LETITIA BOSMAN

v.

PP & OTHER APPEALS

Federal Court, Putrajaya
Rohana Yusuf PCA, Azahar Mohamed CJM, Abang Iskandar CJSS, Nallini Pathmanathan; Vernon Ong, Abdul Rahman Sebli, Zaleha Yusof, Zabariah Mohd Yusof, Hasnah Mohammed Hashim FCJJ
[Criminal Appeal Nos: 05-76-04-2017(J), 05-179-08-2017(B), 05-214-09-2017(K) & 05(M)-118-05-2018(B)]
13 August 2020

Constitutional Law: *Constitutionality — Constitutionality of mandatory nature of death penalty under pre-amended s 39B Dangerous Drugs Act 1952 ('DDA') and under s 302 Penal Code ('PC') for murder — Whether statutory imposition of mandatory death penalty with no possibility of alternative punishment was unconstitutional — Whether mandatory nature of death penalty contrary to Constitution with reference to art 5, 8 and 121 Federal Constitution ('FC')*

Constitutional Law: *Principle of separation of powers — Nature and exercise of judicial power — Whether Parliament empowered only to make law — Whether it was within Parliament's prerogative to prescribe the measure and range of punishment taking into consideration, inter alia, social policy — Whether judicial power vested exclusively in courts — Whether s 39B DDA and s 302 PC violated doctrine of separation of powers, by being impermissible Parliament intrusion into judicial powers — Whether power to determine measure of punishment was judicial power — Article 121 FC*

Constitutional Law: *Legislation — Constitutionality — Mandatory death penalty — Section 39B DDA and s 302 PC — Whether infringed art 5(1) FC — Whether mandatory sentence violated right to life — Whether court empowered to declare legislation void or invalid*

Constitutional Law: *Legislation — Constitutionality — Article 8 FC — Mandatory death penalty — Whether s 39B DDA and s 302 PC allowed for, reasonable classification as it was founded on intelligible differentia having rational relation with object of statute — Whether dissimilarity in circumstances justifying differentiation in punishment purely arbitrary — Whether enhanced mandatory death penalty for offences of drugs trafficking and murder was intelligible differentia that bore rational relation to a valid social object*

Constitutional Law: *Fair Trial — Whether mandatory death sentence violated right to fair trial under art 5(1) FC — Whether there was denial of equal protection of law to offenders in mandatory death cases — Whether there was denial of right to fair trial in case of an offender that was deprived of plea of mitigation before court passed mandatory death sentence — Whether mandatory death sentence arbitrary — Whether right to fair trial under art 5(1) FC subjected to qualifications*

Constitutional Law: *Whether mandatory death sentence was cruel and inhuman and was an inconformity with international instruments*

There were four appeals before this court, which raised constitutional issues pertaining to the mandatory death penalty. The appellants, Letitia Bosman, Jorge Crespo Gomez and Benjamin William Hawkes were separately charged, convicted and sentenced to death by the High Court for trafficking in dangerous drugs contrary to s 39B of the Dangerous Drugs Act 1952 ("DDA"). The appellant Pubalan Peremal was charged, convicted and sentenced to death by the High Court for the offence of murder under s 302 of the Penal Code (PC). In gist, in these four appeals, the principal issue that arose for consideration was the constitutional validity of s 39B of the DDA (prior to its 2017 amendment) and s 302 of PC, in so far as these statutory provisions provided for the mandatory punishment of death with no possibility of any alternative form of punishment. The questions which arose for consideration were: (i) whether s 39B of the DDA (prior to its 2017 amendment) and s 302 of the PC infringed the guarantee contained in art 5(1) of the Federal Constitution ('FC') which provided that "no person shall be deprived of his life or personal liberty save in accordance with law"; (ii) whether the power to determine the measure of punishment, namely, the mandatory sentence was inconsistent with the judicial power enshrined in art 121 of the FC and violated the doctrine of separation of powers; (iii) whether the mandatory death sentence violated the right to a fair trial enshrined under art 5; (iv) whether the mandatory death sentence under s 39B of the DDA and s 302 of the PC violated the proportionality principle vested in art 8 of the FC; and (v) whether the court was under a duty to modify s 302 to bring it into accord with the FC pursuant to cl (6) of art 162.

Held (dismissing the four appeals on constitutionality of the mandatory death penalty):

Per Azahar Mohamed CJM (delivering the Majority judgment of the court):

(1) While the court had a substantive constitutional role in reviewing the legislative act where deemed necessary to ensure legality, the task was complex as it also involved the appropriate measure of judicial deference the court should give the Legislature on matters involving delicate and contentious areas of social policy. The courts, therefore, did not hold legislation unconstitutional in a light vein. They had to draw a fine balance between the 'felt necessities of the time' and 'constitutional fundamentals'." (paras 26-30)

(2) The power to determine the measure of punishment or power to prescribe punishment was not part of judicial power. In the context of criminal law, the courts had the judicial power to try offences. Judicial power under art 121 of the FC in relation to sentencing was to pass or impose punishment or sentence according to law at the conclusion of a criminal trial and upon conviction of an accused person. (paras 47-52)

(3) Parliament had the legislative power to prescribe the mandatory death penalty. The court was only empowered to pass any sentence within the parameters of a prescribed sentence enacted by Parliament. The court could not at its own pleasure impose any sentence as it wished if the law did not permit it. The power of sentencing was statutory and the court could not exceed or limit the power of sentencing in the name of exercising its judicial power. In the present appeals, Parliament by prescribing a mandatory death penalty did not encroach into the power of the court as it was within their power to do so. The impugned provisions were not inconsistent with art 121 of the FC and did not usurp judicial power nor violate the doctrine of separation of powers. (paras 57-68)

(4) The mandatory death penalty satisfied the test of reasonable classification, and hence was not unconstitutional *vis-a-vis* cl (1) of art 8 of the FC. The enhanced mandatory death penalty for the offences of drugs trafficking and murder was an intelligible differentia that bore a rational relation to a valid social object. There was no discrimination against the appellants as the impugned provisions applied to the class of persons who offended the provisions that related to drug trafficking under the DDA and murder under the Code. In matters relating to equal protection, the basis of approach was the identification of legislative purpose and a reasonable classification was one that included all persons who were similarly placed with respect to the purpose of the law. It must be presumed that the Legislature understood and correctly appreciated the need of its own people and that its law was directed to problems made manifest by experience and that its discriminations were based on adequate grounds provided. (paras 75-120)

(5) The mandatory death sentence did not violate the right to a fair trial under cl (1) of art 5 of the FC. Where the Legislature had by proper exercise of its powers prescribed that for drug trafficking and murder offences, the offenders should be punished with a mandatory death penalty, the duty of the court was to impose the legislatively prescribed punishment on offenders. The fact that the court had no alternative but to pass that sentence did not make the mandatory sentence unconstitutional. There was no denial of the right to a fair trial in a case of an offender that was deprived of a plea of mitigation before the court passed the mandatory death sentence. (paras 122-136)

(6) There was nothing unusual and arbitrary in a death sentence being mandatory. The Legislature in prescribing a mandatory death sentence to be inflicted upon the offenders found guilty of the specific offence, no doubt had in mind the object and purpose to be realised by such a mandatory provision and it could not for that reason be arbitrary in any sense of the word. (paras 137-144)

(7) As for the question of whether the mandatory death sentence was cruel and inhuman, it was pertinent to note that Malaysia did not have similar provision as existed in the foreign jurisdictions as in the FC. It was trite that

the function of the court was to apply the law and if at all the present law was disproportionate, cruel, inhuman, or degrading the initiative to change should come from the Legislature. The FC must primarily be interpreted within its own walls and not in the light of analogies drawn from other jurisdictions where the provisions of their Constitution were different than Malaysia's FC. The principle that an international instrument was only applicable in Malaysia if it was incorporated into our domestic law was followed. A rule of international law could only become part of municipal law if and when it was transformed into municipal law by the passing of local legislation. (paras 145-156)

(8) There was no inconsistency between s 302 of the PC which prescribed the mandatory death sentence and arts 5, 8 and 121 of the FC. Hence, there was no necessity to undertake constitutional modification of s 302 under cl (6) of art 162 to bring it into accord with arts 121, 5 and 8 respectively. The pre-conditions for the exercise of modification power did not exist. The court had no power to modify s 302 of the PC pursuant to cl (6) of art 162 because such a power arose only when a law was inconsistent with the FC. The power to modify was not a power to modify every existing law. (para 161)

Per Nalini Pathmanathan (dissenting):

(9) The FC was the supreme law of the land and was in a class of its own (*sui generis*). To that extent, it could not be interpreted according to the ordinary canons of statutory construction, but was construed and governed by its own principles of interpretation. Constitutional provisions were construed broadly and generously, not narrowly nor rigidly. A prismatic approach was to be adopted when interpreting the fundamental rights provisions under Part II of the FC. A vitally important function of the court was to interpret constitutional provisions with the fullness needed to ensure that citizens had the benefit which these constitutional guarantees were intended to afford. (paras 173-177)

(10) Proviso to art 5(1) FC, namely "save in accordance with law" meant that all statutes or 'law' were subject to art 4 FC. This meant that all enacted law must comply with the FC. The term 'law' in the proviso 'save in accordance with law' must refer to law that was constitutionally valid and not simply any regularly promulgated/enacted law. Applying these principles to the 'law' in question, it followed that the deprivation of 'life' so prescribed in s 39B of the DDA and s 302 of PC must be both substantively and procedurally fair. If such deprivation of life as was prescribed by law, ie s 39B of the DDA or s 302 of the PC, were not substantively or procedurally fair or infringed the tests set out in the provisions of the FC protecting fundamental or human rights in Part II, then it would follow that they did not fall within the ambit of 'law' as envisaged in art 5(1) FC and ought to be struck down. (paras 183-205)

(11) Section 39B DDA was a 'law' which was arbitrary and oppressive for the reason that the section prescribed only one punishment, namely the mandatory death penalty for 'trafficking', which was accorded with an extremely broad definition encompassing a wide variety of activities, which were classified

together as justifying one single punishment. This was because there was no intelligible criteria for classifying them together for the purposes of imposing the same punishment of mandatory death, save for the purposes of establishing culpability for the offence of trafficking. As such, it could not be said that the classification was reasonable in so far as punishment or sentencing was concerned. The imposition of the death penalty as the sole punishment for trafficking, being unreasonable, unjust, unfair and devoid of any rational classification, infringed art 8(1) FC. (paras 243-253)

(12) Section 39B DDA was similarly violative of art 5(1) FC, namely the right not to be deprived of life save in accordance with law. The law being arbitrary, capricious and therefore neither fair nor proportionate, did not qualify as 'law' contemplated under art 5(1) FC. Any deprivation of life pursuant to such law was therefore unconstitutional. (paras 254-255)

(13) As for s 302 of the PC, the circumstances within which the offence of murder might arise varied greatly. It might range from a situation where a person was provoked and responded violently so as to cause death, to a carefully planned and strategised commission of the offence with a clear and perceptible intention to kill, on the one hand to a situation where a loved one in pain was allowed to pass on by the provision of drugs. In so far as punishment was concerned, it was difficult to ascertain intelligible differentia with a rational nexus to the object of the statutory provision, in the imposition of the mandatory death penalty. The other circumstances giving rise to the commission of the offence, were so varied that they defied classification into any form of intelligible differentia. As such, the mandatory death penalty specified in s 302 PC infringed art 8(1) FC and accordingly art 5(1) FC for not being fair, just and reasonable. (paras 256-264)

(14) The imposition of the mandatory death penalty as the sole punishment for the offences concerned did not allow for the imposition of a penalty commensurate with the circumstances of commission of the offence. It did not accord an opportunity to be heard for the accused as to why the death penalty was not warranted in the particular circumstances of their case. To that extent, the statutory provisions could not be said to satisfy the constitutional safeguards in art 5(1) or 8(1) FC. As such, the consequences of the application of a law that was inherently not fair or proportionate, afforded further basis for striking down these provisions imposing the mandatory death penalty for a contravention of those articles. (paras 265-278)

(15) The provision by Parliament of a mandatory penalty for an offence did not offend the separation of powers doctrine, as there was no usurpation of judicial power. The fact that the court was not able to exercise a judicial discretion in respect of a particular offence, because the punishment had been stipulated in a mandatory form, did not in itself amount to a transgression of judicial powers. In short, neither the enactment of s 39B of the DDA nor s 302 of the PC by the Legislature, in itself, amounted to a usurpation of judicial powers. (paras 294-295)

(16) While a mandatory penalty may be imposed, such punishment is open to judicial scrutiny in relation to whether it is consonant with or falls within the purview of the FC, when a challenge is made to the effect that it is unconstitutional. Whether a statutory provision conforms to the provisions prescribed in the FC remains the function of the Judiciary. And nowhere is this more clearly articulated than in art 4 FC, which houses the doctrines of the separation of powers and the rule of law. It allows the Judiciary to retain a check and balance on both the Executive and the Legislature by striking down law that does not conform to the FC. If the statutory provision is found to infringe the FC, then the court, exercising its powers under art 4(1) FC is free to strike down such provision as being incompatible with the FC. (paras 297-299)

(17) The imposition of the single, irrevocable and final penalty of death on all manner of persons found to be 'trafficking' in dangerous drugs as defined under s 2 of the DDA is contrary to the doctrine of proportionality as stipulated in art 8(1) of the FC. Section 39B of the DDA is therefore unconstitutional and ought to be struck down. The consequence is that the pre-1983 provision, which confers upon the court the discretion to mete out either life imprisonment or alternatively the death penalty, ought to be restored. Further, the Dangerous Drugs (Amendment) Act 2017 also lends force to the contention that the mandatory death penalty is unconstitutional. Likewise, there is no rational basis for classifying, in one category, the vastly varying circumstances giving rise to the offence of murder under s 302 of the Code. It offends art 8(1) of the FC and is therefore, unconstitutional. (paras 316-325)

(18) While the DDA was a law enacted before Merdeka Day known then as the Dangerous Drugs Ordinance 1952, s 39B was only inserted in 1975 vide the Dangerous Drugs (Amendment) Act 1975. Therefore, s 39B of the DDA could not be said to be a pre-Merdeka law. And it is solely that section that the appellants sought to strike down as being unconstitutional under art 4 of the FC. (para 326)

(19) As regard to s 302 of the PC, since the enactment, the punishment for murder had been, and continues to date to be, the mandatory death sentence. As a pre-Merdeka law, s 302 could not be declared void or invalid as opposed to post-Merdeka law, which is subject to being struck down for inconsistency with the Code under art 4. In the face of any such inconsistency in a pre-Merdeka law, art 162(6) of the FC ought to be invoked to remove that inconsistency. (paras 327-330)

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Counsel:

For the appellants: Gopal Sri Ram (Hisyam Abdullah, Abdul Rashid Ismail, Yasmeen Soh Sha Nisse, Karluis Quek, Azreen Ahmad Rastom, Siti Nurani Md Zahidi & Mohd Nor Hafidzuddin Yusoff with him); M/s Rashid Zulkifli

For the respondent: Nik Suhaimi Nik Sulaiman (Umar Saifuddin Jaafar, Mangaiarkarasi Krishnan, Faizah Salleh, Ku Hayati Ku Haron & Asmah Musa Muhammad Azmi Mashud with him); DPP

JUDGMENT

Azahar Mohamed CJM (Majority):

Introduction

[1] There are four appeals before this court, which raise important constitutional issues and issues of paramount public interest pertaining to the mandatory death penalty. We sat in a quorum of nine to hear these appeals. The first appeal [No 05-76-04-2017(J)] is by Letitia Bosman. The second [No 05-179-08-2017(B)] is by Jorge Crespo Gomez. The third [No 05-214-09-2017(K)] is by Benjamin William Hawkes. The fourth [No 05(M)-118-05-2018(B)] is by Pubalan Peremal. The Public Prosecutor is the respondent in all the four appeals.

