Cf ibid* at p 50, para 217: "Persons who are below the age of 18 at the time of commission of a capital offence *will* be detained at the President's pleasure in lieu of the death penalty" [emphasis added]. See also *ibid* at p 25, para 100; *cf* para 101.

59 Note that the Juvenile Court had no jurisdiction to try the offence of murder before the CYPA was amended in October 2001, because it is an offence triable only by the High Court: see the CYPA, *supra*, n 5, s 33(1)(a). Although the Juvenile Court can now try the offence of murder, certain preconditions must first be satisfied: firstly, the PP must apply to the Juvenile Court to try such an offence, and the legal representative of the child or young person concerned must consent to the offence being tried by the Juvenile Court (CYPA, s 33(2)); and secondly, the child or young person concerned must also not be jointly charged with another person who is 16 years old and above (CYPA, s 33(3)). Also, the Juvenile Court has no jurisdiction to try a person who has attained the age of 16 on the date of commencement of the hearing of the charge: CYPA, s 33(6).

60 Interpretation Act (Cap 1, 1999 Rev Ed).

this point, and essentially requires Singapore courts to interpret statutory provisions purposively:

> In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.

The Constitution of the Republic of Singapore Tribunal expressed in *Constitutional Reference No 1 of 1995* that the purposive approach towards statutory interpretation is adopted so as to give effect to Parliament's will and intent.[61] It essentially requires interpreters to read the words of the Act in their entire context, and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.[62] Bearing this express principle of statutory interpretation in mind, I proceed to discuss the three responses to the clash in mandatory and discretionary wordings of s 213 of the CPC and s 38(1) of the CYPA as outlined above.

Dismissing the inclusion of "murder" in s 38(1) of the CYPA

23 I contend that the inclusion of murder in s 38(1) cannot be dismissed as an accidental or unintended drafting error. I support this contention by referring to the legislative history of s 38(1) of the CYPA. Section 52(2) of the Children and Young Persons Ordinance 1949[63] ("the 1949 Ordinance") is the direct precursor of s 38(1) of the CYPA. It is exceptional that s 52(2) of the 1949 Ordinance is preserved almost[64] word for word in ss 38(1) and 38(2) of the CYPA. Section 52(2) of the 1949 Ordinance was then found in Part III of the Ordinance. This section was also *in para materia* with s 53(2) of the United Kingdom Children and Young Persons Act 1933 ("UK CYPA 1933").[65] Section 53(2) of the UK CYPA 1933 originally states:

> Where a … young person is convicted on indictment of an attempt to murder, or of manslaughter, or of wounding with intent to do grievous bodily harm, and the court is of opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period as may be specified in the sentence …

61 *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201 at 210G–I.
62 *Ibid*.
63 Children and Young Persons Ordinance 1949 (No 18 of 1949), s 52(2), as amended by the Children and Young Persons (Amendment) Ordinance 1954 (No 18 of 1954), s 9 (inclusion of the offence of attempted murder) ("1949 Ordinance").
64 Only non-essential words such were "Ordinance" and "Governor" in the 1949 Ordinance were replaced with "Act" and "Minister" in the CYPA, *supra*, n 5.
65 Children and Young Persons Act 1933 (23 Geo V, c 12) (UK) ("UK CYPA 1933").

Although the then Legislative Council of the Colony of Singapore acknowledged that Part III of the 1949 Ordinance was based on the UK CYPA 1933,[66] it was clear that the drafters of the 1949 Ordinance did not reproduce s 53(2) of the UK CYPA 1933 word for word: whilst s 52(2) of the 1949 Ordinance was drafted to include the offence of murder within its ambit, s 53(2) of the UK CYPA 1933 was not drafted as such. Thus, when s 53(2) was read with s 53(1) of the UK CYPA 1933,[67] it was clear that UK courts were required to sentence a young person who was convicted of murder to be detained during his Majesty's pleasure. Moreover, that position has since been put beyond argument in the UK with further legislative amendments. The UK Powers of Criminal Courts (Sentencing) Act 2000 repealed the whole of s 53 of the UK CYPA 1933.[68] Section 90 of the Powers of Criminal Courts (Sentencing) Act 2000 now states even more clearly that:

> Where a person convicted of murder appears to the court to have been aged under 18 at the time the offence was committed, the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure.[69]

24 The position was and is still not as clear-cut in Singapore. Singapore also had the equivalent of the original s 53(1) of the UK CYPA 1933 in the 1949 Ordinance[70] and the CPC.[71] However, unlike the

[66] See Colony of Singapore, *Proceedings of the First Legislative Council,* 2nd Sess, 1949 (15 March 1949), p B92 at B93 (T P F McNeice).

[67] UK CYPA 1933, *supra*, n 65, s 53(1) ("Sentence of death shall not be pronounced on or recorded against a person under the age of eighteen years, but in lieu thereof the court shall sentence him to be detained during his Majesty's pleasure…")

[68] Powers of Criminal Courts (Sentencing) Act 2000 (c 6) (UK), s 165(4) and Schedule 12.

[69] See also the side-note which reads, "Offenders who commit murder when under 18: *duty* to detain at Her Majesty's pleasure" [emphasis added]. Prior to the enactment of the Powers of Criminal Courts (Sentencing) Act 2000, s 53(1) of the UK CYPA 1933, *supra*, n 65, was already amended to read: "A person convicted of an offence who appears to the court to have been under the age of eighteen years old at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life, nor shall sentence of death be pronounced on or recorded against any such person, but in lieu thereof the court shall (notwithstanding anything in this or any other Act) sentence him to be detained during Her Majesty's pleasure…": see Murder (Abolition of Death Penalty) Act 1965 (c 71) (UK), s 1(5).

[70] 1949 Ordinance, *supra*, n 63, s 52(1). Section 52(1) subsequently appeared as s 56(1) of the Children and Young Persons Ordinance (Cap 128, 1955 Rev Ed). This section was later deleted by the Laws of Singapore (Miscellaneous Amendments) Ordinance 1959 (No 38 of 1959), s 9(a). The deletion was to remove the conflict between s 56(1) and the CPC regarding the age below which a person may not be sentenced to death: Colony of Singapore, *Legislative Assembly Debates, Official Report* (18 March 1959), col 2190 at 2192 (E P Shanks, Attorney-General): see *infra*, n 71.

[71] Criminal Procedure Code (Cap 21, 1936 Rev Ed), s 268, as amended by the Criminal Procedure Code 1955 (No 13 of 1955), s 256. The amendment involved

UK, she also had to deal with the sentencing discretion that s 52(2) of the 1949 Ordinance afforded to her courts. It is tempting to treat the initial inclusion of the offence of murder in the 1949 Ordinance as an unintended and accidental drafting error. However, the fact is that the inclusion has since survived numerous amendments to the 1949 Ordinance, and appears in the current s 38(1) of the CYPA. The CYPA was only recently revised in October 2001.[72] This means that Singapore's Parliament had the recent opportunity to reconsider the inclusion. Had the inclusion been regarded as erroneous, surely Parliament would have amended it on that recent occasion, if not on other previous occasions when the CYPA was amended or revised. This is especially so in the face of recent legislative developments in the UK, which clarified that it is mandatory for UK courts to sentence young persons convicted of murder to be detained during Her Majesty's pleasure.[73] Singapore's Parliament must undoubtedly have been aware of such legislative developments in the UK. The fact that the offence of murder was not taken out from the ambit of s 38(1) of the CYPA must necessarily mean that Parliament intended for the offence to remain in s 38(1) of the CYPA. Therefore, if s 38(1) of the CYPA were to be interpreted purposively,[74] the inclusion of the offence of murder cannot be dismissed as a mere unfortunate drafting error. It means what it says, and it says that there is discretion whether or not to sentence a young person convicted of murder to be detained.

