

**CAPITAL PUNISHMENT:
A CROSS JURISDICTIONAL CRITIQUE**

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DECLARATION OF ORIGINALITY

I, Vengadesh Kumaravelu, hereby declare that this thesis is my own work and effort and that it has not been submitted anywhere for any award. Where other sources of information have been used, they have been acknowledged.

Vengadesh Kumaravelu

Dated: 02 December 2013

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ABSTRACT

This thesis analyses whether any changes to the current scope of the death penalty in either Australia or Singapore invite consideration or whether the respective regimes are grounded in sound principle. Both countries have been selected as they are at opposing ends of the death penalty spectrum, being abolitionist and retentionist respectively.

One major issue reoccurring in various jurisdictions is an innocent accused being wrongfully convicted of a crime. Human institutions such as a country's criminal justice system are fallible. Countries like Singapore that have a more 'weighted' approach towards Herbert Packer's 'crime control model' must try to strike a balance with the 'due process model' to prevent the occurrences of wrongful convictions.

Given the irreversible nature of capital punishment, this paper contends that an accused charged for a capital offence must be provided their fundamental rights, such as the right to access to counsel and the right to silence. The thesis also emphasizes the importance of pre-trial investigative procedures, such as the video-recording of suspect statements during police questioning or the preservation of DNA samples, to protect innocent individuals.

Mandatory sentencing itself is subject to various problems. These issues may be amplified when the mandatory death sentence is concern. Therefore, the thesis contends that the mandatory death sentence does not deter (or only marginally deters) crimes as many retentionist States recognize. However, parliamentary sovereign nations, like Singapore, have the right to determine its criminal laws. The current state of international law does not totally prohibit the imposition of capital punishment.

By considering the community's perception of capital punishment in both jurisdictions, this paper finally discusses two issues; (1) whether the current state of the law in Australia allows it to reintroduce the death penalty if it desires to, and (2) whether the amendments in Singapore's death penalty regime in 2012 signal the possible abolition of the punishment.

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CAPITAL PUNISHMENT: A CROSS JURISDICTIONAL CRITIQUE

VENGADESH KUMARAVELU*

INTRODUCTION

Capital punishment refers to state sanctioned executions of convicted individuals. According to the statistics on the website of Amnesty International, 140 countries have abolished the penalty ‘in law or practise’; whilst 58 countries still impose capital punishment.¹ Notwithstanding these figures, the genesis for this thesis arises from the ongoing international debates, in both abolitionist and retentionist countries, on whether the punishment fits in a civilised legal system.

This thesis paper will explore the origins of the death penalty and whether any change is needed in its administration. It will focus principally on a comparison between the divergent approaches of the two countries, Australia and Singapore. Specifically, laws governing murder and drug related offences, and criminal processes in Singapore and Western Australia, form the bedrock of this thesis. Ultimately, this paper will analyse whether any changes to the current scope of the death penalty in either Australia or Singapore invite consideration or whether the respective regimes are grounded in sound principle.

There are reasons why this thesis compares Singapore and Australia, specifically Western Australia. Firstly, their criminal laws are contained in a single Code. Secondly, Australia and Singapore have common British heritage in their legal systems. Thirdly, both Singapore and Australia are developed countries.² Lastly,

* All errors in this paper are my own.

¹ For breakdown of statistics, See Amnesty International, *Abolitionist and Retentionist Countries* <<http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries>>.

² The International Statistical Institute, *Developing Countries 2013* <<http://www.isi-web.org/component/content/article/5-root/root/81-developing>>.

concepts like the 'Rule of Law' and 'Separation of Powers' are evident in both the Singaporean and Australian legal systems.³

Australia's opposition to the death penalty is apparent from its ratification of the *International Covenant on Civil and Political Rights* ('ICCPR'), and the *Second Optional Protocol* to the ICCPR.⁴ In contrast, Singapore is not a signatory of the ICCPR, and firmly believes that punishment is vital to combat crimes within its jurisdiction.⁵ Singapore claims to impose capital punishment for only the most serious crimes (namely serious murders and drug trafficking),⁶ recognising the severity of the penalty and its irreversible nature.⁷ It did, however, in November 2012, implement reforms to its mandatory imposition of death penalty. The fact that both jurisdictions are at opposing ends of the capital punishment spectrum will make the analysis fascinating and informative.

Chapter one of this paper examines the history of capital punishment in Singapore and Australia. A brief discussion of the ancient English legal system in the 18th and 19th centuries, and the international law obligations of Australia and Singapore will be explained.

³ Cf See, eg, Tania Jeyamohan, *The Rights of Malaysia's Ethnic Minorities- Is Democracy Dead* (LLM Thesis, Murdoch University, 2004)

<<http://researchrepository.murdoch.edu.au/116/2/02Whole.pdf>>.

⁴ Jo Lennan and George Williams, 'The Death Penalty in Australian Law' (2012) 34 *Sydney Law Review* 659, 682-83; See also Lorraine Finlay, 'Exporting the Death Penalty? Reconciling International Police Cooperation and the Abolition of the Death Penalty in Australia' (2011) 33 *Sydney Law Review* 95.

⁵ Ministry of Home Affairs, Government of Singapore, *The Singapore Government's Response to Amnesty International's Report "Singapore - The Death Penalty: A Hidden Toll Of Executions"* (24 July 2007) <http://www.mha.gov.sg/basic_content.aspx?pageid=74>; See also Human Rights Council, Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 15(a) of the Annex to Human Rights Council Resolution 5/1:Singapore*, 11th sess, UN Doc A/HRC/WG.6/11/SGP/1 (2 February 2011) 17 [120]; For instance, the presence of capital punishment in Singapore's legal system has deterred the establishment of major drug syndicates in the country.

⁶ Ministry of Home Affairs, above n 5; This thesis mainly looks at the offences of drug trafficking and murder. It does not discuss about the imposition of the death penalty for terrorists acts. For discussion on the death penalty for terrorist activities, see eg Tony Glynn, 'Death Penalty: To Execute One Terrorist is to Reward Terrorism' (Paper presented at LawAsia Conference, Brisbane, 22 March 2005); This thesis does not also discuss about international police cooperation and the death penalty. For an excellent discussion on this issue, see Finlay, above n 4.

⁷ Ministry Of Home Affairs, above n 5.

Chapter two focuses on the issue of wrongful convictions. This chapter firstly, discusses the respective criminal process models of Singapore and Australia. Secondly, it analyses issues surrounding the rights that suspects possess when being apprehended in Singapore and Australia. This paper contends that an accused charged for a capital offence must be provided their fundamental rights, such as the right to access counsel and the right to silence. This thesis also emphasises the importance of pre-trial investigative procedures, such as the video-recording of suspect statements during police questioning or the preservation of DNA samples, to protect innocent individuals. If the Singapore government retains the death penalty, it should consider making those reforms in its criminal justice system.

Chapter three concentrates on the mandatory death penalty in Singapore. The mandatory imposition of punishments creates an array of problems, including the loss of judicial discretion and a blurring of the Separation of Powers. Such issues are magnified through the mandatory imposition of the death penalty. The constitutionality of the mandatory death sentence in Singapore will be analysed. This paper also explores Singapore's Parliamentary Debates in late 2012 to uncover statistics and reasons to how and why Singapore had amended its death penalty regime.

Finally, by considering the community's perception of capital punishment, two questions will be answered at the end of this paper; (1) whether the amendments in Singapore's death penalty regime in 2012 signal the possible abolition of the punishment, and (2) whether the current state of the law in Australia would allow it to reintroduce the death penalty if it desires to.

A Ancient History

Dating back to the earliest civilisations, the death penalty has been imposed for an array of offences and carried out in varying ways.⁸ For instance, the Ancient Chinese chose beheading,⁹ while the Greeks ordered crucifixion and burning.¹⁰ Interestingly, the Egyptians around 1500 B.C. even saw it fit to leave the choice of method of death up to the prisoner convicted for ‘magic’.¹¹ The Romans too, reserved a unique form of punishment for parricides (individuals who killed their parents or close relative); the convicted along with ‘a dog, a cock, a viper and an ape’, were placed in a sack and thrown to sea.¹²

Natural-law theorists, like Kant and Aquinas, did not disapprove capital punishment.¹³ In fact, the punishment is consistent with Scriptures and traditions. According to the Old Testament, Mosaic Law sanctioned stoning, burning and hanging as some forms of capital punishment.¹⁴ Even Aquinas, considered one of the most significant authors of the Middle Ages, was a proponent of the punishment. He mentioned that ‘...the life of certain pestiferous men is an impediment to the common good, which is the concord of human society. Therefore, certain men must be removed by death from the society of men.’¹⁵ However, only lawful officials

⁸ John Laurence, *A History of Capital Punishment* (Citadel Press, 1960) 1-3; See also Michael Kronenwetter, *Capital Punishment: A Reference Handbook* (ABC-CLIO, 2001) 11-12.

⁹ Laurence, above n 8, 1.

¹⁰ Ibid 3.

¹¹ Ibid 2.

¹² Ibid 3.

¹³ See generally Michael Norko, ‘The Death Penalty in Catholic Teaching and Medicine: Intersections and Places for Dialogue’ (2008) 36(4) *Journal of the American Academy of Psychiatry and the Law* 470.

¹⁴ Laurence, above n 8, 2.

¹⁵ Thomas Aquinas, *Summa Contra Gentiles* (Bourke V J trans, University of Notre Dame Press, 1975) book 3, 220 –1, quoted in Norko, above n 13.

possessed God's approval to administer the punishment.¹⁶ Since the present focus is on the law of Australia and Singapore, whose legal systems descend from English origins, the discussion of ancient history and legal jurisprudence must now give way to that of England.¹⁷ Specifically, 18th and 19th century England will be briefly examined in the following section.¹⁸

B Capital Punishment in England

In the 300 years since the 18th century, the use of the death penalty has become more restricted and governed by law compared to the earlier application which was more haphazard and erratic. Nevertheless, during the 18th century, the death penalty was imposed even for trivial crimes in England. In addition, Britain had an uncertain sentencing regime due to large number of statutes evident during the 17th and 18th centuries. These innumerable statutes imposing the death sentence were later known as the 'Bloody Code'.¹⁹

Blackstone assessed the number of capital offences (without the benefit of clergy)²⁰ under English law to be no less than 160.²¹ In 1819²² and 1823,²³ speakers in

¹⁶ Christian Brugger, 'To Kill or Not To Kill: The Catholic Church and the Problem of the Death Penalty, in Charles Curran (ed), *Readings in Moral Theology, vol 13: Change in Official Catholic Moral Teachings* (Paulist Press, 2003)137, cited in Norko, above n 13.

¹⁷ For a general historical review see Laurence, above n 8.

¹⁸ Ibid 2: Prior to 450 B.C., no documents existed to prove that England imposed the death penalty. During 450 B.C., it was the custom of the English to execute condemned individuals by throwing them into a quagmire. After 450 B.C, records clearly show that the death penalty was imposed.

¹⁹ The *Waltham Black Act* was one of those statutes; See also The National Archive, *Crime and Punishment: The Bloody Code*

<<http://www.nationalarchives.gov.uk/education/candp/punishment/g06/g06cs1.htm>>.

²⁰ Markus Eder, "*At the Instigation of the Devil*": *Capital Punishment and the Assize in the Early Modern England, 1670-1730* (Markus Eder, 2009) 8: The concept of 'benefit of clergy' was a device in which a male accused could prove his literacy and therefore avoid the death penalty by reciting the 51st psalm of the bible. However, even illiterate males memorised the psalm and successfully recited it to escape the death penalty. Women were excluded from claiming the benefit of clergy. In substitution, these individuals were punished by getting burnt on their thumb with a letter to signify their offence so that they only received this privilege once.²⁰ For example, 'T' meant theft or 'M' meant murder. However, the majority of felonies were non-clergyable, since the parliament enacted legislation to restrict the number of crimes and felonies for which the benefit of clergy was applicable; See, eg, Laurence, above n 8, 6-7: Initially, the members of the clergy had immunity from being tried in secular courts. Overtime the immunity covered those who could read the 51st Psalm, which was also known as the "neck verse". This literacy test was abolished in 1705 and benefit of clergy became

Parliament stated that the numbers were 223 and 200 respectively.²⁴ According to Radzinowicz, these inconsistent data asserting the exact number of English capital offences are merely ‘approximations’.²⁵ Furthermore, he notes that the laws imposing capital punishment applied irrespective of gender or age.²⁶

1 *The Black Act*

The *Waltham Black Act* is considered to be the harshest single statute of the 18th century.²⁷ This Act mandatorily imposes the death penalty for many actions such as the stealing of hares,²⁸ and even for just appearing in disguise in certain locations.²⁹ Analysis of this draconian legislation³⁰ would suggest that the total number of cases

automatic for any offence which had not been excluded from this privilege. Section 6 of the *Criminal Statutes (England) Repeal Act 1827*, 7 & 8 Geo 4, c 27 completely abolished the privilege of benefit of clergy; See also William Holdsworth, *A History of English Law* (Sweet and Maxwell, 1956) vol 1, 615-6; Clive Emsley, Tim Hitchcock and Robert Shoemaker, *Crime and Justice: Punishments at the Old Bailey*, Old Bailey Proceedings Online < <http://www.oldbaileyonline.org/static/Punishment.jsp>>: ‘...[B]etween 1699 and January 1707, convicted thieves were branded on the cheek in order to increase the deterrent effect of the punishment, but this rendered convicts unemployable and in 1707 the practice reverted to branding on the thumb...Branding as a punishment for those receiving benefit of clergy ended in 1779’; Leon Radzinowicz, *A History of English Criminal Law and its Administration from 1750: The Movement of Reform* (Stevens & Sons, 1948) vol 1, 140; William Blackstone, *Commentaries on the Laws of England: of Public Wrongs* (Clarendon Press, 1769) vol 4, 365-74; Frederick Pollock and William Maitland, *The History of English Law: Before the Time of Edward I* (Cambridge University Press, first published 1898, 1911 ed) vol 1, 441-57.

²¹ See Lonang Insitute, *Commentaries on the Laws of England (1765-1769): Sir William Blackstone* <<http://www.lonang.com/exlibris/blackstone/>> for the online version of the Blackstone’s Commentaries on the Laws of England.

²² United Kingdom, *Parliamentary Debates* (1819), vol 39, col 808 (Sir Thomas Fowell Buxton).

²³ United Kingdom, *Parliamentary Debates* (1823), vol 9, col 405 (Sir James Mackintosh).

²⁴ For a brief indication and full list of the English capital statutes enacted in the eighteenth century, see Radzinowicz, above n 20, 4-5, 611-59.

²⁵ *Ibid* 3-4: The English criminal law was very confusing during the 18th century. Therefore, it is difficult to exactly state how many statutes imposed the death penalty without the benefit of clergy.

²⁶ *Ibid* 11-4: For example, although children between the ages of seven and fourteen were *doli incapax*, serious malicious acts resulting in heinous crimes could convict them of a capital crime. On the other hand, Radzinowicz notes that in 1814 a 14 year old boy was hanged for stealing. Therefore, age and gender was not a mitigating factor during the 18th century where the English executed convicted individuals of petty crimes.

²⁷ *Waltham Black Act 1722*, 9 Geo 1, c 22; See *Ibid* 50: Blackstone stated that persons in disguises or blackened faces committed crimes near Waltham, in Hampshire. The Black Act was enacted to eradicate those depredations. In the reign of Richard the First, on the border of England and Scotland, Robin Hood and his followers, the famous Roberdsmen, ‘committed great outrages’. Blackstone also mentioned that the technique of the ‘offenders, who operated in the forests of Waltham, seemed to have been modelled on the criminal activities of the famous band of Roberdsmen’.

²⁸ Radzinowicz, above n 20, 60; These individuals have to commit the offence whilst being armed, masked or with blackened faces.

²⁹ *Ibid* 57.

³⁰ *Ibid* 49-79.

in which the mandatory death sentence (without the benefit of clergy) could be imposed was within the range of 200 to over 350.³¹ The *Black Act* clearly represents a lack of judicial discretion in sentencing since the ‘circumstances’ of the crime and the ‘personality’ of the accused were not considerations.³²

Emergency laws were created to fill in the gaps created by existing English law on any particular ‘wrongful act’.³³ These laws were harsh and were passed to curb social injustice rather than to punish the offender.³⁴ For instance, under the *Black Act*, the wilful action of destroying trees and shrubs was a capital crime.³⁵ Two other acts were passed in 1766 for the abovementioned crime. The first statute imposed transportation for seven years as the punishment;³⁶ and the other levied a fine for the first two convictions and, transportation for seven years in the event of a third conviction.³⁷ Such enactments created numerous statutes governing the same wrongful act since the existing laws were not repealed.³⁸

Although ratification of legislation was driven by public opinion,³⁹ individuals who were in charge of the Bills lacked legal education and experience. They usually did not analyse the new Act with the existing body of laws.⁴⁰ Moreover, trivial crimes, like pickpocketing, were punishable by death; whilst the act of stealing a child, which was then a common crime in Britain, did not have an adequate punishment.⁴¹

Hence, legislation was often irrational with regards to the classification of capital

³¹ Ibid 76.

³² Ibid 77, 79: The majority of the *Black Act* was repealed by 1823, and the *Judgement of Death Act 1823*, 4 Geo 4, c 48 made imposition of the death penalty discretionary for all crimes except treason and murder. Do note that judges could commute the death penalty under the *Judgement of Death Act 1823*.

³³ Radzinowicz, above n 20, 15.

³⁴ Ibid 17.

³⁵ Ibid 22.

³⁶ *Cultivation, and for Better Prefervation, of Trees, Roots, Plants and Shrubs Act 1766*, 6 Geo 3, c 36.

³⁷ *Preservation of Timber Trees Act 1766*, 6 Geo 3, c 48.

³⁸ Radzinowicz, above n 20, 20; The enactment of emergency laws resulted in contradicting Acts.

³⁹ Ibid 15.

⁴⁰ Ibid 20.

⁴¹ Ibid 22.

crimes and did not impose a proportionate punishment for wrongs committed.⁴²

These inequalities in punishment negatively impacted the British sentencing regimes.⁴³

C Capital Punishment in Australia

Lennan and Williams published an excellent article in 2012 examining the history of the capital punishment legislation in Australia.⁴⁴ This section will not explore the history in such depth but will instead illustrate the key historical moments from Australia's colonial days until the death penalty was abolished.

In 1788, British convicts were transported to New South Wales (NSW) and a penal colony was formed in that region.⁴⁵ The colony by acquiring the First Charter of Justice had also received English criminal law.⁴⁶

Between 1826 and 1846, 1296 people were sentenced to death and 363 executions were carried out in NSW.⁴⁷ In the early 19th century, 'sheep stealing, forgery,

⁴² Ibid.

⁴³ See, eg, *R v Palmer* (1795) 2 Leach 692 where the offender was discharged since the laws then did not impose a suitable punishment for the individual's action; For a discussion on execution methods and the way the death penalty was commuted, see Emsley, Hitchcock and Shoemaker, above n 20; See also Lennan and Williams, above n 4, 13: In 18th Century, the death penalty was substituted for a less severe sentence for most offences, resulting in about 25 offences that usually attracted the death penalty in Britain. Through mitigation such as the benefit of clergy, pardoning, respited sentencing because of pregnancy, or the performance of military or naval duties, offenders who were convicted for capital crimes were usually not executed. Until it was abolished, transportation was an alternative to the death penalty; See also Alex Castles, *An Australian Legal History* (LawBook, 1982) 56, quoting James Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 1, 480: However, the legislation providing for transportation was 'guided by no principle whatever, and was utterly destitute of any sort of uniformity'.

⁴⁴ Lennan and Williams, above n 4, 659-94.

⁴⁵ Ibid 663; See also Alex Castles, above n 43, 56, 64: The American Revolution prevented the British from transporting the convicts to North America. This was one of the main reasons why Australia came into existence. Individuals guilty of capital crimes had their sentences commuted and were transported to Australia.

⁴⁶ Lennan and Williams, above n 4, 663, citing Letters Patent, 2 April 1787 (*First Charter of Justice* for New South Wales) and the instructions to Governor Darling of 17 July 1825; Following the acquisition of the First Charter of Justice, the Court of Criminal Jurisdiction was to apply English criminal law in matters of 'more serious offences'. Do not that the Governor of New South Wales could commute capital punishment.

⁴⁷ Lennan and Williams, above n 4, 664, citing Tim Castle, 'Watching Them Hang: Capital Punishment and Public Support in Colonial New South Wales, 1826-1836' (2008) 5(2) *History Australia* 1, 43.2; See also Ivan Potas and John Walker, 'Capital Punishment' (Trends and Issues in

burglary, sexual assaults, murder, manslaughter and ‘being illegally at large’ were capital crimes in Australia.⁴⁸ Furthermore, racial conflicts between the Aboriginal people and White Settlers also attracted the death penalty during that period.⁴⁹

By 1833, wrongful acts such as cattle stealing, forgery and some forms of theft were no longer capital crimes in NSW.⁵⁰ Additionally, the English law reforms of 1837 were adopted in NSW in 1838.⁵¹ Through this adoption, offences like nonviolent burglary and attempted murder without effecting bodily injury were no longer punishable by death.⁵² Moreover, capital punishment was also repealed for crimes punishable under riot, smuggling and slave trading statutes.

Van Diemen’s Land, a separate colony formed in 1825, did not adopt the abovementioned reforms.⁵³ Even when Britain declared that carnal knowledge, rape and sodomy were no longer capital crimes, the condemned in Van Diemen’s Land were still punished by death for these offences.⁵⁴

From 1853, Australian colonies started abolishing public executions⁵⁵ Abolitionists in the Australian colonies took this opportunity to suggest that capital punishment

Criminal Justice Paper No 3, Australian Institute of Criminology, Feb 1987) 1: During the colonial times, it has been estimated that about 2000 prisoners were executed in Australia.

⁴⁸ Lennan and Williams, above n 4, 663; Potas and Walker, above n 47; Satyanshu Mukherjee, John Walker and Evelyn Jacobsen, *Crime and Punishment in the Colonies: A Statistical Profile* (History Project Inc, 1986) 5.

⁴⁹ Lennan and Williams, above n 4, 664, citing Tim Castle, above n 47, 43.11; Alex Castles, above n 43, 267.

⁵⁰ *Imperial Acts Adoption Act 1833*, 4 Wm IV No 4 (NSW).

⁵¹ *Imperial Acts Adoption Act 1838*, 2 Vic No 10 (NSW), adopting inter alia *Capital Punishment Abolition Act 1837*, 1 Vic, c 91; *Offences against the Person Act 1837*, 1 Vic, c 85; *Burglary Act 1837*, 1 Vic, c 86; *Burning of Buildings, etc. Act 1837*, 1 Vic, c 89; and *Punishment of Offences Act 1837*, 1 Vic, c 91.

⁵² Lennan and Williams, above n 4, 664.

⁵³ *Ibid.*

⁵⁴ Alex Castles, above n 43, 261-2; See generally *Ibid* 664-5: Throughout these periods, colonies were exposed to media publications of capital punishment which usually took a negative viewpoint towards the punishment.

⁵⁵ Lennan and Williams, above n 4, 665: The Australian colonies abolished public executions as follows- New South Wales, Victoria, and Tasmania in 1855; South Australia in 1858; Western Australia in 1870; and Moreton Bay (present day Queensland) in 1855. (Do note that Moreton Bay settlement was part of New South Wales then, so the New South Wales legislation applied).

itself should be abolished.⁵⁶ However, it is documented that non-Europeans were subject to illegal public executions even after the reforms were passed.⁵⁷ South Australia and Western Australia amended their Acts to encompass an exception:⁵⁸ Convicted Aboriginal people could be executed publically at the place they committed the capital crime.⁵⁹

England repealed capital punishment for various crimes in 1861. Murder, treason, espionage, arson in royal dockyards, and piracy with violence, were the only five capital offences in England from that date.⁶⁰ However the Australian colonies did not follow suit. Various attempts to abolish the death penalty were moved in the various Australian colonies but none were accepted.⁶¹ Hence, by Federation in 1901, each colony had their own laws governing capital crimes. But the crimes that attracted the punishment varied from colony to colony.⁶² For instance, in Western Australia (WA) the death penalty was to be imposed for five crimes: murder, attempted murder by administering poison or wounding, rape, burglary with violence, and treason.⁶³ But in NSW, there were 11 crimes that attracted the death sentence.⁶⁴

Even after Federation, each State followed their respective colonial laws which sanctioned capital punishment.⁶⁵ However, capital punishment was not imposed as often as before and was usually sanctioned only for murder. By 1985, the states,

⁵⁶ Ibid.

⁵⁷ Ibid, citing John McGuire, 'Judicial Violence and the "Civilizing Process": Race and the Transition from Public to Private Executions in Colonial Australia' (1998) 29(111) *Australian Historical Studies* 187, 197, 200.

⁵⁸ See *Act to Amend an Act to Regulate the Execution of Criminals 1861 (SA)*; *Capital Punishment Amendment Act 1871 Amendment Act 1875 (WA)*.

⁵⁹ Lennan and Williams, above n 4, 666.

⁶⁰ Ibid.

⁶¹ See generally Ibid.

⁶² Ibid 667-8.

⁶³ See generally Ibid 668.

⁶⁴ Ibid.

⁶⁵ Ibid.

territories and the Commonwealth had abolished the death penalty from their regimes.⁶⁶

The Australian Federal government recently passed the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth), which extended the prohibition on the capital punishment under the *Death Penalty Abolition Act 1973* (Cth) to State laws.⁶⁷ This prevents any states or territories from reintroducing the capital punishment in their regimes.⁶⁸ This change is aligned with Australia's opposition to the death penalty at the international level which can be noted through the Commonwealth's ratification of the *ICCPR*, and the *Second Optional Protocol to the ICCPR*.⁶⁹ This gradual move away from the death penalty stands in contrast to Singapore, which retains the punishment to this day.

D Brief History of Singapore

Singapore shares much common heritage with Australia in terms of its English background. The advancement of criminal law in Singapore is closely connected with the history of the nation, specifically from the time it was part of the Straits Settlements. The Penal Code of the Straits Settlements, which was initially crafted for India, is to this day part of Singapore's criminal law. Over the years, Singapore has amended the punishment provisions of the Code, and enacted other legislation

⁶⁶ See generally Ibid 668-83.

⁶⁷ A Federal law has superiority over any conflicting state law because of s 109 of the *Constitution of the Commonwealth of Australia*; Section 6 is added to the *Criminal Code Act 1995* (Cth) stating that '[t]he punishment of death must not be imposed as the penalty for any offences under the laws of the Commonwealth, the territories, the states and, to the extent to which the powers of the Parliament permit, Imperial Acts'. See generally Ibid 682-3; See also George Williams, 'Chances of Return of Death Penalty Remain Almost Nil', *The Sydney Morning Herald* (online) 18 June 2013 <<http://www.smh.com.au/comment/chances-of-return-to-death-penalty-remain-almost-nil-20130617-2oeie.html>>: When the *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) was passed there were no speeches or votes against the law from the government and opposition parties.

⁶⁸ For discussion on how Australian states can reintroduce the death penalty if they want to and how complete abolition of the punishment can be undertaken by Australia, see below nn 717-25 and accompanying text.

⁶⁹ Lennan and Williams, above n 4, 682-3; See also Finlay, above n 4; For a brief discussion on International laws and obligations, see below nn 167-214 and accompanying text.

like the *Misuse of Drugs Act*.⁷⁰ Nonetheless, the initial Penal Code to a large extent remains unaltered. It is vital to briefly mention Singapore's history to comprehend how its Penal Code plays a significant role in battling crimes today.⁷¹ Specifically, this section will analyse the crime rates in the Straits Settlements, the capital offences in the Straits Settlements Penal Code and the capital punishment in modern Singapore.

Singapore was founded in 1819 by the British; and in 1826, was united with Penang and Malacca to form the Straits Settlements.⁷² The Japanese invaded Singapore on 15 February 1942 and were in control of the island until 12 September 1945.⁷³ The Straits Settlements was disbanded only in 1946.⁷⁴ Singapore was a separate Crown colony until 1959, when it became the State of Singapore.⁷⁵ In 1963, Singapore became part of the Federation of Malaysia, a union which was short-lived due to

⁷⁰ *Misuse of Drugs Act* (Singapore, cap 185, rev ed 2008) ('*Misuse of Drugs Act* (Singapore)').

⁷¹ For a detailed analysis of Singapore's history, see Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (LexisNexis, 2nd ed, 2012) 5-11; Helena H M Chan, *An Introduction to the Singapore Legal System* (Malayan Law Journal, 1986) 1-20; Kevin Y L Tan, 'Essays in Singapore Legal History: An Introduction' in Kevin Y L Tan (ed), *Essays in Singapore Legal History* (Marshall Cavendish Academic, 2005) 1, 1-27.

⁷² Yeo, Morgan and Cheong, above n 71, 7 [1.18]; Sir Stamford Raffles, a representative of the English East India Company, founded Singapore. This acquisition was prompted because of two reasons; Firstly, Britain's rivalry with their Dutch counterparts and secondly, to uncover a port to facilitate their India-China trade in the Straits of Malacca; See also Chan, above n 71, 1-2: The British and Dutch rivalry spread throughout South-East Asia, which explains why Indonesia, Singapore's neighbouring country, belongs to the 'civil law family' instead. spread throughout South-East Asia, which explains why Indonesia, Singapore's neighbouring country, belongs to the 'civil law family' instead. The British East India Company established a trading post under a signed treaty with the Temenggong, who was an official of the Sultan of Johore. In 1824, the Sultan of Johore ceded Singapore to the British and thus the East India Company had 'acquired full sovereignty in perpetuity over Singapore.' In 1830, the Presidency of Bengal took over governance of the Straits Settlements. Singapore became the British administrative centre of the Straits Settlements in 1836. The Straits Settlements became a separate colony in 1867 and was directly governed as an English colony by the British Colonial Office in London.

⁷³ Wong Kok Weng and Sia Aik Kor, 'A History of the Singapore Legal Service' in Kevin Y L Tan (ed), *Essays in Singapore Legal History* (Marshall Cavendish Academic, 2005) 73, 83-4: During the 'Japanese occupation', colonial laws were still in force unless the Japanese imposed their own laws.

⁷⁴ Chan, above n 71, 3; *Straits Settlements (Repeal) Act 1946* (UK).

⁷⁵ Chan, above n 71, 4.

political differences.⁷⁶ Ultimately in 1965, Singapore became an independent Republic.⁷⁷

1 *Straits Settlements Penal Code*

Prior to 1870, English common law governed criminal matters in the Straits Settlements.⁷⁸ In 1871, the *Indian Penal Code* was adopted into the Straits Settlements by way of local enactment.⁷⁹ It is also vital to note that the Criminal

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Kevin Y L Tan, 'Essays in Singapore Legal History: An Introduction', above n 71, 10-1, 15-20: British colonisation ultimately instilled common law values and methodology into Singapore's legal system. This was achieved in 1826 via the Second Charter of Justice. From the time Singapore was founded until 1826, there were no legal documents suggesting the way "law and order" was to be directed on the island. In that period, self-government was evident since leaders of the different ethnic groups oversaw the 'administration of justice'. The case of *Regina v Willans* (1858) 3 Kyshe 16 expounded that the Second Charter of Justice had introduced English laws into the Straits Settlements (and thus into Singapore). However, acceptance of English laws in Singapore was subject to three modifications- Firstly, English law was to be enforced depending on local religions and customs; secondly, English law was to be enforced depending on local legislation; thirdly, only English law of general policy and application that was suitable for Singapore was acquired. There were still questions about which English statutes were applicable in Singapore. This was clarified when the Singapore Parliament enacted the *English Law Act 1993*; For the printed copy of the Justice and Right Clause of the Second Charter of Justice, see Andrew Phang, *From Foundation to Legacy: The Second Charter of Justice* (Singapore Academy of Law, 2006) 83: According to Andrew Phang, there has been a whole debate on the "Justice and Right" clause- Was the clause introducing English law or the laws of the local population in Singapore since the Second Charter of Justice did not expressly state that English law was to be introduced into the Straits Settlement. However the case of *MacDonald v Levy* (1833) 1 Legge 39, interpreted the "Justice and Right" clause in the New South Wales Letters Patent to 1814 as introducing the English Laws in the colony. For further reasons as to why the decision in *Regina v Willans* is logical and practical, see pp 7-18 in Andrew Phang's book.

⁷⁹ Chan Wing Cheong and Andrew Phang, 'The Development of Criminal Law and Criminal Justice' in Kevin Y L Tan (ed), *Essays in Singapore Legal History* (Marshall Cavendish Academic, 2005) 245, 248-9: The *Indian Penal Code 1860* was substantially framed by Lord Macaulay. The Code, which was a 'modified version' of the English criminal law back in that time, was also inspired by the *French Penal Code* and Livingston's *Code of Louisiana*. Although judges and the Singapore Bar were not in favour of the Penal Code and preferred English criminal law to be applied in the Straits Settlements, the public, the Penang Bar, and the Attorney-General were clearly in favour of the codification of criminal laws. These positive views were based on the 'simplicity' of the Indian Penal Code, the 'satisfactory operation' of the Code in India, and the Code's 'efficiency' when compared to the English criminal law; See also Yeo, Morgan and Cheong, above n 71, 10-11, 14-15 [1.25]-[1.26], [1.33]-[1.35]: The English common law is a reflection of its legal history. A large number of statutes, like the *Waltham Black Act* (illustrated earlier), imposed the death penalty for trivial crimes; creating an uncertain sentencing regime. Furthermore, the English law was 'obscure, over-technical, [and] inaccessible'. As such, individuals without sufficient English legal knowledge and experience would not be able to understand how the English criminal system operated. (However it is important to note that the Straits Settlements' judges and lawyers were English trained unlike Indian judges.) This may have resulted in the application of severe and cruel laws in Singapore over time. Fitzjames Stephen, the famous jurist, stated that '...[comparing] the *Indian Penal Code* with English criminal law was like comparing Cosmos with Chaos.' The codification of the criminal law was indeed a wise decision. The Code reflected core values which were 'accessibility', 'comprehensibility', 'precision and certainty', and 'democracy'.

Code that Sir Samuel Griffith drafted has ‘very significant structural similarities’ to the *Indian Penal Code*.⁸⁰

The *Straits Settlements Penal Code 1871* provided the law for criminal matters in Singapore and excluded the English common law or statute law.⁸¹ Certain offences in the *Code* attracted the death penalty.⁸² These offences included; (1) the waging of war against the King or the planning to cause hurt to the King;⁸³ (2) abetting the commission of mutiny by an officer in the Army;⁸⁴ (3) fabricating or providing false evidence which resulted in a capital offence conviction and execution of an innocent individual;⁸⁵ (4) murder;⁸⁶ (5) abetting the commission of suicide by a child or insane person;⁸⁷ (6) convicts already serving penal servitude for life committing murder;⁸⁸

⁸⁰ Yeo, Morgan and Cheong, above n 71, 13 [1.30]; The Criminal Codes in Western Australia, Queensland, Tasmania and the Northern Territory have either been drafted by Griffith himself or been drafted by relying greatly on Griffith’s Code.

⁸¹ This was affirmed in *R v Lee Siong Kiat* [1935] 4 MLJ 53, 56 (Terrel J); See generally Molly Cheang, *Criminal Law of Malaysia & Singapore: Principles of Liability* (Professional Law Books Publishers, 1990) 1-2.

⁸² *Straits Settlements Penal Code 1871* (Ordinance No 4 of 1871); See *The Laws of the Straits Settlements* (Waterlow & Sons, revised ed, 1920) vol 1

<<http://www.lib.nus.edu.sg/nus/strset/Laws%20Volume-1.pdf>>; The sections mentioned in text are paraphrased. The footnotes will quote the sections; In addition to capital punishment being imposed, the offender would have all of their moveable and immovable property forfeited to the Crown under s 62 of the *Straits Settlements Penal Code*. Nonetheless, the Governor was able to commute the death penalty in two ways. Firstly, under s 54, the Governor could commute the punishment for another punishment provided by the Code, without the consent of the convicted. Secondly, under s 55, with the consent of the convicted, the Governor could commute the capital punishment into perpetual or temporary banishment from the Colony or from any Settlement of the Colony.