[2] Letitia Bosman, Jorge Crespo Gomez and Benjamin William Hawkes were separately charged, convicted and sentenced to death by the High Court for trafficking in dangerous drugs contrary to s 39B of the Dangerous Drugs Act 1952 ("DDA").

[3] Pubalan Peremal was charged, convicted and sentenced to death by the High Court for the offence of murder under s 302 of the Penal Code ("the Code").

[4] At all material times, the law makes it mandatory for courts to impose the death penalty for all offenders under ss 39B of the DDA and 302 of the Code ("the impugned provisions").

[5] All four appellants lost their appeals at the Court of Appeal. The Court of Appeal had affirmed the conviction and sentence of all the appellants.

[6] Before us, one of the grounds of appeal raised by all the four appellants concerns the constitutionality of the impugned provisions, with reference to art 5, 8 and 121 of the Federal Constitution ("FC"). Since all the four appeals were premised on this common ground, we proceeded to hear them together.

[7] This judgment will only deal with this common ground. The other grounds of appeal canvassed by the respective appellants are dealt with in separate judgments of my learned brother, Justice Vernon Ong and my learned sister, Justice Zabariah Mohd Yusof.

Decision Of The Court Of Appeal

[8] It is material to point out that except for Letitia Bosman where the issue of the constitutionality of the mandatory death penalty was raised and decided by the Court of Appeal, all the other appellants raised this issue for the first time before us.

[9] In that respect, the Court of Appeal decided that s 39B(2) of the DDA that imposed the mandatory death sentence was constitutional for, amongst others,

the following reasons. First, the FC does not have an express protection against cruel, inhumane or degrading treatment. Second, the decisions of the judicial committee of the Privy Council were no longer binding after it was abolished on 1 January 1978 in respect of criminal and constitutional matters. Third, the Court of Appeal could not depart from the decisions of *Ong Ah Chuan v. Public Prosecutor And Another Appeal* [1980] 1 MLRA 283 ("*Ong Ah Chuan*") and *Public Prosecutor v. Lau Kee Hoo* [1982] 1 MLRA 359 ("*Lau Kee Hoo*"). Fourth, the initiative to declare the mandatory death sentence as disproportionate, cruel, inhumane or degrading should come from Parliament.

[10] All the appellants appealed to the Federal Court on conviction and sentence.

Brief Legislative History Of The Impugned Provisions

Section 39B(2) Of The DDA

[11] The original 1952 Malaysia drug legislation ("1952 Act") consolidated the existing drug law from the individual Malay States. The Dangerous Drugs (Amendment) Act of 1975 was the first of many amendments to the 1952 Act. The most important change was the addition of s 39B, providing that trafficking in dangerous drugs would be punishable by death, imprisonment, whipping, or some combination of those penalties. Thus, before 1983, s 39B(2) did not provide for the death penalty to be mandatory. The section reads:

> Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death **or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping**.
>
> [Emphasis Added]

[12] Prior to its amendment in 1983, the DDA gave the court discretion on the issue of sentence by permitting an alternative between life imprisonment and death. The death penalty for drug trafficking was only made mandatory by the Dangerous Drugs (Amendment) Act 1983, which deleted the words bolded above. This is the subject matter of the present appeals by Letitia Bosman, Jorge Crespo Gomez and Benjamin William Hawkes.

Section 302 Of The Penal Code

[13] The Code is a law that codifies most criminal offences and punishments in Malaysia. The Code is a pre-Merdeka statute. The death penalty was first introduced in 1872 through s 302 of the Straits Settlement Penal Code (Ordinance No IV of 1871).

[14] The Ordinance developed through passage of time; from Straits Settlement to the Federated Malay States by the Penal Code of the Federated Malay States (FMS Penal Code) ("FMS Cap 45") where s 302 provides that whoever commits murder shall be punished with death. In 1948, the Federation of

Malaya was formed which amalgamated the States of Penang, Malacca, the Federated Malay States and the Unfederated Malay States, which consist of the States of Johor, Kedah, Perlis and Kelantan. The FMS Cap 45 was then extended to the Federation of Malaya by the Penal Code (Amendment and Extended Application) Ordinance (No 3, 1948). All the distinct enactments of each of the Unfederated Malay States and also the Straits Settlements Penal Code were abolished. The Code was extended throughout Malaysia through the Penal Code (Amendment and Extension) Act 1976 [Act A327]. The Code was completely revised as Act 574 under the Law of Malaysia series in 1997. The revised edition came into operation on 7 August 1997. Hence, the present s 302 of the Code has been there in the Straits Settlement Penal Code since 1872.

Validity Of Pre-Merdeka Law

[15] The Code is a pre-Merdeka law. Thus being a pre-Merdeka law, s 302 of the Code cannot be declared void or invalid pursuant to art 4 of the FC, as opposed to post-Merdeka law (see *Jamaluddin Mohd Radzi & Ors v. Sivakumar Varatharaju Naidu; Suruhanjaya Pilihan Raya (Intervener)* [2009] 1 MLRA 555). If at all there is any inconsistency between the provision and the FC, then cl (6) of art 162 must be invoked to remove that inconsistency. Clause (6) of art 162 reads:

> (6) Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

[16] This had been explained in the case of *Assa Singh v. Mentri Besar Johore* [1968] 1 MLRA 886, where Ong Hock Thye CJM said:

> In the third place, I agree that, since art 4 speaks only of law passed after Merdeka Day, the validity or otherwise of the pre-Merdeka Restricted Residence Enactment will have to be considered solely by reference to art 162. The point is summed up most admirably by the learned Solicitor-General as follows:
>
> As to post-Merdeka law, the Constitution is supreme and if any of that law is inconsistent with the provisions of the Constitution, to the extent of such inconsistency that law shall be void – art 4(1). But as regards pre-Merdeka law, such law shall continue to be in force until repealed: in the meantime its continuity and enforceability is subject to modification, firstly, by a Legislative Act or Enactment or, secondly, by process of judicial interpretation, the executive order of the Yang di-Pertuan Agong to modify the same having expired - art 162(1) and (6). It must be noted that art 162 does not use the expression that the pre-Merdeka law shall be void to the extent of the inconsistency but, instead, it expressly states that the law shall continue to be in force.

The Court's Power To Declare Written Law Invalid: Article 4(1)

[17] The court's power to strike down any legislation passed after Merdeka Day for inconsistency with the FC stems from cl (1) of art 4. This supremacy clause stipulates:

> This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

[18] This brings me to the judgment of the Federal Court in *Ah Thian v. Government Of Malaysia* [1976] 1 MLRA 410 ("*Ah Thian*"). This case represents the law on the subject matter as we apply today in relation to the jurisdiction of the courts to declare a law invalid. In this case, Suffian LP in delivering the judgment of the Federal Court put in plain words that validity of a law could be challenged on one of the three grounds as follows:

> (1) ...
>
> (2) in the case of both Federal and State written law, because it is **inconsistent with the Constitution**, see art 4(1);
>
> (3) ...
>
> [Emphasis Added]

[19] Suffian LP went on to say that "The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual".

[20] Case law has clearly demonstrated that the courts have declared law to be invalid on the basis of inconsistency with an express and specific provision of the FC (see *Repco Holdings Bhd v. Public Prosecutor* [1997] 3 MLRH 304, *Public Prosecutor v. Dato' Yap Peng* [1987] 1 MLRA 103 ("*Dato' Yap Peng*"), *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (1)* [1992] 1 MLRA 430, *Dewan Undangan Negeri Kelantan & Anor v. Nordin Salleh & Anor (2)* [1992] 1 MLRA 449, *Mamat Daud & Ors v. The Government Of Malaysia* [1987] 1 MLRA 292, *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 4 MLRA 554 ("*Semenyih Jaya*"), and *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1 ("*Alma Nudo*").

[21] In this regard, it is noted that what Letitia Bosman, Jorge Crespo Gomez and Benjamin William Hawkes are actually challenging is the mandatory nature of the penalty as imposed by the Dangerous Drugs (Amendment) Act 1983. The 1983 amending Act is a law passed after Merdeka Day, and can be held void under cl (1) of art 4 of the FC if it is inconsistent with the FC. As a result of the amendment, s 39B of the DDA is no longer an "existing law which has not been modified ... after Merdeka Day" for the purposes of art 162(6).

Constitutional Issues Raised In These Appeals

[22] Based on the written submissions and the oral submissions before us, learned counsel for all the appellants raised the following four points for our consideration. First, the power to determine the measure of punishment is part of judicial power. The mandatory sentencing provision is inconsistent with the judicial power enshrined in art 121 of the FC, and therefore violated the doctrine of separation of powers ('the separation of powers point').

[23] Second, the mandatory death sentence violated their rights to a fair trial under cl (1) of art 5 of the FC ('the fair trial point').

[24] Third, the mandatory death penalty violated the proportionality principle housed in the equal protection clause in cl (1) of art 8 of the FC ('the proportionality point').

[25] Finally, in relation to *Pubalan Peremal* since the Code is a pre-Merdeka statute, the court is under a duty to modify s 302 to bring it into accord with the FC pursuant to cl (6) of art 162 ('the Pre-Merdeka law point').

General Observations On The Constitutional Issues

[26] Before turning to those constitutional issues upon which all the appellants rely in these appeals, I will make some general observations as my starting point. It is about something of centrality of our FC: the doctrine of separation of powers. While the FC does not expressly delineate the separation of powers, nevertheless as stated by Lord Diplock in *Moses Hinds And Others v. The Queen* [1977] AC 195 ("*Hinds*") at p 212 "it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the Legislature, by the executive and by the judicature respectively". At the core of the doctrine is the notion that each branch of the Government must be separate and independent from each other. It has been said that for one branch of the Government to usurp the rightful authority and power of another is to undermine the doctrine of separation of powers (see *JRI Resources Sdn Bhd v. Kuwait Finance House (Malaysia) Berhad; President Of Association Of Islamic Banking Institutions Malaysia & Anor (Interveners)* [2019] 3 MLRA 87 at para [155] ("*JRI Resources*")).

[27] As the present appeals demonstrate, the proper division and balance of power between the Judiciary and the Legislature continues to be a highly contentious issue in our jurisdiction. In the present appeals, the questions at issue are fraught with the complex issue of the proper balance between judicial power and legislative power that goes into the heart of the doctrine of separation of powers. While the court has a substantive constitutional role in reviewing the legislative act where deemed necessary to ensure legality, the task is complex as it also involves the appropriate measure of judicial deference the

court should give the Legislature on matters involving delicate and contentious areas of social policy.

[28] While none is superior to the other, both the Judiciary and the Legislature are subject to the FC, being the supreme law of the country. In Malaysia, only the FC is supreme (see Tun Mohamed Suffian's *An Introduction To The Constitution Of Malaysia*, 3rd edn, p 17). This has an important implication: like all legal powers, judicial power and legislative powers have constitutional limits. As aptly observed by Sundaresh Menon CJ in the Singapore Court of Appeal case of *Tan Seet Eng v. Attorney General And Another Matter* [2016] 1 SLR 779 ("*Tan Seet Eng*") at para 90:

> We began this judgment by observing that the specific responsibility for pronouncing on the legality of government actions falls on the Judiciary. It is appropriate at this juncture to parse this. To hold that this is so is not to place the Judiciary in an exalted or superior position relative to the other branches of the government. On the contrary, the Judiciary is one of three co-equal branches of government. But though the branches of government are co-equal, this is so only in the sense that none is superior to any other while all are subject to the Constitution. Beyond this, it is a fact that each branch of government has separate and distinct responsibilities.

[29] One final general observation: as we shall see later in the judgment, the principle of presumption of constitutionality of legislation has very much become a part of Malaysian jurisprudence. In recent times, that principle, it appears, has not always been adequately regarded by our courts. In this regard, at the outset, I would like to recall the eloquent words of Lord Diplock speaking at the Second Tun Abdul Razak Memorial Lecture, *'Judicial Control of Government'* [1979] MLJ cxl at cxlvii. For the present purpose, it is enough to quote the following passage on what he said on the relationship between the arms of Government:

> In dealing with matters of public law, modesty I believe to be the most important of judicial virtues - the recognition that judges, however eminent in the law, are not the ultimate repositories of human wisdom in answering the kinds of social, economic and political questions with which parliament and administrators have to deal.

[30] The point cannot be put better than MP Jain did in *Indian Constitutional Law,* 7th edn, p 1641:

> "The judicial function of assessing the constitutional legitimacy of legislation is both delicate and responsible. To declare a statute unconstitutional places an onerous burden on the courts, for a statute is enacted by an elected Legislature which is conversant with the needs and aspirations of the people. The courts, therefore, do not hold legislation unconstitutional in a light vein. They have to draw a fine balance between the 'felt necessities of the time' and 'constitutional fundamentals'."

[31] To return to the present appeals, I will now deal with the first point.