Section 38(1) of the CYPA and the High Court; s 213 of the CPC and the Juvenile Court

25 The Juvenile Court should not have to concern itself with the clash in mandatory and discretionary wordings of s 213 of the CPC and s 38(1) of the CYPA respectively. This is because s 213 of the CPC arguably does not bind the Juvenile Court. The Juvenile Court derives jurisdiction and power from the CYPA.[75] As such it is primarily, if not only, bound by the CYPA. Although it is such a *sui generis* court, s 32(4)

putting the age at which a man may be sentenced to death by hanging at 18 years (previously 16 years) at the time of the commission of the offence: "Report of the Select Committee Appointed to Examine and Report to the Legislative Council on the Bill the Short Title of which is the Criminal Procedure Code, 1954", Council Paper No 89 of 1954 in Colony of Singapore, *Proceedings of the Second Legislative Council*, 4th Sess, 1954/1955, p C680 at C681. The Legislative Council adopted the Select Committee's Report: see Colony of Singapore, *Proceedings of the Second Legislative Council*, 4th Sess, 1954/1955 (14 December 1954) at p B396.

72 Children and Young Persons (Amendment) Act 2001 (No 20 of 2001).

73 *Supra*, n 70 and the accompanying text.

74 *Supra*, para 22.

75 See the Subordinate Courts Act (Cap 321, 1999 Rev Ed), s 55 ("A Juvenile Court shall have the jurisdiction and powers conferred on it by the Children and Young Persons Act (Cap 38)").

of the CYPA says that the Juvenile Court is still bound by provisions of the CPC as if it were a Magistrate's Court, except in cases where the CYPA extends or modifies provisions of the CPC. It may be argued that s 38(1) of the CYPA modifies s 213 of the CPC, in that it makes a detention sentence, which is otherwise mandatory, discretionary. A plausible case can thus be made out that the Juvenile Court is not bound to sentence according to s 213 of the CPC. One may argue that the High Court also does not have to be concerned with the clash because only s 213 of the CPC binds it. This is because s 235 of the CPC states:

> When any youthful offender is convicted before any criminal court of an offence punishable by fine or imprisonment or by both, and whether or not the law under which the conviction is had provides that fine or imprisonment or both shall be imposed upon the person so convicted, that court may, instead of sentencing the youthful offender to pay a fine or awarding any term of imprisonment in default of payment of the fine, or of passing a sentence of imprisonment of any kind, deal with the youthful offender in the manner provided by the Children and Young Persons Act.

By this section, the High Court can exercise its discretion to deal with a young person in a way provided for by the CYPA (invoking s 38(1) of the CYPA is one such way) if it convicts the young person of an offence punishable by imprisonment or fine or by both.[76] Since the section does not also provide for an offence punishable by death, this implies that the High Court has no discretion to impose a sentence other than what is prescribed by s 213 of the CPC (that is, detention during the President's pleasure) in the case of a young person who is convicted of murder.

26 If that were the case, I submit that that part of s 38(1) of the CYPA, which relates to murder, will effectively be rendered otiose. This was particularly so prior to October 2001 when only the High Court had jurisdiction to hear murder cases. This does not give effect to the will and intent of Parliament to afford discretion to courts whether or not to sentence young persons convicted of murder to be detained during the President's pleasure.[77] It is therefore inconsistent with the purposive approach of statutory interpretation required of our courts.[78] I expect two countervailing arguments: firstly, the Juvenile Court can hear murder cases after its jurisdiction was amended in 2001. Because the Juvenile Court can now invoke that part of s 38(1) of the CYPA, which relates to murder, it is kept alive and not rendered otiose. Secondly, even if the Juvenile Court is barred from hearing a murder case because the preconditions for it to do so are not satisfied[79] and the case goes up to

[76] See, *eg*, *PP v Ong Li Xia* [2000] SGHC 149 at [5].
[77] See the discussion *supra*, paras 23–24.
[78] *Supra*, para 22.
[79] *Supra*, n 59.

the High Court, the High Court need not necessarily dispose of the case. After convicting the young person of murder, the High Court can choose not to proceed to pass sentence; instead, it can exercise its power to remit the case to the Juvenile Court for disposal.[80] The Juvenile Court may then deal with the offender in any way in which it might have dealt with him or her (including invoking that part of s 38(1) of the CYPA, which relates to murder), as if the offender had been tried and found guilty by the Juvenile Court.[81] In this way, that part of s 38(1) of the CYPA, which relates to murder, is also kept alive and not rendered otiose.

27 I grant that the Juvenile Court can invoke s 38(1) of the CYPA in practice, but argue this is difficult to accept as a matter of principle. It is unlikely that s 52(2) of the 1949 Ordinance (s 38(1) of the CYPA being its modern embodiment) was drafted with the Juvenile Court as the primary user in mind for two reasons. Firstly, the Juvenile Court did not have jurisdiction to try murder cases,[82] and thus could not invoke that part of the section, which relates to murder. This remained the case until after October 2001 when the Juvenile Court's jurisdiction was extended so that it could hear murder cases. Secondly, the words "convicted" and "sentence" in s 38(1) of the CYPA are inconsistent with a provision that is intended for the primary use of the Juvenile Court. This is because such words are generally not used in relation to children and young persons dealt with by the Juvenile Court.[83] One may argue that s 41(2) of the CYPA can be raised to "cure" the offending words. However, it is circumlocutory to expect this extra step to be taken if s 38(1) of the CYPA was really drafted so that it could be invoked primarily by the Juvenile Court.

28 Another implication of saying that the High Court has no discretion to impose a sentence other than that of detention during the President's pleasure on a young person convicted of murder is that the Juvenile Court would have greater sentencing powers than the High Court, since the Juvenile Court has discretion as to whether or not to impose a detention sentence. It is inconceivable that the High Court, which is a superior court of record, should have lesser sentencing powers in this respect than a Juvenile Court, which is an inferior court. For the foregoing reasons, I am of the view that, notwithstanding s 235

[80] CYPA, *supra*, n 5, s 40(1). See also Tan, *supra*, n 24 at para 2353.1. The power to remit cases was also available before the CYPA was amended in October 2001: see the CYPA (Cap 68, 1994 Rev Ed), s 40.

[81] CYPA, *supra*, n 5, s 40(2).

[82] *Supra*, n 59.

[83] CYPA, *supra*, n 5, s 41(1) ("The words "conviction" and "sentence" shall cease to be used in relation to children and young persons dealt with by a Juvenile Court").

of the CPC, both s 213 of the CPC and s 38(1) of the CYPA bind the High Court contemporaneously.

Section 213 of the CPC and s 38(1) of the CYPA: which prevails?

29 Even if I was right that both s 213 of the CPC and s 38(1) of the CYPA bind the High Court contemporaneously, being sentencing provisions they will only bind the High Court if it chooses to pass sentence on a young person whom it has convicted of murder. The clash in mandatory and discretionary wordings of the two provisions is a non-issue if the High Court does not pass sentence. This can occur if the High Court remits the case to the Juvenile Court for disposition, or if the Juvenile Court itself hears the murder case, finds the young person guilty of murder, and then proceeds to make the appropriate disposition order. Either way, the Juvenile Court may then invoke that part of s 38(1) of the CYPA, which relates to murder. However, this is not totally satisfactory, bearing in mind that the drafters of s 52(2) of the 1949 Ordinance (s 38(1) of the CYPA being its modern embodiment) never intended for it to be invoked by the Juvenile Court.

30 If the High Court chooses to pass sentence, then it has to deal with the clash in mandatory and discretionary wordings of s 213 of the CPC and s 38(1) of the CYPA head-on. Earlier,[84] I sought to show that it is Parliament's will and intent to afford discretion to the court as to whether or not to sentence young persons convicted of murder to be detained by placing the offence of murder within the ambit of s 38(1) of the CYPA. By a parity of reasoning, it can be said, albeit with some contradiction, that it is also Parliament's will and intent not to afford the court with any discretion when sentencing persons under 18 years old, who are convicted of murder. The prohibition against imposing the death sentence, and the duty to impose the sentence of detention during the President's pleasure in lieu of the death sentence, preceded the enactment of s 52(2) of the 1949 Ordinance (s 38(1) of the CYPA being its modern embodiment), and has survived till its present-day manifestation in s 213 of the CPC. Because the perceived will and intent of Parliament is contradictory, it is difficult to decide which of the two provisions, s 213 of the CPC or s 38(1) of the CYPA, prevails on purposive grounds. As such, recourse may be to the maxims of statutory interpretation.