⁸³ Section 121 states ‘[w]hoever wages war against the King, or attempts to wage such war, or abets the waging of such war, shall be punished with death, or penal servitude for life, and shall forfeit all his property.’; Section 121A states that ‘Whoever compasses, imagines, invents, devises or intends the death of or hurt to or imprisonment or restraint of the King, his heirs or successors, shall be punished with death and shall forfeit all his property.’

⁸⁴ Section 132 states ‘[w]hoever abets the committing of mutiny by an officer, soldier, or sailor in the Army or Navy of the King, shall, if mutiny be committed in consequence of that abetment, be punished with death or with penal servitude for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.’

⁸⁵ Section 194 states ‘[w]hoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by this Code, or by the law of England, shall be punished with penal servitude for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if an innocent person be convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either with death or the punishment hereinbefore described.’

⁸⁶ Section 302 states ‘[w]hoever commits murder shall be punished with death.’

⁸⁷ Under section 305 ‘[i]f any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the

and (7) gang robbery where one of the five or more robbers commits murder during that robbery.⁸⁹

2 Crime Rates in the Straits Settlements

Since the British administrative centre and the trading port were situated in Singapore, there was an influx of immigrants from different cultural and religious backgrounds in search of job opportunities.⁹⁰ This multi-cultural society created various social problems which impacted the security of Singapore.⁹¹

Prisoners from British India were transported to Singapore from 1825 till 1873, when the island was a penal station.⁹² These convicts were transported to eradicate the shortages of labour so as to develop the region.⁹³ The convicts were released after the end of their sentence periods.⁹⁴ Most of them settled down in the Straits Settlements, but the British authorities were unable to control these individuals.⁹⁵ Hence, convict transportation was a contributing factor to the high level of crimes in Singapore.

commission of such suicide shall be punished with death or penal servitude for life, or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine.’

⁸⁸ Section 303 states that ‘[w]hoever, being under sentence of penal servitude for life, commits murder, shall be punished with death.’; Section 307 reads as ‘[w]hoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to penal servitude for life, or to such punishment as is hereinbefore mentioned..... When any person offending under this section is under sentence of penal servitude for life, he may, if hurt is caused, be punished with death.’

⁸⁹ Under section 396 ‘[i]f any one of five or more persons, who are con-jointly committing gang-robbery, commits murder in so committing gang-robbery, every one of those persons shall be punished with death or penal servitude for life, or rigorous imprisonment for a term which may extend to ten years, and, where the punishment is not death, with whipping with a cat-of-nine-tails.’

⁹⁰ Nordin Hussin and Shakimah Che Hasbullah, ‘Crimes in the Straits Settlements before World War II’ (2012) 20(1) *Pertanika Journal of Social Science & Humanities* 121, 123.

⁹¹ *Ibid.*: For instance, prostitution, gang fights and increase in criminal activities could be attributed to the increasing immigration in the Straits Settlements.

⁹² Cheong and Phang, above n 79, 257.

⁹³ Hussin and Hasbullah, above n 90, 122.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

Other factors that could be closely linked to the increase of criminal activities in the Straits Settlements include the low number of police officers⁹⁶ (some officers were corrupt and incompetent to perform their duties),⁹⁷ and the lack of prison staff.⁹⁸

Amongst the three stations, Singapore ‘was particularly notorious as a dangerous and lawless place.’⁹⁹ This was attributed to the ‘transitory, poverty-stricken, alien immigrant population and [the] constant influx of turbulent sailors to Singapore’.¹⁰⁰

Furthermore, the operation of triads,¹⁰¹ and the opium trade presented vast problems in upholding law and order in Singapore.¹⁰² For instance, during the 1830s, there

⁹⁶ See generally Ibid 122-125; See also C M Turnbull (Rayner), ‘Internal Security in the Straits Settlements: 1826-1867’ (1970) 1(1) *Journal of Southeast Asian Studies* 37.

⁹⁷ Hussin and Hasbullah, above n 90, 124-125 citing General Resident, 1299/1897, Dismissal of Ong Seng Chye, clerk, Registration of Crime Police, Singapore. For incompetence, memorandum from Secretary of General Resident, Kuala Lumpur, to the Secretary of Colony offices in Singapore, dated 24 February, 1897: One Ong Seng Chye, who was employed under the Department of Crime Registration in a Singapore police station when it was part of the Straits Settlements, was dismissed for the misconduct he committed whilst in service.

⁹⁸ See generally Hussin and Hasbullah, above n 90, 122-125.

⁹⁹ Turnbull (Rayner), ‘Internal Security in the Straits Settlements: 1826-1867’, above n 96, 37.

¹⁰⁰ Ibid.

¹⁰¹ Ibid 40.

¹⁰² See generally Naidu Ratnala Thulaja, National Library Board Singapore, *Opium & Opium Smoking* <http://infopedia.nl.sg/articles/SIP_622_2004-12-16.html>: The British colonial government encouraged opium trading in the Straits Settlements by franchising the trade to rich Chinese businessmen. It was a booming trade which approximately amounted to 49 per cent of the Straits Settlements’ total revenue collection from 1898 till 1906. When opium prices soared, individuals who needed to support their addiction committed criminal offences like theft and abduction. Although opium licenses were mandatory for opium den operations, many illegal operators emerged with close connections to triads. At the start of the 20th century, anti-opium movements were evident in the Straits Settlements. Citizens desired the end of opium trading and consumption. After which in 1907, an Opium Commission was established to examine the usage of opium in the settlements and to provide recommendations in order to illegalise it. The Commission recommended the ban of opium sales to women and children under the age of 18. The Chandu Revenue Ordinance (‘CRO’) was enacted in 1909; and the Monopolies Department was setup in 1910 to control the sale of opium. In 1925, the British government issued licenses to opium consumers to use the drug in their own premises. Opium consumers had to mandatorily register their status with the government. In 1933 the CRO was amended, which stated that the possession of opium by anyone under the age of 21 was illegal. The following year, another amendment was made to the CRO- opium possession was only permitted to those who had a valid medical practitioner’s certification stating that the opium was for health reasons. Although the abovementioned changes had taken place, the number of addicts was increasing in Singapore. For instance, in 1941, there were 16 552 opium addicts. This number rose to approximately 30 000 during the Japanese Occupation. Importantly, it was only in 1943, during the Japanese invasion, that opium sales were totally prohibited in the Straits Settlements. Although the invasion lasted till 1945, opium consumption and trading were still growing till the late 1980s. In 1988, there were 6 062 drug addicts arrested (including opium addicts). However, the previous year only 4,730 drug addicts were caught. To curb the social and legal problems related to drug use, the Singapore government, on 30 November 1989, passed the *Misuse of Drugs (Amendment) Act 1989* (Singapore, Ordinance No 38 of 1989) to extend the death penalty to cocaine, cannabis and opium traffickers. This also included manufacturers, importers and exporters so as to completely eradicate

were accounts of burglaries involving gangs of no less than 50 individuals.¹⁰³

Singapore had the highest level of criminal activities reported in the Straits Settlements from 1895 till 1938.¹⁰⁴ 341 489 crimes were reported in Singapore alone.

The total number of crimes reported in Malacca and Penang over this same period was 43 650 and 243 657 respectively.

drug abuse in Singapore. For further reading, see Derek Mackay, *Eastern Customs: The Customs Service in British Malaya and the Opium Trade* (Radcliffe Press, 2005).

¹⁰³ Turnbull (Rayner), 'Internal Security in the Straits Settlements: 1826-1867', above n 96, 37 citing C B Buckley, *An Anecdotal History of Old Times in Singapore 1819-1867* (University of Malaya Press, 1965) 224.

¹⁰⁴ See tables in Hussin and Hasbullah, above n 90; The figures are the total number of seizable crime reported. Seizable crime refers to more serious offences such as murder and robbery, while non-seizable crime refers to minor punishable offences such as street indiscipline; E M Merewether, *Report on the Census of the Straits Settlements, Taken on 5th April 1891* (Singapore Government Printing Office, 1892) 1: In 1881, the population of the settlement of Singapore was 139 208 whilst Penang and Malacca settlements had a population of 190 597 and 93 579 respectively. In 1891, the figures were 184 554 in the Singapore settlement, 235 618 in Penang settlement, and 92 170 in Malacca settlement respectively; J.R. Innes, Esq., *Report on the Census of the Straits Settlements, Taken on 1st March 1901* (Singapore Government Printing Office, 1901): In 1901, the population of the settlement of Singapore was 228 555 and the population of Penang and Malacca settlements were 248 207 and 95 487 respectively; H. Marriott, Esq., *Report on the Census of the Colony of the Straits Settlements, Taken on 10th March 1911* (Singapore Government Printing Office, 1911): The total population of the settlement of Singapore was 311 985 (this included the population figures of Christmas Island and Cocos-Keeling Islands which was not included in the 1901 census). The total population of the settlement of Penang was 278 003 and the total population of the settlement of Malacca was 124 081; J E Nathan, *The Census of British Malaya, 1921* (Waterlow & Sons, 1922): The total population of the three settlements are as follows- Singapore was 425 913 (the urban population was 351 909), Penang was 304 335 (the urban population was 141 424), and Malacca was 153 522 (the urban population was 33 271); Swee-Hock Saw, *The Population of Singapore* (Institute of Southeast Asian Studies, 2012) 6-7: The population census of Singapore from 1824 till 1860 were unreliable due to serious errors in them ('head counts' were done 10 times within this period). However, from 1871 the population statistics were more trustworthy and comprehensive. These censuses were held once every 10 years up to 1931. In 1941, there was no census collected due to World War II. The census was conducted in 1947 after the war and another 10 years later. Singapore as a Republic then conducted its first census in 1970, which matches the United Nations recommendations for countries to take their census on that year. Following 1970, censuses were conducted once every 10 years till the recent 2010 census.

E Capital Punishment in Singapore

The People's Action Party (PAP)¹⁰⁵ retained the death penalty that the British authorities had introduced in the Straits Settlements.¹⁰⁶ Currently, the law in Singapore allows capital punishment to be ordered for offences including murder;¹⁰⁷ drug trafficking of certain types of narcotic drugs above the prescribed limits;¹⁰⁸ the use of arms¹⁰⁹ to commit a scheduled offence,¹¹⁰ arms trafficking,¹¹¹ and the waging of war against the government.¹¹²

¹⁰⁵ A political party in Singapore that has been winning a majority of seats in every general election since 1959. In 1959, Singapore became a self-government and in 1965 gained full independence.

¹⁰⁶ Alfred Oehlers and Nicole Tarulevicz, 'Capital Punishment and the Culture of Developmentalism in Singapore' in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment* (Stanford University Press, 2005) 291, 291; If the British had completely abolished the death penalty for all crimes prior to the enactment of the Straits Settlements Penal Code, it is safe to speculate that the punishment might not be part of Singapore's legal system today. This speculation is based on two reasons. Firstly, since English common law governed criminal matters prior to the enactment of the Code, the death penalty would have been abolished in the Straits Settlements. Secondly, proponents of English law might have protested against the enactment of the Penal Code since the Code would have been reintroducing the death penalty into the Straits Settlements.

¹⁰⁷ *Penal Code* (Singapore, cap 224, rev ed 2008) s 302 ('*Penal Code* (Singapore)'); However note that there are other capital offences under Singapore criminal law. Under the *Penal Code* (Singapore, cap 224, rev ed 2008), whoever compasses, imagines, invents, devises, or intends the death of or hurt to or imprisonment or restraint of the President (s 121A); and whoever abets such commission of offence against the President (s 121C) can be sentenced to death. Further, piracy involving endangerment to life of another person or the murdering or attempt to murder another person (s130B); genocide involving the killing of any individual (s 130E(a)); attempted murder which hurt caused to another person by a convict under the sentence of imprisonment of life (s 307(2)); kidnapping or abducting a person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered (s 364); gang-robbery where one of the five or more convicted gang-robbers commits murder, resulting in all of those robbers to be punished (s 396); are punishable by death. Under s 227 of the *Penal Code* the death penalty could be reinstated if the convicted individual violates a condition on remission of punishment. Under s 3 of the *Kidnapping Act* (Singapore, cap 151, rev ed 1999), the death penalty can be ordered for the abduction, wrongful restraint or wrongful confinement of a person for ransom. Under the *Singapore Armed Forces Act* (Singapore, cap 295, rev ed 2000), military offences such as the assisting of the enemy by a person subject to military law (s 12), or mutiny committed in the face of the enemy or involves the use of violence (s 15(1)(b)), or officer fails to defend vessel or goods in convoy, or refuses to fight in the defence of a vessel in his convoy when under attack, or abandons or exposes a vessel in convoy to hazard (s 39) can be legally executed. Section 3(1) of the *Terrorism (Suppression of Bombings) Act* (Singapore, cap 324A, 2008 rev ed) states that terrorist bombing involving the use of explosives or lethal devices in a public place, public transportation system, government or infrastructure facilities with the intention to cause death or bodily harm and death is caused, is punishable by death.

¹⁰⁸ See *Misuse of Drugs Act* (Singapore) second schedule; The Singapore Parliament passed the *Misuse of Drugs (Amendment) Act 1989* which extended the mandatory death penalty for the offence of trafficking, importing or exporting particular drugs above a prescribed limit.

¹⁰⁹ *Arms Offences Act* (Singapore, cap 14, rev ed 2008) s 4.

¹¹⁰ *Ibid* ss 4A, 5: accomplices of a person who used any arms to commit or attempted to commit any offence can be punished by death.

¹¹¹ *Ibid* s 6.

¹¹² *Penal Code* (Singapore) s 121.

The social policy of the Singapore government concentrates greatly on controlling crimes.¹¹³ The first Prime Minister of Singapore, Lee Kuan Yew, commented on the approach to punishment regimes:

The three and a half years of Japanese occupation...gave me vivid insights into the behaviour of human beings and human societies, their motivations and their impulses...The Japanese Military Administration governed by spreading fear...Punishment was so severe that crime was very rare. In the midst of deprivation after the second half of 1944, when the people were half starved, it was amazing how low the crime rate remained...I have never believed those who advocate a soft approach to crime and punishment, claiming that punishment does not reduce crime. That was not my experience in Singapore before the war, during the Japanese occupation, or subsequently.¹¹⁴

It is difficult to determine the exact number executions in Singapore from the time of its independence since precise statistics are not publicly available.¹¹⁵ In 2004, Amnesty International published a document about Singapore's death penalty regime.¹¹⁶ This document referred to the quinquennial report on the death penalty by

¹¹³ Chan Sek Keong, 'The Criminal Process: The Singapore Model' (1996) 17 *Singapore Law Review* 431, 438; See also Chen Siyuan and Eunice Chua, 'Wrongful Convictions in Singapore: A General Survey of Risk Factors' (2010) 28 *Singapore Law Review* 98, 104; Siyuan and Chua note that public policy in Singapore focuses more on 'maintaining public order and safety through efficient and effective crime prevention and control' than 'protecting the innocent from conviction'.

¹¹⁴ Lee Kuan Yew, *The Singapore Story: Memoirs of Lee Kuan Yew* (Singapore Pres Holdings, 1998) 74, quoted in Yeo, Morgan and Cheong, above n 71, 65-6 [2.89]-[2.90].

¹¹⁵ Oehlers and Tarulevicz, above n 106, 291; Importantly, unlike Australia, Singapore has not enacted a Freedom of Information statute; Megawati Wijaya, *Prisoners are Fit to Drop in Singapore: 'Once a Jolly Hangman by Alan Shadrake'*, (Book Review) Asia Times Online

<http://www.atimes.com/atimes/Southeast_Asia/LH07Ae01.html>: Former chief executioner of Changi Prison, Darshan Singh, told his interviewer, Alan Shadrake, that he has hung 'over 1000, can be under' from 1959 when he commenced his job; See also Roger Hood, *The Death Penalty: A Worldwide Perspective* (Oxford University Press, 3rd ed, 2002) 92: Hood estimated the population of Singapore in the year 1998 to be 3.5 million. This estimation was based on Singapore Census of Population 2000. According to that Census the population in the year 2000 was approximately 4 million. Furthermore, he stated that 112 executions were carried out between 1996 and 2000. This amounts to 6.40 executions per million population.

¹¹⁶ Amnesty International, *Singapore: The Death Penalty-A Hidden Toll of Executions* (January 2004) <<http://www.amnesty.org/en/library/asset/ASA36/001/2004/en/74c4cb33-d64e-11dd-ab95-a13b602c0642/asa360012004en.pdf>>.

the UN Secretary-General.¹¹⁷ According to that report, between 1994 and 1999, Singapore had the highest rate of executions in the world- 13.57 executions per million population.¹¹⁸ Nevertheless, in the more recent 2010 report on capital punishment,¹¹⁹ the UN Secretary-General stated that the number of executions between 1999 and 2003 was 138.¹²⁰ This amounts to 6.90 executions per million population.¹²¹ Further, between 2004 and 2008, the total number of executions in Singapore was estimated to be 22.¹²² This amounts to 1.26 executions per million population.¹²³

Furthermore, Amnesty International in its document compiled data from various sources, including the figures provided by the Ministry of Home Affairs in answer to a parliamentary question in 2001, and quantified the number of execution for the period between 1991 and 2003 as being 408 individuals.¹²⁴ This figure includes 44 foreign nationals executed in Singapore between the periods 1991 to 2000.¹²⁵

However, in response to Amnesty International's report, the Ministry of Home Affairs stated that 'in its attempt to campaign against the death penalty in Singapore, [Amnesty International] has resorted to grave errors of facts and misrepresentations,

¹¹⁷ Ibid 5-6 [5].

¹¹⁸ Ibid.

¹¹⁹ This was the eighth quinquennial report by the UN Secretary General on capital punishment.

¹²⁰ *Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty- Report of the Secretary-General*, Economic and Social Council, Substantive Session of 2010, UN Doc E/2010/10 (18 December 2009) 22.

¹²¹ Ibid.

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Amnesty International, *Singapore: The Death Penalty-A Hidden Toll of Executions*, above n 116, 5-6 [5]; See also Franklin Zimring, Jeffrey Fagan, David Johnson, 'Executions, Deterrence and Homicide: A Tale of Two Cities' (JSP/Center for the Study of Law and Society Faculty Working Papers, Center for the Study of Law and Society Jurisprudence and Social Policy Program, The University of California Berkeley, August 2009) <<http://escholarship.org/uc/item/80h6484c>>: Franklin Zimring and others have put together a table of the excutions and execution rates in Singapore from 1991 to 2007. See also Singapore Prison Service, Government of Singapore, *Singapore Prison Service Annual Report 2009*, 70 <<http://www.prisons.gov.sg/content/dam/sps/publications/part4.pdf>>. However note that in 2007, the number of executions was three and not two as depicted in their table.

¹²⁵ Amnesty International, *Singapore: The Death Penalty-A Hidden Toll of Executions*, above n 116, 5-6 [5].

which seriously calls into question the credibility of its Report.¹²⁶ The Singapore government believes that the presence of capital punishment in Singapore's legal system has deterred the establishment of major drug syndicates in the country.¹²⁷ The Ministry also emphasized that, unlike Amnesty International's claims, there is no international consensus on abolition of the death penalty.¹²⁸ The Singapore government firmly believes that it only imposes the death penalty for the most serious crimes since it understands the severity of the penalty and the fact that mistakes in its application cannot be remedied.¹²⁹ Other errors identified by the Ministry include; firstly, the fact that between 1993 till 2003 Singaporeans were mostly executed and not foreigners as reported; and secondly, the false accusation that the capital punishment has been disproportionately imposed on the 'poorest, least educated and most vulnerable members of society.'¹³⁰ In fact, 95% of those executed from 1993 to 2003 were above the age of 21, and only 20% had not received formal education.¹³¹ Furthermore, approximately '80% of those who had been sentenced to death had employment before their convictions.'¹³² These errors are claimed to make the report less credible and possibly biased in order for Amnesty International 'to advance its political agenda'.¹³³

The most recent statistics can be viewed in the annual statistics of the Singapore Prison Service.¹³⁴ Three capital executions were carried out in 2007 (one murder and

¹²⁶ Ministry of Home Affairs, above n 5.

¹²⁷ Ibid; See also Human Rights Council, above n 5, 17 [120].

¹²⁸ Ministry of Home Affairs, above n 5.

¹²⁹ Ibid; See also Human Rights Council, above n 5, 17 [120].

¹³⁰ See generally Ministry of Home Affairs, above n 5.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Singapore Prison Service, 'Greater Community Involvement Contributes to Lower Reoffending Rates: Concerted Focus on Stronger Rehabilitation for Drug Offenders' (News Release, 30 Jan 2013) <http://www.prisons.gov.sg/content/dam/sps/publication_latest/2013%20Singapore%20Prison%20Service%20Annual%20Statistics%20Release.pdf>; See also Singapore Prison Service, Government of Singapore, *Singapore Prison Service Annual Report 2009*, above n 124.

two drug trafficking executions).¹³⁵ In 2008, there were six capital executions (four murder and two drug trafficking executions).¹³⁶ There were five capital executions in 2009 (one murder, one firearms, and three drug trafficking executions).¹³⁷ In 2011, a total of four capital executions were carried out (two murder and two drug trafficking executions).¹³⁸ There were no capital executions in Singapore in 2010 and 2012.¹³⁹

In Singapore, all executions are carried out in Changi Prison.¹⁴⁰ The ‘long drop’ method is used by the executioners.¹⁴¹ Trials of capital cases are conducted in the High Court before one High Court judge.¹⁴² Once the accused person is convicted

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Singapore Prison Service, ‘Greater Community Involvement Contributes to Lower Reoffending Rates: Concerted Focus on Stronger Rehabilitation for Drug Offenders’, above n 134, 9.

¹³⁹ Ibid; Since July 2011 until the recent amendments in later 2012, all executions were suspended in Singapore. This is because the government was generally reviewing the ‘drug situation’ and capital punishment as it applied to all of Singapore’s laws. This explains the zero executions in 2012.

¹⁴⁰ Gary Tippet, ‘The Precision of Ritual in the Gallows’ Shadow’ *The Age* (online), 24 November 2005 <<http://www.theage.com.au/news/national/the-precision-of-ritual-in-the-gallows-shadow/2005/11/23/1132703253016.html>>; Amnesty International, *Singapore: The Death Penalty-A Hidden Toll of Executions*, above n 116, 8 [6.1].

¹⁴¹ The method of execution in Singapore is specified in law under the *Criminal Procedure Code* (Singapore, cap 68, 2012 rev ed) s 316 (‘*Criminal Procedure Code* (Singapore)’), which stipulates that ‘[w]here any person is sentenced to death, the sentence must direct that he must be hanged by the neck until he is dead but shall not state the place where nor the time when the sentence is to be carried out’; Gary Tippet, above n 140, 1; Cf *How to Kill a Human Being*, (Directed by Diene Petterle, BBC Horizon, 2008) 0:15:05: If the ‘success’ of hanging is based on the swift death of the prisoner with the least amount of suffering, the rope’s length, and the physiology of the executed individual determine such success. In addition to viewing certain experiments, Michael Portillo was personally involved in some of those experiments. He found that hypoxia was a humane method of execution; For the history and physiology of the ‘long drop’ method, see Richard Clark, *Hanged by the Neck Until Dead! The Processes and Physiology of Judicial Hanging* <<http://www.capitalpunishmentuk.org/hanging2.html>>; Singapore, *Parliamentary Debates*, 21 November 2005, vol 80, column 1937 (Wong Kan Seng): In 2005, the former Deputy Prime Minister and Minister for Home Affairs of Singapore, Wong Kan Seng, affirmed in Parliament that there was no reason to change this method of execution based on the findings from studies conducted into the various execution methods. This was in response to Professor Ivan Png Paak Liang’s query of whether the method of execution would be changed from hanging to lethal injection in Singapore.

¹⁴² In 1969, the ‘jury system’ was abolished in Singapore. The discussion on jury system can be seen in Chapter 2; See also Nisha Francine Rajoo, ‘“Than That One Innocent Suffer”: The Innocence Project in Singapore’ (2012) 30 *Singapore Law Review* 23, 32; Goh Yihan, ‘The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of their Exercise’ [2011] *Singapore Journal of Legal Studies* 178; Cheah Wui Ling, ‘Developing a People-Centered Justice in Singapore: In Support of Pro Bono and Innocence Work’ (2012) 80(4) *University of Cincinnati Law Review* 1429, 1456: The point to note here is that criminal revisionary powers in Singapore are vested in the High Court. This enables the High Court to amend or correct irregularities or erroneous decisions by the Subordinate Courts in criminal proceedings. However, since capital cases are heard in the High Court itself, the High Court cases are not subject to criminal revision. This may negatively affect the defendant of a capital case and the outcome of such non-existent criminal revision result in deadly repercussions. See also *Yong Vui Kong v Public Prosecutor* [2010] 2 SLR 192 [13] (‘*Vui*

and sentenced to death,¹⁴³ that individual has one appeal to the Court of Appeal, where three judges listen to the appeal. The important point to note here is that Singapore's *Criminal Procedure Code*¹⁴⁴ was also amended by the Legislature in January 2013 to provide that death sentences 'shall not be carried out unless [the correctness, legality and propriety of the conviction or sentence]¹⁴⁵ is confirmed by the Court of Appeal in an appeal by the accused; or a petition for confirmation by the Public Prosecutor where there is no appeal.'¹⁴⁶ This procedure has to be complied with in order for the death sentence to be carried out. If the accused appeal in the Court of Appeal is unsuccessful, then the individual could request clemency. The President is constitutionally empowered to grant clemency¹⁴⁷ by commuting the

Kong): The Singapore Court of Appeal will consider whether it has 'an inherent jurisdiction' (in light of previous precedent and the facts of the case) to review its own decision to deal with 'any miscarriage of justice', when the court encounters 'an actual situation where new evidence is discovered' in the future. Hence, it may be possible, in the near future, for the Court of Appeal to conduct criminal review even if an individual, who has been wrongfully convicted, has exhausted all avenues of appeal. See also *Re Nalpon Zero Geraldo Mario* [2013] SGCA 28 for the Court of Appeal's discussion about such 'inherent jurisdictional powers'.

¹⁴³ See *Criminal Procedure Code* (Singapore) s 374(4A); Previously the appeal can be made before the sentence is passed in relation to the conviction. This is no longer the procedure. Individuals must wait for the sentencing to be passed before.

¹⁴⁴ See *Ibid* ss 394A-E; This new review procedure provides an additional safeguard to Singapore's death penalty regime.

¹⁴⁵ Ministry of Law, Government of Singapore, 'Fact Sheet on the Proposed Amendments to the Penal Code and Criminal Procedure Code' (Press Release, 15 October 2012)

<<http://www.mlaw.gov.sg/news/press-releases/fact-sheet-on-the-proposed-amendments-to-the-penal-code-and-criminal-procedure-code.html>>.

¹⁴⁶ See also *Criminal Procedure Code* (Singapore) s 313; Singapore, *Parliamentary Debates*, 14 November 2012, sess no 1, vol 89, sitt no 11 (K Shanmugam; Sylvia Lim): Section 313(c), which came into force on 1 January 2013, states that 'the trial judge [in the High Court] who tried the accused must, within a reasonable time after the sentence has been pronounced, prepare a copy of the notes of evidence taken at the trial and a report in writing signed by him stating whether, in his opinion, there is any reason (and, if so, particulars of the reason) why the death sentence should be carried out.' Under s 313(d), which also came into force on 1 January 2013, these documents prepared by the trial judge must be submitted to the Court of Appeal 'within a reasonable time after being notified by the Registrar of the Supreme Court that a notice of appeal has been given [by the convicted individual] or petition for confirmation has been lodged [by the prosecutor] [under s 394A-B], as the case may be'. The Minister for Law, K Shanmugam, confirmed that the provision required the trial judge to include reasons to whether the death sentence should or should not be carried out, even though s 313(c) states 'whether it should be carried out'. Sylvia Lim, who raised this clarification, explained that the trial judge may have ordered the death penalty because it was mandatory. Therefore the trial judge's opinion of whether any reasons exist as to why the death sentence should not apply to the accused will be relevant when the Cabinet determines and advises the President, under art 22P of the *Singapore Constitution*, to exercise the prerogative for mercy.

¹⁴⁷ *Constitution of the Republic of Singapore* (Singapore, 1999 reprint) art 22P ('*Constitution of Singapore*').

death sentence to a term of imprisonment or fine or both;¹⁴⁸ or to pardon, suspend or remit the punishment.¹⁴⁹ Under art 22P(2) of the Singapore *Constitution*,¹⁵⁰ the President has to send the court reports he received to the Attorney-General for an opinion. Following that, the court reports and the Attorney-General's opinion have to be sent to the Cabinet for consideration.¹⁵¹ Clemency is only granted by the President on the advice of the Cabinet.¹⁵² The Executive arm of government will consider policy issues and mitigating factors when making their decision.¹⁵³ Since 1963, clemency has been awarded six times in Singapore, with the last dating back in 1998.¹⁵⁴

¹⁴⁸ *Criminal Procedure Code* (Singapore) s 334.

¹⁴⁹ *Ibid* s 333.

¹⁵⁰ *Constitution of Singapore* art 22P; See Generally Kevin Y L Tan, 'A Short Legal and Constitutional History of Singapore' in Kevin Y L Tan (ed), *Essays in Singapore Legal History* (Marshall Cavendish Academic, 2005) 27, 50-53: From independence till 1979, Singapore's Constitution was a conglomeration of three separate documents- (1) *The Constitution of the State of Singapore 1963*; (2) *The Republic of Singapore Independence Act 1965*; and (3) portions of the *Federal Constitution* (Malaysia), provisions in relation to fundamental liberties (federal matters) which were missing from the Singapore's State Constitution, were imported through the *Republic of Singapore Independence Act*. David Marshall, the first Chief Minister of the State of Singapore, called this conglomeration the 'untidiest and most confusing constitution that any country has started life with'. After a constitutional amendment in 1979, which authorized the 'Attorney-General to print and publish a consolidated Reprint of the Constitution of Singapore amalgamating such "provisions of the Constitution of Malaysia as are applicable to Singapore, into a single composite document"', the Constitution of Singapore was consolidated into a single document in 1980 for the first time since 1965. See also *Constitution of Singapore* art 155(3).

¹⁵¹ *Constitution of Singapore* art 22P states:

- (1) The President, as occasion shall arise, may, on the advice of the Cabinet —
 - (a) grant a pardon to any accomplice in any offence who gives information which leads to the conviction of the principal offender or any one of the principal offenders, if more than one;
 - (b) grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender; or
 - (c) remit the whole or any part of such sentence or of any penalty or forfeiture imposed by law.
- (2) Where any offender has been condemned to death by the sentence of any court and in the event of an appeal such sentence has been confirmed by the appellate court, the President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet so that the Cabinet may advise the President on the exercise of the power conferred on him by clause (1).

¹⁵² *Ibid* art 22P(1).

¹⁵³ Yeo, Morgan and Cheong, above n 71, 201-202 [8.31]-[8.33].

¹⁵⁴ Amnesty International, *Singapore: Imminent Execution* (May 1998) <<http://www.amnesty.org/en/library/asset/ASA36/002/1998/en/96c9f31f-daa1-11dd-80bc-797022e51902/asa360021998en.html>>: The former President of Singapore, Late Ong Teng Cheong, granted clemency to a third accomplice in a murder case, one Mathavakannan Kalimuthu in 1998.

In December 2010, the Ministry of Home Affairs commenced studies to analyse the applicability of the capital punishment in Singapore's legal system.¹⁵⁵ Based on this study in July 2011, the government generally reviewed the 'drug situation' and capital punishment as it applied to all of Singapore's laws.¹⁵⁶ In October 2011, a review of Singapore's drug situation was conducted.

From the findings of these reviews and studies,¹⁵⁷ the mandatory death penalty regime was amended. The imposition of the death penalty is no longer mandatory for certain culpable homicide cases amounting to murder, and drug trafficking since January 2013.¹⁵⁸ Firstly, the mandatory death penalty only applies to s 300(a) murder where the accused had the intention to kill the victim.¹⁵⁹ Therefore, s 300(b)-(d) murder, which used to be mandatory, are now left to the judge's discretion to either sentence the guilty individual to death or life imprisonment with caning.¹⁶⁰ Secondly, judges may decide whether to sentence the accused to death or life imprisonment with caning in certain circumstances namely, where an accused is convicted of trafficking, importing or exporting drugs above the prescribed quantity that attracts the mandatory death sentence.¹⁶¹ However to invoke this alternative

¹⁵⁵ Singapore, *Parliamentary Debates*, 9 July 2012, sess no 1, vol 89, sitt no 3 (Teo Chee Hean).

¹⁵⁶ The inter-Ministry Taskforce on Drugs, headed by Senior Minister of State for Home Affairs and Foreign Affairs, Masagos Zulkifli, made recommendations which have been incorporated as amendments in the *Misuse of Drugs Act* (Singapore).

¹⁵⁷ Singapore, *Parliamentary Debates*, 9 July 2012, sess no 1, vol 89, sitt no 3 (K Shanmugam): For instance, the total number of recorded homicide offences for the year 2011 was 16, which amounts to 0.3 per 100,000 population.

¹⁵⁸ See the examination of these in chapter 3.

¹⁵⁹ *Penal Code* (Singapore) s 302(1); See also Attorney-General's Chambers, Government of Singapore, 'Revisions to the Mandatory Death Penalty Regime: Follow-Up Actions by the Attorney-General's Chambers' (Press Release, 14 November 2012) <[http://app.agc.gov.sg/DATA/0/Docs/NewsFiles/AGC%20Press%20Release%20%20\[14%20Nov%202012\].pdf](http://app.agc.gov.sg/DATA/0/Docs/NewsFiles/AGC%20Press%20Release%20%20[14%20Nov%202012].pdf)>.

¹⁶⁰ *Penal Code* (Singapore) s 302(2); Please do note that life imprisonment is for the whole lifespan of the prisoner but the prisoner may request parole after serving 20 years in prison.

¹⁶¹ See *Misuse of Drugs Act* (Singapore) ss 5(1), 7; Attorney-General's Chambers, Government of Singapore, 'Revisions to the Mandatory Death Penalty Regime: Follow-Up Actions by the Attorney-General's Chambers', above n 159.

sentencing option, (1) the accused must be a drug mule;¹⁶² and (2) either the accused is certified by the Public Prosecutor as having cooperated and significantly assisted the Central Narcotics Bureau (CNB) to disrupt drug trafficking activities within or outside Singapore, or the accused proves that he was suffering from such abnormality of mind that it significantly compromised his mental responsibility for committing the offence.¹⁶³ If both conditions are not met, the accused must be sentenced to death.

These changes means that judges have more discretion in sentencing a convicted offender of a capital offence by considering all relevant facts and mitigating circumstances of each individual case.¹⁶⁴ From July 2011 until January 2013, executions for all 34 prisoners on death row were suspended.¹⁶⁵ All accused who met the above-mentioned requirements were able to choose to be re-sentenced under the new laws.¹⁶⁶

¹⁶² Under s 33B of the *Misuse of Drugs Act* (Singapore), an individual will be considered a drug mule if they could prove, on the balance of probabilities, that (i) they transported, sent or delivered a controlled drug; (ii) offered ‘to transport, send or deliver a controlled drug;’ (iii) do or offer ‘to do any act preparatory to or for the purpose of his transporting, sending or delivering a controlled drug; or (iv) to any of the combination of activities mentioned in (i), (ii) and (iii)’; Singapore, *Parliamentary Debates*, 12/11/12, sess 1, vol 89, sitt no 10 (Teo Chee Hean); See also *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] SGHC 110 [51]: If the accused was involved in the packing, storing or safekeeping of drugs, then he is not considered to be a drug courier.