The Separation Of Powers Point

[32] It was argued that the power to determine the measure of punishment is a part of judicial power; only the Judiciary can exercise that function. This is the essence of the contention of learned counsel for the appellants. As such, it was contended that by removing the court's discretion in determining the measure of punishment, the impugned provisions are inconsistent with art 121 of the FC, and therefore violated the doctrine of separation of powers. Clause (1) of art 121 reads:

> Judicial power of the Federation
>
> 121.(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed).
>
> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

[33] To start with, it is noted that to a great extent the separation of powers point advanced by the appellants is based on the decision of the Court of Appeal in *Kok Wah Kuan v. PP* [2007] 1 MLRA 613 where the court held that the power to pass sentence and the power to determine the measure of punishment are both part of the judicial power. The Court of Appeal arrived at this decision by relying on the following passage of the judgment of Zakaria Yatim J in *Dato' Yap Peng*:

> In the context of criminal law, the court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty.

[34] I will return to that case later.

[35] Another significant point is that the Federal Court in *Lau Kee Hoo* had considered the question whether the mandatory death penalty provided by statute, violated art 121 of the FC. This was the first time a challenge on the constitutionality of the mandatory death sentence had been mounted in Malaysia. The case concerned s 57(1) of the Internal Security Act 1960, which

prescribed a mandatory death sentence for the offence of having ammunition under one's control in a security area without lawful excuse or authority. The Federal Court rejected the contention that the provision was tantamount to the Legislature usurping judicial power. In so holding, Suffian LP distinguished the case of *Liyanage v. The Queen* [1967] 1 AC 291 ("*Liyanage*"), noting that section in question was not expressed to be retrospective nor was it intended to apply to participants in a particular event. Pertinently, Suffian LP quoted the cautionary words of Lord Diplock in *Ong Ah Chuan* as to the far-reaching impact of accepting the appellants' argument:

> "If it were valid, the argument for the appellants [that a mandatory death sentence under the impugned section of the law in question there was unconstitutional] would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital - an extreme position which counsel was anxious to disclaim."

[36] *Ong Ah Chuan* is a defining case. Even though the seminal judgment was from the Singapore Court of Appeal, the importance of the decision of the Privy Council cannot be overstated. As we shall see in the course of this judgment, that landmark judgment provided the foundation for the interpretation of numerous key provisions of our FC for the reason that the relevant provisions of the Constitution of Singapore that were the subject matter in *Ong Ah Chuan* are almost identical to our FC.

[37] In the present appeals, the fundamental constitutional question we are called upon to decide is whether the impugned provisions violate the doctrine of separation of powers, by being an impermissible Parliament intrusion into judicial powers. The basic issue here is really whether the power to determine the measure of punishment or to put it in another words, power to prescribe the impugned provisions, is a judicial power, as contended by learned counsel for the appellants. We are therefore concerned with the nature and exercise of judicial power.

[38] As can be seen at [32] above, the words "judicial power" do not form part of the provision of cl (1) of art 121 of the FC. The words were deleted from the text of cl (1) of art 121 by the Constitution (Amendment) Act 1988 (Act A704) effectively on 10 June 1988. The words, however, remained in the marginal note. In spite of Act A704, there is little doubt that art 121 still vests judicial power in the courts and no other (see: *Semenyih Jaya).* The question that arises here is what is meant by judicial power. There is no definition of the words "judicial power" in the FC. It is important therefore to understand what is meant by "judicial power". In Australia, the words "judicial power" appearing in s 71 of the Australian Constitution have been defined by the Australian High Court case of *Huddart Parker And Co Proprietary Ltd v. Moorhead* [1908-1909] 8 CLR 330 where Griffith CJ in his judgment said at p 357:

> "... I am of opinion that the words 'judicial power' as used in s 71 of the Constitution mean the power which every sovereign authority must of

> necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision... is called upon to take action."

[39] There is a general agreement amongst judicial authorities that judicial power must be the power to determine and arbitrate disputes of a legal nature in which parties are concerned with the protection of their legal interest as opposed to any other interest (see *Dato' Yap Peng*). Judicial power is generally described as the adjudication of a controversy between subjects. The core function of judicial power is adjudication, which commonly involves making findings of fact, applying the existing law to the facts, and reaching a determination on the rights and liabilities of the parties in dispute in accordance with the law (see: *Semenyih Jaya*, *JRI Resources* and *R v. Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd* [1970] ALR 449).

[40] It is undisputed that in the context of criminal law, the courts have the judicial power to try offences. What then is the judicial power in relation to sentencing or punishment in a criminal trial? To my mind, the answer to this question is entirely clear. In my opinion, it is evident from the way in which our court treated the matter, it has very much become part of our law that the court's judicial power is to pass or impose punishment or sentence according to law at the conclusion of a criminal trial and upon conviction of an accused person (see generally ss 173 and 183 of the Criminal Procedure Code ("CPC"), *Public Prosecutor v. Yee Kim Seng* [1982] 1 MLRH 418; ("*Yee Kim Seng*"), *PP v. Jafa Daud* [1981] 1 MLRH 800 ("*Jafa Daud*") and *Kok Wah Kuan v. PP* [2007] 1 MLRA 613 ("*Kok Wah Kuan*")).

[41] In *Kok Wah Kuan*, the respondent who was 12 years and 9 months' old at the time of the commission of the offence was charged in the High Court for the offence of murder punishable under s 302 of the Code. He was convicted and ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to s 97(2) of the Child Act 2001 (Act 611) ("the Child Act"). He appealed to the Court of Appeal. The Court of Appeal upheld the conviction and set aside the sentence imposed on him and released him from custody on the sole ground that s 97(2) of the Child Act was unconstitutional. The Public Prosecutor appealed to the Federal Court. The Federal Court set aside the order of the Court of Appeal and reinstated the order of the High Court. In delivering the judgment of the court, Abdul Hamid Mohamad PCA (as he then was) made a very important point concerning Parliament's legislative power to determine appropriate sentence for a criminal offence. I find the following passage in his judgment at para 22 to be of direct relevance:

> "Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law. It further provides that, instead, the child shall be ordered to be detained in a prison during the pleasure of the Yang di-Pertuan Agong or the Ruler or

> the Yang Di-Pertua Negeri, depending on where the offence was committed. **That is the sentencing power given by federal law to the court as provided by the Constitution**. Similarly, in some cases, federal law provides for death sentence, in others, imprisonment and/or fine, some are mandatory and some are discretionary. **The Legislature provides the sentences, the court imposes it where appropriate**."
>
> [Emphasis Added]

[42] In this respect, Richard Malanjum CJSS (as he then was) in a separate judgment in *Kok Wah Kuan* again clearly indicated that the law provides the punishment or sentence by way of legislation in the exercise of its legislative authority and for the courts to carry out the process of sentencing as part of judicial process in exercising its judicial power under art 121 of the FC after a conviction order has been made following a full trial or a guilty plea. At paras 32 and 34, he said:

> "[33] On plain reading of subsection (2) of s 97 it is clear that it empowers the court, after convicting a person who was a child at the time of commission of an offence punishable with death, to make an alternative order instead of imposing a sentence of death. In my view the alternative power to make such an order as provided for by the subsection is no less than the power of the court to impose a sentence or punishment on a child convict *albeit* in a different form, namely, to the care of the Yang di-Pertuan Agong or to the Ruler or to the Yang di-Pertua Negeri depending on where the offence was committed.
>
> [34] Hence, with respect **I do not think there is anything unconstitutional in the scheme since it is still the court that makes the order consequential to its conviction order**. In my view when the court makes the order it is carrying out the process of sentencing which is generally understood to mean a process whereby punishment in accordance with established judicial principles is meted out by the court after a conviction order has been made following a full trial or a guilty plea. See: *PP v. Jafa Daud* [1981] 1 MLRH 800; *Standard Chartered Bank and Others v. Directorate of Enforcement and Others* [2005] AIR SC 2622). Incidentally s 183 of the Criminal Procedure Code provides: 'If the accused is convicted, the Court shall pass sentence according to law'."
>
> [Emphasis Added]

[43] Our law in this regard is consistent with other jurisdictions. This can be seen in the judgment of the High Court of Australia in *Palling v. Corfield* [1970] 123 CLR 52 ("*Palling*"). The issue before the court was whether s 49(2) of the National Service Act 1951-1968 ("the Australian National Service Act") infringed the principle of separation of powers in providing that a person convicted of an offence of failing to respond to a national service notice was liable to pay a fine of between A$40 and A$200 and, on the request of the prosecutor, to serve a mandatory sentence of seven days' imprisonment if he (the offender) refused to comply with the requirements of the national service scheme. The court upheld the statutory provision stipulating a fixed

punishment for an offence. Rejecting a similar argument that such a provision offended the separation of powers, at p 58 Barwick CJ said:

> "... it seems to me that the argument supporting the applicant's submission as to its invalidity was founded on a basic misconception as to the exercise of judicial power in relation to the imposition of penalties or sentences for the commission of offences created by statute. **It is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences, which it creates**. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose and, in my opinion, it may lay an unqualified duty on the court to impose that penalty. **The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act**. If the statute nominates the penalty and imposes on the court a duty to impose it no judicial power or function is invaded: nor, in my opinion, is there any judicial power or discretion not to carry out the terms of the statute."
>
> [Emphasis Added]

[44] It was noted that the court ordinarily has discretion as to the extent of the punishment to be imposed, if at all. While expressing the opinion that it is undesirable for the court not to have discretion to mete out punishment appropriate to the crime, Barwick CJ stressed that whether such discretion is given to the court is a legislative decision. He put it this way at p 58:

> "If Parliament chooses to deny the court such a discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution not to confide any discretion to the court as to the penalty to be imposed."

[45] Similarly, Walsh J explained the relative roles of Parliament and the Judiciary in determining the punishment for an offence in the following terms at p 68:

> "It could not be disputed, and was not disputed, that the Parliament may make a valid law by which no discretion is given to the court as to the punishment of a person convicted of an offence. The Parliament may itself specify what sentence is to be imposed. When an Act requires a court, upon an offence being proved, to pass a mandatory sentence this does not involve any unconstitutional intrusion by the Legislature into the field of judicial powers. The relevant exercise of judicial power, when there is a prosecution for an offence against a law of the Commonwealth, consists of the application of the law by the court, according to the terms of the law. **If the Act provides for a mandatory sentence, the only power of sentencing which the court has in that case is the power to impose that sentence**."
>
> [Emphasis Added]

[46] Lord Bingham expressed the relative role of the courts in the area of sentencing in *Reyes v. The Queen* [2002] 2 AC 235 ("*Reyes*") at para 25, as follows:

> "In a modern liberal democracy it is ordinarily the task of the democratically elected Legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. **The ordinary task of the courts is to give full and fair effect to the penal law, which the Legislature has enacted**."
>
> [Emphasis Added]

[47] It can be seen from the above discussion that as regards to sentencing, the judicial power is to impose punishment in accordance with the law upon conviction of an accused person at the conclusion of a trial. Therefore, the power to determine the measure of punishment or power to prescribe punishment is not part of judicial power.

[48] This leads me to the following question. Which branch of the Government then has the power to determine the measure of punishment or power to prescribe punishment? That question must be examined in the context of the FC. It bears noting in this regard that as lucidly stated by Joseph M Fernando in *Federal Constitutions, A Comparative Study of Malaysia and the United States*, at p vii, "Constitutions are the basic fundamental law of most modern nations and the highest source of legal authority. Constitutions provide for a pattern of Government and define the distribution of powers between the various organs of Government and the limits of the Government over the governed".

[49] Evidently, Parliament derives its legislative power from the FC. The power to legislate is a plenary power vested in Parliament. The issue of legislative competency is to be decided by reference to matters falling within Parliament's power to legislate. What is important in the setting of the present appeals is that the constitutional scheme of the FC empowers Parliament, the legislative branch of the Government to make law with respect to any of the matters enumerated in cl (1) art 74 of the FC and the Federal List as set out in the Ninth Schedule. The constitutional provisions highlight the fundamental principle relating to the power of Parliament to make law in respect of a particular matter pursuant to the FC. In this regard, Item 4 of the Federal List provides for "civil and criminal law", including in para (h) "creation of offences in respect of any of the matters included in the Federal List or dealt with by Federal law".

[50] An important point to note is that the words "with respect to" in art 74 must be interpreted with extensive amplitude. The cardinal rule of interpretation is that the entries in the legislative lists are not to be read in a narrow or restricted sense and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. The widest possible construction, according to the ordinary meaning of the words in the entry, must be put upon them. In

construing the words in a constitutional document conferring legislative power the most liberal construction should be put upon the words so that the same may have effect in widest amplitude. (See: *Raja Jagannath Baksh Singh v. The State of Uttar Pradesh* [1962] AIR 1563, *The State Of Rajasthan v. Shri G Chawla And Dr Pohumal* [1959] AIR 544 and *Elel Hotels And Investments Ltd v. Union Of India* 1990 AIR 1664). I had also discussed this area of the law in *Mohd Khairul Azam Abdul Aziz v. Menteri Pendidikan Malaysia & Anor* [2019] 6 MLRA 379. As observed by the Court of Appeal in *Ketua Pengarah Jabatan Alam Sekitar & Anor v. Kajing Tubek & Ors & Other Appeals* [1997] 1 MLRA 474:

> "It is also well settled that the phrase 'with respect to' appearing in art 74(1) and (2) of the Federal Constitution - the provision conferring legislative power upon the Federal and State Governments respectively - is an expression of wide import. As observed by Latham CJ in *Bank of New South Wales v. The Commonwealth* [1948] 76 CLR 1 at p 186, in relation to the identical phrase appearing in s 51 of the Australian Constitution which confers Federal legislative authority:
>
> A power to make law 'with respect to' a specific subject is as wide a legislative power as can be created. No form of words has been suggested which would give a wider power.
>
> The power conferred upon a Parliament by such words in an Imperial statute is plenary as wide as that of the Imperial Parliament itself: *R v. Burah* (1878) 3 App Cas 889; *Hodge v. R* [1883] 9 App Cas 117. But the power is plenary only with respect to the specified subject."

[51] Another equally important point to note is that the function of the entries in the Legislative Lists in the Ninth Schedule is not to confer powers of legislation, but merely to demarcate the fields in which legislative bodies operate. In *Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 2 MLRA 547, the Federal Court summarised the principles applicable to the interpretation of entries in the legislative lists as follows:

(i) The entries in the legislative lists do not confer legislative power. Rather, they are broad heads or fields of legislation to demarcate the respective areas in which Parliament and the State Legislature may operate;

(ii) The entries must be interpreted liberally with the widest amplitude, and not narrowly or restrictively. Each entry extends to all ancillary and subsidiary matters which can fairly and reasonably be said to be comprehended in it;

(iii) The rule of widest construction does not permit an entry to be interpreted so as to include matters with no rational connection to it or to override or render meaningless another entry;

(iv) In the event of apparent conflict or overlap between entries, the court should attempt to reconcile the entries by adopting a harmonious construction; and

(v) In interpreting a particular entry, the court should confine its decision to the concrete question arising from the case, without pronouncing a more exhaustive definition than is necessary.