31 According to the maxim *generalia specialibus non derogant* (a general provision does not derogate from a special one), the conflict between two statutory provisions from different Acts is to be resolved in

[84] See the discussion in paras 23–24, *supra*.

favour of the earlier specific provision rather than the later general one.[85] Though s 213 of the CPC is enacted earlier than s 38(1) of the CYPA, it is difficult to see how s 213 of the CPC can be the specific provision with regards to the sentencing of young persons convicted of murder. Section 213 of the CPC speaks only of being convicted of "an offence". It does not specify what that offence is. According to s 2(1) of the CPC, an offence simply means "any act or omission made punishable by any law for the time being in force". On the other hand, s 38(1) of the CYPA clearly speaks of being convicted of murder (albeit among other offences). Section 38(1) of the CYPA is arguably the specific provision because, unlike s 213 of the CPC, s 38(1) of the CYPA expressly mentions the offence of murder at the very least. I therefore apply the converse maxim, *generalibus specialia derogant* (special provisions override general ones),[86] and submit that s 38(1) of the CYPA prevails over s 213 of the CPC.

32 For the sake of completeness, I address a countervailing argument that there is no need to be over-pedantic about how s 213 of the CPC is exactly worded. Notwithstanding that the offence of murder is not expressly stated in this section, it is possible to extrapolate a correlation between the offence of murder and the section. Section 213 aims to prohibit the imposition of the death sentence upon conviction of "an offence". Because only capital offences, of which murder is one, attract the death sentence, s 213 of the CPC must necessarily relate specifically to such offences,[87] even if it does not expressly say so. Therefore, s 213 of the CPC should prevail over s 38(1) of the CYPA because the latter relates to a general range of "grave" offences such as murder, attempted murder and voluntarily causing grievous hurt.

33 I find it difficult to accept that s 213 of the CPC ought to be taken as the more specific provision when it is so unclearly drafted in that its wording does not make its correlation with capital offences explicit. If the drafters intended for s 213 of the CPC to relate to capital offences, they should have drafted it clearly to that effect and left nothing to guesswork. After all, they did this for other provisions in the CPC and could thus do the same for s 213 of the CPC. For example, s 214 of the CPC also prohibits the imposition of the death sentence. However, unlike s 213 of the CPC, s 214 makes it patently clear that it

[85] See generally Francis Bennion, *Statutory Interpretation* (4th Ed) (London: Butterworths, 2002) at pp 255–257.

[86] *Ibid* at p 998 n 3 ("The principle [*generalibus specialia derogant*] may also apply where the special provision is contained in a later Act: see *Richards v Richards* [1985] AC 174 at 199").

[87] This is clearly Singapore's interpretation: see Singapore's initial report to the United Nations Committee on the Rights of a Child, *supra*, n 33 at p 50, para 217.

relates to capital offences – offences "punishable by death".[88] It is unfortunate that s 213 of the CPC was drafted to relate generally to "an offence", and was left at that for interpreters to figure out that "an offence" must have meant a capital one. For this reason, I submit that between s 38(1) of the CYPA and s 213 of the CPC, s 38(1) of the CYPA is the more specific provision, and thus prevails over s 213 of the CPC.[89]

34 Granted that s 38(1) of the CYPA can be interpreted to prevail over s 213 of the CPC, should it be interpreted as such? My view is that it should because this accords with the welfare mandate that s 28(1) of the CYPA prescribes on the court. As I suggested earlier,[90] the duty to have regard to the welfare of the offender who is a young person when sentencing him or her entails the court assessing the needs and interests of each individual offender, and meting out an appropriate sanction that will best suit those needs and interests with the aim of improving the offender's future overall well being. Section 28(1) of the CYPA does not discriminate between offenders who are young persons according to the type of crimes they commit. It therefore applies with equal force to young persons convicted of murder. If s 213 of the CPC prevails, then detention during the President's pleasure will be the mandatory sentence to be imposed upon a murder conviction, regardless of whether or not it meets the needs and interests of the young person. The court will then be unable to properly discharge the welfare mandate that s 28(1) of the CYPA imposes by meting out individualised sanctions if there were only one mandatory sentence to impose. This is because the welfare of the young person is likely to be substantially compromised as it is improbable that one particular sanction can possibly meet the myriad of needs of all young persons who appear before the court with a murder conviction. As such, for there to be any meaningful discharge of the duty to have regard to the welfare of the young person, discretion in sentencing must be afforded to the courts. Moreover, making detention mandatory is also contrary to Arts 17.1(c) and 19.1 of the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* ("Beijing Rules"),[91] which state that a juvenile shall not be deprived of personal liberty "unless there is no other appropriate

[88] CPC, *supra*, n 4, s 214(1).

[89] *Contra* Tan, *supra*, n 24 at para 2154 ("In the present view, the provisions of the [Criminal Procedure] Code should prevail"). It is unfortunate that Professor Tan did not expound further as to why he thought that s 213 of the CPC should prevail over s 38(1) of the CYPA, *supra*, n 5.

[90] *Supra*, para 14.

[91] *Supra*, n 41. The status of the Rules at international law may be non-binding and are only recommendations but, as Yong CJ expressed it, it is an influential set of international standards that has already transformed the practice and procedures regarding the administration of juvenile justice in some parts of the world. Yong CJ also expressed that Singapore has kept faith with these standards. See Yong, *supra*, n 48 at para 20.

response", and the institutionalisation of a juvenile "shall always be a disposition of last resort".

35 In short, it is difficult to assert that the inclusion of murder in s 38(1) of the CYPA is an unintended drafting error because of its compelling legislative history that says otherwise. Section 213, read with s 235 of the CPC, may suggest that the High Court cannot invoke that part of s 38(1) of the CYPA, which relates to murder. However, if that were the case, then that part of s 38(1) of the CYPA which relates to murder will effectively be rendered otiose. The counter-argument that it is kept alive now that the Juvenile Court can invoke it, either when it hears a murder case (assuming that the preconditions are fulfilled) or when the High Court remits the case to it for disposal, is not totally satisfactory. It should be appreciated that drafters never intended for s 52(2) of the 1949 Ordinance (s 38(1) of the CYPA being its modern embodiment) to be primarily invoked by the Juvenile Court. Should the High Court choose to pass sentence on a young person whom it has convicted of murder, it is possible to interpret s 213 of the CPC and s 38(1) of the CYPA such that the latter provision prevails by means of statutory interpretation. Section 38(1) of the CYPA should be interpreted to prevail if the court is expected to properly discharge its welfare mandate under s 28(1) of the CYPA. This is because s 38(1) of the CYPA affords sentencing discretion that allows for individualised sanctions, and therefore vindicates the welfare mandate. The section should also prevail if Arts 17.1(c) and 19.1 of the Beijing Rules are to be observed.[92] Section 38(1) of the CYPA states that a detention sentence may be imposed when "none of the other methods by which the case may legally be dealt with is suitable". Its requirement to exhaust all other possible suitable methods, and therefore its view of detention as a sentence of last resort, is consistent with Arts 17.1(c) and 19.1 of the Beijing Rules. Even if s 38(1) of the CYPA can and should prevail, what is an appropriate case that will justify the court invoking s 38(1) of the CYPA? The next part proceeds to examine why the *Anthony Ler* case was an appropriate one for the court to have invoked the section, so as either to exercise the discretion afforded therein not to impose a detention sentence on Z or, if indefinite detention was thought to be the most suitable way to dispose of the case, to detain the boy as such then under 38(1) of the CYPA, rather than imposing the very severe sentence of detention during the President's pleasure under s 213 of the CPC.

[92] This is so as to vindicate Yong CJ's pronouncement (*ibid*) that Singapore has kept faith with international standards of dealing with young people, of which the Beijing Rules, *supra*, n 41, is one such set of standards.