¹⁶³ See *Misuse of Drugs Act* (Singapore) s 33B; Attonery-General’s Chambers, Government of Singapore, ‘Revisions to the Mandatory Death Penalty Regime: Follow-Up Actions by the Attorney-General’s Chambers’, above n 159.

¹⁶⁴ See S Chandra Mohan and Priscillia Chia Wen Qi, ‘The Death Penalty and the Desirability of Judicial Discretion’ in Law Society of Singapore (ed), *Judicial Discretion and the Death Penalty* (LexisNexis, March 2013)

<http://www.lawsociety.org.sg/portals/0/ResourceCentre/eshop/pdf/SLG_MARCH_2013.pdf>: Chandra Mohan, a former District Court judge and currently a Practice Associate Professor of Law in Singapore Management University, discusses about the inherent problems with judicial discretion and calls for guidelines for the Judiciary in relation to murder cases. According to him, these guidelines will help judges decide how they should use their discretion rationally and consistently to decide whether to order the death sentence or life imprisonment under the recently amended laws governing the offence of murder. See chapter three of this thesis for discussion in relation to judicial discretion.

¹⁶⁵ Singapore, *Parliamentary Debates*, 9 July 2012, sess no 1, vol 89, sitt no 3 (K Shanmugam); See also Attonery-General’s Chambers, Government of Singapore, ‘Revisions to the Mandatory Death Penalty Regime: Follow-Up Actions by the Attorney-General’s Chambers’, above n 159.

¹⁶⁶ Singapore, *Parliamentary Debates*, 9 July 2012, sess no 1, vol 89, sitt no 3 (K Shanmugam); The outcomes of the 2012 laws have been discussed in chapter three.

There are three ways in which countries can be classified as abolitionist countries- abolitionists for all crimes, abolitionists for ordinary crimes, and abolitionist in practice.¹⁶⁷ Only 16 out of 198 countries had abolished the death penalty for all crimes in 1977.¹⁶⁸ Currently as of November 2013, the total number stands at 97 countries.¹⁶⁹ Australia belongs to this first group of abolitionists.

Under the second group, abolitionists for ordinary crimes, the death penalty is imposed either for exceptional crimes such as crimes under military law or crimes committed in exceptional circumstances, such as wartime crimes.¹⁷⁰ There are eight countries in the second group of abolitionists.¹⁷¹

The final abolitionists group retain the capital punishment for ordinary crimes such as murder but can be considered abolitionist in practice. This is because these countries have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions.¹⁷² 35 countries are currently in this final group.¹⁷³ Hence, in total 140 countries are abolitionists at law or in practise.

There are 58 retentionist countries, including Singapore, still imposing the death penalty.¹⁷⁴ Over the past 30 years there has been a concerted international effort to

¹⁶⁷ Amnesty International, *Figures on the Death Penalty* <<http://www.amnesty.org/en/death-penalty/numbers>>.

¹⁶⁸ Ibid.

¹⁶⁹ Amnesty International, *Death Penalty: Countries Abolitionist for all Crimes* <<http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-all-crime>>.

¹⁷⁰ Amnesty International, *Death Penalty: Countries Abolitionist for Ordinary Crimes Only* <<http://www.amnesty.org/en/death-penalty/countries-abolitionist-for-ordinary-crimes-only>>.

¹⁷¹ Ibid.

¹⁷² Amnesty International, *Death Penalty: Countries Abolitionist in Practice* <<http://www.amnesty.org/en/death-penalty/countries-abolitionist-in-practice>>.

¹⁷³ Ibid.

¹⁷⁴ Amnesty International, *Abolitionist and Retentionist Countries*, above n 1.

abolish capital punishment in all countries. A range of international and regional treaties and instrumentalities have been adopted to this effect.

There are four international or regional treaties imposing the abolition of the capital punishment that have been adopted by the international community of nations. The *Second Optional Protocol to the ICCPR* is a global instrument, whilst the *Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ('ECHR'), the *Protocol to the American Convention on Human Rights to Abolish the Death Penalty*, and the *Protocol No. 13 to the ECHR* are regional instruments. As neither Australia or Singapore are located in the regions covered by these regional conventions, the *ICCPR* will be discussed in detail below, followed by an examination of the international obligations of both countries.

1 International Conventions and Instrumentalities

In 1966, the General Assembly of the United Nations (UN) adopted the *ICCPR*.¹⁷⁵ Article 6(1) states that 'every human being has the right to life' and 'no one shall arbitrarily be deprived of [their] life'.¹⁷⁶ Furthermore, art 6(2) states that in countries that have not already abolished the death sentence, it can be imposed only for the 'most serious crimes'.¹⁷⁷ The *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* was approved by the Economic and Social Council of the UN in 1984 through resolution.¹⁷⁸ This instrument strengthens art 6(2) of the *ICCPR* by electively providing that '[i]n countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes,

¹⁷⁵ Hood, above n 115, 14; See also International Bar Association, *The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty* (May 2008) 3-4 <<http://www.ibanet.org/Document/Default.aspx?DocumentUid=5482860b-b9bc-4671-a60f-7b236ab9a1a0>>.

¹⁷⁶ Hood, above n 115, 14.

¹⁷⁷ Ibid 15.

¹⁷⁸ Ibid 75; International Bar Association, above n 175, 5: The safeguards are not legally binding. However the approval of the safeguards by the UN suggests that there is strong support for these safeguards internationally.

it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.’¹⁷⁹ Article 6(5) of the *ICCPR* states that the death penalty ‘shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.’

Through resolutions adopted by the General Assembly in 1971¹⁸⁰ and 1977,¹⁸¹ the UN called for countries to gradually limit the number of capital offences in order to abolish the death penalty.¹⁸² These are considered to be the first steps the UN took to assert the abolition of capital punishment as a worldwide objective.¹⁸³

In 1989, the *Second Optional Protocol* was adopted by the General Assembly of the UN.¹⁸⁴ Article 1 declares that ‘no one within the jurisdiction of a State party to the [Second Optional] Protocol shall be executed’. Clause 2 of art 1 states that ‘[e]ach State Party shall take all necessary measures to abolish the death penalty within its jurisdiction.’ According to Hood, this clause ‘establishes the important principle that the death penalty shall not be re-established in States that have abolished it.’¹⁸⁵ Article 2 may allow the state to impose the death penalty in time of war but the reservation can only be made at the time of ratification or accession.¹⁸⁶ This crime has to be a ‘most serious’ military offence committed during war. Currently there are

¹⁷⁹ Hood, above n 115, 75-6.

¹⁸⁰ *Capital Punishment*, GA Res 2857 (XXVI), UN GAOR, 26th sess, 2027th plen mtg, UN Doc A/RES/2857 (XXVI) (20 December 1971).

¹⁸¹ *Capital Punishment*, GA Res 32/61, UN GAOR, 32nd sess, 98th plen mtg, UN Doc A/RES/32/61 (8 December 1977).

¹⁸² Hood, above n 115, 15

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ Currently, Azerbaijan, Brazil, Chile and Greece have made reservations in relation to article 2. Cyprus, Malta and Spain withdrew their reservation made upon ratification, accession or succession. See United Nations Treaty Collection, *Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the Death Penalty* <http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-12&chapter=4&lang=en>.

70 state ratifications or accessions with 37 signatories to the *Second Optional Protocol*.¹⁸⁷

2 International Obligations

(a) Australia

Australia has ratified the *ICCPR* and *Second Optional Protocol*. Under the Australian Constitution,¹⁸⁸ specifically s 51(xxix) (the external affairs power), the Commonwealth Parliament is able to enact laws to comply fully with its international obligations.¹⁸⁹ As explained earlier, Australian states and territories are prohibited from reinstating capital punishment.¹⁹⁰ This complies with art 1(2) of the *Second Optional Protocol* since Australia has to ‘take all necessary steps to abolish the death penalty within its jurisdiction’.

(b) Singapore

Unlike Australia, Singapore has not ratified the *ICCPR* and *Second Optional Protocol*. Singapore’s legal system adopts a dualist view of law.¹⁹¹ Thus, international law is not part of Singapore’s domestic law and can only be enforced by the courts if it is incorporated into domestic law.¹⁹² However, according to the Singapore government, the death sentence is imposed only for the most serious crimes, which complies with art 6(2) of the *ICCPR*. Although the definition of ‘most serious crimes’ in art 6(2) depends on various factors such as the ‘social, cultural, religious and political contexts’ of a country, Hood explains that the first safeguard

¹⁸⁷ Ibid.

¹⁸⁸ *Australia Constitution*

¹⁸⁹ See generally Lennan and Williams, above n 4, 682.

¹⁹⁰ See page 11 of this thesis for discussion.

¹⁹¹ Kevin Tan (ed), *The Singapore Legal System* (ed Kevin Tan) 482

¹⁹² Jack Tsen-Ta Lee, ‘The Mandatory Death Penalty and a Sparsely Worded Constitution’ (2011) 127 *Law Quarterly Review* 192, 195.

put in place by the *Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty* places the emphasis on ‘intention, and on lethal or other extremely grave consequences.’¹⁹³ According to Hood, the safeguard intended to imply that the death sentence should only be imposed when the offence committed is life-threatening or led to the loss of life.¹⁹⁴ Currently, it is only under s 300(a) of the *Penal Code*, if an individual is found guilty for murdering another with the intention of causing death, that the courts must impose the mandatory death sentence.¹⁹⁵ Hence, this punishment fulfils the safeguard’s implied intention and certainly qualifies as ‘most serious crime’.

The Deputy Prime Minister of Singapore put forth statistics when he made a statement in parliament in relation to the illegal drug situation in Singapore:

...[T]he mandatory death penalty threshold for heroin is 15 grams of pure diamorphine...[I]n street form in Singapore, at a typical purity level of 2.3%, 15 grams of pure diamorphine is equivalent to some 2,200 straws of heroin worth \$66,000, based on each straw having a gross weight of about 0.3 gram and street price of about \$30. This quantity is enough to feed the addiction of more than 300 abusers for a week. In such cases, the death penalty is imposed,

¹⁹³ Hood, above n 115, 76.

¹⁹⁴ *Ibid* 15-6.

¹⁹⁵ *Penal Code* (Singapore) s 300(a); Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (K Shanmugam); See also Michael Hor, ‘The Death Penalty in Singapore and International Law’ (2004) 8 *Singapore Year Book of International Law and Contributors* 105, 106-9: Note that s 300(c) is more commonly used by the Prosecution in Singapore. Section 300(c) states that culpable homicide is murder where the accused intended to cause bodily injury to the victim and that intended bodily injury is sufficient in the ordinary course of nature to cause death. The intention to cause bodily harm is the *mens rea* under s 300(c). Hor believes that intentional wounding leading to death does not qualify as ‘most serious crime’. At the time of writing his article, s 300(c) murder was punishable with the mandatory death sentence. Today, the mandatory death sentence is no longer applicable to s 300(c) in Singapore. The courts have discretion to order life imprisonment or capital punishment to the convicted individual who ‘unintentionally and unknowingly’ caused death to another. See further discussion in chapter three.

given the harm caused by these drug traffickers, and the numbers of lives they destroy.¹⁹⁶

This statement clearly fulfils the safeguard's implied intention since individuals are likely to die because of drug abuse. Therefore, even though Singapore is not a party to the *ICCPR*, individuals can still claim that Singapore only imposes the death penalty for the most serious crimes, which complies with art 6(2) of that treaty. However, as Hor notes, the Singapore judiciary have not 'squarely' faced the issue of what is considerably a 'most serious crime'.¹⁹⁷ The United States Supreme Court, in *Coker*,¹⁹⁸ stated that rape, no matter how aggravated the crime was, is a serious crime but is not 'most serious' crime. Therefore, in the USA the death penalty is not meted out where the accused is convicted of rape.¹⁹⁹ This judgement is certainly

¹⁹⁶ Singapore, *Parliamentary Debates*, 9 July 2012, sess 1, vol 89, sitt 3 (Teo Chee Hean); See also Hor, 'The Death Penalty in Singapore and International Law', above n 195, 109: According to Hor, the Singapore government's extreme viewpoint with regards to narcotic drugs is due to the negative effect these drugs have on the economy. A working workforce would be affected by the widespread of drugs which would indirectly affect Singapore's economy; See Hood, above n 115: 'Whether maximum deterrence is achieved through capital punishment is debatable. All studies on the deterrence effect have yet to show whether the death penalty deters or does not.'

¹⁹⁷ Hor, 'The Death Penalty in Singapore and International Law', above n 195, 107.

¹⁹⁸ *Coker v State of Georgia*, 433 US 584 (1977); See also *Kennedy v Louisiana*, 554 US 407 (2008): It is unconstitutional under the Eighth amendment (Cruel and Unusual Punishment Clause) for a state to impose the death penalty where the defendant is convicted for the crime of raping a child. The Supreme Court in *Kennedy* also stated that where the victim did not die as a result of the crime the imposition of the death penalty is limited to crimes that have been committed against the state (i.e treason).

¹⁹⁹ Cf See the 2012 Delhi rape case verdict, *The State of Delhi v Ram Singh* (SC No. 114/2013): The accused had inserted the metal rod into the victim and used their bare hands to pull out her internal organs. The victim was flown to Mount Elizabeth hospital in Singapore where she remained in critical condition before passing away. Justice Yogesh Khanna stated that the acts of the assailants exhibit 'extreme mental perversion not worthy of human condonation'. His Honour concluded that the convicts 'shocked the collective conscience' of the society by their inhuman torture to the victim before her death. This case in hand, which conflicts with the reasonings of the USA Supreme Court in *Coker* and *Kennedy*, fell into the 'rarest of rare cases' category warranting the death penalty; In *Bachan Singh v The State of Punjab* (1980) 2 SCC 684, the Supreme Court of India laid down the doctrine that capital punishment in India should be meted out if the case was one that fell within the 'rarest of rare cases' category. The doctrine was formulated after the introduction of s 354(3) of the *Code of Criminal Procedure 1973* (India). The section states that when ordering the death penalty, the judgement shall state the 'special reasons for such sentence'. The interpretation of 'special reasons' to invoke the discretionary death sentence led to the creation of the 'rarest of rare' doctrine in *Bachan Singh*. The courts have to consider aggravating and mitigating factors to determine if a case falls under the 'rarest of rare cases' category. In *Bachan Singh*, the court held that "if a murder involves exceptional depravity, it shall be an aggravating circumstance for imposition of penalty of death. In *C. Munniappan v State of Tamil Nadu* (2010) 9 SCC 567, the Supreme Court of India held 'stressing upon the manner of commission of offence, if extremely brutal, the diabolical, grotesque killing, shocking to the collective conscience of the society, the death sentence should be awarded'. The

controversial and Hor states that the Court's judgement is likely based on the retributive belief that only the act of removing another's life warrants the punishment of death.

It can be argued that Singapore also abides by art 6(5) of the *ICCPR*. This is because Singapore's judiciary will not sentence any guilty individual to death if they were under the age of 18 when they committed the capital offence²⁰⁰ or the convicted offender was a pregnant woman.²⁰¹

Although the Council of Europe believe that 'civilised, democratic societies governed by the rule of law' should not retain capital punishment in their legal

Indian Supreme Court in *Sunder v State* (2013) 3 SCC 215 held 'inter alia, the following factors to be aggravating circumstances: (a) The accused have been held guilty of two heinous offences, which independently of one another, provide for the death penalty, (b) No previous enmity between the parties, no grave and sudden provocation which compelled the accused to take the life of the prosecutrix, (c) Extreme mental perversion, (d) The manner in which the victim was murdered, and the approach and method adopted by the accused, disclose the traits of outrageous criminality in the behaviour of the accused, (e) Well planned and consciously motivated crime, (f) Extreme misery caused to the aggrieved party'. The young age of the accused is not a determinant factor by itself against the ordering of capital punishment (see *Atbir v State (Govt of NCT of Delhi)* (2010) 9 SCC 1). Further, intoxication and socio-economic status of the convict cannot be determinative factors in sentencing (see *State of Karnataka v Krishnappa* (2000) 4 SCC 75); See also Pramod K Das, *Supreme Court on Rarest of Rare Cases* (Universal Law Publishing, 2011); See Mohan and Wen Qi, above n 164, 11; Ariane M Schreiber, 'States that Kill: Discretion and the Death Penalty- A Worldwide Perspective' (1996) 29 *Cornell International Law Journal* 263, 310-4; S Muralidhar, 'Hang Them Now, Hang Them Not: India's Travails with the Death Penalty' (1998) 40 *Journal of the Indian Law Insitute* 143, 143: However a common criticism against the 'rarest of rare cases' doctrine is how judges inconsistently order or fail to order the death penalty in India when applying their absolute discretion in sentencing. Therefore, there is always a possibility of a different panel of judges ordering a different punishment other than the death sentence; See also 'Singapore to Cite Case to Defend Death Penalty', *The Indian Express* (online), 31 December 2012 <<http://www.indianexpress.com/news/singapore-to-cite-case-to-defend-death-penalty/1052305/>>: According to this internet material, Singapore's Minister for Law and Foreign Affairs, K Shanmugam, posted on his Facebook that cases like these reaffirms why the death penalty should not be abolished in Singapore. The Minister stated that '[m]any would agree that this is a type of case where, if the injuries inflicted were of a nature sufficient to cause death, then the abusers should face the death penalty'.

²⁰⁰ *Criminal Procedure Code* (Singapore) s 314: 'A sentence of death must not be passed or recorded against an accused convicted of an offence if the court has reason to believe that, at the time the offence was committed, he was below the age of 18 years, but instead the court must sentence him to life imprisonment.'

²⁰¹ *Ibid* s 315: (1) 'Where a woman convicted of an offence punishable with death alleges that she is pregnant, or where the court before whom a woman is so convicted thinks fit, the question whether or not the woman is pregnant must, before sentence is passed on her, be determined by the court. (2) If the court finds the woman pregnant, it must pass a sentence of life imprisonment on her....'

systems;²⁰² the Singapore government strongly believes that the punishment is necessary to control criminal activities within the country.²⁰³ In 1994, a General Assembly resolution invited countries that have not abolished the death penalty to consider gradually restricting the number of capital offences in their justice system.²⁰⁴ The resolution also encouraged those States to consider establishing a moratorium on pending executions.²⁰⁵ The objective of encouraging this moratorium was to achieve the universal affirmation of the view that no country should dispose of the life of any individual by year 2000.²⁰⁶

In response, Singapore argued that capital punishment is not an issue of human rights but asserted that criminal justice systems are matters of national sovereignty and that States have the sovereign right to deduce the punishments for their societies to effectively eradicate serious crimes.²⁰⁷ In fact, Singapore had introduced an amendment to this effect in the resolution.²⁰⁸ But Hood pointed out that this amendment was not accepted since the amendment proposed by Singapore failed to mention international laws and did not uphold universal human rights principles.²⁰⁹ Furthermore, Singapore argued that ‘the resolution went some way towards dictating a particular set of values from countries which have abolished capital punishment on those which have not’.²¹⁰

²⁰² Christian Boulanger and Austin Sarat, ‘Putting Culture into the Picture: Towards a Comparative Analysis of State Killing’ in Austin Sarat and Christian Boulanger (eds), *The Cultural Lives of Capital Punishment* (Stanford University Press, 2005) 1, 3.

²⁰³ Ministry of Home Affairs, above n 5; See also Human Rights Council, above n 5, 17 [120]: For example, the Singapore government claims that the presence of capital punishment in Singapore’s legal system has deterred the establishment of major drug syndicates in the country.

²⁰⁴ Hood, above n 115, 19.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Singapore’s statement proposing no action to L.32; ultimately the resolution was lost because 74 countries abstained.

Singapore is a member state of ASEAN.²¹¹ According to art 2(2)(e) of the *ASEAN Charter*, ASEAN strongly believes in the principle of not interfering into another ASEAN member country's 'domestic affairs'.²¹² A wider principle is enshrined in art 2(7) of the *Charter of the United Nations* which provides that the UN should not 'intervene in matters which are essentially within the domestic jurisdiction of any state'.²¹³ Nonetheless, human rights activists and opponents of capital punishment may claim that the Singapore government's recent amendments to its mandatory death penalty regime in late 2012 brought the country a step closer to the viewpoint of its European counterparts.²¹⁴

²¹¹ ASEAN stands for Association of Southeast Asian Nations. Singapore adopted the ASEAN Charter on 20th November 2007; See also ASEAN, *Singapore Declaration on the ASEAN Charter* <<http://www.asean.org/news/item/singapore-declaration-on-the-asean-charter>>.

²¹² The *ASEAN Charter* art 2(2)(e): non- interference in the internal affairs of ASEAN Member States; See also Hor, 'The Death Penalty in Singapore and International Law', above n 195, 117: Hor distinguishes the regional pressure to abolish capital punishment in the *ASEAN Charter* and the *Protocol No. 6* to the *ECHR*, which all new members of the Council of Europe must ratify as a condition of admission. *Protocol No. 6* to the *ECHR* abolishes the death penalty in peacetime.

²¹³ Article 2(7) of the *Charter of the United Nations* states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Chapter VII of the Charter is titled 'Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'.

²¹⁴ Singapore, *Parliamentary Debates*, 9 July 2012, sess no 1, vol 89, sitt no 3 (K Shanmugam); See also Ministry of Law, Government of Singapore, 'Fact Sheet on the Proposed Amendments to the Penal Code and Criminal Procedure Code', above n 145.

II CRIMINAL PROCESS MODELS & WRONGFUL CONVICTIONS

A CRIMINAL PROCESS MODELS

The former Chief Justice of Singapore, Chan Sek Keong, has explained that Singapore's criminal process exemplifies a balance between the crime control and due process models and also being 'approximate to the value system of the crime control model'.²¹⁵ The crime control model tends to emphasize law and order by reducing criminal conduct whilst the due process model emphasizes protecting the innocent who may be falsely accused of crimes.

Under the crime control model, the processing of cases must be done quickly and the determination of 'probable guilt' or 'probable innocence' should be ascertained early based upon the administrative expertise of the police force and public prosecutors.²¹⁶ Hence, this model is focused on obtaining an early guilty plea,²¹⁷ so that only guilty individuals go through the various other stages of the justice process after the initial screening by the police and prosecutors.²¹⁸ The investigative and prosecutorial skills of the police and prosecutors are relied upon to construct an understanding of what really happened at the scene of the alleged crime. The crime control model aims to protect the rights of the citizens as a whole by curbing criminal activities with rigorous punishments.

Conversely, the due process model focuses on the rights of individual citizens, namely safeguarding those individuals accused of crimes. Hence, this model ensures

²¹⁵ Siyuan and Chua, above n 113, 99; See also Chan Sek Keong, 'Rethinking the Criminal Justice System of Singapore for the 21st Century' in Singapore Academy of Law (ed) *The Singapore Conference: Leading the Law and Lawyers into the New Millennium @ 2020* (Butterworths, 2000) 50; Rajoo, above n 142, 33.

²¹⁶ Keong, 'The Criminal Process- The Singapore Model', above n 113, 443; See also Siyuan and Chua, above n 113, 99-100; Herbert Packer, 'Two Models of the Criminal Process' (1964) 113(1) *University of Pennsylvania Law Review* 1; Rajoo, above n 142, 33.

²¹⁷ Keong, 'Rethinking the Criminal Justice System of Singapore for the 21st Century', above n 215, 51.

²¹⁸ Keong, 'The Criminal Process- The Singapore Model', above n 113, 440-1; See also Siyuan and Chua, above n 113, 99-100.

that no innocent individual is punished by the justice system by emphasizing the importance of protecting the rights of an accused.²¹⁹ As Packer explains, the due process model stresses that individuals do not actually perceive events as they should; people may provide information to police officers due to ‘physical or psychological’ pressure, so the investigative officers get to hear ‘what they want to hear rather than the truth’; and witnesses’ explanations of what actually took place at the scene of the alleged crime may be influenced by their own biases.²²⁰ Therefore, there is the possibility that errors may occur in the criminal process. Like an obstacle course, the due process model presents ‘formidable impediments’ at every successive stage of the criminal process so that no mistakes occur in those stages and an innocent individual is not wrongfully convicted under the justice system.²²¹

Siyuan and Chua state that ‘the balance in Singapore’s criminal process is struck by heavily weighting the crime control side of the scale’ with due process getting ‘comparatively less attention.’²²² This is ascertainable from the criminal laws of Singapore imposing severe punishments and presumptions against the accused, and the ‘government campaigns and policy’ to combat and eradicate crimes.²²³ For instance, s 261(1) of Singapore’s *Criminal Procedure Code* permits the Court to draw adverse inferences against the accused who is silent.²²⁴ This can be contrasted against jurisdictions that are based on a more traditional due process model, such as WA where the courts do not draw adverse inferences from a silent accused who has a

²¹⁹ Siyuan and Chua, above n 113, 100.

²²⁰ Packer, above n 216.

²²¹ Siyuan and Chua, above n 113, 100; Rajoo, above n 142, 33.

²²² Siyuan and Chua, above n 113, 100; See also Michael Hor, ‘Singapore’s Innovations to Due Process’ (2001) 12(1) *Criminal Law Forum* 25; Rajoo, above n 142, 33.

²²³ Siyuan and Chua, above n 113, 100; Hor, ‘Singapore’s Innovations to Due Process’, above n 222; Rajoo, above n 142, 33.

²²⁴ *Criminal Procedure Code* (Singapore); See also Tey Tsun Hang, ‘Death Penalty Singapore Style: Clinical and Carefree’ (2010) 39(4) *Common Law World Review* 315, 332.

common law right to that effect.²²⁵ The main argument against drawing adverse inferences as opposed to upholding the right of silence is that the presumption of innocence, an important principle relevant to a fair trial,²²⁶ is lost.

Singapore and WA have enacted similar criminal laws in many respects. WA displays certain crime control model elements in its justice system.²²⁷ Both jurisdictions place the onus on the accused to prove that they did not intend to traffic drugs when found with drugs greater in amount than the statutory limitation.²²⁸ This provision allows the prosecutor to convict the accused by removing an obstacle to conviction that would have been preferred by the due process model.²²⁹ Although the provisions may be worded similarly, the sanctions in place in both jurisdictions

²²⁵ *Evidence Act 1906* (WA) ss 8, 11; *Petty v The Queen* (1991) 173 CLR 95, 102-3 ('Petty'); The right to silence is linked to the burden of proof rules and an accused does not have a duty to prove guilt or innocence; Cf Note that s 89A of the *Evidence Act 1995* (NSW) was amended to allow the court to draw adverse inferences if the individual stays silent during police interviews but places reliance in the court on that fact that he or she failed or refused to mention. This will be analysed in the later sections of this chapter.

²²⁶ It is acknowledged that the right to silence is a fundamental element of the fair trial; See *International Convention on Civil and Political Rights* art 14; *European Convention on Human Rights* art 6; *Charter of Human Rights and Responsibilities 2006* (VIC) s 22; *Human Rights Act 2004* (ACT); *Human Rights Act 1998* (UK).

²²⁷ Heather Douglas et al, *Criminal Process in Queensland and Western Australia* (LawBook, 2010) 381-3 [12.350]; See also Ben Power, "For the Term of His Natural Life": Indefinite Sentences- A Review of Current Law and a Proposal for Reform' (2007) 18(1) *Criminal Law Forum* 59; *Veen v The Queen (No 2)* (1988) 164 CLR 465, 486; See also *McGarry v The Queen* (2001) 207 CLR 121, 143 [60] (Kirby J); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; The Australian High Court in *Veen v The Queen (No 2)* held that the Legislature can establish an indefinite sentencing regime. In most of the Australian jurisdictions indefinite sentencing regimes are present. For instance, under s 98 of the *Sentencing Act 1995* (WA), the District or Supreme Court may order the convicted individual to be imprisoned indefinitely as long as the court sentenced that individual who committed an indictable offence to a term of imprisonment and neither suspends the sentence nor makes a parole eligibility order with respect to the nominal sentence. Nonetheless, according to Kirby J in *McGarry v The Queen* (2001) 207 CLR 121, 143-4 [67], the Australian courts do expect specialist medical evidence when assessing the case before them to sentence the offender indefinitely after the end of their nominal term of imprisonment.; See also preventive detention of sexual offenders in the *Dangerous Sexual Offenders Act 2006* (WA). Serious sexual offenders may also be detained for periods longer than the initial imprisonment term ordered. Applications have to be made to the Supreme Court pursuant to the Act.

²²⁸ *Misuse of Drugs Act* (Singapore) s 17: Presumption Concerning Trafficking. Any person who is proved to have had in his possession more than 100 g of opium, 3 g of morphine, 2 g of diamorphine,.... shall be presumed to have that drug in possession for the purpose of drug trafficking unless it is proved that his possession of that drug was not for that purpose; *Misuse of Drugs Act 1981* (WA) s 11: Presumption of intent to sell or supply. Section 11(a) A person who with intent to sell or supply a prohibited drug to another shall, unless the contrary is proved, be deemed to have in his possession a prohibited drug with intent to sell or supply it to another if he has in his possession a quantity of the prohibited drug which is not less than the quantity specified in Schedule V in relation to the prohibited drug.

²²⁹ Siyuan and Chua, above n 113, 100.

create the greatest controversy. In Singapore, the Judiciary may punish an individual convicted for trafficking drugs greater in amount than the statutory limitation by imposing the mandatory death sentence.²³⁰ Hence, Singapore is a more direct example of the crime control model.

Article 9(1) of the Singapore Constitution is the most important and relevant constitutional provision in the context of due process.²³¹ The article states that ‘[n]o person shall be deprived of his life or personal liberty save in accordance with law.’ The Privy Council in *Haw Tua Tau* indicated that it is ‘imprudent to attempt to make a comprehensive list of what constitute fundamental rules of natural justice applicable to procedure for determining the guilt of a person charged with a criminal offence’.²³² Until today, the Singapore Judiciary has not comprehensively enumerated the essential rules of natural justice that art 9(1) embeds in Singapore’s criminal jurisprudence.²³³ According to Tey, judges in Singapore have not tried to discover whether ‘procedural safeguards have evolved into fundamental rules of natural justice’, which increasingly constraints the rights of an accused in criminal procedures.²³⁴ This constraining of rights can negatively impact the sentencing process, especially when it involves the mandatory death sentence.²³⁵

²³⁰ See s 5(1) and second schedule *Misuse of Drugs Act* (Singapore). For instance, the mandatory death penalty is imposed where the offence involves the unauthorised traffic in opium where the quantity is more than 1200g and containing more than 30g of morphine; the unauthorised traffic in controlled drug containing such quantity of diamorphine being more than 15 g; or the unauthorised traffic in controlled drug containing such quantity of cocaine being more than 30 g. Cf Section 34 states that a person who is convicted of having in his possession a prohibited drug with the intent to sell or supply; or sells or supplies, or offers to sell or supply to another a prohibited drug is liable to a fine not exceeding \$100,000 or to imprisonment for a term not exceeding 25 years or both.

²³¹ Article 9(1) of the *Constitution of Singapore* will be discussed in chapter three in relation to the constitutionality of the mandatory death sentence in Singapore.

²³² *Haw Tua Tau v Public Prosecutor* [1980-1981] SLR 73, 76.

²³³ Tsun Hang, above n 224, 329; See also Wui Ling, above n 142, 1434.

²³⁴ Tsun Hang, above n 224, 329.

²³⁵ *Ibid.*

Australian criminal process leans towards the due process model (although it does contain certain crime control model elements as explained above). In *Dietrich*,²³⁶ Justices Deane and Gaudron stated in separate judgements that the right to fair trial is entrenched in Chapter III of the Australian Constitution.²³⁷ Many of the human rights principles mentioned in English constitutional instruments, like the Magna Carta, Bill of Rights 1688, and the Declaration of Rights, are not entrenched in the Australian Constitution.²³⁸ These principles are rather present in the common law heritage through the court's inherent power to prevent abuse of process.

B WRONGFUL CONVICTIONS

According to Lord Bingham, there may be fabrication of evidence; flawed expert evidence; concealment of evidence which were supportive of the defence counsel's case; 'malicious interference' in the jury system; or the court is misdirected or unfair to the accused.²³⁹ Therefore, investigative stages of the crime or the trial process are severely tainted resulting in the conviction of an innocent individual.²⁴⁰ This section focuses on the investigative and trial stages of cases in Western Australia and Singapore. Specifically, it examines the positive and negative aspects of an accused's right to silence and right to access counsel; police corruption and misconduct; video-recording confessions; prosecutor disclosure; jury system; and Innocence Projects. All of the concerns raised are amplified in capital cases due to the finality of the punishment.

²³⁶ *Dietrich v The Queen* (1992) 177 CLR 292.

²³⁷ *Ibid*, 326, 362.

²³⁸ Cf *Victoria v Australian Building Construction Employees' and Builders Labourers' Federation* (1982) 152 CLR 25, 109 (Murphy J); For instance, these human rights principles necessitate adherence to due process and oppose 'cruel and unusual punishment'.

²³⁹ *R v Secretary of State for the Home Department, Ex parte Mullen* [2004] UKHL 18.

²⁴⁰ *Ibid* [4] (Lord Bingham).

1 *The Judiciary and Legislature*

The Singapore legal system does have safeguards in place to ensure there are no wrongful convictions.²⁴¹ These safeguards can be ascertained from the *Criminal Procedure Code*, the *Evidence Act*, the common law, and Singapore's Constitution. These include, (1) the deprivation of the right to life and liberty only in accordance with the law;²⁴² (2) unlawful detention of individual and powers for Courts to look into complaints and remedy any such unlawful detention;²⁴³ (3) the accused has a right to be informed about the reasons of their detention and can choose their own advocate to defend their case;²⁴⁴ (4) a detainee must be brought before a magistrate within 48 hours;²⁴⁵ (5) equality before the law and equal protection of the law;²⁴⁶ (6) the burden of proof rests with the prosecution;²⁴⁷ (7) the prosecutor has to prove the elements of an offence beyond reasonable doubt;²⁴⁸ and (8) the accused has the right to silence.²⁴⁹ Importantly, in a capital case, if an accused does not have the required funds to attain legal representation, the accused will be provided with two state assisted counsel as a matter of policy.²⁵⁰

²⁴¹ Siyuan and Chua, above n 113, 101; See also K S Rajah, 'The Constitutional Right of Silence: Abridged?' [2003] (May) Law Gazette.

²⁴² *Constitution of Singapore* art 9(1); See also K S Rajah, 'The Constitutional Right of Silence: Abridged?' [2003] (May) Law Gazette: Rajah mentions that art 9(1) must include improper police interrogation and procedures which may have been done to control crimes.

²⁴³ *Constitution of Singapore* art 9(2).

²⁴⁴ *Constitution of Singapore* art 9(3); *Criminal Procedure Code* (Singapore) s 195.

²⁴⁵ *Constitution of Singapore* art 9(4).

²⁴⁶ *Constitution of Singapore* art 12.

²⁴⁷ *Evidence Act* (Singapore, cap 97, rev ed 1997) s 103.

²⁴⁸ *Took Leng How v Public Prosecutor* [2006] 2 SLR 70, [27].

²⁴⁹ *Criminal Procedure Code* (Singapore) s 22(2).