[52] In the present appeals, Parliament is empowered by the FC to make law in respect of the creation of 'offences', which in my opinion is a broad head or field of legislation over which Parliament can operate. The word 'offence' is not defined in the FC and no definition appears in the Interpretation and General Clauses Ordinance 1948. The word 'offence' in the Code denotes a thing made punishable by the Code or any other law (s 40). The word is also defined in the CPC as any act or omission made punishable by any law (s 2). The word 'offence' is a general word of wide amplitude. Applying the principles applicable to the interpretation of the legislative lists that I have discussed above, the widest possible construction must be put upon the word 'offence'. In my opinion, Parliament's legislative power to create 'offence' includes the power to legislate on ancillary matters that can be fairly and reasonably be included in the entry 'offence'. Creation of offences serves no purpose in the administration of justice without punishment for its commission. So construed, there could be no doubt, to my mind, that the word 'offence' includes 'punishment'. 'Punishment' has rational connection to the subject of 'offence'. In my opinion, to prescribe measure of punishment is an integral part to legislate offence. Therefore, there can be no doubt that it is well within the realm of the Legislature's power to enact the impugned provisions. I have already discussed the decision of the High Court of Australia in *Palling* at [43] - [45]. As can be seen the important point that Barwick CJ is making is this: "it is beyond question that the Parliament can prescribe such penalty as it thinks fit for the offences, which it creates".

[53] Four other cases must be referred to. First, in *Hinds*, Lord Diplock explained the distribution of powers between the Legislature, Executive, and the Judiciary in respect of punishment for criminal offences at pp 225-226:

> In the field of punishment for criminal offences, the application of the basis principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power. The power conferred upon the Parliament to make law for the peace, order and good government of Jamaica enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law: see Constitution, Chapter III, s 20(1). The carrying out of the punishment where it involves a deprivation of personal liberty is a function of the executive power; and, subject to any restrictions imposed by a law, it lies within the power of the executive to regulate the conditions under which the punishment is carried out. **In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence** - as, for example,

> capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.
>
> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case.
>
> [Emphasis Added]

[54] The second case is *S v. Dodo* [2001] (5) BCLR 423 (CC), which is the judgment of the Constitutional Court of South Africa. This case supports my view that the prescription of measure of punishment for offences falls under the legislative power and not the judicial power. In that case, R was found guilty of raping and murdering a woman. Section 51(1) of the Criminal Law Amendment Act (No 105 of 1997) makes it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under s 51(3)(a), the court is satisfied that "substantial and compelling circumstances" exist which justify the imposition of a lesser sentence. The Eastern Cape High Court declared the section in question to be constitutionally invalid, because it was inconsistent with s 35(3)(c) of the South Africa Constitution, which guarantees to every accused person "a public trial before an ordinary court" and was also inconsistent with the separation of powers required by the Constitution. The Constitutional Court held, that the prescribing minimum sentence under s 51(1) of the Criminal Law Amendment Act 105 of 1997, is not inconsistent with the separation of power principle under the Constitution. It was held that the legislative branch of the Government branches must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect the society. In the words of the court:

> 22 ... When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the State play a functional role and must necessarily do so. No judicial punishment can take place unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the Legislature to determine what conduct should be criminalized and punished. Even here the separation is not complete, because this function of the Legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.
>
> 23. Both the Legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment ...

> 24. The executive and legislative branches of state have a very real interest in the severity of sentences. The executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal law, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.
>
> 25. **In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society**. The Legislature's objective of ensuring greater consistency in sentencing is also a legitimate aim and the Legislature must have the power to legislate in this area...
>
> [Emphasis Added]

[55] The third case is *Deaton v. The Attorney General and the Revenue Commissioners* [1963] IR 170. In that case, the Supreme Court of Ireland explained that it is important to distinguish between the judicial power and the legislative power on the punishment of offenders. The distinction was explained as follows at p 182:

> There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case ... The Legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts ...

[56] And finally, the Singapore case of *Mohammad Faizal Sabtu v. Public Prosecutor* [2012] 4 SLR 947 ("*Mohammad Faizal*") that supported the proposition that the power to prescribe punishment is an integral part of the legislative power to enact offences and that it is within the power of the Legislature to determine the measure and range of punishment. I have commented about this case in *JRI Resources*. In *Mohammad Faizal*, the accused that had previously been admitted into a Drug Rehabilitation Centre ('the Centre') twice was charged with a drug offence under the Misuse of Drugs Act ('MDA') for the consumption of morphine. The relevant section of the MDA provided that where someone is found guilty of a relevant drug-related offence and had two prior centre admissions this would trigger an enhanced punishment regime. In other words, courts are required to impose a fixed or mandatory minimum punishment. The central constitutional issue raised in this case was whether sentencing power was a judicial or legislative power. Chan CJ noted that it is important to know when executive or legislative power ends, and where judicial power begins, 'to separate one constitutional power from the other constitutional powers functionally'. Chan CJ noted that all common law courts, including Singapore, assumed that punishing offenders

was part of judicial power, which included passing a sentence and determining the measure of punishment to impose. However, there was little historical or doctrinal support for the proposition that sentencing power was essentially exclusively a judicial power, even if the long practice of courts exercising discretion in sentencing gave rise to this impression. Against this historical backdrop, it was found that Commonwealth and US courts have consistently held that the prescription of punishments, whether mandatory or discretionary in nature, falls within the legislative power and does not constitute derogation from the core of judicial power. After considering several authorities, Chan CJ held that it fell within the discretion of the Legislature to decide whether to confer broad sentencing discretion to courts and thus, the judicial discretion to determine sentences for offenders was a 'modern legislative development'. It was for Parliament to determine the measure and range of punishments, which involved social policy and value judgments. It was held that since the power to prescribe punishments for offences is part of the legislative power, no written law of general application, prescribing any kind of punishment for an offence, could trespass onto the judicial power. The learned CJ added at para [64] of his judgment, "The sentencing power is not inherent to the judicial power (except, perhaps, where it is ancillary to a particular judicial power, eg, to punish for contempt of court). Instead, the courts' power to punish is derived from legislation. The fact that judges have exercised the power to sentence offenders for such a long time reflects more the functional efficiency of this constitutional arrangement, rather than the principle of separation of powers".

[57] It can be seen from the foregoing analysis that the power to prescribe punishments is an integral part of the power to enact the offences for which the prescribed punishments are to apply. Thus the power conferred upon Parliament to create offences also enables it to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct. In the exercise of its legislative power, Parliament may lawfully prescribe a fixed punishment to be imposed by the courts upon the offender found guilty. On the other hand, the Judiciary having determined the criminal liability of an accused based on the law, has the duty to pass sentence according to law enacted by the Legislature.

[58] The key principles that may be extracted from all the above judgments are as follows:

(i) our Parliament has the legislative power to enact offences. This includes the power to prescribe the punishment for an offence;

(ii) the punishment prescribed by Parliament may be mandatory or discretionary, and may be fixed or within a stipulated range;

(iii) Parliament has the legislative power to prescribe the mandatory death penalty;

(iv) historically, the discretion to determine the measure of punishment is not an inherent or integral part of the judicial power;

(v) the judicial power of the courts is to impose sentence according to law in a particular case; and

(vi) a law of general application prescribing the punishment for an offence does not violate the separation of powers.

[59] It is at this point that I revert to learned counsel's contention that sentencing discretion is an integral part of judicial power. As we have seen at [33] above, to support the proposition that the measure of punishment is part of judicial power, heavy reliance was placed on *Dato' Yap Peng*. In particular, he relied on a passage of Zakaria Yatim J that I have reproduced at [33]. For convenience, I reproduce the passage here:

> In the context of criminal law, the court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty.

[60] I do not read the above observations by Zakaria Yatim J as stating a general principle that the measure of punishment is part of judicial power. It is important to read the judgment in its entirety. It is equally important to understand the context in which it was said. Reading it in its entirety and in its proper context, that passage refers to the court's power to pass sentence according to law pursuant to s 183 of the CPC against a convicted offender in a particular case. Section 183 provides that if the accused is convicted, the court shall pass sentence according to law. They do not in any way contradict the historical background of the sentencing function, and the distribution of power between the Legislature and the Judiciary in the realm of sentencing, as analysed above. Why is this so? This is because in the earlier part of his judgment Zakaria Yatim J cited with approval the judgment in *Yee Kim Seng* where Ajaib Singh said that in criminal trials, the High Court is empowered to pass sentence according to law and if the law prescribes a mandatory death sentence, the court has no choice but to pass that sentence. The contention of counsel was therefore premised on a mistaken reading of the judgment of Zakaria Yatim J. It is for that reason, in my opinion, the Court of Appeal in *Kok Wah Kuan v. PP (supra)* came to a flawed conclusion that the power to pass sentence and the power to determine the measure of punishment are both part of the judicial power. Incidentally, the Federal Court in *Kok Wah Kuan* had set aside the decision of the Court of Appeal.

[61] As to the Federal Court's decision of *Semenyih Jaya* that was relied heavily by counsel, he contended that the removal of the discretion to determine life and death for the punishment of the offence of drug trafficking amounts to an interference of the judicial function. I do not see any merit at all in this argument. Clearly, the decision in *Semenyih Jaya* is distinguishable. That case concerned how much compensation had to be paid to the landowner arising from an acquisition of its land. It is important to note that the Federal Court in *Semenyih Jaya* in dealing with the concept of the judicial power under the FC, struck down s 40D of the Land Acquisition Act 1960 because it provided

for the final decision on compensation for compulsory land acquisition to be determined not by the judge, but by the two assessors sitting with him in the High Court. In that case, it offends the doctrine of separation of power since the assessors decided on the determination of the compensation of the land acquisition and not the judge. This clearly is not the matter in the present case. In our case, the impugned provisions are not legislative usurpation of the judicial power. On the contrary, as seen earlier at [58], prescribing measure of punishment is the prerogative of Parliament. This must be distinguished from the court's power to impose sentence, which is the province of the courts as can be seen in s 183 of the CPC that provides if the accused is convicted, the court shall pass sentence according to law. No judicial punishment can take place unless the person to be punished has been found guilty and convicted by the court. Unlike the facts in *Semenyih Jaya*, the exercising of judicial power by virtue of the impugned provisions is still with the court. The power to impose death penalty is given to the court and no other alien body. For that reason, clearly the case of *Semenyih Jaya* does not advance the appellants' case very far.

[62] Earlier at [58], I have discussed the principles established by case law, and one of which is that Parliament has the legislative power to enact offences that includes the power to prescribe the punishment for an offence. But like all general rules, there are exceptions. It must be emphasised here that the legislative power of Parliament to prescribe punishments for criminal offences is not without limit. It is not the case that any legislation concerning the exercise of sentencing powers cannot constitute a breach of the separation of powers. (See: *Prabagaran Srivijayan v. PP* [2017] 1 SLR 173 at paras [59]-[62]).

[63] Accordingly, two broad limitations may be discerned. First, while Parliament may prescribe a punishment by enacting a law of general application, it cannot by law dictate the punishment to be imposed on individuals in a particular case. The facts of *Liyanage* offer an illustration. In that case, the appellants were convicted of offences relating to an abortive *coup d'etat*. The Jamaican Legislature enacted law directed towards the participants in the coup, altering the applicable penalties with retrospective effect by inserting a minimum punishment of 10 years' imprisonment and a forfeiture of all property. The Privy Council held the impugned law to be invalid. It was found that in pith and substance, the impugned statutes were a "legislative plan *ex post facto* to secure the conviction and enhance the punishment of those particular individuals" (at p 290). It was in this context that Lord Pearce held at pp 290-291:

> Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial.

[64] Second, whereas Parliament may decide whether to confer sentencing discretion upon the courts in respect of an offence, it cannot transfer such discretion to a body, which is not constituted as a court according to the constitution. This was held in *Hinds*, which concerned certain provisions in the Gun Court Act 1974. The impugned provisions prescribed a mandatory sentence of detention at hard labour during the Governor General's pleasure for specified offences, determinable on the advice of the review board. The review board established by the Act consisted of five members, of whom only the Chairman was a member of the Judiciary. The Privy Council held that the impugned provisions were invalid for violating the principle of separation of powers. The effect of the provisions was to transfer the discretion to determine the severity of punishment on an individual offender from the Judiciary to the review board, the majority of whose members were not qualified to exercise judicial powers. Lord Diplock held that at p 226:

> Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the Judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders.

[65] Turning to the impugned provisions in the present appeals, it cannot be denied that the provisions are one of general application, prescribing a fixed punishment for the offence of drugs trafficking and murder, the sections do not have the effect of prescribing the punishment to be imposed on particular individuals or directing the outcome of particular proceedings. Neither do they purport to confer the discretion as to the measure of punishment in any particular case to an executive or other body not constituted in accordance with Part IX of the FC.

[66] Adopting and applying the principles outlined above at [58], it is patently clear that the determination of the measure of punishment is not an integral part of the core judicial function of adjudicating guilt or innocence. On the contrary, it is an integral part of the legislative function of creating offences and prescribing the punishments; in other words, the prescription of the measure of punishment under the FC falls under the legislative power and not the judicial power. In the case of *Alma Nudo*, the Federal Court emphasised that based on the doctrine of separation of powers, each component must carry out their powers within their intended limits. Hence under the scheme of our FC, imposing sentence is a judicial power that must be exercised in accordance with the kind and range of punishments prescribed by the Legislature. It is for the court to carry out these powers within that limit as provided by the Federal law. The court, in exercising such powers will act according to the provision

as prescribed by the law. The court is only empowered to pass any sentence within the parameters of a prescribed sentence enacted by Parliament. The court cannot at its own pleasure impose any sentence as it wishes if the law does not permit it. The power of sentencing is statutory and the court cannot exceed or limit the power of sentencing in the name of exercising its judicial power.

[67] By prescribing a mandatory death penalty on the cases covered in these appeals, Parliament did not encroach into the power of the court as it is within their power to do so. This connotes a respect to the doctrine of separation of power and complements the independence and impartiality of the court. As such, the court as a guardian of the constitution is expected to give effect to law duly passed by Parliament.

[68] The impugned provisions are not inconsistent with art 121 of the FC. I therefore hold that the impugned provisions do not usurp judicial power nor violate the doctrine of separation of powers.

[69] At this juncture, it is convenient for me to deal with the proportionality point.