Suffer the young person: the case of Z in Anthony Ler

36 This part analyses the *Anthony Ler* case. I begin by reciting the relevant facts that led up to Z committing murder. I then focus on the concessions that the judge made about Z. These concessions partly relate to Z's nature, and I explain why it is unexceptional for the judge to have paid regard to Z's nature. The language of the concessions suggests that the judge might have been prepared to show leniency towards the boy given the exceptional extenuating circumstances. Nevertheless, the judge passed the very severe sentence of detention during the President's pleasure on Z. I give two reasons why the judge did so: firstly, s 38(1) of the CYPA was not discussed in his judgment. This may indicate that the provision was not or was inadequately argued during trial. This might have affected the court's perception as to the options available to it to dispose of the case. Secondly, even if s 38(1) of the CYPA were raised and argued, the judge might feel bound by previous case-law authorities to sentence Z to be detained at the President's pleasure anyway. I refer to these relevant cases, and distinguish them from the *Anthony Ler* case.

Facts of the case

37 Z, a 15-year-old boy, was charged with the murder of a 30-year-old female insurance agent, Annie Leong Wai Muen ("Leong"). Z was jointly charged with the deceased's husband, Anthony Ler Wee Teang ("Ler"). Ler was charged with abetting Z to commit the murder. Both of them were tried in the Singapore High Court before the learned Judicial Commissioner Tay Yong Kwang (as he then was, now Tay J).

38 The Court heard that Ler had known Z since the boy was about 9 or 10 years old. They lost contact with each other for a few years when Ler moved out of the residential area in which both of them lived. Subsequently, Z met him again by chance one day. They ran into each other occasionally after that chance encounter. Z usually spent his nights hanging out with friends at a particular fast-food restaurant. Towards the end of April 2001, Ler befriended the group, and started to join them at the fast-food restaurant.

39 At the beginning of May 2001, while Ler was conversing with the boys, he asked whether any of them would dare to kill a person intentionally. He then broached the topic of killing his wife, Leong, for a $100,000 reward. Ler was not taken seriously until 9 May 2001. On that day in the afternoon, he started on the topic of killing Leong again, this time with just Z and his friend Gavin. He revealed to them an elaborate plan of how to murder his wife to make it look as if it were a robbery, avoid detection as the assailant, and escape subsequent arrest for the crime. Ler also mentioned he preferred Gavin to carry out the killing. After Z left them, Ler even invited Gavin to his house. He showed Gavin some photographs of Leong, and demonstrated to Gavin how to kill her.

That night, Ler found out that Gavin decided not to participate in the killing. He then turned to Z to carry out the killing instead. Ler knew Z would be eager to fill Gavin's shoes because he was resentful that Ler initially chose Gavin over him for the task. Ler invited Z to his house later that night to brief him on the murder plan, just as he did with Gavin earlier in the day.

40 On 10 May 2001, Z followed Ler's instructions and bought some items that he said were needed for the murder. Ler then took Z to the block of Hougang flats where Leong lived, where he meticulously rehearsed the murder plan with Z. Ler even tried to make the practice as realistic as possible. He wanted to demonstrate on Z how Leong was to be killed as she emerged from the lift by slitting her throat. He took pains to arrange for Z to experience that demonstration at the lift landing on the 5th floor, just one floor above where Leong stayed. That night, Z tried to carry out the plan as rehearsed. However, there were several abortive attempts on Z's part, as he could not bring himself to kill Leong. The plan ultimately failed.

41 Later that night, Z asked whether he could back out of the plan, but Ler managed to persuade him otherwise. They agreed to return to Hougang the next night on 11 May 2001 to carry out the plan. However, the plan did not succeed due to similar abortive attempts by Z. Later that night, Z asked Ler again whether he could back out. Ler then enticed him with the easy money he could get from carrying out the killing, and the prospect of starting up a modelling agency with that money, which promised girls, glamour and sex. When pressed for the next murder attempt, Z did not give Ler an answer. Instead, he pacified Ler by asking Ler to call him again. On 12 and 13 May 2001, Ler called Z but on both occasions, Z told him he did not want the attempt to be carried out that day. In particular, Z told Ler to let Leong enjoy Mothers' Day that fell on 13 May 2001. On the night of 13 May 2001, Ler met up with Z. At Ler's house, Ler told Z that Z could not refuse to kill Leong because he already knew too much. Ler then issued the final ultimatum – he would kill Z if he did not kill Leong.

42 On 14 May 2001, the fateful day of the murder, Ler made Z practise the motion of killing before bringing him to Hougang to carry out the murder plan. When Z tried to put the plan into action, there were again two abortive attempts by him. One was due to fear; the other was due to the fact that Z saw Leong's daughter with her. He did not want the young girl to see her mother being killed. Finally, on one occasion, Leong emerged from the lift alone while Z was waiting out at the 4th floor lift landing. He took the chance. He slashed Leong's neck and stabbed her, and escaped from the crime scene.

43 Tay JC was satisfied that the prosecution properly made out the murder charge against Z. He duly found Z to be guilty of murder. Because Z was only 15 years old when he committed murder, the

learned judge invoked s 213 of the CPC and sentenced Z to be detained during the President's pleasure in lieu of the death sentence.[93] Although the judge passed the sentence of detention during the President's pleasure, this was not without the judge making several preceding concessions in favour of Z.

The judge's concessions about Z

44 Tay JC's concessions about Z began thus:

> Z appears to be a rather simple-minded and mild-mannered boy ensnared haplessly way out of season in adult intrigue and machinations. Anthony Ler was astute enough not to use Z as the first choice hitman. He was right about Z – he was no killer and had too much conscience and compassion. That accounts for the abortive attempts on Thursday 10 May and Friday 11 May 2001. He even tried to get away from Anthony Ler during that weekend but the persistent Anthony Ler was not about to be thwarted in his deadly mission."[94]

He then continued by expressing that:

> Z's fault in this whole sad story is that he was naïve and rather weak-minded. He was manipulated skilfully by a man experienced in the ways of the world, tempted with easy money, enthused by dreams of glamour and sex, enticed with an ornamental sword that he craved and steered psychologically and persistently down the path of self destruction.[95]

Finally, the judge also expressed that:

> I see no mean miniature monster in Z. I detect no vengeful or vicious spirit in this 15 year old boy before me. I see instead a morose and mortified teenager who is still trying to come to terms with the cataclysmic events of the last seven months.[96]

45 These strongly worded concessions in Z's favour relate to his nature (and partly to the regrettable circumstances that drove him to commit murder against his will). Regard to the nature of a young person offender was also taken into account on previous occasions. During the 5th Subordinate Courts Workplan Seminar in 1996, Yong CJ

[93] The judge was also satisfied that the prosecution properly made out the abetment charge against Ler. He duly found Ler to be guilty of abetting Z to commit murder, and sentenced him to death accordingly. Ler appealed against both the conviction and sentence. Subsequently, the Court of Appeal dismissed his appeal. Z also appealed but withdrew his appeal on the day of the hearing before the Court of Appeal: see *Ler Wee Teang Anthony v PP* [2002] 2 SLR 281, CA.

[94] *Anthony Ler*, *supra*, n 1 at [284].

[95] *Ibid* at [285].

[96] *Ibid* at [287].

responded to the rising number of serious or violent crimes that juveniles (and youths aged between 16 and 20 years old) committed by expressing:

> When they appear before our courts in future, charged with serious or violent crimes, they can expect to be treated *in accordance with the severity of the offences and not solely on the basis of their youth.*[97]

On closer examination, the Chief Justice did not make that extra-judicial statement with general reference to any juvenile offender who appears before the courts. He specifically mentioned juveniles, who engage in activities that were much more than "acts of mischief committed *by immature youths*".[98] At the 8th Subordinate Courts Workplan Seminar in 1999, Yong CJ also expressed:

> [W]e have traditionally been concerned with the rehabilitation and reintegration of the juvenile back into society. These must, of course, remain our dominant motives. Young offenders are easier to rehabilitate, and they are often not fully aware of the seriousness of their callousness … At the same time, there is a worrying worldwide trend of youngsters, *who possess the full knowledge, understanding and reasoning capacity of adults, committing heinous crimes…*The presence of dangerous offenders within the juvenile system is, at the lowest, an impediment to rehabilitation, and, at the highest, a positive hazard, to fellow young offenders.[99]

In both of these addresses, Yong CJ did not focus solely on the nature of the crime (*eg*, "acts of mischief" as opposed to "serious", "violent" or "heinous" crimes). Instead, he also considered the nature of the offender as well (*eg*, whether the offender is "immature", or whether he possesses the "full knowledge, understanding, and reasoning capacity of adults"). This is consistent with his attitude in the later High Court case of *Mok Ping Wuen Maurice* over which he presided. In that case, he intimated that the pervasiveness of rehabilitation as a sentencing principle depended on the court's examination of the facts in every case. He spoke of run-of-the-mill young offenders with susceptible and easily corruptible natures on the one hand, and young offenders who were calculating in their crimes on the other.[100] By implication, the court's examination of the facts will, no doubt, involve assessing the nature of

97 Yong Pung How CJ, "Future Planning and Setting Strategic Directions", keynote address to the 5th Subordinate Courts Workplan Seminar (March 1996) <http://www.ejustice.gov.sg/archives/9502.pdf> at para 20 [emphasis added].