²⁵⁰ Keong, 'The Criminal Process- The Singapore Model', above n 113, 478; See Supreme Court of Singapore, *Legal Assistance Scheme for Capital Offences (Lasco)* <<http://app.supremecourt.gov.sg/default.aspx?pgID=84>>; See also Supreme Court of Singapore, 'Supreme Court Launches New Initiatives for the Legal Assistance Scheme for Capital Offences ("LASCO"): Enhancing the Standards of the Criminal Bar and Providing Greater Support for LASCO Counsel' (Media Release, 20 May 2011) <http://app.supremecourt.gov.sg/data/doc/ManagePage/84/LASCO%20Media%20Release_20%20May%202011.pdf>: Although Legal Assistance Scheme for Capital Offences (LASCO) was institutionalised in 1992, the practice of counsel assignment was evident during the colonial times. The Supreme Court of Singapore administers this Scheme. According to the media release, LASCO counsels defend about 90% of all capital cases filed in the High Court. There is no test or eligibility criteria individuals have to satisfy before LASCO defends that person. Individuals facing a capital

However, as we shall see, some of these rights are somewhat limited in operation. Siyuan and Chua notes that Singapore judges' interpretation and application of the law does not always favour the accused.²⁵¹ From the cases, it can be ascertained that the Judiciary does not generally support the due process model.²⁵² This is because of the ample 'technical procedural or evidentiary rules' within that model which may possibly acquit a large number of 'factually guilty individuals'.²⁵³ Nonetheless, once evidence of wrongful convictions surface to the general public, their confidence in the government's policy and the justice system will be 'greatly shaken'.²⁵⁴

The death penalty being a severe and irreversible punishment invites examination on the issue of wrongful convictions. Singapore Courts have recognised the risk of wrongful convictions.²⁵⁵ '[C]riminal law advocacy's ultimate function is to prevent a miscarriage of justice.'²⁵⁶ Therefore, '[the] risks of the innocent being convicted ...

charge can be assigned two counsels free of charge under the Scheme. One lawyer leads whilst the other assists. LASCO counsels can also represent an accused in appeals to the Court of Appeal and to the President for clemency. To be admitted as a LASCO counsel, the lead counsel has to have at least (1) 5 years of legal practice experience and (2) have been represented accused in two previous capital trials where the accused in those cases did not plead guilty, or five criminal appeals and one capital trial. The assisting counsel has to have (1) at least three years of legal practice experience and (2) were involved in two criminal trials, or one criminal trial and two criminal appeals. Since 2011, the LASCO had initiated a Selection Panel to ensure individuals are represented by experienced and competent practitioners. The Scheme also has a Research Support Group Initiative and Paralegal Support Scheme since 2011. This Scheme ensures that individuals facing capital charges are not disadvantaged in any manner during the criminal proceeding. The Scheme acts as a safeguard also to ensure there is no wrongful conviction of a financially challenged individual because of the lack of competent legal representation.

²⁵¹ Siyuan and Chua, above n 113, 102.

²⁵² Keong, 'Rethinking the Criminal Justice System of Singapore for the 21st Century', above n 215, 51-2; Ibid.

²⁵³ Keong, 'Rethinking the Criminal Justice System of Singapore for the 21st Century', above n 215, 51-52; See also Siyuan and Chua, above n 113, 102.

²⁵⁴ Siyuan and Chua, above n 113, 104.

²⁵⁵ See, eg, *Kwan Peng Hong v Public Prosecutor* [2000] 2 SLR 824, [29]; *Public Prosecutor v Yeow Beng Chye* [2003] SGDC 44, [98]; In *Yeow Beng Chye*, the District Court judge referred to various judgements of the Chief Justice of Singapore. The Chief Justice had explained that in situations where the complainant has made 'a single allegation' against the accused and the court has to acquit or convict that individual based on that allegation, the court has to be 'extremely cautious' because of 'the heightened risk of miscarriage of justice' occurring to the accused in such circumstances. This explanation was provided in relation to eyewitness identification and specifically on the question of whether corroboration was a necessity to justify the conviction; See *Muhammad Bin Kadar v Public Prosecutor* [2011] 3 SLR 1205, discussed later on in this chapter; See also Rajoo, above n 142, 23; In Singapore, '[r]eported cases of wrongful conviction cases are nary a common occurrence'.

²⁵⁶ Amarjeet Singh, 'Criminal Advocacy- Perspective from the Bench' [2003] (May) *Law Gazette* 2.

must be as low as human fallibility allows.²⁵⁷ However, in capital cases one wrongful conviction is one too many.

The case of *Ng Yang Sek* demonstrates that the Singapore Judiciary is able to consider the circumstances of each case and apply a more balanced approach to legislative interpretation than the formalistic method of interpreting statutes.²⁵⁸ In that case, Ng, a practitioner of Chinese medicine, was in possession of 17,405.1g of opium containing 165.59g of morphine. Ng distributed opium in the form of medicated plasters to treat medical illnesses.²⁵⁹ His defence was that he treated patients who saw him for illnesses such as sprains and dislocations. Although the trial judge found that the opium was solely for the manufacturing of medicated plasters, the lower court still convicted Ng for drug trafficking and sentenced him to death.

The Court of Appeal overturned the lower court's conviction for drug trafficking replacing it with a conviction for possession, even though the presumption of trafficking operated against Ng. Ng's action was for bona fide treatment purposes. The Court found that the 'plain meaning of the s 2 definition of "trafficking" [in the *Misuse of Drugs Act*] can, and in certain circumstances must, be construed in the light of the purpose of the legislation to avoid injustice.'²⁶⁰ The Court held that Ng was not a person who falls under the class of offenders the Singapore Parliament had in mind when enacting the trafficking provision in s 5 and he 'never meant or even

²⁵⁷ Singapore, *Parliamentary Debates*, 1 June 1998, vol 69, col 75 quoting Yong Pung How, (Subordinate Courts Work Plan Seminar Keynote Address, 1998).

²⁵⁸ *Ng Yang Sek v Public Prosecutor* [1997] 2 SLR 816; See also Siyuan and Chua, above n 113, 102; See also Tsun Hang, above n 224, 317-8.

²⁵⁹ Ng had learnt this trade from China and worked in a medicine centre in Singapore for three years. The plasters were prepared by; firstly, burying the opium under a 'Toh Pit' tree for 20 days; and then mixing the opium with sweet potatoes and bananas for 10 days; and then lastly blending that mixture with five Chinese herbs.

²⁶⁰ Section 2 of the *Misuse of Drugs Act* (Singapore) defines 'traffic' to mean '(a) to sell, give, administer, transport, send, deliver or distribute; or (b) to offer to do anything mentioned in (a), otherwise than under the authority of the Act, and "trafficking" has a corresponding meaning.'

remotely contemplated' the opium to be used for the purposes of drug addiction.²⁶¹ Ng was not part of any drug trade. Section 5 is more suited for drug dealers who distribute narcotics to addicts and affect the society. The opium in Ng's possession could have fallen into the wrong hands and offence of possession (s 8) is a more suitable provision to punish Ng than the offence of trafficking.²⁶²

This judgement firstly, shows that the Judiciary in Singapore can take a more balanced approach in interpreting legislation by considering the circumstances of each case, and the purpose of the law than the letter of the law; and therefore secondly, reduce the severity of the drug trafficking laws in Singapore through the application of judicial discretion.²⁶³ It also shows that cultural factors (the medicated plasters were Chinese remedies) are influential in the determination of criminal liability of the accused.²⁶⁴

(a) Right to Counsel

Although in *Ng Yang Sek* the courts took a balanced approach to legislation interpretation, this case seems to be an exceptional one. The focus of Singapore Courts has routinely been to take a narrower, more literalistic approach to constitutional interpretation. Article 9(3) of the Singapore Constitution states that '[w]here a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of

²⁶¹ See *Raman Selvam s/o Renganathan v Public Prosecutor* [2004] 1 SLR 550, [35]: The elements for the charge of trafficking under s 5(1) of the *Misuse of Drugs Act* (Singapore) are '(a) possession of a controlled drug (which may be proved or presumed under s18(1) of the Act); (b) knowledge of the nature of the drug (which may be proved or presumed under s18(2) of the Act); and (c) proof that the possession of the drug was for the purpose of trafficking which was not authorised.'

²⁶² Ng was found guilty of unauthorised possession of a controlled drug and was sentenced to two years imprisonment and fined \$10,000.

²⁶³ See also Siyuan and Chua, above n 113, 102.

²⁶⁴ Chan Sek Keong, 'Cultural Issues and Crime' (2000) 12 *Singapore Academy of Law Journal* 1, 20.

his choice.’ In *Rajeevan*, the Court stated that an accused does not have a right to be informed of this right to counsel.²⁶⁵ In that case, it was held that:

The right in art 9(3) is a negative right. The words ‘shall be allowed’ are couched in negative terms in a sense that there is no obligation imposed on the relevant authority to inform and advise the person under custody of his right to counsel.²⁶⁶

Tey indicates that the accused only has a right ‘to consult and be defended by a legal practitioner of his choice’.²⁶⁷ Tey argues that Singapore Judiciary’s historic devotion to textualism negatively impacts the separation of powers.²⁶⁸ It acts as a barrier to the Judiciary presenting a check on Executive power. According to Tey, this may cause an accused in a capital trial to experience ‘inaccurate applications of the Penal Code and the Constitution’.²⁶⁹ Such gaps in due process ‘may cast moral and legal doubt on a capital conviction’.²⁷⁰

In *Jasbir*, it was held that the right to counsel in art 9(3) was not an immediate right, but required a reasonable time period.²⁷¹ The Court stated that there was no ‘statutory basis’ for the proposition that the accused must be permitted access to a counsel before providing statements to the police;²⁷² and two weeks of detention and interrogations before granting access to a lawyer was a ‘reasonable’ period of delay. the Minister for Law indicated that law enforcement agencies have to solve crimes,

²⁶⁵ *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR 815.

²⁶⁶ *Ibid* [19] (Yong Pung How CJ).

²⁶⁷ Tsun Hang, above n 224, 329; See also Kevin Y L Tan, *Constitutional Law in Singapore* (Kluwer, 2011).

²⁶⁸ Tsun Hang, above n 224, 330.

²⁶⁹ *Ibid* 329-30.

²⁷⁰ *Ibid* 330.

²⁷¹ *Jasbir Singh v PP* [1994] 2 SLR 18 (Yong Pung How CJ); See also *Lee Mau Seng v Minister for Home Affairs* (1971) 2 MLJ 137: In *Lee Mau Seng*, the former Chief Justice Wee Chong Jin held that the right to counsel arises when an individual is arrested. However, this constitutional right can only be granted to the individual by the authority that has him or her under custody. This right has to be provided within a reasonable time after the individual has been arrested.

²⁷² *Jasbir Singh v Public Prosecutor* [1994] 2 SLR 18, [32B].

collect lawful evidence, and obtain the truth from individuals undergoing questioning; Conversely, the Minister also said that public interests demand statements to be obtained legally and to reflect the truth.²⁷³ However, certain authors mention that the chief reason for the delay is to allow the police to ‘extract incriminatory statements from the accused undisturbed by any advice to the contrary by’ the lawyer of the accused.²⁷⁴

It is essential to mention art 9(4) of Singapore’s Constitution at this point since it is a relevant legislative comparison to what is a reasonable time frame for delaying access to a counsel. Article 9(4) requires a detainee to be brought before a magistrate within 48 hours, without unreasonable delay (unless the magistrate authorises otherwise). There is no other legislation that pronounces that a two week period is a reasonable time for delaying access to counsel.²⁷⁵ Therefore, Tey argues that the right to counsel should be permitted ‘within the same 48-hour time frame’ in accordance to ‘principles of reasonableness, fairness and justice’.²⁷⁶

The right to counsel keeps police officers in check during interviews and interrogations of suspects and accused. Unlike WA,²⁷⁷ police interrogation

²⁷³ Singapore, *Parliamentary Debates*, 19 May 2010, vol 87, col 559 (Mr K Shanmugam): The Minister of Foreign Affairs and Law, K Shanmugam, mentioned about the ‘access to counsel’ scheme formed in August 2007 and has been in practice ever since. Under the scheme, as long as the police’s investigations are complete or near completion, the police may grant an accused access to counsel before their remand period ends. The Minister also mentioned about a recent police study which showed that more than 90% of the arrested individuals were released within 48 hours. ‘The monitoring system’ which ensures that the ‘investigations are completed expeditiously’ prevents the other 10% of individuals from undergoing ‘unnecessary remand’; See also *Jasbir Singh v Public Prosecutor* [1994] 2 SLR 18, [32D]: The Court in *Jasbir* recognized that the right to counsel ‘must be subject to a balance between the arrested person’s right to legal advice and the duty of the police to protect the public by carrying out effective investigations’.

²⁷⁴ Tsun Hang, above n 224, 330; See also Hor, ‘Singapore’s Innovations to Due Process’, above n 222: ‘The right to counsel... is subordinated to the “needs” of police investigation, which includes the procurement of self-incriminatory statements admissible in court.’

²⁷⁵ Tsun Hang, above n 224, 331.

²⁷⁶ *Ibid*; See also Singapore, *Parliamentary Debates*, 18 May 2010, vol 87, col 438 (Sylvia Lim): In Parliament, Sylvia Lim urged the government to set a statutory limit to make it obligatory for an arrested individual to access their counsel. She mentioned ‘a few days after arrest or, at most, one week after arrest.’

²⁷⁷ The problems with unrecorded confessions can be seen in cases *Driscoll v The Queen* (1977) 137 CLR 517 and *Kelly v The Queen* (2004) 218 CLR 216; See also Heather Douglas et al, above n 227,

proceedings are not recorded in Singapore.²⁷⁸ Testimonies from the police and the accused are adduced in court to prove what took place during the interrogation proceedings.²⁷⁹ Further, Singapore's Constitutional amendment in 2010 allows the police to produce an accused before a Magistrate within 48 hours of their arrest by way of video-conferencing link.²⁸⁰ The police could apply to the Court to detain the arrested individual for more than 48 hours by way of the video-link.²⁸¹ The court approving those orders would not have 'direct contact' with the arrested individual to determine whether the individual has been subjected to police abuse.²⁸² Therefore, the right to counsel acts as the only check and balance against police behaviour in the interrogation room.²⁸³

On 15 November 2013, the issue of what is a reasonable time for an accused to access their counsel was argued in the High Court of Singapore.²⁸⁴ The defendant, who was charged under the *Computer Misuse and Cybersecurity Act*,²⁸⁵ was denied access to counsel by the District Court.²⁸⁶ The High Court required both the prosecution and defence counsel to file submissions with regards to what is the

51-4 [2.440]-[2.470]. The issue of video-recording confessions will be discussed in the later part of this chapter.

²⁷⁸ See, eg, Hor, 'The Death Penalty in Singapore and International Law', above n 195, 105-17, 114.

²⁷⁹ Ibid.

²⁸⁰ *Constitution of Singapore* art 9(4); See Singapore, *Parliamentary Debates*, 26 April 2010, vol 87 (Wong Kan Seng): This amendment was argued to not only 'enhance the management and security of the arrested person' but also 'lead to more efficient use of limited manpower resources.'

²⁸¹ Singapore, *Parliamentary Debates*, 26 April 2010, vol 87 (Sylvia Lim); Singapore, *Parliamentary Debates*, 18 May 2010, vol 87, col 438 (Sylvia Lim).

²⁸² Singapore, *Parliamentary Debates*, 18 May 2010, vol 87, col 438 (Sylvia Lim).

²⁸³ Tsun Hang, above n 224, 331-2; See also Ibid.

²⁸⁴ 'Judgement Reserved in Lawyer's Appeal for Access to Suspected Hacker', *Channel Newsasia* (online), 15 November 2013 < <http://www.channelnewsasia.com/news/singapore/judgement-reserved-in/887548.html>>; Claire Huang, 'Suspected "Messiah" Hacker Charged in Court', *Channel Newsasia* (online), 12 November 2013 < <http://www.channelnewsasia.com/news/singapore/suspected-messiah-hacker/883244.html>>.

²⁸⁵ *Computer Misuse and Cybersecurity Act* (Singapore, cap 50A, rev ed 2007).

²⁸⁶ 'Judgement Reserved in Lawyer's Appeal for Access to Suspected Hacker', above n 284; Huang, above n 284: A human rights lawyer, M Ravi, representing James Raj, the individual who was charged in Singapore under the *Computer Misuse and Cybersecurity Act* for hacking into the Ang Mo Kio Town Council website, challenged the District Court's decision to deny him access to his client. In the District Court, Ravi's argument was that his client's right to counsel should be exercised after 48 hours and such denial breaches the right mentioned in the Constitution. However, the prosecution argued that there is no such obligation and case laws suggest that an individual who has been arrested can be kept away from their counsels for as long as 20 days.

reasonable time for an arrested individual to access counsel.²⁸⁷ It would be interesting to see if the Court would expand the due process jurisprudence in any manner when determining this issue.

In WA, an individual is entitled to have counsel representation.²⁸⁸ Police officers have to inform the suspect that they have a right to communicate with their lawyer, and a friend or family member before the police interrogation is conducted.²⁸⁹ Under s 138(3) of the *Criminal Investigation Act (CIA)*, the rights of the accused must be afforded by the police officers. Officers have to facilitate the communication or attempted communication by the accused with their lawyers. However, the *CIA* does not state that this right includes a right to have a lawyer be part of police interviews.²⁹⁰

The High Court of Australia (HCA) has recognised that the right to liberty is the most fundamental right in the common law.²⁹¹ Nonetheless, the HCA in *Williams*,²⁹² held that there has to be a balance between efficient crime investigations and the right to personal liberty.²⁹³ In WA, the police officers can investigate a crime by detaining the suspect for a reasonable time.²⁹⁴ Reasonable time will be determined by the circumstances of the case.²⁹⁵ For example, whether it was an investigation of multiple serious offences than one offence or whether there is a requirement to have an interpreter to be present to facilitate the understanding of the suspects in

²⁸⁷ ‘Judgement Reserved in Lawyer’s Appeal for Access to Suspected Hacker’, above n 284: In the High Court, Justice Choo Han Teck required both the prosecution and Ravi to file submissions with regards to what is the reasonable time for an accused to be able to access their counsel. The High Court Judge permitted Ravi to speak to his client after the hearing, which was previously denied by the District court. The High Court had reserved judgement on Ravi’s challenge.

²⁸⁸ *Criminal Procedure Act 2004* (WA) s 172; See also Heather Douglas et al, above n 227, ch 10.

²⁸⁹ *Criminal Investigation Act 2006* (WA) ss 137-8.

²⁹⁰ See *Mackenzie v The Queen* [2004] WASCA 146, [61]-[69] (Wheeler J).

²⁹¹ *Trobridge v Hardy* (1955) 94 CLR 147, 152 (Fullagher J).

²⁹² *Williams v The Queen* (1986) 161 CLR 278.

²⁹³ *Ibid* 296 (Mason and Brennan JJ).

²⁹⁴ Under s 141 of the *Criminal Investigation Act 2006* (WA), there are number of factors which assist the determination of reasonable time.

²⁹⁵ See also Heather Douglas et al, above n 227, 49 [2.400].

question.²⁹⁶ In WA, the reasonable time for police investigation is a maximum of six hours with the possibility of the officer in charge applying for an extension of time to further investigate the suspect.²⁹⁷

The right to access counsel, not only acts as the only check and balance against police behaviour, but also ensures a suspect who is facing a capital charge understands the legal proceedings and their rights at an early stage and is in no way disadvantaged during the court proceedings.

(b) Right to Silence

The privilege against self-incrimination ensures that an accused is not obligated to provide information or answer any questions in relation to a crime.²⁹⁸ During the 1970s, there was a debate in relation to curtailing the right to silence in Britain.²⁹⁹ This debate was fuelled by the Criminal Law Revision Committee's (CLRC) report which concluded that adverse inferences should be drawn against an accused if they

²⁹⁶ Ibid.

²⁹⁷ *Criminal Investigation Act 2006* (WA) ss 140(3)-(9).

²⁹⁸ Robert McDougall, *The Privilege Against Self-Incrimination: A Time for Reassessment*, Supreme Court of New South Wales Publications, 1, 2

<<http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/supremecourt/documents/pdf/mcdougall181008.pdf>>; See *Sorby v Commonwealth* (1983) 152 CLR 281, 288 (Gibbs CJ); See also John Langbein, 'The History Origins of the Privilege Against Self Incrimination At Common Law' (1994) 92 *Michigan Law Review* 1047, 1047-8: The privilege against self-incrimination or *nemo debet se ipsum prodere* was not part of criminal trials from the middle of the 16th century to the late 18th century. During this period, the common law criminal procedure provided an accused with the right to speak instead of being silent. The ultimate purpose of trials was for the accused to receive an opportunity to respond to charges laid against them. It was only in the later 18th century and largely the 19th century, that the privilege against self-incrimination became part of the common law procedure.

²⁹⁹ See Steven Greer, 'The Right to Silence: A Review of the Current Debate' (1990) 53(6) *Modern Law Review* 709, 715-8, for the chronology of controversy in relation to curtailing the right to silence during the 1970s and 1980s; See also Gregory W O'Reilly, 'England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice' (1994) 85(2) (Fall) *Journal of Criminal Law and Criminology* 402, 423; In October 1993 at the Conservative Party Conference, Home Secretary Michael Howard announced Britain's limitation of the right to silence in its jurisdiction. Pursuant to the *Criminal Justice and Public Order Act 1994* (UK) c 33, ss 34-8, this change was part of the criminal justice reforms to control the crimes in their jurisdiction.

rely on a fact in their defence during trial which they previously failed to mention during interrogations.³⁰⁰

The Singapore government was the first to adopt the recommendations in the CLRC report in 1976.³⁰¹ Yeo notes that the reasoning for such a change was to ensure the law assists the police and prosecutors in their fight against crime.³⁰² Before the amendments in 1976, individuals were cautioned by the police that they were under no obligation to make statements or answer questions.³⁰³ However, after 1976, individuals were informed about the courts being able to draw adverse inferences from their silence during the interrogation process.³⁰⁴

The Court of Appeal in *Mazlan*,³⁰⁵ held that the privilege against self-incrimination is not a constitutional right under art 9(1). The court also stated that pursuant to s 121(2) of the previous *Criminal Procedure Code* whenever any statements are recorded from an accused, they do not have to be expressly notified of a right to remain silent.³⁰⁶ If the accused at the time of making their statement was told that they were ‘bound to state truly everything [they] knew concerning the case’, such statement is rendered inadmissible since they were induced to make such a statement, within the meaning of s 122(5). The Court also stated that:

... the right of silence has never been regarded as subsumed under the principles of natural justice. It is a rule which originated as being largely evidential in nature. The court was not prepared to elevate an evidential rule to

³⁰⁰ O’Reilly, above n 299, 423.

³⁰¹ *Criminal Law and Procedure Code (Amendment) 1976* (Singapore, Act No 10 of 1976).

³⁰² Meng Heng Yeo, ‘Diminishing the Right to Silence: The Singapore Experience’ [1983] *Criminal Law Review* 89, 90.

³⁰³ *Ibid* 89.

³⁰⁴ *Criminal Procedure Code* (Singapore) s 261.

³⁰⁵ *Mazlan v Public Prosecutor* [1993] 1 SLR 512 (‘*Mazlan*’).

³⁰⁶ Section 121(2) was under the old CPC. See s 23 of the new *Criminal Procedure Code* (Singapore).

constitutional status without it having been given explicit expression in the Constitution.³⁰⁷

Although the right to silence is recognised under s 22(2) of the *CPC 2010*,³⁰⁸ the Singapore courts may draw an adverse inference from the silence of an accused.³⁰⁹

In 2000, the NSW Law Reform Commission found that it was not appropriate to ‘qualify the right to silence in the way provided by the English and Singapore legislation.’³¹⁰ The right to silence fundamentally is implied by two factors- (1) the assumption of innocence and (2) the effect of the assumption of innocence, which is the requirement that the prosecution proves that the accused is guilty beyond reasonable doubt.³¹¹ Therefore, the restriction on the right to silence undermines the basic values of the criminal law.³¹²

The *European Convention on Human Rights* contains a fair trial guarantee in relation to the right to silence under art 6(1).³¹³ In some instances, this right may overlap with art 6(2) which relates to the presumption of innocence.³¹⁴ Drawing of adverse inference from a defendant’s silence may violate the fair trial guarantee in the Convention.³¹⁵ Individuals in the UK have avenues of recourse by complaining to a domestic court and then to the European Court of Human Rights if their right to a

³⁰⁷ *Mazlan* [1993] 1 SLR 512, 515-6.

³⁰⁸ Section 22 *Criminal Procedure Code* (Singapore) states that ‘[t]he person examined [by a police officer] shall be bound to state truly what he knows of the facts and circumstances of the case, except that he need not say anything that might expose him to a criminal charge, penalty or forfeiture’.

³⁰⁹ See ss 261(1) and 291(3) of the *Criminal Procedure Code 2010* (Singapore).

³¹⁰ New South Wales Law Reform Commission, *The Right to Silence*, Report No 95 (2000) 64-5 [2.138].

³¹¹ See *Petty* (1991) 173 CLR 95, 128-9: Justice Gaudron states that the right to silence stems from the principal that no defendant has to prove their innocence (with certain exceptions) and prosecutors bear the burden of proof; *Ibid*; See also *Woolmington v Director of Public Prosecutions* (UK) [1935] AC 462; *Dawson v The Queen* (1961) 106 CLR 1, 17. The high standard of ‘beyond reasonable doubt’ has been described as the golden rule in criminal proceedings. This legal concept will be discussed further in relation to jury system in later part of this chapter.

³¹² New South Wales Law Reform Commission, *The Right to Silence*, above n 310.

³¹³ See, eg, *Funke v France* (1993) 16 EHRR 297 [41]-[45].

³¹⁴ See, eg, *Salabiaku v France* (1988) 13 EHRR 279 [26]-[30].

³¹⁵ Rowan Minson, *Erosion of Right to Silence Highlights Need for Stronger Rights Guarantees* (May 2013) Human Rights Law Centre <<http://www.hrlc.org.au/erosion-of-right-to-silence-highlights-need-for-stronger-rights-guarantees>>.

fair trial has been breached.³¹⁶ However, laws in Australia and Singapore do not possess similar human rights protections.³¹⁷ The NSW government's justification that the new laws 'reflect changes made in the UK in 1994' is somewhat 'misleading'.³¹⁸

Nonetheless, in March 2013, the NSW parliament passed the Evidence Amendment (Evidence of Silence) Bill 2013 in both houses. This Bill amended s 89A of the *Evidence Act 1995*(NSW) which relates to the right to silence of an accused.³¹⁹ At trial, the accused of a serious indictable offence (maximum penalty of life imprisonment or imprisonment term of five years and more)³²⁰ may rely upon facts that support their defence at trial, which they failed or refused to mention at the time of police questioning in relation to the charges laid against them. However, the NSW courts are now allowed to draw an adverse inference against an accused over the age of 18,³²¹ as long as that accused could have reasonably been expected to mention the fact in the circumstances present at the time of questioning and the accused relied on that fact in their defence during the court proceeding.³²² However, the accused must have received special caution for s 89A to apply.³²³

³¹⁶ The *Human Rights Act 1998* (UK) incorporates the *European Convention on Human Rights*. See also the USA and Canada Constitutions which guarantees the right to silence; Anna Patty, 'Right to Silence' Law Changed', *The Sydney Morning Herald* (NSW) (online), 14 August 2012 <<http://www.smh.com.au/nsw/right-to-silence-law-changed-20120814-2462p.html>>; Dovydas Vitkauskas and Grigoriy Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights* (2012) Council of Europe, 61-2 <http://www.coe.int/t/dghl/cooperation/capacitybuilding/Source/documentation/hb12_fairtrial_en.pdf>.

³¹⁷ See art 14(3)(g) of the *International Covenant on Civil and Political Rights*. The right not to be compelled to accept guilt is recognised as a characteristic of being afforded a fair trial.

³¹⁸ Patty, above n 316, quoting Stephen Blanks, Secretary for the NSW Council for Civil Liberties.

³¹⁹ Section 89A of the *Evidence Act 1995* (NSW) came into operation on 1 September 2013.

³²⁰ See Judicial Commission (NSW), *Right to Silence- The Effect of S 89A of the Evidence Act 1995* (Aug 2013)

<http://www.judcom.nsw.gov.au/publications/benchbks/criminal/special_bulletin_31.html>; See Megan Latham, 'How will the New Cognate Legislation Affect the Conduct of Criminal Trials in NSW?' (2013) 25(7) *Judicial Officers Bulletin* 57, 57-60.

³²¹ See *Evidence Act 1995* (NSW) s 89A(5).

³²² *Ibid* s 89A(1).

³²³ See *Ibid* s 89A(2), (9); The special caution has 2 limbs; (1) the accused must be notified that they do not have to say or do anything, but if they wish to rely on something later in court which they

There have been criticisms about the operation of s 89A.³²⁴ Section 89A requires the special caution to be provided in the presence of the defendant's lawyer.³²⁵ However, lawyers have not been coming to the police stations and in one instance a lawyer ran out of the police station to prevent the caution being provided to their client.³²⁶ Therefore, according to the Police Association President of NSW, Weber, the restriction to the right to silence in NSW is not working currently.³²⁷

Conversely, in WA, police officers must caution the suspects that they have a right to silence.³²⁸ In *Petty*,³²⁹ the HCA stated that an individual, who reasonably believes that they have been questioned by a law enforcement officer due to the suspicion of them committing a criminal offence, has a right to remain silent during such questioning. The courts cannot draw any adverse inference from an individual's silence at the police station.³³⁰ Although there have been calls for WA to restrict the right to silence, we will have to wait and see if WA follows NSW's footsteps.

Opponents of the right to silence argue that such a right may be exploited by guilty individuals who remain silent when questioned by the police.³³¹ However, a NSW Law Reform Commission survey conducted with judges, magistrates, legal

failed to mention during questioning, it may harm their defence; and (2) the accused must be notified that whatever they say or do may be used as evidence.

³²⁴ Andrew Clennell, 'Defence Lawyers Exploit Loophole in Right to Silence Laws', *The Daily Telegraph* (online), 15 October 2013 < <http://www.dailytelegraph.com.au/news/nsw/defence-lawyers-exploit-loophole-in-right-to-silence-laws/story-fni0cx12-1226739928098>>.

³²⁵ In the second reading speech, Attorney-General of NSW, Greg Smith, stated the special caution has to be provided in the presence of the defendant's lawyer because admissions of that defendant may be challenged at trial because their counsel was not present during those admissions.

³²⁶ Clennell, above n 324.

³²⁷ Ibid.

³²⁸ *Criminal Investigation Act 2006* (WA) s 138(2)(b); However the *Criminal Investigation (Identifying People) Act 2002* (WA) contains an exception to the absolute right to silence. Under s16(2) of the Act, individuals have to provide their name and address when the police officer reasonably suspects that the individual can help with investigations, or committed an offence. Failure to comply is an chargeable offence under s 16(6).

³²⁹ *Petty* (1991) 173 CLR 95.

³³⁰ Ibid; See also *Glennon v The Queen* (1994) 179 CLR 1; Anthony Mason, 'Fair Trial' (1995) 19 *Criminal Law Journal* 7, 10.

³³¹ See *Petty*, above n 316; See also New South Wales Law Reform Commission, *The Right to Silence*, above n 310, 33-50 [2.60]-[2.102] for a detailed discussion about the arguments that criminals who have committed a serious offence, are experienced offenders or commit drug offences misuse the right to silence.

practitioners and prosecutors found that in majority of cases suspects did not remain silent.³³² Nonetheless, even if individuals remain silent, they may do so for reasons other than guilt.³³³ They might stay silent; (1) to protect their family or friends; (2) because they feel embarrassed, shocked or confused; (3) to obtain proper legal advice from their lawyers after the case against them has been set out in detail; (4) because they are suspicious of the police interrogating them; or (5) because they were advised by their lawyers to stay silent.

There is little or no evidence that by curtailing the right to silence, in order to increase the number of convictions through confessions, crime rates are reduced.³³⁴ According to Yeo, there is no empirical evidence that adverse inferences increased confessions.³³⁵ Two studies conducted in relation to Singapore's modified right to silence during police questioning showed that suspects were rarely silent and the restriction to the right of silence 'did not materially induce' individuals to answer the questions posed by the police.³³⁶ After England abolished the privilege against adverse inferences inferred from a defendant's silence in 1994, various empirical studies were conducted to determine the effects of such amendments.³³⁷ These

³³² New South Wales Law Reform Commission, *The Right to Silence and Pre-trial Disclosure in New South Wales*, Research Report 10 (2000) at Tables 2.1-2.3, [2.12]-[2.18], cited in New South Wales Law Reform Commission, *The Right to Silence*, above n 310, 16 [2.15]; See also N Stevenson, 'Criminal Cases in the NSW District Court: A Pilot Study' in J Basten et al (eds), *The Criminal Injustice System* (Australian Legal Workers Group (NSW) and Legal Service Bulletin, 1982) 106, 108-9, 131-6, 140-1: The New South Wales Bureau of Crime Statistics and Research conducted an empirical research in 1980. The Bureau found that 96% of suspects who were subsequently charged and tried in the Sydney District Court did not remain silent during police questioning.

³³³ See, eg, *R v Swaffield* (1998) 192 CLR 159, 146 (Kirby J); See also E Colvin, S Linden and J McKeachie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (Lexis Nexis, 5th ed, 2008) 644; New South Wales Law Reform Commission, *The Right to Silence*, above n 310.

³³⁴ New South Wales Law Reform Commission, *The Right to Silence*, above n 310, 35 [2.63].

³³⁵ Yeo, above n 302, 94-5; See also Alan Tan, 'Adverse Inferences and the Right to Silence: Re-Examining the Singapore Experience' [1997] *Criminal Law Review* 471.

³³⁶ Alan Tan, 'Adverse Inferences and the Right to Silence: Re-Examining the Singapore Experience' [1997] *Criminal Law Review* 471, 473; See also Yeo, above n 302.

³³⁷ See, eg, Tom Bucke, Robert Street and David Brown, *The Right to Silence: The Impact of the Criminal Justice and Public Order Act 1994* (Research, Development and Statistics Directorate, 2000).

studies found that by restricting the right to silence, criminals would lie rather than confess.³³⁸

The right to silence ensures that there are no power imbalances between suspects and law enforcement officers performing their duties.³³⁹ Recognising this right ensures innocent individuals do not provide false confessions. The curtailment of the right to silence may increase occurrences of false confessions resulting in wrongful convictions.³⁴⁰ This may result in drastic, irreversible consequences where the death penalty is concerned.

2 Police Force

The police force plays an important role in ensuring wrongful convictions do not occur.³⁴¹ In Singapore, where the crime control model is dominant, the police force is entrusted with the duty of constructing the facts of the crime scene and determining whether any individuals are guilty or innocent.³⁴² However, there are three types of errors that the police can make: (1) tunnel vision and confirmation bias; (2) police misconduct; and (3) improper techniques utilised during investigations.³⁴³ Another issue with the police force is the ‘cop culture problem’.³⁴⁴

³³⁸ Alex Stein, ‘The Right to Silence Helps the Innocent: A Response to Critics’ (2008) 30(3) *Cardozo Law Review* 1115, 1117.

³³⁹ Minson, above n 315.

³⁴⁰ O’Reilly, above n 299, 403; *Ibid*.

³⁴¹ Dianne Martin, ‘The Police Role in Wrongful Convictions: An International Comparative Study’ in Sandra Westervelt and John Humphreys (eds), *Wrongly Convicted: Perspectives on Failed Justice* (Rutgers University Press, 2001) 77.

³⁴² Keong, above n 113, 441.

³⁴³ Martin, above n 341, 88-90; Richard Leo and Steven Drizin, ‘The Three Errors: Pathways to False Confession and Wrongful Convictions’ in G Lassiter & Christian Meissner (eds), *Police Interrogations and False Confessions: Current Research, Practice, and Policy Recommendations* (American Psychological Association, 2010) 23, cited in Chin Tet Yung, ‘Criminal Procedure Code 2010: Confessions and Statements by Accused Persons Revisited’ (2012) 24(1) *Singapore Academy of Law Journal* 60, 67; See, eg, Robert M Bohm, ‘Errors in Capital Cases and What Can be Done About Them’ in Robert M Bohm (ed), *The Death Penalty Today* (CRC Press, 2008) 6: Bohm observes that capital crimes place pressure upon the police officers in the USA to solve the case within a reasonable time. However, if their investigations are not getting anywhere, the immense pressure to solve the case may tempt officers to resort to fabricating evidence. For example, a West Virginia State police serologist created, manipulated and told lies about evidences in order to substantiate the prosecutions’ arguments and acquire convictions. For a period of 10 years, the West Virginia prosecutors had used

This is when officers hide one another's mistakes and their wrongdoings are not emphasised or publicised.