The Proportionality Point

[70] As was made clear during the hearing before us, the pivotal position that learned counsel for the appellants sought is this. By introducing the mandatory death penalty, the Legislature was acting disproportionately in violating the proportionality principle housed in the equal protection clause of cl (1) of art 8 of the FC, which reads:

> All persons are equal before the law and entitled to the equal protection of the law.

[71] According to learned counsel, the equal protection clause in cl (1) of art 8 houses the doctrine of proportionality. What is under attack in these appeals, he argued, is the proportionality of the legislative measure. Learned counsel submitted that s 302 of the Code is disproportionate as it does not take into account fact patterns which fall outside the five exceptions to murder, and yet do not warrant the death penalty. Further, he also argued that the Dangerous Drugs (Amendment) Act 1983 is similarly disproportionate, as there may be individual cases with mitigating factors, which warrant the imposition of lesser penalties. I disagree with these lines of arguments.

[72] At the outset, in view of the approach taken by the appellants, I think it will be helpful to begin the discussion by reiterating the basic principles governing the interpretation of cl (1) of art 8 of the FC. Clause (1) of art 8 guarantees that a person in one class should be treated the same as another person in the same class (see *Public Prosecutor v. Khong Teng Khen & Anor* [1976] 1 MLRA 16). The principles were clearly laid down by the Federal Court in the case of *Datuk*

Haji Harun Bin Haji Idris v. Public Prosecutor [1976] 1 MLRA 364. The relevant principles for our purpose are as follows:

(i) The equality provision is not absolute.

(ii) The equality provision is qualified. Specifically, discrimination is permitted within cl (5) of art 8 and within art 153.

(iii) Article itself envisages that there may be lawful discrimination based on classification.

(iv) The first question for consideration: is there classification? If there is and subject to other conditions, the law is upheld. If there is no classification, the law is struck down.

(v) Discriminatory law is good law if it is based on "reasonable" or "permissible" classification, provided that:

(a) the classification is founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group; and

(b) the differentia has a rational relation to the object sought to be achieved by the law in question. The classification may be founded on different bases such as geographical, or according to objects or occupations and the like. What is necessary is that there must be a nexus between the basis of classification and the object of the law in question.

(vi) In considering art 8, there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification, which the Legislature must have in making law operating differently as regards different groups of persons to give effect to its policy.

[73] I also think it is useful to refer to the comments made by the Privy Council in *Ong Ah Chuan* on this constitutional provision. One of the questions before the Privy Council was whether the mandatory sentence of death upon conviction for trafficking in more than 15g of diamorphine (heroin) was contrary to the Constitution of Singapore. The argument presented was that the mandatory nature of the sentence rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their blameworthiness. The Privy Council ruled that the mandatory death penalty for trafficking in 15g or more of diamorphine was not a violation of cl (1) of art 12 that provides that all persons are equal before the law and entitled to the equal protection of the law. As can be seen, art 12(1) of the Singapore Constitution is similar to our cl (1) of art 8 of the FC. In delivering the judgment of the Board, Lord Diplock said:

> All criminal law involves the classification of individuals for the purposes of punishment, since it affects those individuals only in relation to whom there exists a defined set of circumstances - the conduct and, where relevant, the state of mind that constitute the ingredients of an offence. Equality before the law and equal protection of the law require that like should be compared with like. What art 12(1) of the Constitution assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits law which require that some individuals within a single class should be treated by way of punishment more harshly than others; **it does not forbid 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**. The discrimination that the appellants challenge in the instant cases is discrimination between class and class: the imposition of a capital penalty upon that class of individuals who traffic in 15 grammes of heroin or more and the imposition of a penalty, severe though it may be, which is not capital upon that class of individuals who traffic in less than 15 grammes of heroin. **The dissimilarity in circumstances between the two classes of individuals lies in the quantity of the drug that was involved in the offence**.
>
> The questions whether this 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, are questions of social policy. Under the Constitution, which is based on the separation of powers, these are questions which it is the function of the Legislature to decide, not that of the Judiciary. Provided that the factor which the Legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law, there is no inconsistency with art 12(1) of the Constitution.
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> [Emphasis Added]

[74] Later in his judgment, Lord Diplock dealt with the argument on a "class to argument in the following manner:

> The social object of the Drugs Act is to prevent the growth of drug addiction in Singapore by stamping out the illicit drug trade and, in particular, the trade in those most dangerously addictive drugs, heroin and morphine. The social evil caused by trafficking which the Drugs Act seeks to prevent is broadly proportional to the quantity of addictive drugs brought on to the illicit market. There is nothing unreasonable in the Legislature's holding the view that an illicit dealer on the wholesale scale who operates near the apex of the distributive pyramid requires a stronger deterrent to his transactions and deserves more condign punishment than do dealers on a smaller scale who operate nearer the base of the pyramid. It is for the Legislature to determine in the light of the information that is available to it about the structure of the illicit drug trade in Singapore, and the way in which it is carried on, where the appropriate quantitative boundary lies between these two classes of dealers. No plausible reason has been advanced for suggesting that fixing a boundary at transactions which involve 15 grammes of heroin or more is so low as to be purely arbitrary.

> **Wherever a criminal law provides for a mandatory sentence for an offence there is a possibility that there may be considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory sentence must be passed**. In the case of murder, a crime that is often committed in the heat of passion, the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed. But art 12(1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt. In their Lordships' view there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. The minimum quantity that attracts the death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good samaritan out of the kindness of his heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of the law and is the long-established constitutional way of doing so in Singapore as in England.
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> [Emphasis Added]

[75] The views of the Board were cited and applied with approval by the Federal Court in *Lau Kee Ho*. In delivering the judgment of the Federal Court, Suffian LP stated "all criminal law involves the classification of individuals for the purposes of punishment. Equality before the law and equal protection of the law require that like should be compared with like. What our art 8(1) assures to the individual is the right to equal treatment with other individuals in similar circumstances. It prohibits law, which require that some individuals within a single class should be treated by way of punishment more harshly than others. Provided that the factor which Parliament adopts as constituting the dissimilarity in circumstances, which justifies dissimilarity in punitive treatment is not purely arbitrary but bears a reasonable relation to the object of the law, there is no inconsistency with art 8(1). Article (1) is concerned with equal punitive treatment for similar legal guilt, not with equal punitive, treatment for equal moral blameworthiness".

[76] Clause (1) of art 8 is not concerned with equal punitive treatment for equal moral blameworthiness but is concerned with equal punitive treatment for similar legal guilt. In matters relating to equal protection, the basis of approach is the identification of legislative purpose and a reasonable classification is one that includes all persons who are similarly placed with respect to the purpose of the law (see *Che Ani Itam v. Public Prosecutor* [1983] 1 MLRA 351 ("*Che Ani Itam*")).

[77] Subsequently, there has been further development in the way cl (1) of art 8 has been interpreted. I will begin by saying that our own Malaysian constitutional jurisprudence has developed so as to recognise that statutory provisions may be struck down on the grounds of proportionality. It appears that the basis of reading it into our law stems from cl (1) of art 8 of the FC

that provides that all persons are equal before the law and entitled to the equal protection of the law.

[78] In *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2006] 2 MLRA 396 ("*Dr Mohd Nasir bin Hashim*"), the Court of Appeal stated at para [8]:

> The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all-pervading provision of art 8(1). That article guarantees fairness of all forms of State action (see *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLRA 186). It must also bear in mind the principle of substantive proportionality that art 8(1) imports (see *Om Kumar v. Union of India* AIR 2000 SC 3689). This doctrine was most recently applied by this court in the judgment of my learned brother Mohd Ghazali JCA in *Menara Panglobal Sdn Bhd v. Arokianathan Sivapiragasam* [2006] 1 MELR 14; [2006] 1 MLRA 496. In other words, not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as the doctrine of rational nexus. (See *Malaysian Bar & Anor v. Government Of Malaysia* [1986] 1 MLRA 272). A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved.

[79] It must be noted that the case above concerned the application of para (a) of cl (2) of art 10 - not art 8. On art 10, the Federal Court agreed in *PP v. Azmi Sharom* [2015] 6 MLRA 99 that qualifying words can be read into the FC. This was done in the context of the words 'such restrictions' that was taken to mean 'such reasonable restrictions'. The Federal Court agreed that proportionality ought to be read into para (a) of cl (2) of art 10. Arifin Zakaria CJ held at paras 41-43:

> The Proportionality Test
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> This court in *Sivarasa Rasiah* also alluded to the proportionality test in determining whether a given law is consistent with the Constitution. This test emanates from the equality clause housed in art 8(1). The learned judge in *Sivarasa Rasiah* considered the statement of Gubbay CJ in *Nyambirai v. National Social Security Authority* [1996] 1 LRC 64, the leading authority on the matter, which was approved by the Privy Council in *Elloy de Freitas v. Permanent Secretary of Ministry of Agriculture*, *Fisheries, Lands and Housing & Ors* [1998] UKPC 30. In that case Lord Clyde stated:
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> In determining whether a limitation is arbitrary or excessive he (Gubbay CJ) said that the court would ask itself:
>
> Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.
>
> Their Lordships accept and adopt this threefold analysis of the relevant criteria.

> The proportionality principle/test was explained by the Court of Appeal in *Dr Mohd Nasir Hashim* in the passage we earlier quoted at para 33. In short, the learned judge said that the legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved.

[80] While Arifin Zakaria CJ applied the principle to art 10, he did affirmatively indicate that the basis for the proportionality principle actually stems from cl (1) of art 8. The rationale for saying that proportionality comes from cl (1) of art 8 is explained by Jagannadha Rao J in *Om Kumar v. Union of India* [2000] AIR SC 3689, a judgment of the Indian Supreme Court cited with approval in *Dr Mohd Nasir bin Hashim* as follows:

> So far as art 14 is concerned [equivalent to art 8(1)], the courts in India examined whether the classification was based on intelligible differentia and whether the differentia had a reasonable nexus with the object of the legislation. Obviously, when the court considered the question whether the classification was based on intelligible differentia, the courts were examining the validity of the differences and the adequacy of the differences. This is again nothing but the principle of proportionality.

[81] The Federal Court in *PP v. Gan Boon Aun* [2017] 3 MLRA 161 had to deal with the constitutional question whether s 122(1) of the Securities Industry Act 1983 violated cl (1) of art 5 and cl (1) of art 8 of the FC. The court was of the view that it did not. In respect of the doctrine of proportionality, the court said at para 48:

> (e) there is no prohibition against presumptions in principle, but the principle of proportionality must be observed. A balance must be struck between the general interest of the community and the protection of fundamental rights. The substance and effect of presumptions adverse to an accused must not be greater than is necessary and must be reasonable;
>
> (f) the test to be applied is whether the modification or limitation pursues a legitimate aim and whether it satisfies the principle of proportionality;

[82] The most recent pronouncement on the subject is the decision of the Federal Court in *Alma Nudo*. The provision struck down, as being disproportionate was s 37A of DDA on the grounds that the double presumption prescribed therein was disproportionate to the legislative objective it served.

[83] Coming back to the proportionality point that was raised before us, the learned Deputy Public Prosecutor ("DPP") in responding to the arguments of the appellants, amongst others, raised a very important point. The point the learned DPP wanted to make concerns, the cardinal principle of the presumption of constitutionality. Citing the case of *Ooi Kean Thong & Anor v. PP* [2006] 1 MLRA 565 and *Public Prosecutor v. Pung Chen Choon* [1994] 1

MLRA 507 ("*Pung Chen Choon*"), he argued that there is a presumption - perhaps even a strong presumption - of the constitutional validity of the impugned sections and so the burden of proof lies on the party seeking to establish the contrary. Learned DPP also referred to *Public Prosecutor v. Su Liang Yu* [1976] 1 MLRH 63, where Hashim Yeop Sani J in expressing his views on the issue of constitutionality of an impugned legislation came close to the heart of the matter, I believe, when he said "it must be presumed that the Legislature understands and correctly appreciates the need of its own people and that its law are directed to problems made manifest by experience and that its discriminations are based on adequate grounds provided however that while good faith and knowledge of the existing conditions on the part of the Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of holding that there must be some undisclosed and unknown reasons for the discrimination".

[84] In this regard, the point was also discussed by MP Jain in *Indian Constitutional Law (supra)* at p 1641:

> The courts generally lean towards the constitutionality of a statute upon the premise that a Legislature appreciates and understands the needs of the people, that it knows what is good or bad for them, that the law it enacts are directed to problems which are made manifest by experience, that the elected representatives in a Legislature enact law which they consider to be reasonable for the purposes for which these law are enacted and that a Legislature would not deliberately flout a constitutional safeguard or right. **The Legislature composed as it is of the elected representatives of the people is supposed to know and be aware of the needs of the people and what is good or bad for them and that a court cannot sit in judgment over the wisdom of the Legislature.** Therefore, usually, the presumption is in favour of the constitutionality of the statute, and the onus to prove that it is unconstitutional lies upon the person who challenges it.
>
> [Emphasis Added]

[85] On this point, there is an important observation made by Das CJ on behalf of the Supreme Court of India in *Shri Ram Krishna Dalmia & Ors v. Shri Justice SR Tendolkar & Ors* [1958] AIR SC 538 that was cited with approval by our Federal Court in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 1 MLRA 20. Augustine Paul JCA quoting Das CJ held as follows at para 47:

> SR Das CJ also listed some guidelines that must be borne in mind by the court when it is called upon to adjudge the constitutionality of any particular law attacked as discriminatory and violative of the equal protection of the law. They are:
>
> (1) A law may be constitutional even though it relates to a single individual if, on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by himself.

(2) There is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

(3) It must be presumed that the Legislature understands and correctly appreciates the needs of its own people, that its law are directed to problems made manifest by experience and that its discriminations are based on adequate grounds.

(4) The Legislature is free to recognise degrees of harm and may confine its restrictions to those cases where the need is deemed to be the clearest.

(5) In order to sustain the presumption of constitutionality, the court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation.

(6) While good faith and knowledge of the existing conditions on the part of a Legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

[86] Of the above guidelines that must be borne in mind by the court when it is called upon to adjudge the constitutionality of an impugned legislation, Nos 2, 3 and No 4 are of critical importance to our present discussion. This is sometimes described as judicial deference that the court should accord to the judgment of the democratically elected Legislature on matters that are placed within the domain of the Legislature. To be more precise, legislative decisions are entitled to an appropriate measure of deference and respect. It basically means courts attach proper weight to the views and policies adopted by Parliament. In this regard, Lord Bingham in *Reyes* explained the relative role of the Legislature and the courts. I have earlier referred to a passage of his judgment at [46] when I discussed the separation of powers point. There is a further point to be made about what was said by Lord Bingham. For convenience, I reproduce that passage in the context of the discussion about judicial deference shown by the courts to the will of the Legislature. This is what he said:

In a modern liberal democracy it is ordinarily the task of the democratically elected Legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract. The prevention of crime, often very serious crime, is a matter of acute concern in many countries around the world, and prescribing the bounds of punishment is an important task of those elected to represent the people. The ordinary task of the courts is to give full and fair effect to the penal law, which the Legislature has enacted. **This is sometimes described as deference shown by the courts to the will of the democratically elected Legislature**. But it is perhaps more

aptly described as the basic constitutional duty of the courts which, in relation to enacted law, is to interpret and apply it.