98 *Ibid* [emphasis added]. This was recently reiterated in Yong CJ's keynote address to the 12th Subordinate Courts Workplan Seminar in 2003, where he expressed that due allowance should be made for juvenile offending behaviour that were part of a "transient process" of growing up: see Yong, *supra*, n 16 at para 16.

99 Yong, *supra*, n 21.

100 *Mok Ping Wuen Maurice*, *supra*, n 21.

the offender at hand. Rehabilitation will feature less as a dominant consideration if the offender exhibits a calculative nature in committing crime.

46 Yong CJ's extra-judicial statement expressed at the 5th Subordinate Courts Workplan Seminar[101] was later elevated in case of *PP v Muhammad Anis Bin Osman*.[102] In that case, the Senior District Judge, Richard Magnus, who heads the Subordinate Courts of Singapore, expressed that he adopted the statement as an "additional sentencing principle in this and other similar cases".[103] Judge Magnus clearly thought this entailed taking into account not only the nature of the offence, but the nature of the offender as well,[104] when sentencing the offender at hand. The serious nature of his offence was borne out by the fact that he made five attempts to abscond from the Singapore Boys' Home, which "resulted in severe injury to the staff and personnel of the Home".[105] Previously, the boy was ordered to stay in the Bukit Batok Boys' Hostel for one year after he was convicted of vandalism as a juvenile. He ran away twice from that hostel, which subsequently landed him in the Singapore Boys' Home. As to his nature, Judge Magnus expressed thus:

> [The offender] had been given opportunities within a well-ordered rehabilitative regime to mend his ways. The progress reports ... clearly show that manpower, other state resources had been conscientiously applied to encourage and persuade his reformation. *The offender has not willed himself to be rehabilitated.*[106]

In the light of the foregoing reasons, it is therefore unexceptional for Tay JC to have paid regard to Z's nature in the *Anthony Ler* case.

47 Indeed, by doing so, the judge showed that he was thinking about the duty in s 28(1) of the CYPA to have regard to Z's welfare. However, it was difficult for the judge to impose a sanction that would

101 See *supra*, n 97 and the accompanying text.

102 *PP v Muhammad Anis Bin Osman* Juvenile Arrest Case No 842 of 1996 (7 January 1998), DC ("*Muhammad Anis Bin Osman*").

103 *Ibid* at [8].

104 *Ibid* at [11] ("All considered, the Court is satisfied having regard to the offender's character and previous conduct, and to the circumstances of the offence…").

105 *Ibid* at [9].

106 *Ibid* at [6]. In a co-written paper presented to the Youth Justice Conference 2000, Senior District Judge Magnus also alluded to the nature of the offender (*eg*, "dangerous" and "potentially incorrigible") when considering what sentencing principle(s) to adopt. See Senior District Judge Richard Magnus *et al*, *Balancing Opposing Paradigms between Retributive and Restorative Youth Justice, the Singapore Experience: Factorial Approach Towards Juvenile Justice Management in Singapore*, Youth Justice Conference 2000: Managing a New World in Transit (14 September 2000) at p 6 (unpublished).

best suit Z's needs and interests for his future overall well-being if he thought there was only one mandatory sentence for him to impose. Yet, even if it had been argued during trial that s 38(1) of the CYPA afforded sentencing discretion, the judge arguably had to consider relevant case-law authorities prior to *Anthony Ler* as well. In these cases prior to *Anthony Ler*, the courts had consistently sentenced young persons and youths (above 16 but under 18 years old) convicted of capital offences to be detained during the President's pleasure. I proceed next to examine these cases, and to distinguish them from the *Anthony Ler* case.

Comparative local case law authorities

48 There are at least five prior cases where young persons and youths convicted of capital offences (mainly murder and drug trafficking offences) were sentenced by the Singapore courts to be detained during the President's pleasure. *Mohd Iskandar bin Mohd Ali v PP*[107] is the most relevant because it involves a young person convicted of murder. In that case, the Singapore Court of Appeal dismissed the appeal of the 14-year-old appellant. Prior to that, the High Court had convicted the young person of murder and sentenced him to be detained during the President's pleasure.[108] As a decision of Singapore's final appellate court, *Mohd Iskandar bin Mohd Ali* is technically binding on courts below it. However, it is significant that the appellant appealed against conviction but not sentence. Consequently, the Court of Appeal dismissed his appeal on the ground that the trial court had rightly convicted him in the circumstances. As such, *Mohd Iskandar bin Mohd Ali* is not binding authority for sentencing a young person convicted of murder to be detained during the President's pleasure. The detention sentence remains a decision of the High Court. To the extent that the High Court is not bound by its previous decisions,[109] it is free to depart from this decision.[110] The rest of the cases are not as relevant since they either involve young persons convicted of the capital offence of drug trafficking (not murder), or youths (not young persons) convicted of murder. However, for the sake of completeness, I briefly discuss them.

49 In *PP v Gwee Siew Kuan*,[111] the High Court convicted the first accused for a drug trafficking offence punishable by death. She was 14 years and 9 months old when she committed the offence. Subsequently, she was sentenced to detention during the President's pleasure. This

[107] *Mohd Iskandar bin Mohd Ali v PP*, *supra*, n 3.
[108] *PP v Mohd Iskandar bin Mohd Ali*, *supra*, n 3.
[109] *Wong Hong Toy v PP* [1986] SLR 86 at 89, [11], CA; Walter Woon, "The Doctrine of Judicial Precedent" in *The Singapore Legal System* (2nd Ed, Kevin YL Tan ed) (Singapore: Singapore University Press, 1999), p 297 at 306.
[110] *PP v Mohd Iskandar bin Mohd Ali*, *supra*, n 3.
[111] *PP v Gwee Siew Kuan*, *supra*, n 3.

decision is distinguishable from *Anthony Ler* in two respects: firstly, the first accused was convicted of an offence that falls outside the ambit of s 38(1) of the CYPA;[112] secondly, Amarjeet Singh JC expressed that the first accused was a "street-wise young person". To me, this is an incriminating observation on the girl's character. This is to be contrasted with Tay JC's expressions of Z's nature and character in Z's favour, *eg*, "naive", "simple-minded", "ensnared haplessly way out of season in adult intrigue and machinations" – Z was inexperienced in the ways of the world, and therefore able to be manipulated skilfully by an opportunistic adult who was so experienced. The two reasons in *Gwee Siew Kuan* imply that, unlike in *Anthony Ler*, it would have been unsuitable to invoke s 38(1) of the CYPA. The second accused, who was 17 years and 11 months old when he committed the offence with the first accused, was also convicted and sentenced to be detained during the President's pleasure. The Court of Appeal dismissed his appeal.[113] This decision is also distinguishable from *Anthony Ler*. Unlike in *Anthony Ler*, raising s 38(1) of the CYPA was also untenable for two reasons: firstly, and most importantly, the appellant was not a young person, and thus could not avail himself of s 38(1) of the CYPA; and, secondly, the appellant was convicted of an offence that fell outside the ambit of the section. Even if the appellant had been a young person, and had been convicted of an offence expressly stated in s 38(1) of the CYPA, he appealed against his conviction but not his sentence. Therefore, like *Mohd Iskandar Bin Mohd Ali*, the appeal decision is not binding authority for imposing the sentence of detention during the President's pleasure on young persons convicted of murder. In the case of the second accused, the detention sentence remains a decision of the High Court. The same is also true in the case of the first accused since she did not appeal. To the extent that the High Court is not bound by its