(a) *Tunnel Vision and Confirmation Bias*

Siyuan and Chua explain that the mentality and the 'good investigative' procedures of the police force are the likely reasons why tunnel vision is not apparent in Singapore.³⁴⁵ Tunnel vision can be defined as 'the tendency to focus on a suspect, select and filter the evidence that will built a case for conviction while ignoring or suppressing evidence that points away from guilt'.³⁴⁶ Confirmation bias is 'the psychological tendency to seek out and interpret evidence in ways that support existing beliefs, perceptions, and expectations and to avoid or reject evidence that does not'.³⁴⁷ Studies conducted by psychologists in relation to police interrogation and false confessions have shown that tunnel vision and confirmation bias are not only 'pervasive in the criminal justice system' but are also existent 'in virtually all wrongful convictions'.³⁴⁸ As such, can we be certain that wrongful convictions will never take place?³⁴⁹

hundreds of blood tests connecting defendants to the crime scene. In 1993, the West Virginia Supreme Court of Appeals ruled these blood tests invalid. As a result of this misconduct, at least 134 prisoners behind bars may have been allowed new trials. Such police misconduct has severe repercussions in capital cases.

³⁴⁴ Jonathan Quah, 'Preventing Police Corruption in Singapore: The Role of Recruitment, Training and Socialisation' (2006) 28(1) *Asia Pacific Journal of Public Administration* 59.

³⁴⁵ Siyuan and Chua, above n 113, 105.

³⁴⁶ Leo and Drizin, above n 343, 23, quoted in Yung, above n 343, 67; See also Martin, above n 341, 79.

³⁴⁷ Leo and Drizin, above n 343, 23, quoted in Yung, above n 343, 67.

³⁴⁸ *Ibid.*

³⁴⁹ See eg 'Review of 50 Brooklyn Murder Cases Ordered', *The New York Times* (online), 11 May 2013 <http://www.nytimes.com/2013/05/12/nyregion/doubts-about-detective-haunt-50-murder-cases.html?pagewanted=all&_r=1&>: Brooklyn District Attorney's Office's Conviction Integrity Unit has been ordered to review every murder case investigated by Detective Louis Scarcella, who handled some of the notorious cases in Brooklyn during the 1980s and 1990s, which have pronounced the accused guilty. The New York Times, by way of examination into the cases, discovered that Scarcella have relied upon the same individual as an eyewitness in various murder trials. Scarcella had also presented confessions of the accused, which the accused usually denies proving to the detective. There were allegations that the detective in some cases coerced false testimony from accused.

(b) Police Corruption

Singapore is recognised as one of the most successful countries to have significantly decreased the rate of corruption in the police force.³⁵⁰ Quah suggests that the Singapore government's commitment to eradicate corruption; better benefits and salary packages; better working environment; thorough investigations into prior criminal records, character and family background, including an integrity oriented psychological testing for potential recruits during the recruitment process; and in-depth training are reasons for the success of Singapore's police force.³⁵¹ However, Singapore's former Commissioner of Police, Hui, points out that every organisation has its own "black sheep".³⁵² The police force is no exception.³⁵³ There may only be a small proportion of corrupt officers in the force.³⁵⁴ Nonetheless, Hui explained that measures were already in place to remove these corrupt officers when they are discovered.³⁵⁵ These measures include the rotation of officers in vulnerable positions (like investigators, and anti-vice and gambling suppression officers) every three years; and debt statuses of all police force personnel being assessed.³⁵⁶

In addition, the Corrupt Practices Investigation Bureau (CPIB) ensures police officers are always kept in check for corruption.³⁵⁷ The enactment of the *Prevention*

³⁵⁰ Leslie Holmes, 'Australian Police Corruption in Comparative Perspective' (Paper presented at the Australian Political Studies Association 58th Annual Conference, University of Melbourne, 26-29 September 2010) 8.

³⁵¹ Quah, above n 344, 59-75; See also Ibid 8-9; Martin, above n 341, 91.

³⁵² Khoo Boon Hui, (Speech presented at the Presentation Ceremony for the Minister for Home Affairs Award for Operational Efficiency, Senior Police Officers Mess, 22 October 99).

³⁵³ Ibid.

³⁵⁴ Ibid.

³⁵⁵ Ibid.

³⁵⁶ Khoo Boon Hui, (Speech delivered at the World Ethics and Integrity Forum 2005, Integrity Institute of Malaysia, Kuala Lumpur, 29 April 2005); See also Quah, above n 344, 70.

³⁵⁷ Quah, above n 344, 71; The CPIB was established in 1952, independent of the police force by the British colonial government.

of *Corruption Act* in 1960 ensures that the CPIB have the capability to curb corruption in all organisations, including the police force.³⁵⁸

The Internal Affairs Office,³⁵⁹ an independent entity organised in 2011, investigates complaints about police misconduct in Singapore.³⁶⁰ This department's disciplinary power and the government's commitment to eliminate police misconduct keep the "cop culture" problem at bay.³⁶¹

Similarly in WA, the Crime and Corruption Commission (CCC) was set up in 2004 pursuant to the *Corruption and Crime Commission Act*.³⁶² The Kennedy Royal Commission report looked into the corruption of WA police officers, after which the CCC was established. During the Royal Commission, about 500 police officers were under inquiry.³⁶³ The report stated that 'culture and poor management' were prime factors causing police corruption in WA.³⁶⁴ Conduct of police and public officers are governed by the CCC.³⁶⁵ The CCC may only recommend that charges be laid against a police officer but has vast 'investigative powers and coercive powers of compulsory examinations'.³⁶⁶

³⁵⁸ Ibid 71-2.

³⁵⁹ Previously the Internal Affairs Office was known as the Internal Investigations Section till 1997 and later known as the Internal Investigation Division.

³⁶⁰ Similarly, WA has its own Internal Affairs Department. Since 2008, 347 charges have been laid against 100 officers. For more statistics see Ashlee Mullany, 'West Australian Police officers charged with criminal offences', *The Sunday Times*, 28 April 2013.

³⁶¹ See also Siyuan and Chua, above n 113, 109.

³⁶² *Corruption and Crime Commission Act 2003* (WA).

³⁶³ Heather Douglas et al, above n 227, 84 [3.200].

³⁶⁴ Ibid.

³⁶⁵ Ibid 84-5 [3.200].

³⁶⁶ *Corruption and Crime Commission Act 2003* (WA) ss 137-145. Under s 196 and pt 13 of the *Corruption and Crime Commission Act 2003* (WA) The CCC is monitored by a Parliamentary Inspector, who investigates any allegations of misconduct by the CCC, and by a parliamentary committee; See also Ibid.

(c) Video-recording Interrogations

There are no legislative guidelines, rules or protocol listing out police investigation procedures of suspects or accused in Singapore.³⁶⁷ This lack of guidelines or rules reinforces Singapore's focus on the crime control model. Police interviews and interrogations are not video-recorded in Singapore. In Australia, the implementation of video-recording of police interviews has made the whole process more transparent and accountable.³⁶⁸

In WA, only an audio-visual recording of confession is admissible.³⁶⁹ However, an unrecorded admission can be adduced as evidence as long as the prosecution proves to the court that there is a reasonable excuse for the admission not being recorded.³⁷⁰ Additionally, the WA courts do have the discretion to admit unrecorded confessions that have not been proved to have a reasonable excuse.³⁷¹ In such a situation, the courts may consider, amongst other things, any objections to accepting the unrecorded confessions and the seriousness of the offence committed by the accused.³⁷² This is essential so that the courts do not consider admissions that are illegally obtained or unreliable.³⁷³ According to Finlay, one of the reasons why

³⁶⁷ Siyuan and Chua, above n 113, 105; Hor, 'Singapore's Innovations to Due Process', above n 222; See also Singapore, *Parliamentary Debates*, 19 May 2010, vol 87, col 559 (K Shanmugam): The Minister for Law mentions about the 'access to counsel' scheme formed in August 2007 and has been in practice ever since. Under the scheme, as long as the police's investigations are complete or near completion, the police may grant an accused access to counsel before their remand period ends.

³⁶⁸ Heather Douglas et al, above n 227, 47 [2.370].

³⁶⁹ *Criminal Investigation Act 2006* (WA) s 118(3)(a).

³⁷⁰ Ibid ss 118(1), (3)(b)(i); Reasonable excuse for not recording the evidence has to be proved on a balance of probabilities by the prosecution. Examples of reasonable excuse include situations where the recording of the confession was not practical, the recording equipment was not available, the suspect did not consent to the recording, or the recording equipment malfunctioned

³⁷¹ Ibid ss 118(3)(b)(ii), 155.

³⁷² See Ibid ss 155(2)-(3): The court will determined if the desirability of admitting the evidence outweighs the undesirability of admitting the evidence. In addition to (1) the possible objections and (2) seriousness of the offence, the courts will also look at the (3) seriousness of any contravention of the *Criminal Investigation Act* in obtaining the evidence; (4) whether any contravention of the *Criminal Investigation Act* in obtaining the evidence was intentional, reckless or arose from an honest and reasonable mistake of fact;(5) the probative value of the evidence;(6) and any other matter the court things fit.

³⁷³ See *R v Murcott* (2005) 31 WAR 198 (Owen J).

Australia could expect fewer wrongful convictions than in the USA is the fact that alleged confessions are not required to be videotaped in the USA.³⁷⁴

Although the implementation of compulsory video-recording of statements made by accused persons in custody has been proposed in the Singapore Parliament a considerable number of times, the proposals were not accepted and the procedure's efficacy was doubted since an accused may, for example, raise the issue that the video-recording failed to record the abuse they had suffered prior to the interrogations.³⁷⁵ Therefore, there is no assurance that the accused voluntarily provides their statements even if video-recording was implemented. The problems with unrecorded confessions can be seen in *Driscoll and Kelly*.³⁷⁶ Police officers conducting interrogations may fabricate the case or misunderstand information.³⁷⁷ There have been allegations by the accused in Singapore court proceedings that the police tortured them and involuntarily obtained statements or confessions during investigations.³⁷⁸ The consequences of these in the context of a system imposing the mandatory death sentence are apparent.

Nonetheless, if the Singapore court is of the opinion that the police officers obtained statements from the accused by "inducement, threat or promise", the court must

³⁷⁴ Mervyn Finlay, Review of the NSW Innocence Panel 14 (2003), cited in Lynne Weathered, 'Wrongful Convictions in Australia' (2012) 80(4) *University of Cincinnati Law Review* 1391.

³⁷⁵ Singapore, *Parliamentary debates*, 1 June 1998, vol 69, col 99; Singapore, *Parliamentary debates*, 25 aug 1994, vol 63 col 377; See also Singapore, *Parliamentary Debates*, 8 March 2013, sess 1, vol 90 (HriKumar Nair; Sylvia Lim; Indranee Rajah; and K Shanmugam); Sylvia Lim had raised this issue of implementing the videotaping also in the 2008 and 2011 Ministry of Law- Committee of Supply. In both times, the government responded that video-taping does not ensure statements are voluntarily provided by the accused. Similarly in 2013, Sylvia Lim and Hri Kumar raised this issue again in Parliament. Indranee Rajah explained that comes under the purview of the Ministry of Home Affairs since it matter related to police investigations. However, according to Rajah, the Ministry of Home Affairs is not currently planning to implement video-taping when an accused provides statements to law enforcement agencies. K Shanmugam added that the Ministry of Home Affairs have to consider; (1) whether the implementation of video-recording is viable, (2) whether the Ministry has sufficient resources to implement such changes, and (3) in what way their investigative procedures would be affected because of such new implementation.

³⁷⁶ *Driscoll v The Queen* (1977) 137 CLR 517; *Kelly v The Queen* (2004) 218 CLR 216.

³⁷⁷ See also Heather Douglas et al, above n 227, 51-4 [2.440]-[2.470].

³⁷⁸ See, eg, *Public Prosecutor v Ismil bin Kadar* [2009] SGHC 84 *Lim Thian Lai v Public Prosecutor* [2006] 1 SLR 319.

render the statement inadmissible.³⁷⁹ Additionally, the court will not admit statements where the accused had suffered oppression.³⁸⁰ In *Lim Kian Tat*, the accused did not have sufficient sleep for four days and the statement was taken on the fourth night after an 18 hour interrogation with only one hour of rest in between.³⁸¹ The Court held that the statement was obtained by oppression.³⁸² The inadmissibility of statements obtained by inducement, threat, promise or oppression is to ensure that the risk of false confessions is reduced and the innocent are not convicted.³⁸³ Since the prosecution has to prove beyond a reasonable doubt that the statements or confession were voluntarily provided by the accused, the provision is meant to act as a check on the police officer obtaining statements from the accused.³⁸⁴

Various studies conducted by psychologists and social scientists on the issue of false confession uncovered that interrogation techniques used by the law enforcement agencies today, 'may increase the risk of voluntary but false confessions.'³⁸⁵ According to these studies, psychological pressure need not be in the form of inducements, threats or promises where the law enforcement officer interrogating is trained in behavioural sciences.³⁸⁶ Hence, voluntary but false confessions are evidence of guilt and can lead to wrongful convictions in criminal cases. During sentencing, confession alone can be relied upon to mete out the death sentence in Singapore.³⁸⁷ Further, if more than one individual are jointly tried for the same

³⁷⁹ See *Criminal Procedure Code* (Singapore) ss 258(3) and (4).

³⁸⁰ *Seow Choon Meng v Public Prosecutor* [1994] 2 SLR 338, [33]-[34].

³⁸¹ *Public Prosecutor v Lim Kian Tat* [1990] 1 SLR 273, [29].

³⁸² *Ibid.*

³⁸³ Yung, above n 343, 64.

³⁸⁴ Siyuan and Chua, above n 113, 106.

³⁸⁵ Gisli H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Wiley & Sons, 2003), cited in Yung, above n 343, 67; See also Brandon L Garrett, 'The Substance of False Confessions' (2010) 62(4) *Stanford Law Review* 1051.

³⁸⁶ Yung, above n 343, 67: Behavioural sciences are highly developed fields of studies today

³⁸⁷ M Ravi, *Death Penalty in Singapore*, Briefing Paper to the European Parliament's Sub-committee on Human Rights, Jan 2007, (EXPO/B/DROI/2007/07) 3.

offence, and the confession of one of the individual, affecting himself and some other individual within that group of individuals, is proved to be voluntary, the court may take into consideration the confession against both accused.³⁸⁸ There were cases in which false confessions were adduced in Singapore courts, but the Judiciary was able to discover such confessions.³⁸⁹ The outcome of admitting one such confession into a capital trial will be deadly and irreversible.³⁹⁰

In Parliament, Sylvia Lim asked the Singapore government whether it would reconsider its position on the issue of video-recording accused statements or at least implement it for offences where the death penalty could be ordered.³⁹¹ She stated that the implementation of video-recording will be beneficial not only to the defence, but also the state.³⁹² It could protect law enforcement officers against accusations of duress, threat or coercion.³⁹³ The courts could view the footage of the video-recording, which may show the demeanour of the accused and recording officer, to determine whether the accused was sleep deprived or was otherwise ‘not in a proper frame of mind’.³⁹⁴ Video-recording of statements can also eradicate any arguments that the officer recording the statement added their own words into the statements of the accused.³⁹⁵ Implementing such a procedure will save the time of the courts and police force, since the prosecution and defence, after viewing the recorded footage, may not want to contest certain issues at trial.³⁹⁶ Given that the accused or suspect has limited right to counsel under arrest, Lim believes that Singapore needs to implement video-recording.³⁹⁷ Ultimately, this safeguard maintains ‘high standards

³⁸⁸ *Criminal Procedure Code* (Singapore) s 258(5).

³⁸⁹ Siyuan and Chua, above n 113, 117-8.

³⁹⁰ See *Muhammad bin Kadar's* case below n 420 and accompanying text.

³⁹¹ Singapore, *Parliamentary Debates*, 8 March 2013, sess 1, vol 90 (Ms Sylvia Lim).

³⁹² *Ibid.*

³⁹³ *Ibid.*

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

³⁹⁶ *Ibid.*

³⁹⁷ *Ibid.*

of law enforcement',³⁹⁸ and prevents the occurrences of wrongful convictions in capital cases.

3 Prosecutor's Non-Disclosure and Police Misconduct

In *Mallard*,³⁹⁹ Andrew Mallard, who was suffering from a psychiatric condition, was convicted for murder in 1995 and sentenced to life imprisonment in WA.⁴⁰⁰ The HCA heard his appeal application.⁴⁰¹ Since the prosecution failed to disclose certain documents, which breached the DPP's Statement of Prosecution Policy and Guidelines,⁴⁰² the HCA set aside the conviction.⁴⁰³ Mallard had already spent 12 years in prison by the time he was exonerated. However, the chief prosecutor secured Mallard's continued detention in prison on the basis that he was still the main suspect. Upon release, the same prosecutor still stated that Mallard remained the prime suspect.⁴⁰⁴ A cold case review later showed that the prosecution was in possession of a palm print which incriminated another individual in the murder, who was already in prison and committed suicide upon knowledge of this information.⁴⁰⁵

Later, the CCC officially investigated the public officials involved in the case. It was apparent from the CCC's report that the prosecutors and police officers' conduct

³⁹⁸ *Ibid.*

³⁹⁹ *Mallard v The Queen* (2005) 224 CLR 125.

⁴⁰⁰ See generally Weathered, 'Wrongful Convictions in Australia', above n 374, 1402-4; See also Bibi Sangha, Kent Roach and Robert Moles, *Forensic Investigations and Miscarriages of Justice: The Rhetoric Meets the Reality* (Irwin Law, 2010) 14.

⁴⁰¹ Do note that Mallard's initial appeal was rejected. The Attorney-General provided a reference to the WA Court of Appeal but even that appeal was unsuccessful.

⁴⁰² The Statement of Prosecution Policy and Guidelines was gazetted pursuant to the *Director of Public Prosecutions Act 1991* (WA); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (1999)

<http://www.dpp.wa.gov.au/content/statement_prosecution_policy2005.pdf>.

⁴⁰³ See Justice's Kirby's judgement in *Mallard v The Queen* (2005) 224 CLR 125, 150, 153.

⁴⁰⁴ See Amanda Banks, 'Released Man Vows to Solve Murder Case', *The Australian*, 22 February 2006.

⁴⁰⁵ Corruption and Crime Commission Report on the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mallard, and Other Related Matters 133-6 (2008), cited in Weathered, 'Wrongful Convictions in Australia', above n 374, 1402-4.

were improper.⁴⁰⁶ For instance, the police officers had tunnel vision,⁴⁰⁷ earlier statements of witnesses were neither provided to the defence nor included in the brief of evidence,⁴⁰⁸ and the police requested an expert report to be amended to strength their case.⁴⁰⁹ Although evidence showed that a wrench could not have caused the injuries to the victim, the prosecution proceeded with their case on the basis of Mallard's drawing of a wrench.⁴¹⁰ *Mallard* is a classic example of how withholding of exculpatory evidences by the prosecution and police misconduct can lead to wrongful convictions.

In Australia there have been concerns about police officers staging criminal activities or creating situations so as to induce a suspect to make a confession.⁴¹¹ Acquiring evidence in this manner is potentially unreliable.⁴¹² Further, the Queensland Crime and Misconduct Commission have found that prisoners are admitting to crimes that have been labelled unsolved in exchange for the opportunity to leave the prison

⁴⁰⁶ Corruption and Crime Commission Report on the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mallard, and Other Related Matters (2008), cited in Weathered, 'Wrongful Convictions in Australia', above n 374, 1402-4.

⁴⁰⁷ See Corruption and Crime Commission Report on the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mallard, and Other Related Matters (2008) [178]-[180], [324], [351], cited in Weathered, 'Wrongful Convictions in Australia', above n 374, 1402-4.

⁴⁰⁸ Corruption and Crime Commission Report on the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mallard, and Other Related Matters (2008), xxii-xxiv, 85-100, cited in Weathered, 'Wrongful Convictions in Australia', above n 374, 1402-4; Note that only statements supporting the prosecution's case against Mallard were included.

⁴⁰⁹ This report was about the findings from the saltwater testing of Mallard's clothes.

⁴¹⁰ Corruption and Crime Commission Report on the Inquiry into Alleged Misconduct by Public Officers in Connection with the Investigation of the Murder of Mrs Pamela Lawrence, the Prosecution and Appeals of Mr Andrew Mallard, and Other Related Matters (2008) 83-4, cited in Weathered, 'Wrongful Convictions in Australia', above n 374, 1402-4.

⁴¹¹ See, eg, *Toufilau v The Queen* [2007] HCA 39; See also Weathered, 'Wrongful Convictions in Australia', above n 374, 1396.

⁴¹² Kyle Unger, 'Five Year Wait Over, Another Wait Begins' (2009) 10 *Association in Defence of the Wrongfully Convicted* 14, cited in Weathered, 'Wrongful Convictions in Australia', above n 374, 1396: From the 'Mr Big' operations in Canada, it has surfaced that acquiring evidences by staging criminal activities or creating situations so as to induce a suspect to make a confession are potentially unreliable.

premises to spend some time with their partners or wives.⁴¹³ Police misconduct certainly taints the whole justice system and diminishes the community's trust.

Judges, lawyers and academics are critical of the fact that the disclosure regimes in Singapore's criminal matters were not favourable to the accused,⁴¹⁴ and informal.⁴¹⁵ The prosecution does not have to disclose accused statements and admissions made to the police since there is no right to pre-trial discovery for those types of documents.⁴¹⁶ This in turn causes the defence counsel to speculate about their clients exact statements to the police officers which may be used by the prosecution as their trump card when evidence is not favourable to them.⁴¹⁷ Other criticisms include (1) the lack of obligation on the part of the prosecution to disclose prosecution witness statements to the defence counsel, and (2) the prosecution, without the accused lawyer or any third party, could interrogate the accused to obtain statements.⁴¹⁸ Winslow notes that the defence's requests for information that would be beneficial to their client's case were hardly ever granted.⁴¹⁹ Nonetheless, *Kadar* and the enactment of the new disclosure regime under Singapore's *Criminal Procedure Code* have made the disclosure regime less informal and more favourable to the accused.⁴²⁰

⁴¹³ Crime & Misconduct Commission (Qld), *Dangerous Liaisons: A Report Arising From a CMC Investigation into Allegations of Police Misconduct (Operation Capri)* (2009) <<http://www.cmc.qld.gov.au/research-and-publications/publications/police/dangerous-liaisons-a-report-arising-from-a-cmc-investigation-into-allegations-of-police-misconduct-operation-capri.pdf/view.>>.

⁴¹⁴ M Ravi, *Death Penalty in Singapore*, Briefing Paper to the European Parliament's Sub-committee on Human Rights, Jan 2007, (EXPO/B/DROI/2007/07) 3; Singapore, *Parliamentary Debates*, 2 March 2007, vol 82, col 2338 (Sylvia Lim); K S Rajah, 'Discovery and Fair Trials' [2003] (November) *Law Gazette* 1; Amarjeet Singh, 'Equality of Arms: The Need for Prosecutorial Discovery' [2005] (September) *Law Gazette* 3.

⁴¹⁵ Lim Wee Teck, 'The Phantom of Pre-Trial Discovery by the Accused: The Singapore Experience' [1982] *Law Times* 19.

⁴¹⁶ M Ravi, *Death Penalty in Singapore*, Briefing Paper to the European Parliament's Sub-committee on Human Rights, Jan 2007, (EXPO/B/DROI/2007/07) 3.

⁴¹⁷ *Ibid.*

⁴¹⁸ *Ibid.*

⁴¹⁹ Valentine S Winslow, 'Discovery in Criminal Cases: Disclosure by the Prosecution in Singapore and Malaysia' (1989) 31 *Malaya Law Review* 1.

⁴²⁰ *Muhammad Bin Kadar v Public Prosecutor* [2011] 3 SLR 1205 ('*Kadar*'); Please do note that Singapore's new *Criminal Procedure Code* (Singapore) contains a new disclosure regime under Part IX, which allows the unused statements of the accused to be passed to the defence if the defence passed its statements to the Prosecution. See Attorney- General's Chambers, Government of

Kadar is a case where non-compliance with police procedures and non-disclosure of the prosecution nearly caused an individual's death.⁴²¹ This seminal case also widened the scope of the prosecution's disclosure obligations.⁴²² In *Kadar*, Muhammad and his brother Ismil were charged for murdering a lady in her dwelling. The victim's bedridden husband, Loh, gave his statement to the police that there was only one assailant. Ismil also gave statements to a police officer when he was arrested and on a later date in a briefing room.⁴²³

The Court of Appeal concluded that the statements were not obtained by the police officer pursuant to standard procedures. Ismil was under the influence of drugs when his first statement was recorded and thus it was a time where he was vulnerable to manipulation. Ismil's first statement recorded on a slip of paper and then transferred to the officer's field diary was not police protocol. During both police interviews, Ismil neither corrected his statements nor signed them. The police officers did not read Ismil's statements back to him. Justice Rajah held this non-compliance with procedures to be 'deliberate' rather than 'mere carelessness or operational necessity'.

Singapore, 'Court of Appeal's Supplementary Grounds of Decisions Clarify Obligations of Prosecution' (Press Release, 27 Aug 2011) 2. See generally Singapore, *Parliamentary Debates*, 8 March 2013, sess 1, vol 90 (Sylvia Lim; K Shanmugam): Sylvia Lim, who has personally assisted few cases under the new framework notes that the new disclosure regime 'contributes towards a fair trial'; The point to note is that although selected statutes and District Court cases under the Penal Code come under the new disclosure regime in Part IX of the *Criminal Procedure Code* (Singapore), the *Prevention of Corruption Act* (Singapore, cap 241, rev ed 1993) is yet to be covered under the regime. The Minister for Law replied in Parliament that the success of the new changes have to be examined before more legislations can be confidently added to the regime; See also 'CPIB Monitoring Effectiveness of Criminal Case Disclosure Regime', *Channel Newsasia* (online) 11 November 2013 <<http://www.channelnewsasia.com/news/singapore/cpib-monitoring/882960.html>>; Prime Minister of Singapore, Lee Hsien Loong, also stated that there are ongoing investigations in relation to the expansion of disclosure regimes under the *CPC 2010* for offences investigated by other legal enforcement agencies other than the CPIB under the *Prevention of Corruption Act*.

⁴²¹ *Kadar* [2011] 3 SLR 1205.

⁴²² *Ibid* [1]: *Kadar* was considered an 'extraordinary case' by VK Rajah JA, who delivered the judgement in that case.

⁴²³ Based on Ismil's statements, the prosecution in the High Court argued that Ismil was the only assailant and Muhammad had a 'common intention' under s 34 of the *Penal Code* (Singapore) and was equally liable. Ismil had initially informed the police that he was the main assailant but during trial maintained innocence. Muhammad then claimed he was the only perpetrator. Nonetheless the prosecution argued that Muhammad was the only assailant but both brothers were guilty under s 34 of the *Penal Code*. The High Court convicted both brothers and sentenced them to death in April 2009. But the Court did not ascertain the actual murderer's identity. Both brothers were in prison for four years and another two years on the death row. In January 2011, both brothers lodged an appeal.

The Court found that the prosecution did not disclose to the defence counsel Loh's statement regarding the single assailant he saw and the details of how the attacker looked like. Justice Rajah emphasised that the duty of the prosecution is to 'assist the court in its determination of the truth'. His Honour further said that the prosecution's duty is to the court and society to ensure only the guilty are convicted and not to 'secure a conviction at all costs'. Due to the lack of evidence that Ismil was in the dwelling at the time of murder, Ismil was exonerated.

The Court 'strongly criticised' the conduct of the prosecution in *Kadar*.⁴²⁴ In comparison to Tey's arguments about the Judiciary,⁴²⁵ such a firm stance by the Court of Appeal does signify that the Singapore courts are not taking any possible injustice to the defendant lightly.⁴²⁶

The Court considered various common law cases from various jurisdictions (including Kirby J's judgement in *Mallard*)⁴²⁷ and expanded the prosecution's duty in relation to unused materials.⁴²⁸ There was a clarification judgement provided by

⁴²⁴ Chen Siyuan, 'Case Comment- The Prosecution's Duty of Disclosure in Singapore: Muhammad Bin Kadar v Public Prosecutor [2011] 3 SLR 1205' (2012) 11(2) (Winter) *Oxford University Commonwealth Law Journal* 207, 208.

⁴²⁵ See Tsun Hang, above n 224, 332: Tey argued that the constraints on the accused's rights because of the non-development of due process jurisprudence by the Singapore Judiciary have been favourable to the prosecutors during criminal trials.

⁴²⁶ See *Ong Pang Siew v Public Prosecutor* [2011] 1 SLR 606, [72]: The Court of Appeal was critical of the fact that the prosecution's expert was not up to standards known in their field of expertise. See also *Eu Lim Hoklai v Public Prosecutor* [2011] 3 SLR 167, [57]-[59]: The Court of appeal criticised the prosecution's expert witness; See also Siyuan, above n 424, 207: Siyuan states that the Court of Appeal's criticism in *Eu Lim Hoklai* was done 'in a rare move'; See also *Lim Boon Keong v Public Prosecutor* [2010] SGHC 179 [41]-[42]: The Health Sciences Authority (HSA) is the statutory body that conducts drug tests in Singapore. The Singapore High Court in this case stated that the lack of man power and resources is not a justifiable reason for the HSA not to comply with its strict legal obligations. The Court also emphasized that HSA must ensure that its internal procedure was not breaching the law.

⁴²⁷ *Mallard v The Queen* (2005) 224 CLR 125.

⁴²⁸ Siyuan, above n 424, 209 citing *Kadar* [2011] 3 SLR 1205 [113]: Pursuant to *Kadar*, Singapore prosecutors are obligated to disclose to the defence:

- (a) any unused material [not including material neutral or adverse to the accused] that is likely to be admissible and that might reasonably be regarded as [prima facie] credible and relevant to the guilt or innocence of the accused;
- and
- (b) any unused material [not including material neutral or adverse to the accused] that is likely to be inadmissible, but would provide a real (not fanciful) chance of pursuing a line of inquiry

the Court of Appeal to the effect that the prosecutor's obligation, in relation to the unused material, is limited to those they have in fact received from the investigating agencies.⁴²⁹ Additionally, the Minister of Law mentioned that the determination of disclosure obligations in court proceedings will be from the pre-trial stage until the case proceedings have concluded.⁴³⁰ *Kadar* is 'a small incremental development in the nature of the prosecution's disclosure obligations.'⁴³¹

A Code of Practice, launched in March 2013,⁴³² sets out the best practices guidelines for both the prosecution and defence counsel in criminal proceedings.⁴³³ The Code states that '[p]rosecutors and defence counsel should comply with disclosure requirements imposed by law'.⁴³⁴ The guidelines also cover issues such as the prosecution and defence counsel's duty to the courts.⁴³⁵ Importantly, the Code mentions that prosecutors should communicate with an accused person through or

that leads to material that is likely to be admissible and that might reasonably be regarded as credible and relevant to the guilt or innocence of the accused.

⁴²⁹ Attorney-General's Chambers, Government of Singapore, 'Court of Appeal's Supplementary Grounds of Decisions Clarify Obligations of Prosecution', above n 420, 2-3: The Court also confirmed that the obligations in *Kadar* do not supersede the 'statutory provisions that exclude disclosure, including the safeguards under the *Misuse of Drugs Act* and the *Evidence Act*'.

⁴³⁰ Ministry of Law, Government of Singapore, *Oral Answer by Minister of Foreign Affairs and Law, Mr K Shanmugam, to Parliamentary Question on the Kadar Case* (25 Nov 2012) <http://www.mlaw.gov.sg/news/parliamentary-speeches-and-responses/oral-answer-by-minister-for-foreign-affairs-and-law-mr-k-shanmugam-to-parliamentary-question-on_1.html>.

⁴³¹ Attorney-General's Chambers, Government of Singapore, 'Court of Appeal's Supplementary Grounds of Decisions Clarify Obligations of Prosecution', above n 420, 3.

⁴³² Ministry of Law, Government of Singapore, *Oral Answer by Minister of Foreign Affairs and Law, Mr K Shanmugam, to Parliamentary Question on the Kadar Case*, above n 430: The 'Joint Code of Practice' was explained by Singapore's Minister of Foreign Affairs and Law after *Kadar*. According to him, the guidelines were meant to guide both the prosecution and defence counsel on their obligations in relation to the disclosure regimes; See Tham Yuen-c, 'AGC and Law Society Launch Code of Practice for Criminal Proceedings', *The Straits Times* (online) 27 March 2013 <<http://www.straitstimes.com/breaking-news/singapore/story/agg-and-law-society-launch-code-practice-criminal-proceedings-20130327>>: The Code was launched by Attorney-General's Chambers (AGC) and Law Society. At the launch of the Code of Practice Attorney-General Steven Chong said that '[t]he Code of Practice signals a very powerful message of a joint commitment and pledge by the twin engines of the criminal justice system to raise the Bar in ensuring that criminal proceedings are conducted at the highest level of professionalism.'

⁴³³ Attorney-General's Chambers, Government of Singapore, *The Code of Practice for the Conduct of Criminal Proceedings by the Prosecution and the Defence* <<http://app.agc.gov.sg/DATA/0/Docs/NewsFiles/Code%20of%20Practice%20for%20the%20Conduct%20of%20Criminal%20Proceedings%20-%20FINAL.pdf>>.

⁴³⁴ *Ibid* [8].

⁴³⁵ *Ibid* [29]-[36].

with the permission of the defence counsel.⁴³⁶ Although this would be beneficial to an accused who has been charged with a capital offence, the Code expressly states that non-compliance by the Prosecution will not result in disciplinary action or judicial review.⁴³⁷

As Kirby notes, during the earlier days lawyers and judges acknowledged that there was a risk of miscarriage of justice resulting in a few wrongful convictions.⁴³⁸ But those officers of the courts believed that people should accept a few wrongful convictions since no human institution is infallible.⁴³⁹ Kirby also notes that such attitude is not a usual sight amongst judges and lawyers today. According to him, this change in attitude may be attributable to (1) the various accounts of innocent individuals being convicted and punished by the justice system; (2) the scrutiny of the media and academics; (3) judges and lawyers are now less formalistic than they were in those earlier times; and (4) the concept of human rights.⁴⁴⁰

The Singapore government places great importance on ensuring that the police force is free from corruption, so that interrogation procedures and investigation by the police force will not be tainted. The probability of wrongful convictions in capital cases is very low since the police force places emphasis on securing a conviction lawfully and truthfully, without abusing their powers. In addition to Singapore government's commitment to promote public confidence in the criminal justice system and constant development of police officers to eradicate police misconduct, public's constant scrutiny of the few 'black sheep' in the police force, keeps the

⁴³⁶ Ibid [24].

⁴³⁷ Ibid [2].

⁴³⁸ Sangha, Roach and Moles, above n 400, xxi.

⁴³⁹ Ibid.

⁴⁴⁰ Ibid.

police force in check.⁴⁴¹ The Judiciary is also not taking any injustice to the accused lightly.

Even though, justice was served in Ismil's case, it is a clear representation of how one error in a capital case could have severe repercussions. If Singapore is determined to retain the death penalty certain reforms could be considered; (1) enacting a legislative Code of Practice listing rules for police investigation procedures which firstly, sets out a shorter time period for individuals to access their counsel, and secondly, implement the procedure of video-recording interrogations of suspects; and (2) reinforce the right to silence by amending its criminal laws. Such amendments will help strike a balance between the due process and crime control models. However, given the various stages before a capital trial, it takes only one procedural error in any of those stages to taint the whole trial process. There is no guarantee that wrongful conviction will be completely eradicated with these reforms in place, although these changes would certainly reduce this risk.