[Emphasis Added]

[87] In the same vein was an earlier observation made by Lord Bingham in *Brown v. Stott* [2001] 2 WLR 817 in the following terms at p 834:

Judicial recognition and assertion of the human rights defined in the Convention is not a substitute for the processes of democratic government but a complement to them. While a national court does not accord the margin of appreciation recognised by the European Court as a supra-national court, **it will give weight to the decisions of a representative Legislature and a democratic government within the discretionary area of judgment accorded to those bodies**...

[Emphasis Added]

[88] Lord Steyn shared this view at p 842:

National courts may accord to the decisions of national Legislatures some deference where the context justifies it.

[89] The following passage from *De Smith's Judicial Review* at paras 11-004 is instructive on this subject:

The question of the appropriate measure of deference, respect, restraint, latitude or discretionary area of judgment (to use some of the terms variously employed) which the courts should grant the primary decision-maker under this head of review is one of the most complex in all of public law and goes to the heart of the principle of the separation of powers. This is because there is often a fine line between assessment of the merits of the decision (evaluation of fact and policy) and the assessment of whether the principles of 'just administrative action' have been met. The former questions are normally matters for the primary decision-maker, but the latter are within the appropriate capacity of the courts to decide ...

[90] There are two points that must be stressed. First, it is an elementary point that judicial deference is not the same as non-justiciability. As we have seen earlier at [17], in accordance with the supremacy clause, courts have a vital role to play in determining that the law passed by Parliament is consistent with the FC; our courts have declared law to be invalid on the basis of inconsistency with an express and specific provision of the FC. And secondly, while it is one thing to say that the court will give weight to the decision of Parliament, it is quite another to say Parliament's decision may not be scrutinised by the court at all. In this context, I entirely agree with the observation of Justice McLaclin of the Supreme Court of Canada in *RJR MacDonald v. Att-Gen (Canada)* [1995] 3 SCR 199 on the limits of judicial deference:

Care must be taken not to extend the notion of deference too far... Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role:

> to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is so serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and nation is founded.

[91] In this context it is worth recalling the words of Lord Diplock, speaking at the Second Tun Abdul Razak Memorial Lecture ("*Judicial Control of Government*") *(supra)* where he expressed his reservations about judges reviewing decisions, which are laden with issues of policy:

> The control which the judges are enabled to exercise over the two other branches of government, the Legislature and the Executive, because of their exclusive function under the constitution to interpret the written and declare the unwritten law carries with it great responsibilities. In dealing with matters of public law, modesty I believe to be the most important of judicial virtues - the recognition that judges, however eminent in the law, are not the ultimate repositories of human wisdom in answering the kinds of social, economic and political questions with which parliament and administrators have to deal. Few of these questions are of a kind to which the best solution can be found by applying a judicial process or which the experience and training which a judge has acquired in the course of his career equips him to deal with better than other men... The judge above all must resist a temptation to turn sociologist, economist, and politician, and in interpreting the written law to restrict that range of choice so as to exclude solutions which give effect to policies of which he himself strongly disapproves...

[92] In my opinion, judicial deference does not apply inevitably with reference to any particular subject matter. All will depend upon the facts and circumstances of each case. Each case must be judged in its own context. The important question then arises: what are the circumstances in which the judgment of the democratically elected Legislature should attract or be liable to attract deference by court? I do not intend to be very prescriptive. In my opinion, controversial matters of policy involving differing views on the moral and social issues involved are one circumstance where Parliament is better placed to assess the needs of society and to make difficult choices between competing considerations. Courts should accept and recognise that Parliament is better placed to perform those functions. The Hong Kong Court of Final Appeal made this point very clear in *Lau Cheong v. HKSAR* [2002] 2 HKLRD 612. The issue before the court was whether the mandatory sentence of life imprisonment for murder infringed the constitutional guarantees against arbitrary punishment and unequal treatment. In upholding the validity of the mandatory punishment, the court held at paras [102] and [105]:

> 102. It is also established that when deciding constitutional issues, the context in which such issues arise may make it appropriate for the courts to give particular weight to the views and policies adopted by the Legislature. In *R v. DPP, ex p Kebilene* [2000] 2 AC 326, speaking of the Human Rights Act 1998

which took effect on 2 October 2000, incorporating the European Convention on Human Rights (ECHR), Lord Hope stated:

> In this area difficult choices may have to be made by the executive or the Legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the Judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention, (at 381B-C).

105. The context and circumstances of the present case render this approach relevant and justify the courts giving proper weight to the decision of the Legislature. As is clear from the legislative history of the mandatory life sentence provisions, the question of the appropriate punishment for what society regards, as the most serious crime is a controversial matter of policy involving differing views on the moral and social issues involved. The Legislature has to make a difficult collective judgment taking into account the rights of individuals as well as the interests of society. It has to strike a balance bearing in mind the conditions and needs of the society it serves, including its culture and traditions and the need to maintain public confidence in the criminal justice system. As Lord Woolf pointed out in *Attorney General v. Lee Kwong Kut* [1993] AC 951:

> In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the Legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the Legislature (at 975 C-D).

[Emphasis Added]

[93] The Singapore Court of Appeal echoed these sentiments in the case of *Yong Vui Kong v. PP* [2010] 3 SLR 489 ("*Yong Vui Kong*"), Chan Sek Keong CJ observed at para [49]:

> With regard to the offence of drug trafficking, what is an appropriate threshold of culpability for imposing the MDP is, in our view, really a matter of policy, and it is for Parliament to decide, having regard to public interest requirements, how the scale of punishment ought to be calibrated. This is par excellence a policy issue for the Legislature and/or the Executive, and not a judicial issue for the Judiciary.

[94] The presumption of constitutionality exists because Parliament is deemed better placed than the courts to determine social policy. Parliamentarians are democratically elected and represent the will of the people. This point was also aptly made by Lord Reed in his speech delivered on the occasion of the 32nd Sultan Azlan Shah Law Lecture delivered on 22 November 2018. Lord Reed said at pp 13-15:

> In politics, as in diplomacy, evasion and ambiguity can be constructive, and may be necessary to achieve a consensus. **Politicians typically defend their decisions on the basis of their moral convictions or their views of social or economic policy. Their decisions are accepted as legitimate because of the government's democratic mandate**.
>
> The courts, on the other hand, are responsible for the resolution of disputes over the application or interpretation of the law. That function is reflected in the recruitment of the Judiciary from experienced lawyers or teachers of law. Judicial decisions are based on evidence and arguments presented in open court by the parties to the dispute. Judgments are designed to set out the reasoning of the judges in unambiguous terms, with disagreement between them resulting, in common law systems, in dissent rather than compromise. It would be incompatible with the function of the courts for their decisions to be influenced by the media, pressure groups or public opinion. Judges are experts in the analysis and application of legal rules and principles, and in the interpretation of legal texts. Their independence from the world of politics enables them to determine the meaning of those rules and texts by professional methods, unaffected by political programmes or the necessity of winning elections. That is what allows them, when a constitutional conflict arises, to give effect to the constitution as they construe it as independent and expert interpreters, rather than as one or another group of politicians might wish it to be construed.
>
> [Emphasis Added]

[95] Indeed, controversial matters of policy involving differing views on the moral and social issues involved are inherently matters for determination by the elected Legislature rather than the court. This issue had been considered in the recent case of *R (Nicklinson) v. Ministry of Justice* [2015] AC 657 ("*R (Nicklinson*")). The UK Supreme Court had to deal with the issue concerning assisted suicide for terminally ill patients. It was one of the most sensitive and controversial moral issues in UK at that time. The Strasbourg court had previously held that the whole issue was culturally and politically too sensitive to permit of a single pan-European answer. Each Convention State would have to decide it in accordance with its own values. The essential issue for the Supreme Court was 'who should give Britain's answer': Parliament or the courts. Parliament had already given Britain's answer. The Suicide Act 1961 says that assisting someone to kill himself is a crime. Parliament has considered proposals to change the law on a number of occasions, but it has always decided against it. The Supreme Court expressed a range of views. Four of the nine judges of the Supreme Court (Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Reed and Lord Hughes JJSC) decided that whether and to what extent assisted suicide should be lawful, and whether the risks to vulnerable people could be mitigated, is inherently a matter for determination by the elected Legislature rather than the court. They decided that the whole issue should be left to Parliament. In his judgment, Lord Sumption JSC explained that there are three main reasons why the matter was entirely for Parliament:

Parliament or the courts?

230. The Human Rights Convention represents an obligation of the United Kingdom. In a matter, which lies within the margin of appreciation of the United Kingdom, the Convention is not concerned with the constitutional distribution of the relevant decision-making powers. The United Kingdom may make choices within the margin of appreciation allowed to it by the Convention through whichever is its appropriate constitutional organ. That will depend on its own principles of constitutional law. In *re G (Adoption: Unmarried Couple)* [2009] AC 173, the House of Lords accepted that where questions of social policy were within the United Kingdom's margin of appreciation and admitted of more than one rational choice, that choice would ordinarily be a matter for Parliament, but considered that even in the most delicate areas of social policy, this would not always be so. They held that the rule in question, namely the ineligibility of unmarried couples to adopt children, was irrational and unjustifiably discriminatory because it erected a reasonable generalisation (that children were better brought up by married couples) into a universal rule of eligibility preventing unmarried couples from even being considered. It therefore contravened art 8 and 14 of the Convention: see paras 16-20, per Lord Hoffmann; para 53, Per Lord Hope; paras 129-130, 143-144, per Lord Mance. Doubtless, where there is only one rational choice the courts must make it, but the converse is not true. Where there is more than one rational choice the question may or may not be for Parliament, depending on the nature of the issue. Is it essentially legislative in nature? Does it by its nature require a democratic mandate? The question whether relaxing or qualifying the current absolute prohibition on assisted suicide would involve unacceptable risks to vulnerable people is in my view a classic example of the kind of issue which should be decided by Parliament. There are, I think, three main reasons. **The first is that, as I have suggested, the issue involves a choice between two fundamental but mutually inconsistent moral values, upon which there is at present no consensus in our society. Such choices are inherently legislative in nature. The decision cannot fail to be strongly influenced by the decision-makers' personal opinions about the moral case for assisted suicide. This is entirely appropriate if the decision-makers are those who represent the community at large. It is not appropriate for professional judges. The imposition of their personal opinions on matters of this kind would lack all constitutional legitimacy**.

231. **Secondly, Parliament has made the relevant choice**. It passed the Suicide Act in 1961, and as recently as 2009 amended s 2 without altering the principle. In recent years there have been a number of bills to decriminalise assistance to suicide, at least in part, but none has been passed into law. Lord Joffe introduced two bills on the House of Lords in 204 and 2005. The 2005 bill went to a second reading in May 2006, but failed at that stage. Lord Falconer moved an amendment to the Coroners and Justice Bill 2009 to permit assistance to a person wishing to travel to a country where assisted suicide is legal. The amendment also failed. The Assisted Dying Bill, sponsored by Lord Falconer, is currently before the House of Lords. **In addition to these specific legislative proposals, the issue of assisted suicide has been the subject of high-profile public debate for many years and has been considered on at least three occasions since 2000 by House of Lords Select Committees**. Sometimes, parliamentary inaction amounts to a decision not to act. But this

> is not even an issue on which Parliament has been inactive. **So far, there has simply not been enough parliamentary support for a change in the law. The reasons why this is so are irrelevant. That is the current position of the representative body in our constitution**. As Lord Bingham observed in *R (Countryside Alliance) v. Attorney General* [2008] AC 719, para 45, "The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament." *cf AXA General Insurance Ltd v. HM Advocate* [2012] 1 AC 868, para 49, per Lord Hope.
>
> 232. **Third, the parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. The Legislature has access to a fuller range of expert judgment and experience than forensic litigation can possibly provide**. It is better able to take account of the interests of groups not represented or not sufficiently represented before the court in resolving what is surely a classic "polycentric problem". But, perhaps critically in a case like this where firm factual conclusions are elusive, Parliament can legitimately act on an instinctive judgment about what the facts are likely to be in a case where the evidence is inconclusive or slight: see *R (Sinclair Collis Ltd) v. Secretary of State for Health* [2012] QB 394, especially, at para 239 (Lord Neuberger of Abbotsbury MR), and *Bank Mellat v. HM Treasury (No 2)* [2014] AC 700, 795-796, paras 93-94, per Lord Reed. Indeed, it can do so in a case where the truth is inherently unknowable, as Lord Bingham thought it was in *R (Countryside Alliance) v. Attorney General* [2008] AC 719, para 42.
>
> [Emphasis Added]

[96] With respect, I fully agree with the views of Lord Sumption that generally, matters concerning sensitive and controversial moral and social issues are inherently legislative questions, calling for the representatives of the general body of citizens to decide on them. As he observed, the parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. His opinion can be viewed as a case in which the court attaches weight to the judgment of the democratically elected Legislature.

[97] I am mindful that Malaysia's jurisprudential position can be contrasted with that of the United Kingdom. Unlike the United Kingdom, in Malaysia it is the FC, not Parliament, which is supreme. As stated by Suffian LP in delivering the judgment of the Federal Court in *Ah Thian*, "the doctrine of the supremacy of Parliament does not apply in Malaysia". But that difference is not significant in the context of our present discussion. We are concerned here, as in the case of *R (Nicklinson)*, largely about the constitutional role of courts and the Legislature and the whole purpose of the judicial process. The supremacy of Parliament in the United Kingdom was not a factor that was taken into consideration by Lord Sumption in deciding that the whole issue should be left to Parliament. His analysis is therefore of considerable importance and relevant to our case.

[98] Coming back to our present appeals, a key point to note is that the matter we have to deal with concerns the mandatory death penalty, which is one of the most sensitive and controversial social issues of our time on which there is no consensus and our society is divided about this. It cannot be denied that it relates to the most delicate area of social policy.