[112] *Quaere* whether this distinction, though defensible on a strict literal reading of s 38(1) of the CYPA, *supra*, n 5, is in fact sensible. It should be noted that murder is the only capital offence that falls within the ambit of s 38(1) of the CYPA. There is no reason why other capital offences, such as the trafficking of controlled drugs of a specified amount (see the Misuse of Drugs Act (Cap 185, 1985 Rev Ed), ss 5, 33 and the Second Schedule), the trafficking of firearms (Armed Offences Act (Cap 14, 1988 Rev Ed), ss 4, 4A, 5, 6), or kidnapping (Kidnapping Act (Cap 151, 1999 Rev Ed), s 3) should be excluded, but s 38(1) of the CYPA does not mention these other capital offences. In any case, the offences (of murder, attempted murder, and voluntarily causing grievous hurt in s 38(1) of the CYPA have no obvious correlation, except that they are labelled as "grave" by the section. The rationale behind the labelling is not clear. The UK's position is no longer as befuddling. Though specific sexual and road traffic offences are enumerated, the general rule is that an offence (the sentence for which is not fixed by law) punishable with imprisonment for 14 years or more is considered a "serious offence", for which the court can impose a detention sentence on an offender under the age of 18 years: see the Powers of Criminal Courts (Sentencing) Act 2000, *supra*, n 68, s 91(1)(a). I am grateful to Associate Professor Chan Wing Cheong for pointing out this lacuna in s 38(1) of the CYPA to me.

[113] *Lim Peng Ann v PP* [1996] SGCA 30.

previous decisions,[114] it is free to depart from its decision in *Gwee Siew Kuan*.

50 *Ng Beng Kiat v PP* and the related *Ong Chee Hoe v PP* are Court of Appeal decisions.[115] In both cases, the appellants appealed against conviction and sentence. Previously, the High Court had convicted them for murder and subsequently sentenced them to be detained during the President's pleasure.[116] The Court of Appeal dismissed the appellants' appeals against conviction and sentence. Unlike in *Mohd Iskandar bin Mohd*, and *Lim Peng Ann v PP*,[117] the Court of Appeal held in *Ng Beng Kiat* and *Ong Chee Hoe* that the trial courts had rightly convicted the appellants of murder, and rightly sentenced them to be detained during the President's pleasure after convicting them of murder. As such, these are binding authorities on the lower courts to impose detention during the President's pleasure on such future offenders. However, it must be emphasised that the appellants were not young persons. Therefore, *Ng Beng Kiat* and *Ong Chee Hoe* do not stand for the proposition that young persons convicted of murder are to be sentenced to be detained during the President's pleasure. Since the *Anthony Ler* case involves a young person, *Ng Beng Kiat* and *Ong Chee Hoe* do not apply. Also, unlike in *Anthony Ler*, it was not possible to raise s 38(1) of the CPC in *Ng Beng Kiat* and *Ong Chee Hoe* because the boys were not young persons and thus could not avail themselves to s 38(1) of the CYPA.

51 The last decision I will consider is the High Court decision of *PP v Poon Yuen Chung*.[118] The second accused was convicted of a drug trafficking offence punishable by death. She was 17 years and 6 months old when she committed the offence. The High Court subsequently sentenced her to be detained during the President's pleasure.[119] Again, *Poon Yuen Chung* is distinguishable from *Anthony Ler* for three reasons: firstly, like the boys in *Gwee Siew Kuan*, *Ng Beng Kiat*, and *Ong Chee Hoe*, raising s 38(1) of the CYPA was untenable because the second accused was not a young person, and thus she could not avail herself of s 38(1) of the CYPA; secondly, like the accused persons in *Gwee Siew Kuan*, the second accused in *PP v Poon Yuen Chung & Anor* was

[114] *Supra*, n 109.

[115] *Ng Beng Kiat v PP*, *supra*, n 3; *Ong Chee Hoe v PP*, *supra*, n 3.

[116] *PP v Ng Beng Kiat*, *supra*, n 3; *PP v Ong Chee Hoe*, *supra*, n 3.

[117] *Supra*, n 113; *PP v Gwee Siew Kuan*, *supra*, n 3, on appeal.

[118] *PP v Poon Yuen Chung*, *supra*, n 3.

[119] The first accused was found to be 18 years and 10 months old when she committed the offence. She could neither have availed herself of s 38(1) of the CYPA, *supra*, n 5, nor indeed of s 213 of the CPC, *supra*, n 4. The High Court convicted her and sentenced her to death. She appealed against her conviction, and the Court of Appeal subsequently dismissed her appeal: see *Poon Yuen Chung v PP* [1994] SGCA 25.

convicted of an offence that fell outside the ambit of s 38(1) of the CYPA; and thirdly, even if the second accused had been a young person convicted an offence that is expressly stated in s 38(1) of the CYPA, MPH Rubin JC (as he then was, now Rubin J) expressed that she was not "wanting in the ways of the world".[120] This is reminiscent of the incriminating observation that Amarjeet JC made about the nature and character of the first accused in *Gwee Siew Kuan*. These three reasons imply that, unlike in *Anthony Ler*, it would have been unsuitable in *Poon Yuen Chung* to invoke s 38(1) of the CYPA.

52 Unlike the cases that preceded the *Anthony Ler* case, s 38(1) of the CYPA could have been invoked in *Anthony Ler* for three reasons. Firstly, Z had committed murder, and that offence fell squarely within s 38(1) of the CYPA. Secondly, he was 15 when he committed murder and was therefore a young person. Being so, he could have availed himself of s 38(1) of the CYPA. Thirdly, the judge's concessions about Z's nature and the regrettable circumstances that led him to commit murder against his will were favourable to Z, and this indicated that it would have been suitable to invoke s 38(1) of the CYPA. Yet, I submit it is not a long-term solution to have to resort to statutory interpretation to say that s 38(1) of the CYPA prevails over s 213 of the CPC. There should still be recourse to legislative reform so that it will be put beyond doubt that the court has discretion when sentencing young persons convicted of murder.

Legislative reform as panacea

53 I have suggested that s 213 of the CPC and s 38(1) of the CYPA can be interpreted such that s 38(1) of the CYPA prevails.[121] However, relying on the technicalities of statutory interpretation is but an interim measure. Ultimately, the real panacea is legislative reform of certain provisions to clarify that judicial discretion exists where the sentencing of young persons convicted of murder is concerned. Before proceeding to discuss what provisions should be amended and how they should be amended, I should first recommend against adopting the current contrary UK position.

The UK experience: model or anti-model?

54 In the UK, it is patently clear that a specific duty is imposed on her courts to sentence young persons convicted of murder to be detained during Her Majesty's pleasure.[122] In terms of ease of legislative

[120] *PP v Poon Yuen Chung*, *supra*, n 3 at [56].
[121] See the discussion in paras 30–33, *supra*.
[122] See *supra*, n 68 and the accompanying text.

amendment, adopting the UK position is tempting indeed. This is because all that needs to be done is to amend s 38(1) of the CYPA such that it excludes the offence of murder. However, caution must be exercised in this regard. Since the first predecessor of the CYPA was enacted, it must be emphasised that Singapore opted to depart from the UK by affording discretion to her courts as to whether or not to sentence young persons convicted of murder to be detained. This was despite the fact that it was then under British colonial rule. There are even less compelling reasons to adopt UK's stance towards young persons convicted of murder now: firstly, Singapore's colonial links with the British has long been severed, and it is beneficial to Singapore to develop her own autochthonous sentencing regime for her young persons convicted of murder; and, secondly, there are new guiding principles put in place in the UK that affect her juvenile justice system[123] which are absent in Singapore. These are mainly the "just deserts" principle,[124] which essentially requires sentences to be commensurate with the seriousness of the offence for which the offender is currently convicted, and the new statutory principal aim of youth justice to prevent offending.[125] Therefore, UK courts have comparatively different demands where the sentencing of juveniles are concerned. They have to

123 See Gordon *et al*, *supra*, n 55 at pp 97–99.

124 This principle underpins the overhauled sentencing framework of the UK in 1991 *via* the Criminal Justice Act 1991 (c 53) (UK): see generally Gordon, *ibid*, at pp 92–97. The new Criminal Justice Act 2003 (c 44) (UK) advocates a "modified" just deserts principle: s 143(2). The Lord Chancellor explained this modified principle thus when the bill (Criminal Justice Bill (Bill 69, 2002–2003 Sess)) was debated: "Alongside the existing principle that the severity of sentence should reflect the seriousness of the current offence will be the principle that previous convictions, where recent and relevant, should be treated as an aggravating factor when determining the severity of a sentence": United Kingdom, House of Lords, *Parliamentary Debates* (16 June 2003), vol 649, col 517 at 561.

