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The Death Penalty On Trial

A Comparative study between the US and Singapore

The issue regarding the role of the Death Penalty within our criminal justice system has long been questioned. As recent as August 2010,[1] the death penalty in Singapore came under scrutiny. Is it time now to abolish the death penalty? This paper will seek to examine:

1. The original reasons for abolishing the death penalty;
2. Whether the abolition of the death penalty had any effect on crime rates for the relevant offences in the abolitionist States and;
3. The arguments for re-instituting the death penalty in the US.

At relevant points, I will comment on the relevant situation in Singapore. Having covered these issues, I will conclude whether should we retain this penal tradition.

As early as 1870's the death penalty was abolished in Maine and Iowa. The reasons[2] raised during these early years focused on moral reasons, the purpose of punishment, arbitrariness and its effectiveness as a deterrent. If one were to trace the death penalty in our common legal history[3], one would find its roots originating from England where it served as an iron fist in maintaining law and order. However, societal sentiments do change and for case of America, it shifted away from retributive and deterrent ideologies towards that of rehabilitation. This change in societal perception was noted in the landmark case of ***Furman***[4]. Brennan J and Marshall J pointed out the apparent rejection by their society. The word cruel 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'. Given the momentum generated in the years leading up to *Furman,* nine States no longer inflict the punishment of death while five others have restricted it to rare situations. In place of the death penalty, rehabilitative punishments were preferred as a second chance for offenders. Such sentiments can be perhaps linked to the strong Christian faith in America. Typical arguments draw from both the old[5] and new[6] testaments and it appears now that Christ had

[1]Abolish death penalty, says Minister, The Star/Asia News, 29 Aug 2010
[2]Rivkind, Nina, American Casebook Series, *Cases and Materials on The Death Penalty,* Third Edition Pg 2-18
[3]Rivkind, Pg 19-20
[4]Furman v Georgia 408 US 238 (1972)
[5]Num 35:16-31
[6]Romans 13:1-7 (Rulers being the servants of God in enacting justice)

distinguished the law of Moses; The trend now is to refrain from being the "first to throw the stone"[7].

This idea is unique to secular Singapore. In place of a common belief or tradition, we are a diverse society. Perhaps the approach described in the Shared Values White Paper[8] would be more appropriate. It was proposed that we look at a variety of values taken from the Chinese, Indian, Malay on top of European ones. Chan CJ in *Sentencing Principles in Singapore*[9], mentioned the Book of Lord Shang[10]. Being a legal administrator for the Qin, he developed harsh laws so as to deter criminals. Whereas for Islamic Law, death penalty for murder was placed under Family Law with *jus talionis* being practiced subjected to the concept of blood money. Perhaps a union can be drawn from these practices to develop a system (That is suitable to our local context) where retributive principles are balanced with the need for deterrence and judicial mercy where appropriate?

The death penalty was "trialed" in the landmark case of *Furman* where the Supreme Court questioned the purpose of the death penalty and in a 5-4 decision held that the death penalty in specific circumstances violated both Eighth[11] and Fourteenth Amendments[12]. The following are the **t**wo issues raised:

(1) whether, in specific situations, it was unconstitutional;
(2) whether is it unconstitutional *per se*.

Arbitrariness and its effect on deterrence was extensively covered in *Furman.* The problem occurs when the death penalty is part of the sentencing options available with such "discretionary" sentencing resulting in inconsistent punishments despite the cases being similar. It was because of this discretion that the death sentence became "unusual" with the lesser punishments being preferred. As Brennan J so tellingly puts it, the death penalty "smacks of little more than a lottery system". If such sentences are given out in a non-consistent manner, how can there be 'equal protection of the law'? Such a legal practice clearly violates the Fourteenth Amendment! This would in turn affect its deterrent effect. However, deterrence 'depends upon the existence of a system in which the punishment of death

[7]John 8:3-11, Matt 5:38-42
[8]Paragraph 29, *Shared Values White Paper,* (Cmd 1 of 1991) (Singapore: Singapore National Printers)
[9]Kow Keng Siong, *Sentencing Principles in Singapore*, "*Foreword"*
[10]http://www.xinfajia.net/6730.html , J. J.-L. DUYVENDAK (1889-1954), Chapter 5 Paragraph 25, "*Attention to Law"*
[11]Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

[12]...nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

is invariably and swiftly imposed.'If the legal system is now a “lottery”, a 'rational person contemplating a murder is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long term imprisonment is near and great'. The effectiveness of the punishment was being undermined!

This issue of whether the death penalty is unconstitutional due to arbitrariness is not a significant problem here in Singapore and would not be a good reason for abolishing the capital punishment. This problem was prevented due to two key features of our legal system -The Penal Code and also the abolishment of the jury.

The learned writers of the Criminal Law in Malaysia and Singapore[13] aptly summarised the advantages of the Penal Code over that of common law. Offences are generally well defined unlike ambiguous definitions such as killing with 'malice aforethought' as provided by common law. The clarity of the offence elements removed the possibility of a situation where the crime is based on one's perception of the law. Classification of each crime is clearly differentiated from sibling crimes of varying blameworthiness. However, not all of the punishments prescribed by the code are clear cut; various forms of punishment do provide a list of available sentences involving the Death Penalty and other alternatives. An example of this would be s396 where the accused if guilty can be either sentenced to death or life imprisonment with caning. For such cases, a guiding benchmark ought to be established to prevent arbitrariness from occurring.

The jury system was abolished in 1970 after much debate[14]. With the removal of the system, it inadvertently prevented a lot of controversial issues such as racial bianess and ignorance of the jury. Judges are now both the judges of fact and law. We instead rely on the professionalism of Judges to nullify personal biasness[15]. Although such an ability to “self-limit” can perhaps never be proven, it is comforting to know that till today such an issue has yet to surface at a dramatic level.