[99] One essential point needs to be made here. Based on my earlier analysis at [70] - [74], the mandatory death penalty satisfies the test of reasonable classification, and hence is not unconstitutional *vis-a-vis* cl (1) of art 8 of the FC. The enhanced mandatory death penalty for the offences of drugs trafficking and murder is an intelligible differentia that bears a rational relation to a valid social object. There is no discrimination against the appellants as the impugned provisions apply to the class of persons who offend the provisions that relate to drug trafficking under the DDA and murder under the Code.

[100] Now as noted earlier at [11] and [12] prior to its amendment in 1983, the DDA gave the court discretion on the issue of sentence by permitting an alternative between life imprisonment and death. However, pursuant to the Dangerous Drugs (Amendment) Act 1983, by enacting the mandatory death penalty, Parliament changed its policy for the reason that the drugs problem assumed alarming proportions. The objective and intention of the law was stated by the Deputy Prime Minister at that time when tabling the Bill (see Dewan Rakyat Hansard dated 24 March 1983), which can be summarised as follows:

(i) there was no uniformity in sentencing under the previous law, when judges had the discretion, leading to haphazard application of the discretion;

(ii) drug trafficking was on the increase, causing social ills. Previous sentence was not a deterrent; and

(iii) it had now become a threat to national security and resilience.

[101] Of even greater significance to our discussion is that the Dewan Rakyat Hansard dated 24 March 1983 highlighted the debate among the legislators about the difficult choices they have to make arising out of the moral and social dilemma. The debate underlined that the Legislature had to make a difficult collective judgment taking into account the rights of individuals as well as the interests of the nation. It involved a most problematic area of social policy. As is clear from the parliamentary debates, the question of appropriate sentence for drug traffickers is a controversial social policy matter. From the debate, it can be deduced that Parliament at that time adopted a zero-tolerance policy against the offence of drug trafficking and the amendments were introduced to safeguard national interest. The mandatory death penalty would serve to deter drug traffickers from causing greater harm and committing other grave offences that would endanger the public. That was the decision of the Legislature in introducing the mandatory death sentence. Parliament decided

that the mandatory death penalty was proportionate and appropriate for the punishment of an offence for which it regarded as the cause of social ills and a threat to national security and resilience.

[102] Interestingly in 2012, Professor Roger Hood, Professor Emeritus of Criminology at the University of Oxford, together with "The Death Penalty Project" in London and Bar Council of Malaysia carried out a useful nationwide public opinion survey with Malaysians on the mandatory death sentence in Malaysia for the three offences, ie murder, drug trafficking and discharging of a firearm with intent to kill or harm. The findings were presented in a report entitled '*The Death Penalty in Malaysia: Public opinion on the mandatory death penalty for drug trafficking, murder and firearms offences*'. This report was brought to our attention by learned counsel for the appellants in his written submissions. Based on this survey, learned counsel submitted that there was a shift in public opinion in relation to the mandatory death sentence. He added that the survey showed that the majority of Malaysians do not favour a mandatory death sentence. Unsurprisingly, this report, among others, disclosed that while 80% favored the death penalty, when asked about a mandatory sentence of death the number fell to 56% for murder, between 25% and 44% for drug trafficking (depending on the drug), and 45% for firearms offences. My reading of the report as a whole is that the question as to whether to abolish or not to abolish the mandatory death penalty for the offences covered by the present appeals remains a controversial and divisive social issue in the context of the Malaysian society.

[103] A significant event took place in 2017. In December of that year, the Dangerous Drugs (Amendment) 2017 Act was passed by Parliament. This is a new legislative framework on the mandatory death sentence introduced by Parliament. This partially abolished the death penalty as a mandatory punishment for drug trafficking. By this new initiative, in drug trafficking offences, courts can now exercise a limited amount of discretion in sentencing in the presence of specific circumstances, namely, the limited involvement of the accused in the illicit activity and the accused's substantial contribution to disrupting drug trafficking. These are signs of a shift in the legislative policy of Parliament. This is an incremental policy change by Parliament as regards the mandatory death sentence. But the most important point to note, however, is this: the amended s 39B *vide* the Dangerous Drugs (Amendment) 2017 still mandatorily prescribes the death sentence. A perusal of the Hansard indicates that Parliament, in the exercise of its democratic power remains of the view that the mandatory death penalty is necessary to curb the social ills caused by the trafficking of dangerous drugs. Drugs trafficking is deeply rooted in social problems. The Minister when proposing a Bill amending s 39B of the DDA to its present form (see Hansard, Dewan Rakyat per Dato' Sri Azalina Othman, 23 March 2017, at pp 59-60) said something very significant, "Tuan Yang di-Pertua, saya ingin menegaskan di sini walaupun itu adalah keputusan Jemaah Menteri, tetapi hukuman mati mandatori tidak boleh dilihat tidak berfungsi sebagai satu hukuman pencegahan". In the wide-ranging debate that had

taken place, different views had been expressed, including the majority view that the mandatory death penalty should not only be retained, but should be carried into effect. Parliament has made the choice. As far as the Legislature's current policy is concerned, the seriousness of trafficking of drug cases that caused harm to society is the same today as it was 40 years ago when the mandatory death sentence was introduced by Parliament. This has largely remained constant as far as the policy of Parliament is concerned in dealing with drug trafficking. So far, it appears, there has basically not been enough parliamentary backing for the abolition of the mandatory death sentence. The reasons why this is so are wholly immaterial for our purpose. But there is nothing to suggest that the policy of Parliament will not be subject to change in the future. One can conceive of a situation that eventually Parliament will abolish the mandatory death penalty.

[104] It is against the above background, I come to the conclusion that in the context of the Malaysian society, Parliament as the duly elected Legislature is the appropriate body to decide the appropriate measure of punishment for drug traffickers and murderers for what society regards as the most serious crimes. It is a controversial matter of policy involving differing views on the moral and social issues involved which by its nature is more suitable for determination by Parliament than by the courts. If a judge were to decide that the mandatory death penalty is not proportionate, it would entail the judge enacting his or her personal views of what is just and desirable into legislation. As observed by Lord Clarke in *R (Nicklinson)* at para 293 "judges should not express their own personal views on the moral questions which arise in deciding what is the best way forward as a matter of policy". As also observed by Justice Iacobucci in the Canadian Supreme Court case of *Vriend v. Alberta* [1998] 1 SCR 493 "In carrying out their duties, courts are not to second-guess Legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches". The imposition of the personal opinion of judges in matters of this kind would lack all constitutional legitimacy. This is an inherently legislative question, calling for lawmakers to resolve in Parliament, not for judges. Change whether desirable or not, or what the law ought to be, must be for Parliament to make. In *R (Nicklinson)*, Lord Reed JSC also emphasised the need for caution when he said at para 297, which I respectfully agree:

> 297. That issue raises highly controversial questions of social policy and, in the view of many, moral and religious questions on which there is no consensus. The nature of the issue therefore requires Parliament to be allowed a wide margin of judgment: the considered assessment of an issue of that nature, by an institution, which is representative of the citizens of this country and democratically accountable to them, should normally be respected. That is not to say that the courts lack jurisdiction to determine the question: on the contrary, as I have explained. But it means that the courts should attach very considerable weight to Parliament's assessment.

[105] Undeniably, there are always important elements of social policy and moral value judgment involved in prescribing punishment for a particular criminal offence. This is really what concerns us in the present appeals. In the context of our case, the issue pertaining to the mandatory death sentence is sensitive to the people's most fundamental collective moral and social values. This gives rise to a fundamental question: whether it is inherently and essentially a legislative matter for determination by the elected Legislature rather than the court? Does it by its nature require a democratic mandate? In my opinion, the courts should leave the matter to Parliament to decide whether in the light of societal value and conditions to do away with the mandatory death sentence. As observed by Lord Hope in *AXA General Insurance Ltd v. The Lord Advocate & Others* [2011] UKSC 46, at para 49, "While the judges, who are not elected, are best placed to protect the rights of the individual, including those who are ignored or despised by the majority, the elected members of a Legislature of this kind are best placed to judge what is in the country's best interests as a whole".

[106] The point I am making is that in cases such as the present case, the social and moral features of the issue make Parliament the proper organ of the Government for deciding it rather than the courts. Commenting on the balance of powers among the three branches of Government, J Clifford Wallace, Judge US Court of Appeals in an articl entitled "*The Jurisprudence of Judicial Restraint: A Return to the Moorings*" in "*Judges on Judging*" (2nd edn), collected and edited by David O'Brien [CQ PRESS] observed at p 152 that "when courts become engaged in social legislation, almost inevitably voters, legislators, and other elected officials will conclude that the activities of judges should be closely monitored. If judges act like legislators, it follows that judges should be elected like legislators. This is counterproductive. The touchstone of an independent Federal Judiciary has been its removal from the political process. Even if this removal has sometimes been less than complete, it is an ideal-worthy of support and one that has had valuable effects. The constitutional trade-off for independence is that judges must restrain themselves from the areas reserved to the other separate branches".

[107] The court is not primarily in the business of articulating social or moral policy, which I see it as the domain of the Legislature. As observed by Chief Justice Sundaresh Menon, Supreme Court of Singapore in a speech entitled Executive Power: Rethinking The Modalities of Control, delivered on 1 November 2018 at Duke University, North Carolina:

> The more the Judiciary is resorted to for the resolution of matters of searing social controversy, the more the line between legal and political questions will be blurred and the more likely citizens will begin to see the courts as a forum for the continuation of politics by other means.

[108] Policies determination often requires surveys, investigation and reports conducted where the findings are on a macro scale. The Legislature has the facilities and resources to undertake surveys, investigation and reports

conducted where the findings are on a macro scale, which are useful tools in determining social policy. That's why the Legislature is better placed than the courts to make difficult choices between competing considerations before deciding to prescribe the mandatory death sentence.

[109] At this point, it is relevant to note that in respect of appellant Pubalan Peremal, the petition of appeal added a political dimension to the issue when it averred "the ... Government at the material time has in their manifesto promised to reform all oppressive law, which includes the removal of all mandatory death sentences currently in the statute books. The removal of the mandatory death sentence under s 302 of the Penal Code by Parliament would be a clear reflection of prevailing societal standards; the introduction of this reform would be a recognition by Parliamentarians that the death penalty is a disproportionate penalty if applied automatically in every case".

[110] What's more in his 'speaking note' that was tendered in court, learned counsel raised an issue of shift of political opinion. In it, he said, 'the most recent development in the shift of political and public opinion is reflected in the acceptance by the majority of the Malaysian population in the manifesto by the party during the recent 14th General Election that they would revoke or abolish "mandatory death by hanging in all Acts" which is a clear repudiation of such oppressive law. Now, even the Government is contemplating to abolish the death penalty law as announced by the Minister of Law on 11 October 2018'. To this, I want to say that courts must recognise the risks to judicial independence and the integrity of the judicial process that arises when courts are invited or required to address any political issues, which should not be for them to decide. In this way, we are protected from political controversy. As Lord Bingham said in *R (Countryside Alliance) v. Attorney General* [2007] UKHL 52, para 45: "The democratic process is liable to be subverted if, on a question of moral and political judgments, opponents of the Act achieve through the courts what they could not achieve in Parliament".

[111] In the context of the present appeals, I will add that the doctrine of separation of powers is liable to be subverted and rule of law undermined if, on a question of social and political judgment, opponents of the mandatory death penalty achieve through the courts what they could not achieve in Parliament. As a co-equal branch of Government the Judiciary must remain impartial and non-political in order to do its job.

[112] As a country based on the rule of law and the separation of powers, we should respect that whether it is desirable or not to abolish the mandatory death penalty, it must be for Parliament to make. As things stand now, the crucial point here is our Parliament has decided the punishment for trafficking of drugs should remain as it is. It follows that, in my opinion, as the matter is an inherently legislative issue for Parliament to decide, it would be inappropriate for the courts now to declare the mandatory death sentence incompatible with art 8 on the basis that Parliament violated the proportionality principle. Doing

so would tantamount to challenging the policies underlying Parliament's decision to legislate the mandatory death sentence penalty. Although we are the guardians of the constitution, we must always recognise the proper constitutional role of courts. In cases such as the present case, we must avoid usurping the policy-making role of Parliament, which is a democratically elected institution. As I have stated at [28] above that like all legal powers, judicial power has constitutional limits. It is not our role to formulate policy. A court cannot substitute its view for the legislative policy decided by Parliament. In *Lim Meng Suang v. Attorney-General* [2015] 1 SLR 26 (CA), a case concerning the constitutionality of a criminal provision against acts of "gross indecency" between male persons, the court said, "it is impermissible for the courts to arrogate to themselves legislative powers - to become, in other words, 'mini-Legislatures'".

[113] We cherish the doctrine of separation of powers. All three branches of the Government must respect each other's jurisdiction. The Judiciary must respect the prerogatives of Parliament. Judicial decision, which undermines Parliament's lawful authority, would turn the rule of law on its head. The courts have the duty to uphold the FC. Judges must restrain themselves and should resist the temptations to encroach into the areas reserved to the other separate branches. It is important to keep our FC balanced.

[114] On the proportionality point, I conclude that whether or not the mandatory death penalty is a disproportionate response to the cases covered by these appeals involves controversial issues of legislative policy and social values, which by its nature is more suitable for determination by Parliament than by the courts. It would therefore be wholly inappropriate for the courts to declare the mandatory death sentence inconsistent with art 8 on the basis that Parliament violated the proportionality principle.

[115] In the context of the present appeals, it is appropriate for the courts to give particular weight to the views and policies adopted by Parliament. Therefore, it is only right that the decision and the initiative to change or to abolish the mandatory death penalty should come from Parliament. A change, whether desirable or not, must be for Parliament to make.

[116] This brings me to the fair trial point.

The Fair Trial Point

[117] Learned counsel argued that the mandatory death sentence violated the appellants' right to a fair trial under cl (1) of art 5 of the FC. In contending that the mandatory death sentence is unconstitutional and unlawful as it breaches that provision, the arguments raised by learned counsel were three-pronged. First, he argued that the appellants were deprived of the right to mitigation. Secondly, he contended that the mandatory death penalty was imposed arbitrarily. And thirdly, he argued that a mandatory sentence of death is cruel and inhuman.

[118] In order to understand the points raised, it is necessary to appreciate the context of those arguments in the light of the specific provision of the FC. We are concerned here with cl (1) of art 5 that provides "No person shall be deprived of his life or personal liberty save in accordance with law". The right to a fair trial is a constitutionally guaranteed right (see *Shamim Reza Abdul Samad v. PP* [2009] 2 MLRA 677). When the principle is applied to a criminal case, what it means is that an accused has a constitutionally guaranteed right to receive a fair trial within a reasonable time by an impartial tribunal established by law (see *Public Prosecutor v. Choo Chuan Wang* [1987] 2 MLRH 68). Whether there has been a fair trial by an impartial tribunal depends on the facts of each case (see *Lee Kwan Woh v. PP* [2009] 2 MLRA 286).