4 Jury System

Jury deliberation serves community and democratic values and acts as a check against the possible abuse by judges and prosecutors.⁴⁴² In WA, jury trials have been

⁴⁴¹ Siyuan and Chua, above n 113, 104, 109.

⁴⁴² Alfredo Garcia, *The Sixth Amendment in Modern Jurisprudence: A Critical Perspective* (Greenwood Press, 1992) 183, quoted in Ho Hock Lai, 'Liberalism and the Criminal Trial' (2010) 32 *Sydney Law Review* 243, 252; See also *Patton v US*, 281 US 276 (1930), 296-7: The United States Supreme Court noted that 'trial by jury in criminal cases...uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against oppressive power of the King and the arbitrary or partial judgement of the court'; Trial by jury, an Anglo-Saxon concept, has been commonly linked to Clause 39 of the Magna Carta. Clause 39 of Magna Carta reads *Nullus liber homo capiatur vel imprisonetur, aut disseisiatum aut utlagetur, aut exuletur, aut aliquot modo destruat, nec super eum ibimus nec super eum mitemus, nisi per legale iudicium parium vel per legum terrae*. See Holdsworth, above n 20, 59 for translation: *No freeman shall be taken or/and imprisoned, or disseised, or exiled, or in any way destroyed, nor will we go upon him nor will we send upon him, except by the lawful judgment of his peers or/and by the law of the land*. See also Penny Darbyshire, 'The Lamp that Shows that Freedom Lives- Is It Worth the Candle?' (1991) *Criminal Law Review* 740, 742: Lord Devlin has claimed that it is a constitutional guarantee of a right to jury trial enshrined in Magna Carta. However, legal historians have argued that the clause is not in any way related to trial by jury. According to Holdsworth,

part of the criminal justice system ever since the establishment of the British settlement. However, in recent times, less than 0.5% of criminal cases are tried by jury.⁴⁴³ Jurors, representing the community,⁴⁴⁴ play an important role in boosting public confidence in the criminal justice system.⁴⁴⁵ Legislation across Australia imposes a requirement that these jurors have to be randomly chosen.⁴⁴⁶ In Australia, pattern or standard jury instructions are provided to jurors.⁴⁴⁷ Since most research on jury systems have been conducted in the USA where pattern instructions are used, those research findings may translate to Australia.⁴⁴⁸ However, unlike in the USA,⁴⁴⁹ Australian jurors do not play a part in sentencing.⁴⁵⁰

In Singapore, the jury system was adopted for only criminal trials.⁴⁵¹ Up until the abolishment in 1873, the Grand Jury of about 13 to 23 individuals was part of Singapore's justice system.⁴⁵² Following which, the special and common juries were

[T]he words *judicium parium* [(trial by one's peers)] do not refer to trial by jury... What [the barons]... want was firstly a tribunal of the old type in which all the suitors were judges of both law and fact, and secondly a tribunal in which they would not be judged by their inferiors...

Even Forsyth agreed that that it was a common misconception (a misconception that even Devlin and Blackstone possessed) that *judicium parium* referred to jurors. Thus, the right to trial by jury was never enshrined in the Magna Carta as various proponents of the jury system contend.

⁴⁴³ Western Australian Law Reform Commission, *Selection, Eligibility and Exemption of Jurors*, (Final Report) Project No 99 (2010) 7: Civil trials are rarely conducted with jurors.

⁴⁴⁴ See J Horan and D Tait, 'Do Juries Adequately Represent the Community?' (2007) 16(3) *Journal of Judicial Administration* 179, 185.

⁴⁴⁵ Western Australian Law Reform Commission, *Selection, Eligibility and Exemption of Jurors*, (Final Report) Project No 99 (2010) 9.

⁴⁴⁶ *Juries Act 1957* (WA) ss 14(2), 32C; *Jury Act 1995* (Qld) ss 16, 26; *Jury Act 1977* (NSW) s 12; *Juries Act 2000* (Vic) s 4; *Juries Act 1927* (SA) ss 23, 29; *Juries Act 2003* (Tas) s 4; Western Australian Law Reform Commission, *Selection, Eligibility and Exemption of Jurors*, Discussion Paper (2009) Ch 2: In WA, jurors are selected by way of random balloting processes.

⁴⁴⁷ Tarika Daftary-Kapur, Rafaele Dumas and Steven Penrod, 'Jury Decision-making Biases and Methods to Counter Them', (2010) 15(1) *Legal and Criminological Psychology* 133, 134.

⁴⁴⁸ *Ibid* 135.

⁴⁴⁹ See *Summerlin v Stewart*, 341 F 3d 1082 (9th Cir, 2003): In the USA it is unconstitutional if the laws of a state impose that only judges, and not the jury, can determine whether a convicted individual should be sentenced to death.

⁴⁵⁰ Michael Kirby, 'The High Court and the Death Penalty: Looking Back, Looking Forward, Looking Around' (2003) 77 *Australian Law Journal* 811, 817.

⁴⁵¹ The jury system was adopted via the *Second Charter of Justice 1826* (UK); See Chan, above n 71, 103; See also C B Buckley, *An Anecdotal History of Old Times in Singapore 1819-1867* (University of Malaya Press, 1965); C M Turnbull, *The Straits Settlements 1826-1867: Indian Presidency to Crown Colony* (Athlone Press, 1972) 72, 134-7; Siyuan and Chua, above n 113, 110.

⁴⁵² Malathi Das, *Law Society and Legal First Facts* < <http://www.lawgazette.com.sg/2007-10/legalfirst.htm>>; See also Y K Lee, 'The Grand Jury in Early Singapore (1819-1873)' (1973) 46(2) *Journal of the Malaysian Branch of the Royal Asiatic Society* 55; C B Buckley, *An Anecdotal History*

introduced.⁴⁵³ In 1960, jurors were restricted to capital cases, and in 1969, the jury system was totally abolished in Singapore.⁴⁵⁴ This was because the Singapore government believed that jurors were erratic and oblivious and that guilty individuals were acquitted in large numbers due to persuasive lawyers.⁴⁵⁵ Especially in capital cases, the jurors were reluctant to find the accused guilty so the accused regularly escaped the death sentence.⁴⁵⁶ Ever since, there have been debates in the public sphere on whether Singapore should reintroduce the jury system in criminal trials.⁴⁵⁷ Although, the removal of the jury system in Singapore was due to the reluctance of jurors to provide a guilty verdict on an accused who was actually guilty, this section of the thesis contends that the removal of the jury system is arguably the right step taken by the Singapore government in order to prevent wrongful convictions in capital cases.

of Old Times in Singapore 1819-1867 (University of Malaya Press, 1965); Turnbull, 'The Straits Settlements 1826-1867', above n 451, 134-7.

⁴⁵³ Das, above n 452; The jury panel at that time consisted of four Europeans and three natives, or five Europeans.

⁴⁵⁴ See Chan, above n 71, 103; Siyuan and Chua, above n 113, 110.

⁴⁵⁵ Singapore, *Legislative Assembly Debates*, 1959, vol 2, col 565 (Prime Minister in Parliament); Chan, above n 71, 103; Siyuan and Chua, above n 113, 104, 111; Andrew Phang, 'Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution' (1983) 25 *Malaya Law Review* 50; Molly Cheang, 'Jury Trial: The Singapore Experience' (1973) 11 *Western Australia Law Review* 120.

⁴⁵⁶ Andrew Phang, 'Jury Trial in Singapore and Malaysia: The Unmaking of a Legal Institution', above n 455, 69; See also Siyuan and Chua, above n 113, 104, 111.

⁴⁵⁷ See, eg, Speaker's Corner, *Should Jury System be Restored?*

<www.sgforums.com/forums/10/topics/194834>; Cf William Bower and Wanda Foglia, 'Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing', (2003) 39(1) *Criminal Law Bulletin* 51: Bower and Foglia found that jurors in the USA may have already made up their minds on their decision making before the sentencing stage of trials commences. Such inappropriate decision making process usually resulted in the imposition of the death penalty to the defendants. This finding is not applicable in Australia since the jury do not play a part in sentencing; See also Bohm, above n 343, 13.

(a) *Instructions to Jury*

Liberman and Sales observe that jurors' poor understanding of judges' instructions affect the way justice is administered.⁴⁵⁸ This poor understanding can be attributed to the law's intricate nature, the law being foreign to jurors, and the information overload jurors face in and outside court proceedings.⁴⁵⁹ Such poor understanding may cause jurors to use their own beliefs, moral values, and ideologies of 'what is fair and just'.⁴⁶⁰ Since legal instructions may comprise of legal jargon, and sentences that are too lengthy and difficult to comprehend,⁴⁶¹ jurors often are confused with their role.

Even with instructions not to consider certain types of documents, jurors may also rely on extra-legal evidence, like hearsay or inadmissible evidence,⁴⁶² other than the evidence and testimonies in trial to reach their verdict.⁴⁶³ The problem is amplified by the fact that jurors in Australia do not provide written reasons for their decisions (unlike judges) so generally it is difficult to ascertain if the jurors have relied on evidence outside of court proceedings. This also affects the possibility of appealing against any judgement of the court.

⁴⁵⁸ See also Daftary-Kapur, Dumas and Penrod, above n 447, 134.

⁴⁵⁹ Joel Liberman and Bruce Sales, 'What Social Science Teaches Us About Jury Instruction Process' (1997) 3(4) *Psychology, Public Policy and Law* 589.

⁴⁶⁰ Daftary-Kapur, Dumas and Penrod, above n 447, 134.

⁴⁶¹ D U Strawn and R W Buchanan, 'Jury Confusion: A Threat to Justice' (1976) 59(10) *Judicature* 478.

⁴⁶² Daftary-Kapur, Dumas and Penrod, above n 447, 137-8; Nancy Steblay et al, 'The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-analysis' (2006) 30(4) *Law and Human Behaviour* 469: For instance, it is difficult to prevent the jury panel from totally disregarding evidence that is inadmissible once judges have drawn their attention to it by instructing the jurors to disregard the evidence. Hence, some judges do not even give instruction relating to the inadmissible evidence since studies show that the human mind cannot easily disremember 'information on command'. A study conducted in 2006 shows that once jurors believe that evidence is probative in weight they will not disregard it; and inadmissible evidence may still be considered by jurors even if instructions were given to disregard.

⁴⁶³ See Andrea M Halverson et al, 'Reducing the Biasing Effects of Judges' Nonverbal Behavior with Simplified Jury Instruction' (1997) 82(4) *Journal of Applied Psychology* 590.

There is always a possibility of jurors pressuring other fellow jurors to reach a majority verdict.⁴⁶⁴ In *Smith*, the Western Australia Court of Appeal dismissed Smith's appeal against the verdict of the trial judge.⁴⁶⁵ In the District Court, Smith was found guilty on two counts of indecently dealing with a girl under the age of 13. The foreman of the jury who pronounced the guilty verdict on two counts, also stated that the verdict was from all the jurors. The following day, a note addressed to the trial judge was found in the jury room. The note written by one of the jurors (the note does not indicate the identity of the juror) states that the individual was coerced physically by another juror to change their plea to make sure it is aligned with the majority vote.⁴⁶⁶

Smith appealed that the verdict was a miscarriage of justice. However, the common law 'exclusionary rule' disallows evidence of jury deliberations being presented into a court. Therefore, Smith's appeal was dismissed by the Court of Appeal. A special leave of appeal has been submitted in the HCA.⁴⁶⁷ Such coercion in a capital case can result in an innocent individual being wrongfully convicted.

The high standard of 'beyond reasonable doubt' has been described as the golden rule in criminal proceedings.⁴⁶⁸ It arises from the presumption of innocence and

⁴⁶⁴ There are even situations where jurors, who may have poor understanding or no understanding of judges' instructions, rely on other confident jurors who may not even be more well-informed to reach their decisions.

⁴⁶⁵ *Smith v Western Australia* [2013] WASCA 7 (17 January 2013).

⁴⁶⁶ Ibid [3]-[4]: The note reads 'I have been physically coerced by a fellow juror to change my plea to be aligned with the majority vote. This has made my ability to perform my duty as a juror on this panel (ts 187)'. The trial judge did mention that once the verdict was delivered, one of the jurors was upset. Further, the judge noticed that the jury left the courtroom in an 'unusually noisy' manner and the foreman was a little slow in affirming that the verdict was from all the jurors.

⁴⁶⁷ Transcript of Proceedings, *Smith v Western Australia* [2013] HCATrans 225 (12 September 2013). The date of that HCA appeal is yet to be confirmed.

⁴⁶⁸ *Woolmington v Director of Public Prosecutions* (UK) [1935] AC 462; See also Mohan and Wen Qi, above n 164, 14; William Paley, *The Principles of Moral and Political Philosophy* (Liberty Fund, 2002) 391-2; James Q Whitman, *The Origins of Reasonable Doubt* (Yale University Press, 2008) 1-4: The origins of the doctrine 'beyond reasonable doubt' is from ancient theology. Unlike the modern rationale for the doctrine to protect an accused, the origin of the 'beyond reasonable doubt' doctrine was to protect 'the souls of the jurors from damnation'. In those times, people believed that by convicting an innocent individual, the person commits a potential mortal sin. Due to religious reluctance to convict individuals, the doctrine originated. So the 'beyond reasonable doubt doctrine'

requires the prosecution to prove its case to that high standard.⁴⁶⁹ When jurors have a reasonable doubt as to the defendant's guilt, they should pronounce a non-guilty verdict. By way of research, Ellsworth observed that jurors knew about the necessity of being convinced beyond reasonable doubt, but were all unable to define the concept.⁴⁷⁰ In Australia, the phrase 'beyond reasonable doubt' has been often the subject of appeal.⁴⁷¹ Judges are not required to explain or illustrate the concept,⁴⁷² and attempts to do so have not been successful.⁴⁷³ Therefore, judges must not define 'beyond reasonable doubt' which is a 'time honoured formulae'.⁴⁷⁴

(b) Scientific Evidence

Judges, lawyers and jurors are usually not trained in the field of Science and as a result are not the 'most effective gatekeepers' to evaluate the 'merit of scientific evidence'.⁴⁷⁵ There has been a study showing that physical evidence like pictures and DNA analysis are more influential on jurors' decision making, resulting in more guilty verdicts,⁴⁷⁶ than eyewitness testimony.⁴⁷⁷

was to make it easier for jurors to convict individuals since they do believe that they are not risking their own salvation when they found a person guilty without any reasonable doubts in that person's guilt.

⁴⁶⁹ *Dawson v The Queen* (1961) 106 CLR 1, 17.

⁴⁷⁰ Phoebe Ellsworth, 'Are Twelve Heads Better Than One?' (1989) 52(4) (Autumn) *Law and Contemporary Problems* 205.

⁴⁷¹ See P K Waight and C R Williams, *Evidence: Commentary and Materials* (Lawbook, 7th ed, 2006) 96; See also Heather Douglas et al, above n 227, 13-4 [1.60].

⁴⁷² *R v Wilson, Tchorz and Young* (1986) 22 A Crim R 130.

⁴⁷³ See, eg, *Goncalves v The Queen* (1997) 99 A Crim R 193: The court held that 'absolute certainty' was not the best definition; See also *Green v The Queen* (1971) 126 CLR 28, 32: The HCA in *Green*, referring to various unsuccessful and unnecessary attempts of other trial judges in defining the phrase, held that the trial judge in *Green* had confused the jury and misdirected them.

⁴⁷⁴ *Dawson v The Queen* (1961) 106 CLR 1, 18; See also G P Kramer and D M Koenig, 'Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project' (1990) 23(3) (Spring) *University of Michigan Journal of Law Reform* 401: In the Michigan Juror Comprehension Project reasonable doubt standards were contrasted between jurors who had served jury duty and those who were invited to but did not perform those duties. According to Kramer and Koenig, only 25% of jurors in both groups would pronounce the defendant not guilty if they had reasonable doubt. Further, by providing the definition of reasonable doubt, 68% of jurors were under the misconception that the concept was based on the evidence alone and not the conclusions drawn from the evidence. In contrast, only 52% of uninstructed jurors were under this erroneous impression.

⁴⁷⁵ Daftary-Kapur, Dumas and Penrod, above n 447, 141.

⁴⁷⁶ Joel Liberman et al, 'Gold Versus Platinum: Do Jurors Recognize the Superiority and Limitations of DNA Evidence Compared to Other Types of Forensic Evidence?' (2008) 14(1) *Psychology, Public*

In Australia, there was a study based on 200 sexual assault cases.⁴⁷⁸ It was discovered that in cases where DNA evidence were submitted, jurors are 33 times more likely to pass the guilty verdict than when no evidence are presented.⁴⁷⁹ Therefore, the Australian Law Reform Commission stated that judges and jurors needed to be more equipped to analyse complex DNA evidence.⁴⁸⁰

Another issue concerning jurors is the ‘CSI effect’. This is where a layperson watching television programmes involving forensic science form expectations in relation to the standards of forensic evidence.⁴⁸¹ According to the various studies on the ‘CSI effect’,⁴⁸² the impact of forensic science programmes on jurors is not conclusive, but there is a possibility of these programmes affecting jury decision making.⁴⁸³ All of the above mentioned concerns are amplified in capital cases due to the finality of the punishment.

Policy, and Law 27; See also J M Golding et al, ‘The Impact of DNA Evidence in a Child Sexual Assault Trial’ (2000) 5(4) *Child Maltreatment* 373.

⁴⁷⁷ Liberman et al, above n 476; See also The Justice Review, *Eyewitness Identification: A Policy Review*, The Justice Project, 19

<http://www.psychology.iastate.edu/~glwells/The_Justice%20Project_Eyewitness_Identification_%20A_Policy_Review.pdf> : According to the Innocence Project in the USA, 101 out of the first 130 post conviction DNA exonerations, were due to mistaken eyewitness identification. In a more recent review by the Innocence Project, mistaken eyewitness identification testimony was the chief reason of wrongful convictions. 75% of the 200 post conviction DNA exonerations in the USA involved such mistaken identification. According to the Center on Wrongful Convictions at Northwestern University School of Law, 54% of the 86 individuals who have been exonerated after a death sentence was passed because of mistaken eyewitness testimony; See pg for a discussion on DNA exonerations and Innocence Projects in Australia and Singapore.

⁴⁷⁸ Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information*, Briefing Note: Law Enforcement (2003) vol 2, Sydney, Australia; See also Daftary-Kapur, Dumas and Penrod, above n 447, 142.

⁴⁷⁹ Daftary-Kapur, Dumas and Penrod, above n 447, 142.

⁴⁸⁰ Ibid.

⁴⁸¹ Ibid.

⁴⁸² See generally Ibid 142-3

⁴⁸³ Ibid 150.

(c) *Pre-trial Publicity*

Jurors can be affected by the ‘pre-trial publicity’ created by the media. According to Steblay et al., jurors could be influenced by the nature, amount, timing and type of pre-trial publicity.⁴⁸⁴ It is highly possible for jurors to be tainted even before they commence their court duties.⁴⁸⁵

These interrelated issues came to a head in *Chamberlain*.⁴⁸⁶ Lindy Chamberlain was charged with her baby’s murder. Her argument was that a dingo had taken her baby whilst the Chamberlains were at a family campsite at Ayers Rock. Her husband was charged as an accessory after the fact. Both parents were found guilty. Later, a Royal Commission inquiry found support for the idea that Azaria Chamberlain was taken away by a dingo.⁴⁸⁷ More importantly, the ‘fetal blood’ (a forensic biologist testified to that effect at trial which the prosecution used to theorise the manner and place Lindy killed Azaria) that was found in the Chamberlain’s car was actually a fluid used in car batteries.⁴⁸⁸ After the Commission’s inquiry and recommendation, their convictions were quashed.⁴⁸⁹ In June 2012, the coroner made the official finding that Azaria was killed by a dingo.⁴⁹⁰ It took approximately 32 years for the case to be resolved and to prove that Lindy was innocent.

⁴⁸⁴ Steblay et al, above n 462.

⁴⁸⁵ See Dean Fewster, ‘Courts Face Massive Problems as Jurors Corrupt Trials by Turning to Social Media for Help’, *News Ltd* (online), 17 April 2013 < <http://www.news.com.au/technology/courts-face-massive-problems-as-jurors-corrupt-trials-by-turning-to-social-media-for-help/story-e6frfmnr-1226622511074>>: There have been cases where jurors hold polls on Facebook to decide on their verdict and some jurors even post remarks on such social media platforms which condemn the legal system and the presiding judges.

⁴⁸⁶ *R v Chamberlain* (1982) 69 FLR 445 (NT); *Chamberlain v The Queen* 153 CLR 521.

⁴⁸⁷ T R Morling, Royal Commission of Inquiry into Chamberlain Convictions, *Report* (1987).

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Re Conviction of Chamberlain* (1988) 93 FLR 239.

⁴⁹⁰ ‘As it Happened: Azaria Chamberlain Inquest’, *ABC* (Melbourne) (online) 14 June 2012 <<http://www.abc.net.au/news/2012-06-12/azaria-chamberlain-inquest-findings/4065466/default.htm?site=melbourne>>.

The media coverage during the time of the court proceedings portrayed Lindy as someone who was not behaving like a grieving mother should have.⁴⁹¹ The media certainly influenced her conviction.⁴⁹² This case also reinforces another view; the wrongful conviction in this case could not have been corrected if the death penalty was still ordered in Australia during the time of the Chamberlains' sentencing. Capital cases due to their very nature are often going to have been subject to significant pre-trial publicity. Therefore, jurors who are exposed to biased publicity may prejudge defendants in capital trials.⁴⁹³

Jury deliberation, where a representative group of citizens reason and discuss on a fellow citizen's case to find a collective judgement, is described as the 'the crucible of democracy'.⁴⁹⁴ The jury system acts as a check against possible abuse by judges and prosecutors.⁴⁹⁵ Nonetheless, as discussed above, it is not appropriate for the jury system to be part of capital cases due to the various problems they may encounter before and during the trial process. Judges, on the other hand, are much better equipped to be both trier of fact and law.

⁴⁹¹ Weathered, above n 374, 1397.

⁴⁹² Ibid.

⁴⁹³ See, eg, Justin Brooks, *Wrongful Convictions: Cases and Materials* (Vandeplas Publishing, 2011).

⁴⁹⁴ See Hock Lai, above n 442, 252.

⁴⁹⁵ Garcia, above n 442, 183, quoted in Ibid; See also *Patton v US*, 281 US 276 (1930), 296-7: The United States Supreme Court noted that 'trial by jury in criminal cases...uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against oppressive power of the King and the arbitrary or partial judgement of the court'.

5 Unanimous Decision

In Singapore, after the abolition of the jury system, it was proposed by the first Prime Minister, Lee, that criminal trials be heard by three judges.⁴⁹⁶ However, due to the shortage of judges, the number of judges hearing a capital trial in the High Court was reduced to two.⁴⁹⁷ The two judges unanimously could convict a defendant.⁴⁹⁸ However, if either one of the judges is of the opinion that the defendant is not guilty beyond a reasonable doubt, then the court could acquit or discharge the defendant; or if both judges agreed, convict that defendant of a lesser offence with the same facts.⁴⁹⁹ The judges may also order a retrial in another court.⁵⁰⁰ In April 1992, the number of judges in trials was reduced to one.⁵⁰¹

Currently, the Court of Appeal may uphold the death sentence with a less than unanimous decision.⁵⁰² This is contrary to the procedures followed by the High Court before 1992. Tey argues that there will be an expectation that the benefit of the doubt accrues in favour of the accused when there is disagreement between judges on law and fact at the highest level of the court hierarchy.⁵⁰³ There could be doubt on the accused's liability because of the less than unanimous decision amongst the Judiciary in a capital case. As Blackstone expressed, it is 'better that ten guilty persons escape

⁴⁹⁶ Francis T Seow, 'The Judiciary' in Michael Haas (ed), *The Singapore Puzzle* (Praeger Publishers, 1999) 107, 109; Tsun Hang, above n 224, 336-8.

⁴⁹⁷ Seow, above n 496, 109.

⁴⁹⁸ *Ibid.*

⁴⁹⁹ *Ibid.*

⁵⁰⁰ *Ibid.*

⁵⁰¹ *Ibid.*

⁵⁰² See, eg, *Took Leng How v Public Prosecutor* [2006] 2 SLR 70: The High Court convicted an individual for murdering an eight year old girl during a game of hide and seek. The death sentence was upheld by the Court of Appeal even though the Court was divided 2:1; See also Tsun Hang, above n 224, 336-8.

⁵⁰³ Tsun Hang, above n 224, 338.

than that one innocent suffer.⁵⁰⁴ This concept constantly reminds us of the irreversible nature of the death penalty.

6 Innocence Projects & DNA

In the United Kingdom, the discovery and prevention of wrongful convictions has also been carried out by an independent body called the Criminal Cases Review Commission (CCRC).⁵⁰⁵ Since 1997, the CCRC has been conducting reviews of applications from individuals who believe they have been wrongfully convicted in the criminal courts of England, Wales and Northern Ireland.⁵⁰⁶ As of September 2013, the Court of Appeal has quashed 351 convictions following referrals from the CCRC.⁵⁰⁷

Singapore and Australia do not currently have an independent body, like the CCRC, working specifically to ensure there are no wrongful convictions within their

⁵⁰⁴ W Morrison (ed), *Blackstones Commentaries on the Laws of England* (Cavendish, 2001) 358; See also Heather Douglas et al, above n 227, 15 [1.60]: Blackstone wrote this concept during the time when murder was punishable by the death in Britain.

⁵⁰⁵ See Sangha, Roach and Moles, above n 400, 331-3: The CCRC is established by the *Criminal Appeal Act 1995* (UK) c 35. This Act covers the powers and duties the CCRC possesses.

⁵⁰⁶ Sangha, Roach and Moles, above n 400, 331-48: Before the case application is fully reviewed, the CCRC assesses whether there are any reviewable grounds in the case in hand. The applicant should have used all the available appeal avenues before their case is reviewed by the CRCC. Once a Commissioner is certain that the applicant's case has reviewable grounds, the case is sent to a case review manager who proceeds to conduct a full review of the case. Once investigations are completed, a panel of three Commissioners will decide whether to refer the matter to the Court of Appeal, with a Statement of Reasons with all the documentations required for disclosure. After investigations, one Commissioner alone may decide not to transfer the matter to the Court of Appeal. If the matter is referred to the Court of Appeal, the CCRC must provide the applicant with the Statement of Reasons as well as the disclosure materials. The Court of Appeal will only consider issues certified by the CCRC from its referral or if the Court of Appeal has granted leave on other grounds; See also Weathered, 'Wrongful Convictions in Australia', above n 374, 1391-2: Norway also has an CCRC and Canada established the Criminal Conviction Review group, similar to a CCRC, to refer wrongful convictions to the criminal courts in Canada; Rajoo, above n 142.

⁵⁰⁷ It is not within the scope of this thesis to discuss about the advantages or disadvantages of implementing the CCRC in Singapore or Australia. Nonetheless, there have been a number of criticisms against the CCRC amongst academics and practitioners. For a detailed discussion of these criticisms, see Stephanie Roberts and Lynne Weathered, 'Assisting the Factually Innocent: The Contradictions and Compatibility of Innocence Projects and the Criminal Cases Review Commission' (2009) 29 *Oxford Journal of Legal Studies* 43; See also Sangha, Roach and Moles, above n 400, 347-56.

jurisdictions.⁵⁰⁸ Nonetheless, there are active Innocence Projects (IPs) in both of these jurisdictions.⁵⁰⁹ Unlike the CCRC which is a state established commission, IPs are either initiated by law schools (pro bono clinics) or are independent organisations involving volunteers and law students who have acquired placements in that organisation.⁵¹⁰ Generally, IPs place great reliance on DNA to prove innocence of wrongfully convicted individuals (although IPs do conduct non-DNA investigations).⁵¹¹ The IPs review cases, conduct research and recommend policies.⁵¹² According to Kent Roach, IPs can be structured in two ways: (1) the ‘error correction model’, or (2) the ‘systemic reform model’.⁵¹³ In the USA, IPs have been able to use DNA to exonerate individuals who were convicted under the justice system.⁵¹⁴ Many of those exonerated in the USA were on the death row.⁵¹⁵

⁵⁰⁸ Rajoo, above n 142; Weathered, ‘Wrongful Convictions in Australia’, above n 374, 1408-9; South Australian Parliament debated about implementing a body like the CCRC. However, in June 2011, the *Criminal Cases Review Commission Bill 2010 (SA)* did not pass the second reading. See Legislative Review Committee, *Report of the Legislative Review Committee on Its Inquiry into the Criminal Cases Review Commission Bill 2010*, 81 (2012): The Australian Legislative Review Committee looked into this matter. The Committee found that the CCRC establishment at this time was not warranted but did propose that in light of fresh and compelling evidence surfacing which need to be considered in the interest of justice, a second or subsequent statutory right of appeal should be established. This was adopted in 2013 in the *Statutes Amendment (Appeals) Act 2013 (SA)*. Currently there is only one opportunity to appeal at the state level and the High Court of Australia does not possess the right to hear fresh evidence, even if the evidence is beneficial or not beneficial to the defendant’s case. Therefore, the second right of appeal, which requires the courts to be satisfied that it is in the interest of justice to consider fresh and compelling evidence, is a new addition to South Australia’s arsenal to combat wrongful convictions. The success of this new avenue can be a topic to write about in future papers. Will the other states follow South Australia will be something we have to wait and see.

⁵⁰⁹ There are three Innocence Projects in Australia: the UTS Innocence Project, the Sellenger Centre Innocence Project, and the Australian Innocence Project. In Singapore there is the recently launched NUS Innocence Project.

⁵¹⁰ Wui Ling, above n 142, 1456-7; Rajoo, above n 142, 29.

⁵¹¹ Wui Ling, above n 142, 1457; Rajoo, above n 142, 29.

⁵¹² Wui Ling, above n 142, 1456.

⁵¹³ Kent Roach, ‘The Role of Innocence Commissions: Error Discovery, Systemic Reform or Both?’ (2010) 85 *Chicago-Kent Law Review* 89; See also Wui Ling, above n 142, 1456.

⁵¹⁴ See Innocence Project <<http://www.innocenceproject.org/know/>> : The total number of post-conviction DNA exonerations in the USA between 1989 to 1 November 2013 is 311.

⁵¹⁵ See Death Penalty Information Center, *The Innocence: List of Those Freed From Death Row* <<http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row>>: There have been a total of 143 death row exonerations in the USA. DNA played a substantial factor in establishing innocence in 18 cases. According to the criteria set by Cardozo Law School’s Innocence Project, the DNA testing played a role in the defendant’s reversal and the results of the testing were central to the inmate’s defence and to the identity of the perpetrator.

The Australian Innocence Project, based at Griffith University, specifically concentrates on two types of cases; (1) DNA was used at trial but the reliability of that evidence is questionable, and (2) DNA was not used at trial, but the inclusion of such evidence will be beneficial to the defendant's case.⁵¹⁶ Due to the years of lobbying by this Innocence Project, Queensland implemented DNA innocence testing guidelines in August 2010.⁵¹⁷ Currently, only New South Wales has DNA innocence testing legislation in force.⁵¹⁸ It allows individuals convicted of heinous offences to make an application to a DNA Review Panel.⁵¹⁹ If the Panel is of the opinion that there is reasonable doubt as to whether the individual concerned is guilty, then the Panel can refer the matter to the Court of Appeal.⁵²⁰

In Singapore, the NUS Innocence Project (NUS IP) was officially launched in May 2013.⁵²¹ Their objective is to increase public awareness about the issue of wrongful convictions and improve Singapore's criminal justice system.⁵²² It also teaches people about the contributing risk factors to wrongful convictions. The Project's

⁵¹⁶ Lynne Weathered, 'The Emerging Role of Innocence Projects in the Correction of Wrongful Convictions in Australia' (2003) 12 *Griffith Law Review* 64.

⁵¹⁷ Department of Justice and Attorney-General (Qld), Guidelines for Applications to the Attorney-General to Request Post-Conviction DNA Testing (2010) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0008/58283/dna-guidelines-august2010.pdf>; See also Weathered, 'Wrongful Convictions in Australia', above n 374, 1407.

⁵¹⁸ The *Crimes (Appeal and Review) Amendment (DNA Review Panel) Act 2006* (NSW) was passed in the NSW Parliament in October 2006; Weathered, 'Wrongful Convictions in Australia', above n 374, 1407.

⁵¹⁹ See Lawlink Attorney General and Justice (NSW), *The DNA Review Panel* <http://www.dnarp.lawlink.nsw.gov.au/dnarp/dnarp_applications.html>:

'A person is eligible to make an application to the DNA Review Panel if:

- (1) The person's claim of innocence may be affected by DNA information as specified in the application form, and
- (2) The person was convicted before 19 September 2006 for an offence that is punishable by life imprisonment or for a period of 20 years or more, or
The person was convicted before 19 September 2006 for an offence punishable by imprisonment in respect of which the Panel considers that there are special circumstances that warrant the application, and
- (3) The convicted person continues to be subject to the sentence (whether in custody or on parole) or is subject to supervision or detention under the *Crimes (Serious Sex Offenders) Act 2006* (NSW) in connection with the offence to which innocence is claimed.'

⁵²⁰ *Crimes (Appeal and Review) Act 2001* (NSW) s 94(1); Weathered, 'Wrongful Convictions in Australia', above n 374, 1407.

⁵²¹ Wui Ling, above n 142, 1458; Do note that the NUS Innocence Project (NUS IP) was established in Singapore in 2010. The Project looks into applications of wrongful convictions either by writing to the Project or when referred to by the Law Society of Singapore.

⁵²² Rajoo, above n 142, 36; Wui Ling, above n 142, 1458.

general aim is to act as a ‘safety net’ so that there are no wrongful convictions in Singapore.⁵²³ These objectives of the NUS IP are similar to other IPs across the globe.

IPs can be viewed as a body that redresses the imbalance between the prosecution and the police and the accused and their defence counsel.⁵²⁴ In an adversarial justice system, IPs can play a positive role in addressing the issue of wrongful convictions. There are some criticisms levelled against IPs. One such issue is that IPs exaggerate the wrongful convictions rates and the problems underlying wrongful convictions to show that justice systems are ‘naturally’ flawed and are not efficiently dispensing justice.⁵²⁵ Medwed states that IPs should be seen as a body complementing the criminal justice system and be developed in that manner. Therefore with proper funding and access to essential information,⁵²⁶ the inclusion of IPs in a country with the death penalty is a positive and welcoming step.

DNA has been an important tool in acquiring not only convictions but also exonerations.⁵²⁷ In Australia and Singapore there are statutes to maintain a national DNA database.⁵²⁸ For instance, under s 13F of the *Registration of Criminals Act*,⁵²⁹

⁵²³ See Rajoo, above n 142, 32; Wui Ling, above n 142, 1458.

⁵²⁴ Rajoo, above n 142, 38.

⁵²⁵ See, eg, Daniel S Medwed, ‘Innocentism’ [2008] (5) *University of Illinois Law Review* 1549; Rajoo, above n 142, 38.

⁵²⁶ Rajoo, above n 142; Wui Ling, above n 142; Weathered, ‘The Emerging Role of Innocence Projects in the Correction of Wrongful Convictions in Australia’, above n 516; Weathered, ‘Wrongful Convictions in Australia’, above n 374; Authors like Lynne Weathered do mention that Innocence Projects do not have access to information (like DNA evidence) about the applicant’s case.

⁵²⁷ Sangha, Roach and Moles, above n 400, 278; See also Ian D F Callinan, ‘Capital Punishment’ (Paper presented at the LawAsia Conference, Brisbane, 22 March 2005) 15: DNA technology has proven that some individuals were in fact innocent.