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[13]Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, [1.31- 1.32]

[14]Compare Andrew Phang, *Jury Trial in Singapore and Malaysia: The unmaking of a legal institution,* (1983) 25 MLR 50 and Chandra Mohan Shunmugam and Sukumaran Ramankutty, *The Introduction and Development of Trial by Jury in Malaysia and Singapore,* (1966) MLR Vol.8 No.2 270

[15] L. P. Thean, “*Judicial Independence and Effectiveness*”, 2003, ASEAN Law Association Workshop

With regard to the second issue, the majority (including the dissenting judges) held that the death penalty is not unconstitutional *per se*. However, within the majority, two judges took the view that the death penalty itself was unconstitutional. Marshall J in his argument concluded that a punishment may be deemed cruel and unusual when it is excessive and fulfils no legislative purpose. He discussed the reasons for a punishment, and whether lesser penalties can achieve similar results. If so, then the death penalty is unnecessary cruel and, therefore, unconstitutional. He examined the reasons for the death penalty, *inter alia*, general and specific deterrence.

The question on deterrence, in his opinion, is not whether the death penalty is effective but whether is it more effective than any other forms of punishment. He based his argument on the evidences provided by pro-abolitionist groups and held that they 'have succeeded in showing ... that capital punishment is not necessary as a deterrent to crime in our society' and that he must conclude that capital punishment cannot be justified' on this ground.

Having "proved" the ineffectiveness in deterring others, he focused on specific deterrence. Due to the finality of death, the death penalty is no doubt effective in prevention. However, can we serve a similar purpose using a lesser punishment? He took the view that such a point is moot because 'murderers are extremely unlikely to commit other crimes .... For the most part, they are first offenders, and when released from prison they are known to become model citizens.'

With respect, I must object. The evidence regarding the effectiveness of the death penalty is not conclusive. If one looks at the relevant tables[16], there cannot be said a trend proving or disproving the punishment. Take for example the state of New York where the death penalty was reintroduced in 1995 and abolished in 2007. During that twelve years, the homicide rates fell by more than 40% and yet in the state of Delaware where death penalty is still practiced, homicide rates rose. Regarding his second point, it is again absurd and against policy reasons to do so. Do we risk the lives of many because of the possibility that a criminal will become a model citizen after his release?[17]

The issue of death being an unusually severe punishment due to its degree of physical and mental suffering imposed on the person was also raised. Not only does the person suffer from the actual punishment but also the mental anguish during the long wait till his final hour. Such mental anguish is

[16]Refer to Annex I
[17]Drug Trafficking 'deserves death penalty': Singapore PM, ABC Newsonline, Tuesday, November 29, 2005

the manifestation of cruelty of the punishment and in his opinion violates the Eighth Amendment.

The issue of constitutionality[18] was covered in Singapore but before we can examine this issue, we must note that the Privy Council in *Ong Ah Chuan*[19] cautioned against comparing our constitution with the American Amendments. With respect, I disagree with Lord Diplock. 'Fundamental Liberties' are universal and should not never be confined within legal jurisdictions! Going back to the issue of mental anguish, it was covered in *Jabar*[20] where it was questioned whether a long lapse between the date of conviction and the execution date would constitute as cruel and inhumane. It was held that such an effect would depend on the facts of the case. If the accused fails to get a response within a reasonable time, perhaps it will be considered similar to the case of *Pratt*[21] and hence unconstitutional. However if the cause for such a delay is "self-induced", 'it cannot be said that there had been an undue and unconscionable delay in the execution'. Such an argument would also not work in face of the crime control model practiced in Singapore where legal proceedings are streamlined and made efficient. So long as the penalty is 'in accordance with law' and the 'punishment of death is invariably and swiftly imposed', mental anguish may be minimal.

The problem instead lies with the way how Singaporean courts choose to bypass the issue by reasoning that the "cruel and unusual" clause is not present within in our Constitution and therefore irrelevant in the proposed arguments[22]. With respect, I would like to appeal for our Courts to address the issue directly (as in *Furman*) and adopt substantive reasons in justifying the capital punishment as part of our attempt to develop an autochthonous legal system.

Furman was a landmark case in America as it led to a *de facto* moratorium on the death penalty. This was one of the strongest attempt in untying the noose. However, one has to note that the main contention is not with the sentence itself but rather the way it was given. After *Furman,* affected states simply redrafted their legislation such that the discretionary "option" was removed. Juries now have either mandatory sentencing or guided sentencing (Guilt and punishment are to be decided separately and subjected to appellate review). This legislative solution was put to the test five years later in

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[18] Tan, Kelvin YL, *Constitutional Law in Malaysia and Singapore,* 3rd Edition, LexisNexis Pg 735-766
[19] *Ong Ah Chuan v PP* [1981] 1 MLJ 64, (Privy Council, on appeal from Singapore)
[20] *Jabar v PP* [1995] 1 SLR 617
[21] *Pratt v A-G for Jamaica* [1994] 4 All ER 769
[22] Yong Vui Kong v Public Prosecutor and another matter [2010] SGCA 20 [59]-[65] and [71]-[74]

Gregg[23] where it was held that the imposition of the death penalty does not automatically violate the two Amendments if subjected to the limitations mentioned above. The death penalty had returned.

So what is the situation for Singapore? A fitting analogy here would be that of a lighthouse guiding ships. We hear stories of horrific wrecks but do we hear the many other stories of ships safely reaching their destination? Do we demolish the lighthouse for want of success stories? Unless there are strong arguments that prove otherwise, we should retain the capital punishment subjected to the limitations discussed above.

Word Count: 1998

[23] *Gregg v Gerogia* 428 US 153 (1976)