125 Crime and Disorder Act 1998 (c 37) (UK), s 37 ("It shall be the principal aim of the youth justice system to prevent offending by children and young persons"). See also a framework document to explain this new principal aim to prevent offending: <http://www.homeoffice.gov.uk/docs/youjust.html>.

reconcile the welfare principle with the just deserts principle,[126] and also with the aim of youth justice to prevent offending.[127]

Recommendation

55 Singapore's Parliament has yet to demand that the court divide its fidelity to the welfare principle in dealing with juvenile offenders. To the extent that no new guiding principles are introduced, the welfare principle enunciated in s 28(1) of the CYPA predominantly informs the court in so far as the sentencing of juvenile offenders is concerned. I reiterate that discretion should be afforded to the court in sentencing young persons convicted of murder if the court is expected to give proper effect to this welfare principle. To this end, Parliament's wisdom in leaving s 38(1) of the CYPA, which affords such discretion, unamended should be heeded and should thereby persist.[128] On the other hand, the mandatory wording of s 213 of the CPC should be amended. A possible amendment (my additions italicised) is as follows:

> Sentence of death shall not be pronounced on or recorded against a person convicted of *a capital* offence if it appears to the court that at

[126] Gordon *et al*, *supra*, n 55 at p 97 ("There is in fact no statutory guidance on the interaction of the often competing welfare and just deserts consideration, and [the court] must itself decide what weight to give to each in a given case and deal with any resulting tensions"); Caroline Ball *et al*, *supra*, n 33 at para 11.25 ("The framework of [the Criminal Justice Act 1991, *supra*, n 125] was introduced without any explicit reference to or attempt to reconcile the welfare principles"). The situation may have improved with the advent of the Criminal Justice Act 2003, *supra*, n 124: the purposes of sentencing enumerated in s 142(1) of the Act are pursued *vis-à-vis* the "modified" just deserts principle. However, s 141(2) says that these enumerated purposes of sentencing do not apply when a court deals with an offender under 18 at the time of conviction. This implies that UK courts can afford to be less concerned with just-desert considerations when sentencing juvenile offenders.

[127] Gordon, *ibid* at p 98 ("There is now a need to [reconcile] welfare and the new principal statutory aim of youth justice to prevent offending"). However, the UK government suggested that reconciliation was not required because both welfare and preventing offending were compatible with each other. See Home Office (UK), "No More Excuses – A New Approach to Tackling Youth Crime in England and Wales" (1997) <http://www.homeoffice.gov.uk/docs/nme.html> at para 2.2 ("The Government does not accept there is any conflict between protecting the welfare of a young offender and preventing that individual from offending again. Preventing offending promotes the welfare of the individual young offender and protects the public").

[128] Except perhaps that the upper limit of the age of a young person should be amended to 18 years old, following the recommendation of the United Nations Committee on the Rights of the Child: see para 22(a) of its concluding observations, *supra*, n 33. This would mean that cases involving youths above 16 but under 18 years old convicted of murder can be disposed of by detaining the youths, or by any other suitable methods. Recall that this is not possible under the current sentencing regime: see the discussion in paras 49–51, *supra*. As for a suggestion of what "suitable methods" entail, see para 56, *infra*.

> the time when the offence was committed he was under the age of 18 years but instead of that the court, *if it thinks fit*, *may* sentence him to be detained during the President's pleasure …

For the avoidance of doubt, s 235 of the CPC should also be amended so as to make it clear that the High Court is at liberty to invoke s 38(1) of the CYPA, not only in cases where the youthful offender is convicted of an offence punishable by fine or imprisonment, or by both, but also for one that is punishable by death. The ambit of s 235 of the CPC should be widened and may read thus:

> When any youthful offender is convicted before any criminal court of an offence, and whether or not the law under which the conviction is had prescribed the punishment that shall be imposed upon the person so convicted, that court may, instead of sentencing the youthful offender to such punishment, deal with the youthful offender in the manner provided by the Children and Young Persons Act.

The effect of my recommendation means that instead of having to impose one mandatory sentence on all young persons whom it convicts for murder, the court will be better able to tailor a sanction that suits the particular and individual needs of the young person offender convicted of murder with a wider selection of sentencing options that follow.

Dispositions under s 44(1) of the CYPA

56 Detention under s 38(1) of the CYPA can only be ordered provided the court is of the opinion that "none of the other methods by which the case may legally be dealt with is suitable". The local courts have yet to interpret that phrase. I submit that the English Court of Appeal decision of *R v B*[129] may be helpful guidance on this point. In the UK, the predecessor of the phrase in question appeared as "no punishment which under *the provisions of this Act* [the court] is authorised to inflict is *sufficient*".[130] In *R v B*, the court ruled that the contemporary use of the word "suitable" is not synonymous with "sufficient". However, the court did not say that the change in phraseology brought "suitable methods" out of the ambit of disposition provisions under the UK CYPA 1933. Because we inherited (the now) s 38(1) of the CYPA from the UK,[131] any English decision that sheds light on its phraseology should be of persuasive authority. I therefore suggest that the suitable methods which our courts have to consider before imposing a detention sentence under s 38(1) of the CYPA invariably include, if they are not confined to, disposition orders as provided for

129 *R v B* [1999] 1 WLR 61, CA.

130 Children Act 1908 (8 Edw VII, c 67) (UK), s 104 [emphasis added].

131 *Supra*, para 23.

mainly in s 44(1) of the CYPA. These dispositions are unconditional discharge (unlikely to be applicable), conditional discharge with a bond to be of good behaviour, committal to the care of a relative or other fit person, probation, community service, detention not exceeding six months, weekend detention, and being sent to an approved school. These can be imposed either singly or in a combination as s 44(2) of the CYPA permits.

Section 38(1) of the CYPA: fixed or indefinite detention with possibility to be released on licence

57 Section 38(1) of the CYPA states clearly that the period of detention *may* be specified. Therefore, the court has the flexibility of either fixing a period of detention if it feels confident to do so,[132] or ordering a period of indefinite detention.[133] Unlike detention under s 213 of the CPC, detention under s 38(1) of the CYPA does not carry the stigma of being the alternative to the death sentence. Another important distinction is that under s 38(1) of the CYPA a detainee may be released on licence at any time.[134] This essentially means a detainee can possibly serve out part of his or her sentence in the community. Upon the detainee's release, it is expected that he or she will be able to reintegrate[135] back into society more quickly and easily because loss of contact with the outside world during his or her detention is shortened in accordance to the period of time that he or she is released on licence.

Section 213 of the CPC: detention during the President's pleasure

58 The indefinite detention sentence, no doubt draconian and very severe, must still be retained so that it can be imposed in dire circumstances, for instance where the juvenile who commits murder possesses the "full knowledge, understanding, and reasoning capacity of adults",[136] or where the juvenile exhibits a calculative nature when committing crime.[137] It should be a sentence of last resort. Whilst there is no formal minimum period of detention, figures released by the Singapore government and information about the regime indicate that a

[132] The court has to be cognisant of the perils of fixing a period of detention at trial: *supra*, para 15.