⁵²⁸ Sangha, Roach and Moles, above n 400, 278; See also Rajoo, above n 142, 26.

⁵²⁹ *Registration of Criminals Act* (Singapore, cap 268, rev ed 1985).

an ‘arrested, convicted or imprisoned’ person’s DNA information is stored in a ‘computerised form or otherwise’.⁵³⁰

However, both Australia and Singapore do not have laws requiring the preservation of DNA samples after the trial process has concluded.⁵³¹ In Singapore, the ‘guidelines, rules and policy’ of institutions, like the Health Sciences Authority (HSA), oversee the ‘use, preservation and destruction’ of DNA samples.⁵³² Additionally, individuals who would want to access DNA samples for testing and analysis are not provided such access.⁵³³ Generally in most Australian jurisdictions evidence is destroyed once the appeal has been concluded.⁵³⁴ Even the Queensland post-conviction DNA testing guidelines do not mention about the preservation of evidence.⁵³⁵ Therefore, reforms are required in both Australia and Singapore to preserve DNA samples and allow individuals access to DNA samples for testing purposes.⁵³⁶ Introducing laws to govern the preservation of DNA samples and providing access of these samples to interested parties will facilitate post-conviction DNA testing to identify those individuals who have been wrongfully convicted.⁵³⁷ The Legislature in these jurisdictions should also implement post-conviction DNA testing and allow any findings from the DNA testing to be adduced in the Court

⁵³⁰ Rajoo, above n 142, 26: Section 13F states that the Registrar maintains such a DNA database in Singapore. Singapore’s *Misuse of Drugs Act* was also amended to enable law enforcement agents to obtain body sample of individuals for DNA profiling.

⁵³¹ Sangha, Roach and Moles, above n 400, 277; See also Rajoo, above n 142, 26.

⁵³² Rajoo, above n 142, 26.

⁵³³ Wui Ling, above n 142, 1463.

⁵³⁴ Weathered, ‘Wrongful Convictions in Australia’, above n 374, 1409.

⁵³⁵ *Ibid.*

⁵³⁶ *Ibid.*; Wui Ling, above n 142, 1463.

⁵³⁷ Weathered, ‘Wrongful Convictions in Australia’, above n 374, 1409; Rajoo, above n 142, 25-6; See also Cynthia Jones, ‘Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes’ (2005) 42 *American Criminal Law Review* 1239; See also Callinan, above n 527.

proceedings.⁵³⁸ The effects of such reforms in a country with the death penalty are obvious.

Nonetheless, the risk of contamination and possible human error are two issues that DNA supporters have to always keep in mind.⁵³⁹ Further, as of 25 October 2013, there have been 18 DNA exonerations out of a total of 143 death row exonerations in USA.⁵⁴⁰ Such small numbers may seem insignificant. However, as far as wrongful convictions in capital cases are concerned even one such occurrence is one too many. Ultimately, the prevention of wrongful convictions is the ultimate goal of Australia and Singapore's criminal justice system which can be achieved by implementing the above mentioned reforms.⁵⁴¹

⁵³⁸ Weathered, 'Wrongful Convictions in Australia', above n 374, 1409; See also Andy Ho, 'The Case for Post-Conviction DNA Testing', *The Straits Times*, 14 January 2012, cited in Rajoo, above n 142, 25.

⁵³⁹ See, eg, Attorney-General's Chambers, Government of Singapore, 'Laboratory Incident Affecting Results of DNA Tests' (Press Release, 3 January 12); Callinan, above n 527, 16.

⁵⁴⁰ See Death Penalty Information Center, above n 515; See also Callinan, above n 527, 16.

⁵⁴¹ See generally Jacqueline McMurtrie, 'Role of the Social Sciences in Preventing Wrongful Convictions' (2005) 42 *American Criminal Law Review* 1271.

III THE MANDATORY DEATH PENALTY

The severity of the death sentence and the fact that no mistakes can be remedied once execution has taken place, pose the greatest challenge to retentionist countries. The mandatory death sentence adds a piece to this puzzle. If we consider the difference between the mandatory and discretionary death sentence, it is clear that the former ties the hands of the Judiciary, disabling them to consider any mitigating factors of the case.⁵⁴² Therefore, judges have no choice (since there is only one sentencing option) in relation to sentencing even if the circumstance of the case requires a different approach. The Singapore government firmly believes the mandatory death penalty deters crimes.⁵⁴³ Nonetheless, the vital question to consider is whether the mandatory death penalty fits into a developed criminal justice system like Singapore? This chapter firstly, discusses the constitutionality of the death penalty in Singapore;

⁵⁴² See, eg, R Palakrishnan, 'Mandatory Sentences and Judicial Discretion in Criminal Law: Throwing Away the Key?' (Paper presented at the LawAsia Biennial Conference, Christchurch, New Zealand, 6 October 2001); See also Stanley Yeo, 'Mandatory Minimum Sentences: A Tying of Judicial Hands' (1985) 2 *Malayan Law Journal* 186; See also K S Rajah, 'The Mandatory Death Sentence' (Paper presented at the LawAsia Conference, Brisbane, 22 March 2005); Declan Roche, 'Mandatory Sentencing' [1999] (138) *Trends and Issues in Crime and Criminal Justice* 1, 4; Norval Morris, 'Sentencing and Parole, 1977' 51 *ALJ* 523, 529; See also Norval Morris, 'Sentencing and Parole' (1977) 51 *Australian Law Journal* 523; Heather Douglas et al, above n 227, 326-9 [11.210]; It is also true that mandatory sentencing blurs the separation of powers. While Australia has abolished capital punishment, it does, like Singapore, still retain mandatory minimum sentences for other offences in its legal system. See eg ss 297, 318, 401(4) of the *Criminal Code Act Compilation Act 1913* (WA) for the offences of causing grievous bodily harm to a specific group of public officers and home burglary. See also *Road Traffic Act 1974* (WA) s 59A(4A) for dangerous driving causing death or serious injury; Opponents of mandatory minimum sentencing argue that such laws may result in overcriminalisation by politicians who want to be seen as being firm on the issue of crime; or the loss of discretion of the Judges, blurring the distinction between the separation of powers. On the other hand, the absence of discretion enables consistency in sentencing. Although opponents of mandatory sentencing regimes agree that consistency is an important aspect of a criminal justice system, they disagree that the Judges' discretion should be transferred to the Parliament and also argue sentences need to be individualised so that the circumstances of the offending and the offender can be taken into account. Conversely, proponents of such punishment argue that these laws prevent crime by acting as deterrence to the perpetrator of the crime (specific deterrence) and the general public (general deterrence), significantly impacting the crime rates in the state; The mandatory imposition of punishment creates an array of problems; (1) leads to great inconsistency and can be discriminatory on certain groups of people; (2) The principle of proportionality (the punishment fitting the offence) can be seriously undermined; (3) The costs can also be a negative factor when the mandatory sentencing is concerned. Such issues are magnified through the mandatory imposition of the death penalty.

⁵⁴³ Ministry Of Home Affairs, above n 5; See also Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt no 10; Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt no 11.

secondly, it examines the parliamentary debates in late 2012; and finally, by considering the community's perception of capital punishment in Australia and Singapore, answers two issues; (1) Whether the amendments in Singapore's death penalty regime signal the possible abolition of the punishment, and (2) whether the current state of the law in Australia allows it to reintroduce the death penalty if it desires to.

1 *Constitutionality of Singapore's Mandatory Death Penalty*

The mandatory death sentence for drug trafficking survived constitutional challenges in three different cases:⁵⁴⁴ in *Ah Chuan*,⁵⁴⁵ *Tuong Van*,⁵⁴⁶ and recently in *Vui Kong*.⁵⁴⁷ In all three cases, art 9 and 12 of the Singapore Constitution were in question and the defendants were unsuccessful in their arguments that the mandatory death penalty violated those articles.⁵⁴⁸

In *Ah Chuan*,⁵⁴⁹ the appellant was found guilty of trafficking 209.84g of diamorphine. This contravened s 3(a) of the *Misuse of Drugs Act* and he was sentenced to death. Lord Diplock stated that '[t]here is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not'.⁵⁵⁰ Article 12(1) of the Constitution guarantees rights to 'equality before the law and equal protection of the law'. The Court interpreted art 12(1) to provide the right to equal treatment of an accused with other accused in a

⁵⁴⁴ Patrick Gallahue et al, *The Death Penalty for Drug Offences: Global Overview 2012 Tipping the Scales for Abolition*, International Harm Reduction Association, 13-6 <http://www.ihra.net/files/2012/11/13/Death_penalty_2012_Tipping_the_Scales_Web.pdf>; See also Tsun Hang, above n 224; Tsen-Ta Lee, above n 192, 192-5; See also Yvonne McDermott, 'Yong Vui Kong v Public Prosecutor and the Mandatory Death Penalty for Drug Offences in Singapore: A Dead End for Constitutional Challenge?' (2010) 1 *International Journal on Human Rights and Drug Policy* 35.

⁵⁴⁵ *Ong Ah Chuan v Public Prosecutor* [1980-1981] SLR 48 ('*Ah Chuan*').

⁵⁴⁶ *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR 103.

⁵⁴⁷ *Vui Kong* [2010] 3 SLR 489.

⁵⁴⁸ McDermott, above n 544, 36; Tsun Hang, above n 224, 315-28; Tsen-Ta Lee, above n 192, 192.

⁵⁴⁹ *Ah Chuan* [1980-1981] SLR 48; *Ah Chuan* was heard by the Privy Council when it was still the final appellate court of Singapore.

⁵⁵⁰ *Ibid* (Lord Diplock).

similar context.⁵⁵¹ Hence, laws expressing that some persons ‘within a single class’ should be treated more severely than other individuals by way of penalty are forbidden.⁵⁵² However, their Lordships observed that art 12(1) does not prohibit ‘discrimination in punitive treatment between one class of individuals and another class in relation to which there is some difference in the circumstances of the offence that has been committed.’⁵⁵³

Their Lordships further stated that due to the separation of powers, it is within the scope of the Legislature to consider ‘social policy’ issues.⁵⁵⁴ This includes questions of whether ‘dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the other, and, if so, what are the appropriate punishments for each class’.⁵⁵⁵ However if the factor that ‘the legislature adopts as constituting the dissimilarity in circumstances’ was purely arbitrary or bore no ‘reasonable relation to the social object of the law,’ then there is an apparent inconsistency with art 12(1) of the Constitution.⁵⁵⁶ ‘[Article] 12(1)...is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt.’ In subsequent cases, Singapore Courts relied on the judgement in *Ah Chuan* for legal justifications for the mandatory death sentence.⁵⁵⁷

Recently in *Vui Kong*,⁵⁵⁸ the Singapore Court of Appeal reaffirmed the constitutional validity of the punishment. The appellant, Kong, was caught with 47.27g of

⁵⁵¹ Ibid [64E].

⁵⁵² Ibid.

⁵⁵³ Ibid [64F].

⁵⁵⁴ Ibid [64G].

⁵⁵⁵ Ibid.

⁵⁵⁶ Ibid [64I].

⁵⁵⁷ See *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR 103; *Vui Kong* [2010] 3 SLR 489.

⁵⁵⁸ *Vui Kong* [2010] 3 SLR 489; See also ‘Lawyer Files Petition in 3rd Attempt to Save Drug Traffickers Life’, *The Straits Times Stomp, Court Room* (online), 22 July 2010 <<http://thecourtroom.stomp.com.sg/courtroom/cases/lawyer-files-petition-in-3rd-attempt-to-save-drug-traffickers-life>>; See also ‘Drug Offender Spared Death Sentence’, *The Straits Times Stomp, Court Room* (online), 15 November 2013 <<http://thecourtroom.stomp.com.sg/courtroom/cases/this->

diamorphine and charged and convicted for trafficking. Kong claimed that he was unaware of the contents in the parcel that he was delivering. According to Kong, his boss asked him not to open the parcels. Although suspicious about the content, Kong followed instructions. Kong's counsel, M Ravi, argued that the mandatory capital punishment for drug trafficking was unconstitutional, specifically basing his arguments around art 9(1) and 12(1) of the Singapore Constitution.

Kong's counsel was arguing that a law which permitted inhuman punishment was not law within the meaning of the term in art 9(1).⁵⁵⁹ To substantiate his arguments, the appellant relied on various recent Privy Council judgements, which include appeals from Caribbean States.⁵⁶⁰ These cases held that the mandatory death penalty

urban-jungle/drug-offender-spared-death-sentence>: The sequence of events in Kong's case are as follows-In 2008 Kong was convicted and the mandatory death penalty was ordered by the High Court. In 2009 Kong was supposed to be hanged. Four days before his execution, M Ravi, a solicitor, filed a motion, on behalf of Kong, to appeal the sentence which Kong had previously dropped. In 2009, Ravi's plea for president clemency was unsuccessful. In 2010, the Court of Appeal rejected Ravi's appeal that the mandatory death penalty was unconstitutional and upheld Kong's conviction (This Court of Appeal's decision is what has been discussed in this section of the thesis). In July 2010, Ravi sought judicial review of the clemency process stating that there was a breach in the clemency process since the Minister for Law during a dialogue session with the residents of Joo Chiat had stated that by allowing Kong to go free, drug lords would choose people like Kong to continue their illegal drug business (This argument was also put forth by the Minister in Parliament during the second reading of the *Penal Code (Amendment) Bill* and *Misuse of Drugs (Amendment) Bill*. The Parliamentary discussions can be seen in the later section of this chapter.) According to Ravi, the Minister, as a member of the Cabinet, had already prejudged his client. Furthermore, Ravi argued that it was not right for the Attorney-General to advise the government. Citing these two issues, M Ravi argued that the clemency process was flawed. Therefore, Ravi said that the Cabinet had 'usurped' the 'President's independent power to grant clemency' under art 22P of the Constitution. He wanted to get an indefinite stay of execution from such judicial review. However various legal practitioners have stated that Ravi's judicial review claim 'was unprecedented' since executive actions are usually subject to judicial review and not processes that are inherent in the Constitution. In order for Ravi to succeed in such a review, it has to be shown that some kind of legal process error has occurred. Ultimately the High Court and then the Court of Appeal disagreed with Ravi's arguments. In March 2012, another appeal was filed by Ravi. His argument was that by dropping the charges against the individual, who requested Kong to deliver the drugs, this was a violation of the constitutional right to equal protection. However even this argument failed. Nonetheless, Kong was able to apply for resentencing under the new alternate sentencing option under the *Misuse of Drugs Act*.

⁵⁵⁹ *Vui Kong* [2010] 3 SLR 489, [52]-[53]; Article 9(1) of Singapore's Constitution states that 'no person shall be deprived of life or personal liberty save in accordance with law'. 'Law' is defined under art 2 of the Constitution to include (1) UK Parliamentary legislation and written laws, and (2) common law which are in operation in Singapore; and any custom or usage having the force of law in Singapore.

⁵⁶⁰ See, eg, *Reyes v The Queen* [2002] 2 AC 235; *Boyce v The Queen* [2005] 1 AC 400; *Fox v The Queen* [2002] 2 AC 284; *Mattew v State of Trinidad and Tobago* [2005] 1 AC 433; *Watson v The Queen* [2005] 1 AC 472.

was unconstitutional and was a form of inhuman punishment.⁵⁶¹ For instance, in *Watson*,⁵⁶² Lord Hope of Craighead stated that:

It is no longer acceptable, nor is it any longer possible to say, as Lord Diplock did...in [*Ah Chuan*]...that there is nothing unusual in a death sentence being mandatory...The decision in...[*Ah Chuan*]...was made at a time when international jurisprudence on human rights was rudimentary.⁵⁶³

The Singapore Court of Appeal stated that the recent cases from the Privy Council relied on the article of the respective constitutions that expressly prohibited inhuman punishments which is not evident in the *Singapore Constitution*.⁵⁶⁴ For instance in *Bowe*,⁵⁶⁵ the *Ah Chuan* decision was not applicable to the *Bahamian Constitution* since that Constitution had an express prohibition against torture, inhuman or degrading punishment.⁵⁶⁶ The 1966 Constitutional Commission, a Commission set up to look into the safeguarding of minorities' racial, linguistic and religious rights,⁵⁶⁷ had recommended to the Singapore government to include an article expressly prohibiting against torture, inhuman or degrading punishment in the 'new' Constitution.⁵⁶⁸ The recommendation was considered by the Singapore government.

⁵⁶¹ Tsen-Ta Lee, above n 192, 192; McDermott, above n 544, 38.

⁵⁶² *Watson v The Queen* [2005] 1 AC 472; See also Tsen-Ta Lee, above n 192, 192.

⁵⁶³ *Watson v The Queen* [2005] 1 AC 472, [29]; See also *Reyes v The Queen* [2002] 2 AC 235, 244 [17], [45] (Lord Bingham).

⁵⁶⁴ *Vui Kong* [2010] 3 SLR 489, [61]-[63].

⁵⁶⁵ *Bowe v The Queen* [2006] 1 WLR 1623.

⁵⁶⁶ *Vui Kong* [2010] 3 SLR 489, [30] citing *Bowe v The Queen* [2006] 1 WLR 1623, [41].

⁵⁶⁷ Li-ann Thio, 'The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Commission' in Li-ann Thio and Kevin Y L Tan (eds), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Routledge, 2009) 7, 8-9; See also Kevin Y L Tan, 'A Short Legal and Constitutional History of Singapore', above n 150, 53; The 1966 Constitutional Commission is also known as the Chief Justice Wee Chong Jin Commission.

⁵⁶⁸ Tsen-Ta Lee, above n 192, 193; See also Li-ann Thio, 'The Passage of a Generation: Revisiting the Report of the 1966 Constitutional Commission', above n 567, 16: Wee Commission also recommended two other articles were about the right to vote and on the right to judicial remedy; Kevin Y L Tan, 'A Short Legal and Constitutional History of Singapore', above n 150, 53; See also Kevin Y L Tan, 'State and Institution Building Through the Singapore Constitution, 1965-2005' in Li-ann Thio and Kevin Y L Tan (eds), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Routledge, 2009) 50, 54: A temporary Constitution was adopted in 1965 after Singapore seceded from Malaysia. Up until 1979, Singapore's Constitution was a conglomeration of three separate documents- (1) The Constitution of the State of Singapore 1963; (2) The Republic of

In Parliament, Barker stated that the recommendation would be ‘incorporated in some form in the new Constitution to be drawn up’.⁵⁶⁹ However, the Singapore government neither drafted a Constitution nor implemented the proposal of the Wee Commission.⁵⁷⁰ Hence, the Court in *Vui Kong* was reluctant to interpret art 9(1) as possessing a constitutional right against inhuman torture since the government had already considered the Constitutional Commission’s proposal and had not included it in the Constitution.⁵⁷¹

Article 21 of the *Indian Constitution* is worded similarly to art 9(1) of the Singapore Constitution.⁵⁷² There is also no express prohibition against inhuman punishment in the Indian Constitution. Therefore, the appellant depended on *Mithu*,⁵⁷³ where the Indian Supreme Court applied a ‘fair, just and reasonable’ test to the concept of ‘law’ in art 21. The Singapore Court of Appeal rejected this argument stating three reasons. Firstly, it is beyond the role of the Judiciary to engage in policy making and perform tasks of the Legislature which blurs the separation of powers.⁵⁷⁴ The courts, through interpretation of Constitutional provisions, are instead effectively engaged in constitutional dialogues with the government.⁵⁷⁵ The Legislature is able to make

Singapore Independence Act 1965; and (3) portions of the Malaysian Federal Constitution, provisions in relation to fundamental liberties (federal matters) which were missing from the Singapore’s State Constitution, were imported through the Republic of Singapore Independence Act.

⁵⁶⁹ Singapore, *Parliamentary Debates*, 21 December 1966, vol 25, col 1052-3 (Edmund William Barker).

⁵⁷⁰ *Constitution (Amendment) Act 1969* (Singapore, Act 19 of 1969); Only one of Wee Commission’s recommendation was adopted into the *Constitution (Amendment) Act 1969*; See also McDermott, above n 544, 40.

⁵⁷¹ *Vui Kong* [2010] 3 SLR 489, [64]-[65], [71]-[72].

⁵⁷² Article 14 of the *Constitution of India* and art 12 of the *Constitution of Singapore* are similar; See also McDermott, above n 544, 41-3.

⁵⁷³ *Mithu Singh v State of Punjab* AIR 1983 SC 473 . Section 303 of the *Indian Penal Code 1860* states that persons who were serving a life sentence who committed murder while serving the sentence will be punished by the mandatory death sentence. The Indian Supreme Court, at [12] and [25], in *Mithu* held that s 303 of the Indian Penal Code was ‘arbitrary and oppressive’ and is a ‘provision of law which deprives the Court of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed’. Such a ‘harsh, unjust and unfair’ provision ‘must go the way of all bad laws’. Therefore, s 303 was struck down in that case; See also McDermott, above n 544, 41-2.

⁵⁷⁴ *Vui Kong* [2010] 3 SLR 489, [79]-[80].

⁵⁷⁵ Tsen-Ta Lee, above n 192, 194; McDermott, above n 544, 42.

changes to the *Constitution* if they do not agree with any court judgements.⁵⁷⁶ However, McDermott argues that s 93 of the Singapore Constitution not only provides the Judiciary with judicial power but also gives the judges the right to review ‘any official power’.⁵⁷⁷ Hence, McDermott believes that the Court’s reasoning is a portrayal of ‘excessive and unreasonable deference to the’ Executive and Legislature.⁵⁷⁸

Secondly, a plain reading of art 9(1) of the *Singapore Constitution* shows nothing that inhibits Parliament from making the death penalty mandatory.⁵⁷⁹ According to Lee, the Judiciary are required to interpret vague language, like the one used in art 9(1), to determine the scope of the expressed words.⁵⁸⁰ This second reasoning by the Court was a ‘rather curious argument’ to him.⁵⁸¹

The final reason was that ‘the economic, social and political conditions prevailing in India and the pro-active approach of the Indian Supreme Court in matters relating to social and economic conditions of the people of India’ warranted the expansive interpretation of art 21 of the Indian Constitution.⁵⁸² However, the Singapore Court of Appeal did not provide an explanation of how the conditions in Singapore are different from that in India.⁵⁸³ McDermott speculates that the Singapore Court of Appeal might have been concerned with the possibility of opening the floodgates to further constitutional challenges under art 9(1) since the scope of art 21 after *Mithu* ‘includes the right to education, the right to health and medical care and the right to

⁵⁷⁶ Tsen-Ta Lee, above n 192, 194.

⁵⁷⁷ McDermott, above n 544, 42; Article 93 of the Singapore Constitution states that ‘[t]he judicial power of Singapore shall be vested in the Supreme Court and in such subordinate courts as may be provided by an written law for the time being in force.’

⁵⁷⁸ McDermott, above n 544, 42.

⁵⁷⁹ *Vui Kong* [2010] 3 SLR 489, [81]-[82].

⁵⁸⁰ Tsen-Ta Lee, above n 192, 194.

⁵⁸¹ *Ibid.*

⁵⁸² *Vui Kong* [2010] 3 SLR 489, [83]-[84].

⁵⁸³ Tsen-Ta Lee, above n 192, 194.

freedom from noise pollution’.⁵⁸⁴ However, McDermott correctly points out that any further constitutional challenges based on art 9 of Singapore’s Constitution would turn on the merits of each case.⁵⁸⁵ This is because, although a later case (like *Vui Kong*) may possess identical facts and is based on similar constitutional provisions (like *Mithu*), the fact that the jurisprudence is unrelated would cause it to have no ‘bearing on the weight’ of that new case.⁵⁸⁶

Another argument Kong put forth was that customary international law is widely known to be against the imposition of inhumane punishment.⁵⁸⁷ Hence, according to the appellant this customary law forms part of the ‘law’ in article 9(1) making the mandatory death sentence unconstitutional.⁵⁸⁸ However, the Court stated that it could only declare a customary law to be a law under art 9(1) if it becomes part of the domestic laws of Singapore. The Court was unable to incorporate customary international law into domestic law when there is an inconsistent legislation to that effect, which would undermine the ‘hierarchy of legal rules’.⁵⁸⁹ In order to establish a customary international law rule to the effect that the mandatory death sentence equates to inhuman punishment, sufficient state practice and opinion juris have to be identified.⁵⁹⁰ The Court was unable to identify this practice and was not under any obligation to consider whether the mandatory death penalty is an inhuman punishment.⁵⁹¹

⁵⁸⁴ *Vui Kong* [2010] 3 SLR 489, [83]; McDermott, above n 544, 43.

⁵⁸⁵ McDermott, above n 544, 43.

⁵⁸⁶ *Ibid.*

⁵⁸⁷ Tsen-Ta Lee, above n 192, 194-5; McDermott, above n 544, 43; Patrick Gallahue et al, above n 544, 14.

⁵⁸⁸ Tsen-Ta Lee, above n 192, 194-5; McDermott, above n 544, 43-5.

⁵⁸⁹ *Vui Kong* [2010] 3 SLR 489, [90]-[91].

⁵⁹⁰ *Statute of the International Court of Justice* art 38(1)(b); See also *North Sea Continental Shelf (Federal Republic of Germany v Denmark)(Merits)* [1969] ICJ Rep 3.

⁵⁹¹ *Vui Kong* [2010] 3 SLR 489, [120]; See ICCPR art 7; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* arts 1,16; *European Convention for the Protection of Human Rights and Fundamental Freedoms* art 2; *American Convention on Human Rights* art 4; and *African Charter in Human Right and Peoples’ Rights* art 4. See also Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or*

Nonetheless, on 14 November 2013, Kong was the first drug offender on death row to be resentenced under the new alternative sentencing regime under the *Misuse of Drugs Act*.⁵⁹² The Court ordered life imprisonment with 15 strokes of the cane instead of the death sentence.

2 Abolishing the Mandatory Nature of the Death Penalty?

The discussion about the recent amendments to the mandatory death penalty for drug trafficking and homicide offences can be ascertained from the Singapore parliamentary debates in 2012.⁵⁹³ This section explores these debates and uncovers statistics and reasons to how and why Singapore has amended its *Misuse of Drugs Act* and *Penal Code*. Additionally, it provides recommendations that Singapore should consider implementing. Finally, the section will conclude whether the recent changes to Singapore's legal system signals that the nation has embarked on the journey to end the mandatory death penalty in near future.

Degrading Treatment or Punishment, UN Doc A/67/279 (9 August 2012) 5: Cruel and inhuman punishments are completely prohibited under international law. If the death penalty is ordered and execution is done accordance to international and domestic laws, the use of capital punishment is not a violation of the right to life per se. According to the UN Special Rapporteur report, violations of the absolute prohibition to torture and inhuman punishment are apparent due to the method of execution causes suffering and indignity and the death row phenomenon (length of detention prior to execution). See also *Soering v United Kingdom* (1989) 11 EHRR 439: The death row phenomenon which the State of Virginia of the USA practiced was found to be a violation against the prohibition of cruel, inhuman and degrading treatment under art 3 of the European Convention of Human Rights. There have been cases concluding that hanging was a cruel and inhumane execution method and violated the right to dignity of a person. See, eg, *Republic v Mbushuu alias Dominic Mnyaroje* [1994] TLR 146. Nonetheless the Privy Council as discussed in pg have held that the mandatory death sentence was a form of inhumane punishment.

⁵⁹² See also Kimberly Spykerman and Imelda Saad, 'First Drug Offender on Death Row Escapes Gallows' *Channel Newsasia* (online), 14 Nov 2013 <<http://www.channelnewsasia.com/news/singapore/first-drug-offender-on/886162.html>>: On 14 November 2013, Yong Vui Kong satisfied the High Court that he only played the role of a drug mule and was certified by the Public Prosecutor that he had provided substantial assistance to the CNB. Therefore, Justice Choo Han Teck of the High Court resentenced Kong.

⁵⁹³ See also Mohan and Wen Qi, above n 164, 11 : These amendments were implemented after legal practitioners and academics were consulted.

(a) *Drug Offences*

The Singapore government takes an uncompromising attitude towards drug related offences. There are a few reasons for this ‘zero tolerance’ approach. Firstly, Singapore is located close to the ‘Golden Triangle’.⁵⁹⁴ Further, neighbouring countries like Indonesia and Malaysia have operational clandestine laboratories.⁵⁹⁵

Secondly, the production of psychoactive substances, which are potentially as harmful as or more harmful than controlled drugs, has increased globally at a fast rate. This has caused some difficulties for law enforcement agencies in Singapore to effectively deal with such new substances.

Thirdly, between 2007 and 2011, the number of drug abusers arrested arose from 2211 to 3326.⁵⁹⁶ The number of arrested drug abusers in the first half of 2013 was 1790.⁵⁹⁷ However, in the same period of 2012, 1731 abusers were arrested.⁵⁹⁸ About 70% of the drug abusers arrested in 2013 were repeat offenders.⁵⁹⁹ These repeat

⁵⁹⁴ Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt 10 (Edwin Tong Chun Fai); See also Peter Hogdkinson, Lina Gyllensten, and Diana Peel, ‘Capital Punishment Briefing Paper’ (Centre for Capital Punishment Studies, University of Westminster, 2010) <http://www.westminster.ac.uk/__data/assets/pdf_file/0006/79134/CCPSBriefingPaper.2010.pdf>; The ‘Golden Triangle’ is commonly referred as the world’s second largest narcotics market. It is situated at the borders of Thailand, Laos and Burma.

⁵⁹⁵ Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt 10 (Teo Chee Hean): In 2009 and 2010, 88 clandestine laboratories were seized in Malaysia and Indonesia (61 in Indonesia and 27 in Malaysia); See also ‘RM 10m Drugs Found in ‘Food Factory’ After Fire’, *New Straits Times* (online), 13 June 2012 <<http://www.nst.com.my/nation/general/rm10m-drugs-found-in-food-factory-after-fire-1.93888>>: In 2012, a factory which was trading as a frozen food factory caught fire. Authorities seized RM\$10m worth of methamphetamine and ecstasy from the factory which was used as an underground drug laboratory.

⁵⁹⁶ Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt 10 (Teo Chee Hean).

⁵⁹⁷ Nursha Ismail, ‘Majority of Drug Abusers Arrested Are Repeat Offenders’, *Channel Newsasia* (online), 2 November 2013 <<http://www.channelnewsasia.com/news/singapore/majority-of-drug-abusers/871770.html>>; ‘CNB Seizes S\$428,000 Worth of Heroin’, *Channel Newsasia* (online), 24 October 2013 <<http://www.channelnewsasia.com/news/singapore/cnb-seizes-s-428-000/860252.html>>: Even in late October 2013, three individuals were arrested for drug trafficking. Two individuals were caught with approximately four kilograms of heroin (estimated street value of S\$428,000); See also ‘7.1kg of Ice Worth S\$1.4m Seized at Changi Airport’, *Channel Newsasia* (online), 26 October 2013 <<http://www.channelnewsasia.com/news/singapore/7-1kg-of-ice-worth-s-1-4m/862298.html>>: The other individual was caught smuggling about seven kilograms of ‘Ice’ (estimated street value of S\$1.4 million). These individuals may escape the noose as long as they satisfy the two stages under the amended provisions governing the mandatory death penalty regime.

⁵⁹⁸ Ismail, above n 597.

⁵⁹⁹ Ibid.

offenders may also influence other individuals to consume drugs.⁶⁰⁰ Therefore, the government is trying to strategically target the demand and supply for narcotic drugs in Singapore.

Singapore has amended the *Misuse of Drugs Act* in late 2012 to combat these problems.⁶⁰¹ The most important amendment in relation to this thesis is the changes to the death penalty regime for drug trafficking, importation and exportation.⁶⁰² The amendment allows drug enforcement agencies to focus on catching the individuals who are higher up the hierarchy of drug syndicates and disrupt trafficking networks.⁶⁰³ It also increases the sentencing discretion of the courts.⁶⁰⁴ Under s 33B of the *Misuse of Drugs Act*, judges can either impose life imprisonment with at least 15 strokes of the cane or the death penalty. This discretion requires two conditions to be met.⁶⁰⁵ Firstly, the accused who has been charged has to prove, on the balance of probabilities that they were just acting as the courier of transporting, sending or delivering drugs.⁶⁰⁶ They must not play any other role in the drug chain.⁶⁰⁷

⁶⁰⁰ Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt 10 (Teo Chee Hean).

⁶⁰¹ See generally Ibid: The first change is the inclusion of a Fifth Schedule in the Act which allows temporary listing of psychoactive substances. The second amendment is the introduction of hair analysis to establish drug abuse. However at this point of time, hair analysis does not complement urine testing for drug abuse prosecutions. The third amendment makes it an offence to arrange or plan a gathering where the purpose of such gathering is for the consumption of drugs. If there are young and vulnerable individuals (individuals suffering from mental impairment) involved in the gathering, the punishment will be more severe. The fourth amendment involves the establishment of a Community Rehabilitation Centre where young drug abusers who are considered to be low risk can undergo rehabilitation by undergoing their usual education and employment during the day and attend counselling programmes in the evening. Ultimately, the Singapore government has put in measures to tackle both the demand for and supply of drugs in Singapore.

⁶⁰² See *Misuse of Drugs Act* (Singapore) ss 5(1), 7.

⁶⁰³ Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt 10 (Teo Chee Hean).

⁶⁰⁴ Ibid.

⁶⁰⁵ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (K Shanmugam): In order to increase the discretion of judges, the Singapore government had acquired the views of Chief Justices Chan Sek Keong and Sundaresh Menon, prior to the above mentioned amendments. They were of the opinion that Parliament should clearly draft the legislation to set out the possible instances where the death penalty should be ordered for drug offences. Although judges will then interpret such laws consistently and principally, it is the Legislature's duty, as the elected representees of the people, to show in what instances the ordering of the death penalty is justifiable.

⁶⁰⁶ Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt 10 (Teo Chee Hean).

⁶⁰⁷ Ibid.

Secondly, the Public Prosecutor must certify the drug mule to ‘have substantially assisted the CNB in the disruption of drug trafficking activities within or outside Singapore’. Substantial assistance was clarified to include ‘enhancing the enforcement effectiveness of the CNB’.⁶⁰⁸ One example of substantial enhancement is when the drug courier’s information causes the ‘arrest or detention or prosecution of any person involved in drug trafficking activity.’⁶⁰⁹ However, ‘substantial assistance’ cannot be precisely defined since it can limit ‘operational latitude’ of the prosecutor and CNB officers.⁶¹⁰ Further, if ‘substantial assistance’ is defined in the Act, there is a possibility that drug couriers may not assist the CNB beyond what is defined.⁶¹¹ The Minister for Law clearly stated that the issue is not how the government can help drug mules avoid the death penalty.⁶¹² It is more about enhancing the effectiveness of the Act.⁶¹³ Therefore, the government has chosen to enable discretionary sentencing to be offered to those who substantially assist the law enforcement agencies.⁶¹⁴

The Public Prosecutor will determine if the assistance provided by the drug mule meets the requirement of ‘substantial assistance’.⁶¹⁵ If this requirement is not met, then there is only one other way for the mandatory death penalty not to apply. The drug courier must prove, on a balance of probabilities, that he was suffering from mental impairment which reduced their ‘mental responsibilities’ during the commission of the trafficking, importing or exporting offence.⁶¹⁶

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid.

⁶¹⁰ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (K Shanmugam).

⁶¹¹ Ibid.

⁶¹² Ibid.

⁶¹³ Ibid.

⁶¹⁴ Ibid.

⁶¹⁵ Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt 10 (Teo Chee Hean).

⁶¹⁶ Ibid; ‘Operationally’ once the arrest has been made, the CNB officers will notify the accused about these new conditions. Under the amended s 258 of the *Criminal Procedure Code* (Singapore), this notification will not render any statements provided by the accused to be caused by ‘threat, inducement or promise’. Therefore such statements by the accused will be admissible in Court.