[133] See, *eg*, *R v Abbott* [1964] 1 QB 489, CA. Again, with the lack of local case-law interpreting s 38(1) of the CYPA, *supra*, n 5, reliance is placed on English case-law that has done so.

[134] CYPA, *ibid*, s 38(4).

[135] Recall that Yong CJ himself suggested that the juvenile justice system is not only concerned with rehabilitating the offender, but also reintegrating the offender back to society: *supra*, n 28.

[136] *Supra*, para 45.

[137] *Ibid*.

minimum period of detention may have unwittingly resulted out of practice or from how the system of releasing detainees is designed to operate.[138] The home detention scheme[139] is not extended to offenders detained under s 213 of the CPC.[140] Such detainees, unlike their counterparts detained under s 38(1) of the CYPA, inevitably lose contact with the outside world during the period of their detention as they are strictly required to serve their detention in a particular place of detention. Even if there were some programmes in the places of detention to prepare them for their return to the community upon their release, it is expected that it will be harder and that it will take them longer to reintegrate back to society, as compared to their counterparts who are detained under s 38(1) of the CYPA but can be released on licence at any time.

Sentencing criteria

59 If the court were afforded discretion in sentencing young persons convicted of murder, the court should be guided by some criteria when exercising this sentencing discretion. The notion of "welfare" in s 38(1) of the CYPA *per se* does not really assist the court because it has yet to be authoritatively interpreted.[141] The welfare model of juvenile justice may assist in unravelling what welfare in sentencing entails. It essentially suggests that the court should focus on meting out individual-based sanctions that meet the offender's perceived needs, which are manifested by his criminal conduct.[142] Beyond that, it provides limited assistance. I propose three ways that can help judges develop criteria for sentencing young persons convicted of murder.

60 The first way is for the judge to make sentencing decisions in consultation with expert advisors. This affords the judge with the opportunity to draw from the wisdom of professionals, such as psychiatrists, psychologists, counsellors, or social workers, who may be more attuned to the needs and interests of young offenders because they have more frequent dealings with them. Though the court's ultimate role is to dispense justice and not to provide social services or to engage in child reform, there is recognition that laws and punishment alone cannot meet the challenge of juvenile crime. Consultation with expert advisors should enable the judge to pass more realistic and meaningful

138 *Supra*, para 16.

139 This scheme is similar to being released on licence under s 38(4) of the CYPA, *supra*, n 5, in that a detainee who is granted a home detention order can serve out part of his or her sentence outside his or her place of detention. In the case of home detention, the alternative place of detention is the detainee's residence.

140 Prisons Act (Cap 247, 2000 Rev Ed), s 53(1)(b), and the Schedule, para 4.

141 *Supra*, para 11.

142 *Supra*, para 14.

sentences and fewer "ivory-tower" sentences. This is already being practised in the Juvenile Court.[143] I recommend that this specific practice of the Juvenile Court should be further extended to any other court when dealing with an offender who is a young person.

61 The second way is to develop more extrinsic aids that help analyse offender behaviour. For example, the risk of re-offending is a factor that is taken into account when imposing the appropriate sentence. This is *a fortiori* the case when the offence committed is very severe, such as murder, where committing it even once is considered one time too many. The judge has to realistically weigh the possibility of the young person committing murder again when he returns back to the community after he serves his sentence. The Juvenile Court currently uses the "Juvenile Offender Behaviour" criteria to assess the risk of offender recidivism.[144]

62 The last way is to do a profiling of young persons who commit grave crimes. This will help judges better appreciate the finer aspects (*eg*, the psyche) of a typical young person who commit crimes such as murder. Thus far, the Subordinate Courts of Singapore have commendably produced several research bulletins on the typology of youth rioters[145] and juvenile shoplifters,[146] and the profile of female juvenile offenders.[147]

[143] CYPA, *supra*, n 5, s 32(3). The presiding Magistrate of the Juvenile Court is required to sit with two advisers from a panel of advisors that the President has nominated when determining the method of dealing with a child or young person.

[144] What the Juvenile Offender Behaviour criteria does is basically to calculate an offender's individual scores for three factors (severity of offence, risk factors and proximate factors), combine these scores into an overall score, and to place this overall score placed along a continuum (from "adolescent-limited" to "life-course persistent") to assess the risk of re-offending behaviour. See generally Joseph Paul Ozawa, "Juvenile Offender Behaviour ('JOB') Criteria: Assessing Risk of Recidivism in Juvenile Court" *Singapore Law Gazette* (July 2001) at p 14, available on-line at <http://www.subcourts.gov.sg/Juvenile/publications/Law gazetteJuly01(focus3).pdf>.

[145] Research & Statistics Unit, Subordinate Courts, "Typology of Youth Rioters", *Subordinate Courts of Singapore Research Bulletin* (Issue No 10, April 1998) <http://www.subcourts.gov.sg/research_bulletins/ RB10Pg1-8.pdf> and <http:// www.subcourts.gov.sg/research_bulletins/RB10Pg9-16.pdf>.

[146] Research & Statistics Unit, Subordinate Courts, "A Study of Juvenile Shoplifters", *Subordinate Courts of Singapore Research Bulletin* (Issue No 20, August 1999) <http://www.subcourts.gov.sg/research_bulletins/rb20.pdf>.

[147] Research & Statistics Unit, & Psychological Services, Criminal, Family and Juvenile Justice Centres, Subordinate Courts, "Profile of Female Juvenile Offenders", *Subordinate Courts of Singapore Research Bulletin* (Issue No 26, August 2001) <http://www.subcourts.gov.sg/research_bulletins/issue26.pdf>.

63 It is appropriate to caution that any sentencing criteria that are eventually developed are but only a guide. Adhering strictly to them will only make the whole sentencing exercise mechanistic and inflexible, which will in turn make it unable to produce sentences that will meet the perceived needs of the offender. This defeats the purpose of affording sentencing discretion to the court in the first place. Ultimately, judges still have to draw on their own wisdom and judgment, as well as their innate sense of fairness and justice, when deciding on the appropriate sentence to impose on a young person convicted of murder.

Conclusion

64 There are several lessons to learn from the *Anthony Ler* case, and we must learn them well so as to prevent another young person convicted of murder from suffering Z's ill fate. The first is that specific and active consideration of s 38(1) of the CYPA is presently lacking. It is therefore hoped that s 38(1) of the CYPA can be raised and argued effectively in court in future cases to merit a discussion of the provision by the courts. Secondly, the clash in the respective mandatory and discretionary wordings of s 38(1) of the CYPA and s 213 of the CPC is a real issue. Ultimately, the task of resolving that issue should not fall squarely on the shoulders of the judiciary. The judiciary can only do so much by resorting to technicalities of statutory interpretation. The legislature must take on the task of clarifying how young persons convicted of murder should be sentenced. To this end, I have suggested that Parliament's past wisdom of affording discretion to the courts in sentencing young persons convicted of murder should persist. Lastly, with the horrific homicides that juveniles have committed, such as the Bulger murder in the UK and the Arkansas school shooting in the US, deeply lodged in memory, hearts have undoubtedly hardened against juveniles who murder. We are inclined to think that when young persons commit murder it signifies the demise of childhood innocence, and that they should therefore face the full rigour of the law. It is tempting to demonise all our young persons who commit murder in this way. Yet, the *Anthony Ler* case serves to remind us that there may be young persons who commit murder out of mere follies of youth. Although such murderers may be far and few and are the exceptions of the lot, they should be spared the very severe sentence of detention during the President's pleasure, which should be reserved only for the most devious of the lot. Arguing that Singapore courts should have discretion when sentencing young persons convicted of murder is not to advocate being unreservedly lenient with them. It is merely an impassioned plea to ensure that extraordinary measures are put in place,

so that they may be available when extraordinary circumstances call for them.[**]

[**] My mother passed away on 19 June 1998. She dedicated most of her life to nurturing young minds as an educator. Her sense of public spiritedness did not falter even when she was diagnosed with cancer. She left behind a legacy of countless nurtured individuals, including her two children. This paper is for her, in fond memory of her love, selflessness, resilience, and strength.