(b) Culpable Homicide amounting to Murder

Murder is defined as the commission of culpable homicide with either of the four mental states mentioned under s300(a)-(d) of the *Penal Code*.⁶¹⁷ Parliament amended s 302 which dictates the punishment for the offence of murder. Following the amendments, only where the defendant intended to cause death and committed murder will they be punished by death.⁶¹⁸ Therefore for murder without the specific intention to kill under 300(b)-(d), judges may use their discretion to either order life imprisonment or the death penalty.⁶¹⁹ The rationale provided by the Minister for Law was that the homicide rate in Singapore in July 2012 was low (0.3 cases per 100,000 population).⁶²⁰ Therefore the introduction of judicial discretion in such circumstances was the right thing to do.⁶²¹

Academics commonly argue that s 300 was drafted too widely.⁶²² Hence, it is not justifiable for the courts to impose the mandatory death penalty for all types of murder.⁶²³ For example, since 1972, most convictions for homicide fell under s300(c).⁶²⁴ Under s 300(c), if an individual intentionally causes an injury which they might not have even known is of a fatal nature and that injury leads to the demise of the victim, that perpetrator is guilty of murder.⁶²⁵ Many individuals are unaware that stabbing of the thigh can lead to death because medically once the femoral vein is

⁶¹⁷ For a detailed discussion about the case law in relation to s 300 of *Penal Code* (Singapore), see Yeo, Morgan and Cheong, above n 71, 197- 202, 218- 246 [8.25]-[8.34], [9.24]-[9.91]; The four mental states are (a) ‘the intention of causing death’, (b) ‘intention of causing such bodily injury’ as the defendant ‘knows to be likely to cause death’, (c) ‘intention of causing bodily injury’ which ‘is sufficient in the ordinary course of nature to cause death’, and (d) knowledge that the act ‘is so imminently dangerous that it must in all probability cause death or bodily injury as it is likely to cause death’ and the defendant had no excuse for incurring such risk. Section 300(a)-(c) are intention based fault whilst (d) is knowledge based fault. Previously the commission of any of these types of murder was punishable only by death.

⁶¹⁸ *Penal Code* (Singapore) s 302(1).

⁶¹⁹ *Ibid* s 302(2).

⁶²⁰ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (K Shanmugam).

⁶²¹ *Ibid*.

⁶²² Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (Sylvia Lim).

⁶²³ *Ibid*.

⁶²⁴ Hor, ‘The Death Penalty in Singapore and International Law’, above n 195, 106-9; Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (Sylvia Lim).

⁶²⁵ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (Sylvia Lim).

severed it can cause death.⁶²⁶ In such situations, the mandatory death penalty is too severe a punishment when we consider the fact that the individual did not specifically intend to kill and may not even have known the injury they intended to cause could lead to the death of the victim.⁶²⁷ Therefore, by amending the mandatory death penalty for the offence of murder, the Singapore government has allowed Judges to consider the circumstances of the case and any mitigating factors that may exist in cases where the perpetrator had no intention to kill.⁶²⁸

Sylvia Lim, who welcomed the changes to Singapore's mandatory death penalty regime, proposed that the Singapore government should consider using 'presumptive sentencing' rather than mandatory sentencing.⁶²⁹ WA's presumptive sentence for murder is life imprisonment.⁶³⁰ However s 279 of the WA's Criminal Code specifies that the life imprisonment should not be ordered where the 'sentence would be clearly unjust given the circumstances of the offence and the person; and (when) the person is unlikely to be a threat to the safety of the community when released from imprisonment'. Citing WA's provision and court's approach, Lim suggested Singapore government implementing such an approach for the most serious offences including murder.⁶³¹

Although individuals may not be sentenced to death and may even be acquitted under the Singapore Penal Code if they have a valid defence, the burden of proving any defence, on the balance of probabilities, is on the accused.⁶³² If there are unable to

⁶²⁶ Ibid.

⁶²⁷ Ibid.

⁶²⁸ Ibid.

⁶²⁹ Ibid.

⁶³⁰ *Criminal Code Act Compilation Act 1913 (WA)* s279.

⁶³¹ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (Sylvia Lim);

Singapore, *Parliamentary Debates*, 12 November 2012, sess 1, vol 89, sitt 10 (Sylvia Lim):

According to Sylvia Lim Singapore judges may consider factors such as whether the murder was committed under duress (defence of duress is not a defence for murder in Singapore) or was premeditated or whether the accused was in possession of weapons at the crime scene to determine whether the life imprisonment or the death sentence should be ordered in each individual case.

⁶³² Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (Sylvia Lim).

prove any partial or full defences, the accused can be hanged under s 300(a).⁶³³ Lim's argument was that the intention to kill can be applicable to a large range of situations, which can be either cold blooded murder committed by hired mercenary or the murdering of another with the knowledge that their child will be murdered if they do not do so.⁶³⁴ Although murder committed in any circumstances is 'tragic', 'this does not mean that' a similar punishment must be ordered for all the cases where murder has been committed.⁶³⁵ Hence s 300(a) can be amended to implement presumptive sentencing than mandatory sentencing. The Minister for Law acknowledged that this is a possible approach under s300(a).⁶³⁶ But he explained that in the current circumstances where most people in society deem 'intentional, cold-blooded, deliberate killing' 'extremely serious' and prefer the mandatory death sentence to be applied,⁶³⁷ 'the mandatory death penalty should apply' under s 300(a).⁶³⁸ Nonetheless, the Minister emphasized that the government will continuously review the criminal laws in Singapore to enable further reform in future.⁶³⁹

⁶³³ Ibid.

⁶³⁴ Ibid.

⁶³⁵ *Public Prosecutor v Lim Ah Seng* [2007] 2 SLR 957: The former Judicial Commissioner and current Chief Justice of Singapore, Sundaresh Menon, stated that '[e]very killing is utterly tragic; but this does not mean that every killer is to be punished in the same way.'

⁶³⁶ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (K Shanmugam).

⁶³⁷ The Minister for Law stated that this finding is based on the assessment conducted by the government.

⁶³⁸ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (K Shanmugam).

⁶³⁹ Ibid.

(c) *The Future of the Death Penalty in Singapore*

(i) *Judicial Discretion*

As the former Attorney-General of Singapore, Woon, stated, the amendments in 2012 by the Singapore government was not about the death penalty per se.⁶⁴⁰ It was rather focused on the issue of whether the judges or prosecutors should have the discretion to impose the death penalty in Singapore.⁶⁴¹ The amendments have certainly strengthened the view that the Judiciary are independent, according to the doctrine of separation of powers, and can decide the appropriate sentences for the convicted individual.⁶⁴²

However, solicitors and academics have written about the inconsistency in sentencing when judges are provided ample discretionary powers.⁶⁴³ Further, Woon stated that Judges are generally unwilling to impose the death sentence.⁶⁴⁴ Therefore, Mohan called for guidelines for the Judiciary. These guidelines will help judges decide how they should use their discretion rationally and consistently to decide

⁶⁴⁰ Walter Woon, 'We're not Talking about the Death Penalty, We're Talking About Discretion', *The Straits Times SingaPolitics* (online), 30 Aug 2012 < <http://www.singapolitics.sg/views/were-not-talking-about-death-penalty-were-talking-about-discretion>>.

⁶⁴¹ Ibid: The former Attorney- General of Singapore was certain that the death penalty in Singapore is constitutional and there is no point on discussing about breach of human right because at a global level there is no unanimous consensus about it; See also Michael Hor, 'Death, Drugs, Murder and The Constitution' in Teo Keang Sood (ed), *Developments in Singapore Law between 2001 and 2005* (Singapore Academy of Law, 2006) 499, 534; See also *Ramalingam Ravinthran v Public Prosecutor* [2012] 2 SLR 49; *Public Prosecutor v. Balakrishnan a/l Sannasy* [2008] SGHC 6; *Public Prosecutor v Dhanabalan s/o A Gopalkrishnan* [2003] SGHC 178; *Public Prosecutor v Rahmat Bin Abdullah* [2003] SGHC 206; *Public Prosecutor v Vanmaichelvan s/o Barsathi* [2005] SGHC 78; See Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (Assistant Professor Tan Kheng Boon Eugene); In Singapore, there were instances where the prosecution reduced the amount of drugs in the charge, just below the fixed limit that requires the judge to order the mandatory death penalty. For instance in *Dhanabalan* the accused was charged with trafficking 499.9g of cannabis. In *Vanmaichelvan*, the accused was charged for trafficking 499.9g of cannabis when 749.17g of cannabis was found on the accused. The mandatory capital punishment applies for trafficking more than 500g of cannabis. In such situations one may start questioning the wide discretion the prosecution have. Judges reach their decisions in open court and provide reasoning for their decisions. There is also an avenue of appeal. Conversely, prosecutor's decisions are done in a closed environment, and thus are not transparent. Their decisions are not appealable. The prosecutors' discretion to not proceed with a capital charge does imply that Singapore already has a de facto discretionary penalty regime.

⁶⁴² Woon, above n 640.

⁶⁴³ See, eg, Mohan and Wen Qi, above n 164.

⁶⁴⁴ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (K Shanmugam): Walter Woon had provided his view to the Minister for Law.

whether to order the death sentence or life imprisonment under the recently amended laws governing the offence of murder.⁶⁴⁵

(ii) Attitude of Singaporeans

Maintaining public confidence in the process of sentencing is important since a justice system cannot function without such confidence.⁶⁴⁶ This utilitarian perspective is considerably derived from the requirement that there is some connection between the courts' sentencing practices and the values of the community on whose behalf guilty individuals are punished.⁶⁴⁷ Therefore, it is true to state that punishments 'do not exist in a vacuum' and a government's reactions to a particular kind of offence are determined culturally.⁶⁴⁸ Community values influence components of the criminal law such as 'the gravity of offences' and 'legitimacy of legal defences'.⁶⁴⁹ Therefore, public opinion must not be ignored. Such ignorance can threaten the 'legitimacy of the sentencing system'.⁶⁵⁰ Threats alone are not sufficient to achieve society's compliance with the law.⁶⁵¹ For such compliance to be achieved, the community has to recognize the sentencing system as being legitimate.⁶⁵² Therefore, from a consequentialist viewpoint, the ignorance of community views will negatively affect the community's; (1) compliance with the laws of the country and (2) perceptions of legitimacy of the sentencing system.⁶⁵³

According to Robinson, governments should consider reorganising sentencing

⁶⁴⁵ Mohan and Wen Qi, above n 164.

⁶⁴⁶ See generally Paul Robinson, 'How Psychology is Changing the Punishment Theory Debate' (Public Law and Legal Theory Research Paper Series, University of Pennsylvania Law School, 2007); Paul Robinson, *Distributive Principles of Criminal Law* (Oxford University Press, 2008), cited in Barry Mitchell and Julian V Roberts, *Exploring the Mandatory Life Sentence for Murder* (Hart Publishing, 2012) 67.

⁶⁴⁷ See generally Robinson, 'How Psychology is Changing the Punishment Theory Debate', above n 646; Robinson, *Distributive Principles of Criminal Law* above n 646, cited in Mitchell and Roberts, above n 646, 67.

⁶⁴⁸ Mitchell and Roberts, above n 646, 66.

⁶⁴⁹ Ibid 69.

⁶⁵⁰ Ibid 67.

⁶⁵¹ Ibid.

⁶⁵² Ibid.

⁶⁵³ Ibid 68.

policies and practices to mirror what most people in the community perceives about punishment.⁶⁵⁴ Such restructuring will result in the enhancement of the credibility of the criminal law, which is vital to effectively control crimes.⁶⁵⁵

From a local survey carried out three weeks after the execution of Nguyen Tuong Van in 2006, 96% of those involved in the face to face interviews at their dwellings supported the death penalty for heinous crimes.⁶⁵⁶ The sample size was 425 Singaporeans and permanent residents, aged 20 and older.⁶⁵⁷ The survey also showed that most of those interviewed preferred the death sentence to be mandatory for crimes such as murder and drug trafficking.⁶⁵⁸ These individuals were of the opinion that capital punishment is effective since it deterred others from committing similar offences, kept Singapore safer and is a 'just' punishment for those who committed heinous crimes.⁶⁵⁹

However, Hor stated that the hanging of Nguyen few weeks before the survey was conducted may have influenced the survey findings.⁶⁶⁰ The other 15 individuals who opposed the punishment did so because they believed that the convicted individual

⁶⁵⁴ See generally Robinson, 'How Psychology is Changing the Punishment Theory Debate', above n 646; Robinson, *Distributive Principles of Criminal Law* above n 646; Paul Robinson, 'Empirical Desert' in Paul Robinson, S Garvey and K Ferzan (eds), *Criminal Law Conversations* (Oxford University Press, 2009) 29-39, 61-66, cited in Mitchell and Roberts, above n 646, 68.

⁶⁵⁵ Robinson, 'How Psychology is Changing the Punishment Theory Debate', above n 646; Robinson, *Distributive Principles of Criminal Law* above n 646; Paul Robinson, 'Empirical Desert' in Paul Robinson, S Garvey and K Ferzan (eds), *Criminal Law Conversations* (Oxford University Press, 2009) 29-39, 61-66, cited in Mitchell and Roberts, above n 646, 68.

⁶⁵⁶ Lydia Lim and Jeremy Au Yong, '96% of Singaporeans back the death penalty', *The Straits Times*, 26 February 2006.

⁶⁵⁷ Ibid.

⁶⁵⁸ Ibid.

⁶⁵⁹ Ibid.

⁶⁶⁰ Ibid; See also Samantha Donovan, 'Singapore to Abolish Death Penalty for Some Drug Couriers', *ABC News* (online), 11 December 2012 <www.abc.net.au/pm/content/2012/s3652404.htm>: Van Nguyen was the Australian citizen who was executed in Singapore in 2005 after convicted for trafficking heroin above the specified limit. According to Julian McMahon, one of the barristers who represented Nguyen, it is difficult to determine whether the new amendments in Singapore would have spared Nguyen from the noose if they were implemented before his execution. Nguyen had given information to the police and he was not a druglord, producer or retailer. Nonetheless, McMahon stated that it is unclear if Nguyen would have satisfied the dual requirements under s 33B of the *Misuse of Drugs Act* (Singapore).

should be given an opportunity to repent, more countries were becoming abolitionist states and the fear of innocent individuals being wrongfully executed.⁶⁶¹

Using these figures, one can argue that the community supports the Singapore government's decision to retain the death penalty. However, more information is needed to identify how the interviewers posed the questions to the sample group. By closely examining those questions it may be proven that the surveys were flawed to begin with. For instance, Roberts and Hough found that by only asking whether the sample group supported the death penalty, a high level of support was observed.⁶⁶² However, when the same group were asked whether they supported the punishment in relation to specific cases, the number was much lesser than what was recorded in the previous question.⁶⁶³ This is because the human mind perceives different forms of a particular offence (i.e. the offender had previous convictions or bad motive) when asked about what punishment fits a particular offender.⁶⁶⁴ Therefore, more information should be provided to the sample so as to achieve a less misleading public view in relation to punishments.⁶⁶⁵

In order to determine the level of public support capital punishment gathers, one needs to put in place a more 'sophisticated methodology' than just asking whether people support the punishment 'in the abstract'. Further, given that the findings from the survey conducted in 2006 were based on a small sample, a larger sample with better understanding of the law could be used in future surveys. The surveys could

⁶⁶¹ Lim and Yong, above n 656.

⁶⁶² JV Roberts and M Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005), cited in Mitchell and Roberts, above n 646, 74: Please do note that this book was written in relation to the death penalty for murder, with emphasis on the English model (although it discusses about other jurisdictions like Australia and Canada).

⁶⁶³ JV Roberts and M Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005), cited in Mitchell and Roberts, above n 646, 74.

⁶⁶⁴ Mitchell and Roberts, above n 646, 74.

⁶⁶⁵ Mitchell and Roberts, above n 646, 74.

also be conducted in specified intervals.⁶⁶⁶ Such surveys would precisely depict whether the community supports capital punishment.

(iii) Ensuring the Community Understands

According to the Minister for Law, if the Legislature has to list out discretionary factors, such as age or whether the person was a young mother or the circumstances of the accused family for offences which carry the mandatory death penalty under the *Misuse of Drugs Act*, the drug lords will use individuals who exactly fit those descriptions.⁶⁶⁷ This is because the government is setting the standards based on ‘background factors’.⁶⁶⁸ In this way the circumstances of the crime loses importance and the deterrent effect of the death penalty may be lost.⁶⁶⁹

The Minister suggested that society should consider certain questions;⁶⁷⁰ (1) ‘Why do drug kingpins avoid Singapore?’, (2) ‘Why is it difficult to get people to traffic [drugs] into Singapore?’, (3) ‘Why is it that traffickers often and deliberately keep below the limits for capital punishment?’, (4) What will be the consequences if Singapore removes the mandatory death penalty? (5) Would this then result in more people willing to be couriers? The Minister questioned whether in light of the global drug situation, people are willing to risk whatever Singapore already has in place by limiting the deterrent effect of the punishment.⁶⁷¹

Increasing the legal knowledge of the society is one way any government can ensure its citizens are aware of their legal rights, obligations and the necessity of not

⁶⁶⁶ See Ian McAllister and Juliet Pietsch, *Trends in Australian Political Opinion: Results from the Australian Election Study, 1987-2010*, Australian National Institute for Public Policy, 54 <<http://aes.anu.edu.au/sites/default/files/Trends%20in%20Australian%20Political%20Opinion.pdf>>; McAllister and Pietsch have consolidated all the findings from Australian Election Study surveys.

⁶⁶⁷ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (K Shanmugam).

⁶⁶⁸ Ibid.

⁶⁶⁹ Ibid.

⁶⁷⁰ Ibid.

⁶⁷¹ Ibid.

breaching laws.⁶⁷² The Singapore government planned to distribute a Pamphlet of Rights to the public in 2013.⁶⁷³ In November 2013, the Attorney-General's Chambers (AGC) initiated a new project called the 'Plain Laws Understandable by Singaporeans'.⁶⁷⁴ The aim of this project is to make the written laws of Singapore more comprehensible and accessible to the general public.⁶⁷⁵

In November 2013, the AGC launched a new handbook titled 'Giving Evidence in Court'. This book assists individuals who are witnesses in criminal trials.⁶⁷⁶ Such a handbook will ensure witnesses in capital trials do understand the importance of their role and prevent any wrongful convictions.

Another method of increasing public knowledge is to include a compulsory unit in school curriculum that requires students to familiarise themselves with the criminal laws of Singapore.⁶⁷⁷ Individuals who are well-informed can provide a more reliable answer when surveyed on the question whether capital punishment should be retained by the Singapore government.

⁶⁷² Kimberly Spykerman, 'AGC Seeking Public Feedback to Make S'pore Laws More Accessible', *Channel Newsasia* (online), 8 November 2013 <<http://www.channelnewsasia.com/news/singapore/agc-seeking-public/879628.html>>.

⁶⁷³ Lok Vi Ming, 'Address by the President of the Law Society' (Speech delivered at the Opening of Legal Year 2013, Singapore Academy of Law 29, 4 Jan 2013), cited in Wui Ling, above n 142, 1463; The Pamphlet of Rights is produced by the Law Society and Attorney-General's Chambers.

⁶⁷⁴ Spykerman, above n 672.

⁶⁷⁵ *Ibid*; The public's views will be collected through a survey online and through focus groups. According to the Chief Legislative Counsel of AGC's Legislation and Law Reform Division, Owi Beng Ki, anecdotal feedback displays that individuals have difficulty finding and understanding written laws of Singapore. Therefore, this new project will encourage and improve society's understanding of the laws in Singapore.

⁶⁷⁶ Chitra Kumar, 'New Handbook & Exhibition to Raise Awareness of Singapore's Criminal Justice System', *Channel Newsasia* (online), 1 November 2013 <<http://www.channelnewsasia.com/news/singapore/new-handbook-exhibition/870926.html>>.

⁶⁷⁷ Singapore, *Parliamentary Debates*, 14 November 2012, sess 1, vol 89, sitt 11 (Mr Masagos Zulkifli): Currently, the younger generation are educated about the severe penalties and harmful effects of drugs. For instance, approximately 80% of primary and secondary schools have Preventive Drug Education (PDE) modules and activities. Anti-drug messages can be seen not only in school based talks but also social media and interest based activities like sports and dance. The inter-Ministry Task Force on Drugs have recommended to the CNB to reach out to other groups of people, namely army personnel, youth and post-secondary individuals.

(iv) New Laws in Action

In April 2013, Haleem was charged for the offence of trafficking a controlled drug.⁶⁷⁸ He was the first individual to have successfully met the dual requirements under s 33B of the Misuse of Drugs Act.⁶⁷⁹ He was sentenced to life imprisonment with 24 strokes of the cane instead of the death penalty.

As of 19 November 2013, five individuals who were convicted for committing murder had their sentences reviewed. All five individuals had seen their death sentences commuted to life imprisonment with caning.⁶⁸⁰

(v) No Radical Change for Now

Singapore is unlikely to abolish the death penalty anytime soon. According to Hor ‘any abolitionist or restrictive regional custom or pressure’ is improbable to occur in ‘Southeast Asia in the near future’.⁶⁸¹ This is because there are many retentionist countries in Southeast Asia; and ASEAN does not interfere into another ASEAN member country’s ‘domestic affairs’.⁶⁸²

⁶⁷⁸ See definition and elements of ‘trafficking’ in chapter 2; See also *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] SGHC 110, [60]: The other accused in the case, Muhammad Ridzuan, had proved to the court that he was acting as a drug courier but was not certified that he had substantially assisted the CNB. Therefore, the Judge could not consider the alternative sentencing option under s 33B. Therefore the mandatory death sentence was ordered as prescribed by s 33 read with the Second Schedule of the *Misuse of Drugs Act*.

⁶⁷⁹ Rahimah Rashith, ‘Drug Trafficking in Singapore Becomes the First to Escape Death Penalty’, *Yahoo News Singapore* (online), 11 April 2013 < <http://sg.news.yahoo.com/drug-trafficker-in-s-pore-becomes-the-first-to-escape-death-penalty--160444864.html>>; *Public Prosecutor v Abdul Haleem bin Abdul Karim* [2013] SGHC 110, [52]-[56]: Haleem satisfied the High Court that he was only a courier since he proved, on a balance of probabilities, that he only played the role of either ‘offering to transport, send or deliver a controlled drug under s 33B(2)(a)(ii)’ or ‘doing or offering to do any act preparatory to or for the purpose of...transporting, sending or delivering a controlled drug under s 33B(2)(a)(iii).’ He was certified by the CNB for substantially assisting in disruption of trafficking activities within or outside Singapore.

⁶⁸⁰ ‘China National Who Killed Cabbie Sheds Tears of Joy After Spared Hanging’, *The Straits Times Stomp, Court Room* (online), 14 November 2013 <<http://thecourtroom.stomp.com.sg/courtroom/cases/case-of-the-day/man-no-longer-faces-the-gallows-after-killing-taxi-driver>>.

⁶⁸¹ Hor, ‘The Death Penalty in Singapore and International Law’, above n 195, 117

⁶⁸² *Ibid.*

Alfred Dicey viewed parliamentary sovereignty as the power of lawmaking without any legal limit.⁶⁸³ The Singapore government believes that capital punishment is not an issue of human rights. Instead, punishments are matters of national sovereignty.⁶⁸⁴ Singapore, with no international law obligations, firmly believes that community protection reigns supreme and the death penalty is a necessary punishment to deter heinous crimes.

However, various studies have been conducted to show that no deterrence (or only marginal deterrence) can be acquired from the death penalty.⁶⁸⁵ For instance, a study examined the ‘capacity of capital punishment to deter homicide’ by comparing the homicide rates in Singapore and Hong Kong.⁶⁸⁶ The researchers chose both these countries as they have a lot of similarities between them.⁶⁸⁷ These include similar economic growth rates and British colonisation experiences.⁶⁸⁸ Since 1966, Hong Kong has been a de facto abolitionist state and in 1993 the death penalty was abolished.⁶⁸⁹ Therefore, the researchers wanted to see whether there is any difference

⁶⁸³ See E C S Eade (ed) *An Introduction to the Study of the Law of The Constitution* (MacMillan: London, 10th ed, 1959), cited in David Clark, *Principles of Australian Public Law* (LexisNexis, 3rd ed, 2010) 74-9: According to Alfred Venn Dicey’s theory, there are three key parts to parliamentary sovereignty. (1) Parliament has the power to legislate on any topic, (2) No parliament maybe bound by their predecessors, and (3) Nobody can challenge the validity of an Act of Parliament.

⁶⁸⁴ Cf Mirko Bagaric, ‘The Execution of Van Nguyen: An Australian Perspective’ (2006) 70(3) *Journal of Criminal Law* 215, 216: Mirko Bagaric, on the other hand, urges the Australian government not allow issues like national sovereignty and moral relativity silence its ‘moral voice’. His article, which was published after the execution of Van Nguyen, an Australia, in Singapore, argues that moral relativity is misleading and national sovereignty has been ‘beaten down’ by ‘globalisation’ and ‘human rights movements’. Therefore, Bagaric states that such sovereignty cannot be used as a defence to justify laws that are extremely severe.

⁶⁸⁵ Cf Isaac Ehrlich, ‘The Deterrent Effect of Capital Punishment: A Question of Life and Death’ (1975) 65(3) *The American Economic Review* 397: Ehrlich engaged in economic statistical analysis to look at the relationship between the offence of murder and capital punishment. He found that from 1933 to 1965, ‘an additional execution per year...may have resulted on the average in seven or eight fewer murders’. Nonetheless, Ehrlich did admit that this finding does not automatically provide a sufficient justification to use capital punishment over other forms of punishment.

⁶⁸⁶ Zimring, Fagan and Johnson, above n 124; See also David T. Johnson, ‘Asia’s Declining Death Penalty’ (2010) 69(2) *The Journal of Asian Studies* 337, 343-5.

⁶⁸⁷ Johnson, above n 686, 343.

⁶⁸⁸ The other similarities are similar ‘population densities, age distributions, per capita gross domestic products,...birth and migration rates, infant mortality rates,...life expectancies and gender-related development scores’; See Zimring, Fagan and Johnson, above n 124, 38.

⁶⁸⁹ Johnson, above n 686, 343.

in Singapore and Hong Kong's homicide trend if capital punishment really deters homicide as many retentionist countries like Singapore claim.⁶⁹⁰

According to the researchers,⁶⁹¹ the homicide rates recorded in both countries were tracking 'each other closely'.⁶⁹² The researchers found that Singapore was 'slightly safer' from 2005 to 2007 than from 1994 to 1996 (based on the (estimated) homicide executions recorded).⁶⁹³ They also noted that Hong Kong, without any executions, was equally as safe as Singapore.⁶⁹⁴ Therefore, they concluded that '[i]f Singapore gets any marginal deterrence from the death penalty, it must be for drug crimes, not homicide.'⁶⁹⁵

The researchers explained that they faced certain limitations in relation to examining the deterrence level.⁶⁹⁶ For instance, Singapore does not provide sufficient statistics on how death penalty deters drug offending.⁶⁹⁷ Therefore, it hinders any empirical research to be conducted to measure deterrence.⁶⁹⁸

Nonetheless, it is unlikely for any radical change to occur in Singapore's death penalty regime anytime soon. The government has the sovereign right to deduce the appropriate punishments to eradicate heinous crimes.⁶⁹⁹ Singapore prefers not to impose its views on others and asks others not to impose their views on Singapore.⁷⁰⁰

⁶⁹⁰ Ibid 344.

⁶⁹¹ Zimring, Fagan and Johnson, above n 124, 45.

⁶⁹² Johnson, above n 686, 344; Ibid 27-8.

⁶⁹³ Johnson, above n 686, 344; Zimring, Fagan and Johnson, above n 124, 27-8.

⁶⁹⁴ Johnson, above n 686, 344; Zimring, Fagan and Johnson, above n 124, 27-8.

⁶⁹⁵ Johnson, above n 686, 344.

⁶⁹⁶ Zimring, Fagan and Johnson, above n 124, 24-6; Johnson, above n 686, 344.

⁶⁹⁷ Zimring, Fagan and Johnson, above n 124, 24-6; Johnson, above n 686, 344.

⁶⁹⁸ Zimring, Fagan and Johnson, above n 124, 24-6; Johnson, above n 686, 344.

⁶⁹⁹ Hood, above n 115, 19.

⁷⁰⁰ Ministry Of Home Affairs, above n 5.

3 Can Australia Reinstate the Death Penalty?

Unlike the findings in the Singapore survey, the Australian community is against the reintroduction of the death penalty for murder.⁷⁰¹ Lesser Australians over the years have ‘agreed’ and ‘strongly agreed’ to the question whether Australia should reintroduce the death penalty for murder.⁷⁰² At the 1987 Federal election, 60% of the sample agreed that Australia should reintroduce the punishment. However, in 2010, the number of support recorded was only 45%. Such low figures endorses the Federal government’s decision of abolishing the death penalty.

According to Kirby, most Australian lawyers and judge are against the death penalty for three reasons;⁷⁰³ (1) They are more exposed to the imperfect and fallible justice system than any other individual, (2) they know that homicide rates are not significantly affected even if the death penalty is a sentencing option or not, and (3) the lawyers are the only people who are ‘involved in such deliberate, planned homicide’ and the state that imposes the punishment and executes the guilty individual is brutalised by the death penalty.⁷⁰⁴

Nonetheless, there is no guarantee that the death penalty may never be reintroduced in Australia.⁷⁰⁵ Although Australian states are barred from reintroducing the

⁷⁰¹ See McAllister and Pietsch, above n 666, 54; See also Roy Morgan Research, *Australians Say Penalty for Murder should be Imprisonment (64%) rather than the Death Penalty (23%)* (August 2009) < <http://www.roymorgan.com/findings/finding-4411-201302260051>>: A telephone poll was conducted in 2009. 687 individuals, 14 years and older, took part in this poll. When asked about the punishment for murder, 64% chose imprisonment, whilst 23% chose the death penalty. The other 13% could not decide. When asked whether the death penalty should be carried out against Australians who have been convicted for the offence of drug trafficking in a country where the offence is punishable by death, 50% agreed, whilst 44% said capital punishment should not be carried out. 6% could not say if it should or should not be carried out.

⁷⁰² See McAllister and Pietsch, above n 666, 54.

⁷⁰³ Kirby, above n 450, 819; See also Bagaric, above n 684; Bagaric argues that the Australian government should display a zero tolerance policy to capital punishment by (1) exerting moral pressure on retentionist countries; (2) reducing harshness of some sentencing laws; and (3) showing sympathy for all convicted individuals awaiting execution, and not only in cases where Australian citizens are concern.

⁷⁰⁴ Kirby, ‘above n 450, 819: Do note that traditionally, Australian judges had ‘little or no discretion’ in relation to imposing the death penalty since the punishment ‘was ordinarily fixed by law’.

⁷⁰⁵ Callinan, above n 527, 18.

punishment, a State government may pass such changes in its own Parliament.⁷⁰⁶

Following which, the State has to ensure that both houses of the Federal Parliament allow such amendments.⁷⁰⁷ In May 2013, Papua New Guinea (PNG) reintroduced capital punishment, despite its international law obligations under the ICCPR.⁷⁰⁸

The only way to ensure politicians do not ever reinstate the death penalty in Australia is to enshrine the abolition of the punishment in the Constitution by way of referendum.⁷⁰⁹ Using the recent 2010 election survey findings as a guide, it is safe to speculate that after such a referendum, the Constitution would be amended to expressly abolish the death penalty. Nonetheless, until such an event occurs, it is difficult, but not impossible, to reinstate the death penalty in Australia.

⁷⁰⁶ Williams, above n 67.

⁷⁰⁷ Ibid.

⁷⁰⁸ Do note that Papua New Guinea only ratified the *ICCPR* and not the *Second Optional Protocol to the ICCPR*; See Rowan Callick, 'PNG to Enforce Death Penalty', *The Australian* (online), 29 May 2013 <<http://www.theaustralian.com.au/news/world/png-to-enforce-death-penalty/story-e6frg6so-1226652553341#>>; See also 'PNG Machete Attackers Should "Face Death Penalty"', *BBC* (online), 12 September 2013 <<http://www.bbc.co.uk/news/world-asia-24059282>>: Papua New Guinea reintroduced the death penalty for offences such as aggravated rape, armed robbery, murder, and sorcery when it passed the *Criminal Code (Amendment) Act (CC(A)) 2013* (Papua New Guinea). The new laws were passed to combat heinous crimes such as the killing of Australian and New Zealand hikers on Papua New Guinea's Black Cat Trail. Papua New Guinea's Prime Minister, Peter O'Neill, stated that the people whom the government represents support capital punishment and preferred such laws to be introduced earlier.

⁷⁰⁹ Williams, above n 67; See also Cameron Murphy, 'Australia as International Citizen- From Past Failure to Future Distinction' (Speech delivered at 22nd Lionel Murphy Memorial Lecture, 11 November 2008)

<<http://lionelmurphy.anu.edu.au/22%20lecture%20by%20Cameron%20Murphy.doc.>> 5-6: Politicians such as the former Labour Leader, Mark Latham stated that '[He] wouldn't be losing any sleep over the decision [of the Indonesian government] to hand down the death penalty [to the Bali Bombers]'. Even the former Foreign Minister Downer mentioned that he never supported capital punishment but speculated that many individuals would not be upset if Osama bin Laden was executed since he had killed many individuals. According to Cameron Murphy such attitudes weaken 'Australia's commitment to international human rights standards.'

CONCLUSION

The imposition of the death penalty is such a controversial topic that no one individual can rightfully claim that the punishment should or should not exist in any civilised criminal justice system. Even if one closely examines the international treaties such as the *ICCPR*, capital punishment may be ordered as long as it combats the most serious crimes. The definition of most serious crimes would depend on the social, cultural, religious and political contexts of any given country.

From the way capital punishment was applied in the ancient times, one can understand that the application of the punishment was haphazard and erratic. Even the English ordered the punishment for trivial crimes. In contrast, Singapore, which orders the death penalty for the most serious crimes such as drug trafficking and murder, ensures that frequent studies are conducted to understand whether the punishments should be part of their criminal laws.

However, it is important to note that innocent individuals may be wrongfully convicted because of the fallibility of the criminal justice system. Importantly, countries like Singapore that have a more 'weighted' approach towards Herbert Packer's 'crime control model' must try to strike a balance with the 'due process model' to prevent the occurrences of wrongful convictions. Currently, the right to access counsel and the right to silence are limited in Singapore. Reforms are essential in these areas if Singapore wants to retain the death penalty. Further, Singapore should introduce a legislative Code of Practice listing out pre-trial investigative procedures. The video-recording of suspect statements during police questioning or the preservation of DNA samples will protect innocent individuals charged with the commission of capital crimes.

The former Attorney-General of Singapore is certain that the death penalty in Singapore is constitutional and there is no point on discussing about capital punishment breaching human rights because at a global level there is no unanimous consensus on it. Furthermore, the Singapore government has the sovereign right to deduce the appropriate punishments to eradicate heinous crimes. Many retentionist countries argue that capital punishment deters crime rates. As explained, it is highly debatable whether maximum deterrence can be achieved through capital punishment. There has yet to be conclusive results. As things stand, the deterrent effect of the death penalty remains open to debate.

Nonetheless, the examination of the community's perception of capital punishment shows that most Australians believe the death penalty should not be reintroduced into their jurisdictions. In contrast, the people in Singapore prefer to keep the punishment in the criminal justice system since it deters crimes and keeps the country safe. Singapore is unlikely to make any radical change to its death penalty regime anytime in the near future and Australia can still reinstate the punishment if it desires to.

Whichever side one takes in the death penalty spectrum, the main question we should ask ourselves is whether we can be certain that no innocent individual will be wrongly convicted and executed. Given the irreversible nature of the punishment, the repercussions of one such occurrence can severely undermine the trust and confidence the public has in any civilised criminal justice system.

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