[119] In dealing with cl (1) of art 5, the first point that we must bear in mind with respect to its construction is that fundamental liberty is not absolute. As stated by HE Groves in *The Constitution of Malaysia - Its Development*: 1957-1977 at pp 27-28:

> An examination of the text of each Article suggests that the makers of the Constitution regarded some liberties as more fundamental than others. The Fundamental Liberties can be placed in two distinct categories: (1) Those that are absolute in the terms of the constitutional provision, and (2) Those that are limited by the terms of the constitutional grant itself.

[120] Clause (1) of art 5 clearly is a category of a fundamental liberty, which falls within the second category in that it is not absolute as it is drafted that no person shall be deprived of his life or personal liberties save in accordance with law. In other words, the constitutional rights as guaranteed under that articl can be taken away in accordance with law. (See: *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 1 MLRA 511 ("*Sugumar Balakrishnan*"), *Government Of Malaysia & Anor v. Selangor Pilot Association* [1977] 1 MLRA 258 ("*Selangor Pilot Association*"), *S Kulasingam & Anor v. Commissioner Land Federal Territory & Ors* [1981] 1 MLRA 184 and *Bird Dominic Jude v. PP* [2014] 4 MLRA 1 ("*Bird Dominic Jude*")).

[121] Against the above principles of law, I will now look in turn at these three prongs.

The Fair Trial Point: Right To Mitigation

[122] Taking the first prong, as I understand learned counsel's argument, the mandatory death penalty violated the appellants' right to a fair trial because the effect of the mandatory death sentence is that the appellants were deprived of the right to mitigation. He argued that the right to be heard in mitigation is an integral part of the right to a fair trial. It was argued, the appellants were prevented from making any meaningful representations to the court on the appropriate sentence on the appropriate punishment.

[123] Now, all criminal trials should be conducted in accordance with the provisions of the CPC (see s 3). It is clear from the provisions in Chapter XX

of the CPC that deals with the procedure in "Trials Before the High Court" in s 178 to s 183 that sentencing process takes place after the conclusion of a trial that is upon the conviction of an accused person. Section 182A provides for the procedure at the conclusion of a criminal trial. If the court finds that the prosecution has proved its case beyond reasonable doubt, the court shall find the accused guilty and he may be convicted thereon (see s 182A(2)). Notably, the provision that immediately follows s 182A is s 183, which expressly provides that "if the accused is convicted, the court shall pass sentence according to law".

[124] Sentencing is the final process in a criminal trial. A sentence is a final order disposing of a criminal case in court. It involves punishment, which is meted out by court to punish offenders. Those who are guilty will receive the prescribed punishment for their crime. Before the court passes sentence, a few steps are usually taken. Generally, the law does not fix a mandatory sentence for a certain offence. A maximum sentence is prescribed for the offence and the court is left to decide the appropriate sentence within the ambit of the punishment provision. In such a case, the accused will then makes a plea of mitigation, which is a submission to move the court to pass a lenient sentence. It bears noting that under the scheme of Chapter XX of CPC that governs the procedure of criminal trials in the High Court, there is no statutory requirement for mitigating factors to be considered by the court before it passes sentence according to law. Although there is no provision in the CPC for a plea in mitigation in High Court trials, nevertheless as a matter of fact, in practice it is quite common to allow a plea in mitigation before the court imposes sentence. After the accused has submitted the mitigation plea, the prosecution will submit the aggravating factors for the purpose of pressing for a heavy sentence.

[125] In passing sentence, the court takes into consideration the mitigating and aggravating factors in order to ensure that the sentence is in accordance with the law. Passing a sentence according to law means the sentence imposed must not only be within the ambit of the sentence period stipulated but also assessed and passed according to established judicial principles (see *Jafa Daud* at p 316 of the judgment of Mohamed Azmi J).

[126] It can be seen from the foregoing discussion that in a case where a law does not fix a mandatory sentence for a particular crime, a judge is given a broad discretion to determine the appropriate sentence for an offender. Both the defence and the prosecution assist the court by forwarding submissions pertaining to sentence. In such circumstances, a mitigation plea is a constituent element of the sentencing process (see *Zaidon Shariff v. PP* [1996] 3 MLRH 34). A plea in mitigation must be considered together with the aggravating factors so as to strike a balance in the scale of justice (see: *Raja Izzuddin Shah v. Public Prosecutor* [1978] 1 MLRH 248 and *Fu Foo Tong v. PP* [1995] 1 SLR 448).

[127] However, one crucial point must be highlighted here. Earlier, at [58] I have expressed my opinion that Parliament has the legislative power to

prescribe the punishment for an offence, including prescribing the mandatory death penalty. In a case where the death penalty is the only punishment entrenched in the legislation, the mitigation plea plays no role in the sentencing process because of the automatic nature of the mandatory death penalty prescribed thereunder. As correctly observed by *Mallal's Criminal Procedure*, 6th edn (2001), at footnote 4 para 9279, "Note however that where the accused is found guilty of an offence punishable with the mandatory death sentence, a plea in mitigation would serve no purpose".

[128] In the context of our present appeals, the punishment prescribed by s 39B(2) of DDA and s 302 of the PC is as follows:

> Trafficking in dangerous drugs
>
> 39B. (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia - (a) traffic in a dangerous drug; (b) offer to traffic in a dangerous drug; or (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.
>
> Punishment for murder
>
> 302. Whoever commits murder shall be punished with death.

[129] The wording of the impugned provisions is clear and unambiguous and "shall" as used therein has an imperative sense. That is not disputed. Once the person to be punished has been convicted by the court, there is no power on the part of the court to impose a different or lesser sentence. Where the Legislature has by proper exercise of its powers prescribed that for drug trafficking and murder offences, the offenders shall be punished with a mandatory death penalty, the duty of the court is to impose the legislatively prescribed punishment on offenders. The court has no choice but to impose the mandatory sentence provided by law as enacted by Parliament. There is no room to make the mandatory principle discretionary; otherwise it would amount to usurpation of constitutional powers of Parliament. The fact that the court has no alternative but to pass that sentence does not make the mandatory sentence unconstitutional. There is no denial of the equal protection of the law to the offenders. In this way, there is no denial of the right to a fair trial in a case of an offender that is deprived of a plea of mitigation before the court passes the mandatory death sentence.

[130] It will not be out of place, however, to mention here that in order to mitigate the mandatory sentence of death, there is provision for review by the Pardons Board and in suitable cases, death sentences are commuted to life imprisonment and even to lesser terms of imprisonment (see: *Yee Kim Seng*). In such a case, the factors advanced during sentencing, however, may be relevant

for the purpose of pardon. The power of pardon provided for under art 42 of the FC is, however, a prerogative of mercy exclusively vested in the Yang di-Pertuan Agong or Ruler of any States in Malaysia (see *Sim Kie Chon v. Superintendent Of Pudu Prison & Ors* [1985] 1 MLRA 167).

[131] If a mitigation plea constitutes a right to a fair trial that is guaranteed under cl (1) of art 5, we can take the discussion further by asking whether in a case where the accused is found guilty of an offence punishable with the mandatory sentence, can that right be taken away? As we have noted earlier at [120], this right enshrined in cl (1) of art 5 is not absolute and is subject to qualifications. The key to the issue herein lies in the phrase 'save in accordance with law'.

[132] The position in law on this matter is now well-settled. That the constitutional rights as guaranteed under cl (1) of art 5 can be taken away in accordance with law has been authoritatively established by a line of our authorities. In other words, a law that provides for the deprivation of a person's life or personal liberty is valid and binding as long as it is validly passed by Parliament. The leading authority now is the decision of *Selangor Pilot Association*. In that case, the issue the Privy Council had to decide was whether the restriction on the exercise of a pilot's rights given by the grant of a licence amounted to a deprivation of property and in violation of art 13 of the FC which is headed "rights to property" that reads as follows:

> (1) No person shall be deprived of property save **in accordance with law**.
>
> [Emphasis Added]

[133] It is necessary to appreciate what that case concerns. The respondent was an association of pilots under the Port Authorities Act 1963 ('PAA'). The pilots had been carrying out the business of providing piloting services within a certain area of Port Klang under the Merchant Shipping Ordinance 1952 ("the Ordinance"). The PAA was amended in 1972 adding two new ss 29A and 35A to the Ordinance. The effect of these new sections was to empower the port authority to declare an area as a pilotage area, in which event no person may act as a pilot in that area unless employed by the port authority. The Port Klang Authority declared Port Klang as a pilotage area. Some members of the association elected to work for the authority. But other members refused to work for the authority. They sued the Federal Government and the Port Klang Authority claiming that the amendments to the PAA were unconstitutional as it deprived them of their right to property (goodwill and livelihood) and that they were therefore entitled to compensation. The appellant argued among others that the respondent had not been deprived of any property and that a distinction should be drawn between on the one hand a mere negative prohibition of property (the pilots could operate at lots elsewhere) and on the other hand actual taking of property (which had not happened here). The Privy Council allowed the appeal with a 4-1 majority (Lord Salmon dissenting). The Privy Council was of the view that the deprivation of the respondent of its

property was in accordance with the law. Viscount Dilhorne (for the majority) said:

> Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision, which leads to deprivation, also leads to compulsory acquisition or use.
>
> If in the present case the Association was in consequence of the amending Act deprived of property, there was no breach of art 13(1) for that deprivation was in accordance with a law which it was within the competence of the Legislature to pass.

[134] Further, in *Sugumar Balakrishnan* the Federal Court stated emphatically that the constitutional rights as guaranteed under cl (1) of art 5 of the FC could be taken away in accordance with law. In that case, the constitutionality of s 59 of the Immigration Act 1959/1963 was challenged on the basis that the exclusion of the right to be heard in that provision, before the cancellation of respondent's entry permit, was unconstitutional as it was said to have infringed his right to livelihood. The Federal Court held that s 59 that removes the *audi alteram partem* rule, which was duly enacted by Parliament is valid and constitutional.

[135] Additionally, this approach has been clearly upheld in the Federal Court's decision of *Bird Dominic Jude* where the apex court cast its mind to the issue as to whether there is a specific law authorising the deprivation of the applicant's personal liberties. In light of the express provision authorising the deprivation of the personal liberty as set out in s 56A of the Courts of Judicature Act 1964, the Federal Court refused to entertain the challenge to the provision on the ground of inconsistency with cl (1) of art 5.

[136] I have already expressed my view earlier that the legislative prescription of a mandatory death penalty is within the legislative power to enact. The impugned provisions are therefore valid and binding law passed by Parliament. Those provisions are specific and explicit law that authorise automatic imposition of the death penalty if the accused person is convicted at the conclusion of the trial rendering the mitigation plea playing no role in the sentencing process. Therefore, the deprivation of the right to fair trial was in accordance with the law as the impugned provisions were duly enacted by Parliament.

The Fair Trial Point: Mandatory Death Sentence Is Arbitrary

[137] The second prong of the argument raised the issue of whether the mandatory death penalty was imposed arbitrarily, in that the High Court had no discretion to tailor the punishment to the individual circumstances of their case, regardless of their personal culpability or other relevant circumstances. Learned counsel referred to the decision of the Supreme Court in the *Mithu v. State of Punjab* [1983] 2 SCR 690 ("*Mithu*") where it stated, "no law which provides for (the death penalty) without involvement of the judicial mind can be

said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive".

[138] I do not agree with any of the points raised by learned counsel. In my opinion, there is nothing unusual and arbitrary in a death sentence being mandatory. As can be seen in the discussion at [99] - [101] and [103], the Legislature in prescribing a mandatory death sentence to be inflicted upon the offenders found guilty of the specific offence, no doubt had in mind the object and purpose to be realised by such a mandatory provision and it cannot for that reason be arbitrary in any sense of the word.

[139] In the first place, this is not a novel challenge. It was raised, considered and dismissed by the Privy Council in *Ong Ah Chuan*. As we have seen earlier at [73] that case was an appeal from the Singapore Court of Appeal. One of the important questions before the Privy Council was whether the mandatory death sentence upon conviction for drug trafficking in more than 15g of heroin was contrary to cl (1) of art 9 of the Constitution of Singapore, which provides that no person shall be deprived of his life or personal liberty save in accordance with law. It corresponds with cl (1) of art 5 of the FC on liberty of a person. As in the present appeals before us, it was argued before the Privy Council that the mandatory nature of the penalty rendered it arbitrary. In this context, Lord Diplock observed:

> As Their Lordships understood the argument presented to them on behalf of the appellants, it was that the mandatory nature of the sentence, in the case of an offence so broadly drawn as that of trafficking created by s 3 of the Drugs Act, rendered it arbitrary since it debarred the court in punishing offenders from discriminating between them according to their individual blameworthiness. **This, it was contended, was arbitrary and not "in accordance with law" as Their Lordships have construed that phrase in art 9(1)**; alternatively it offends against the principle of equality before the law entrenched in the Constitution by art 12(1), since it compels the court to condemn to the highest penalty of death an addict who has gratuitously supplied an addict friend with 15 grammes of heroin from his own private store, and to inflict a lesser punishment upon a professional dealer caught selling for distribution to many addicts a total of 14.99 grammes.
>
> Their Lordships would emphasise that in their judicial capacity they are in no way concerned with arguments for or against capital punishment or its efficacy as a deterrent to so evil and profitable a crime are as trafficking in addictive drugs.
>
> Whether there should be capital punishment in Singapore and, if so, for what offences are questions for the Legislature of Singapore which, in the case of drugs offences, it has answered by s 29 and the Second Schedule of the Drugs Act. A primary object of imposing a death sentence for offences that society regards with particular abhorrence is that it should act as a deterrent; particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk. **There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent**

> **may be to some extent diminished if it is not**. At common law all capital sentences were mandatory; under the Penal Code of Singapore the capital sentence for murder and for offences against the President's person still is. If it were valid the argument for the appellants would apply to every law which imposed a mandatory fixed or minimum penalty even where it was not capital - an extreme position which counsel was anxious to disclaim.
>
> [Emphasis Added]

[140] As regards *Mithu*, which was cited by learned counsel, it is noted that the accused moved the court to declare s 303 of the Indian Penal Code violates art 21 of the Indian Constitution, which is to a large extent similar to our cl (1) of art 5. Section 303 provided for a mandatory death sentence only in respect of murders committed by persons already serving a sentence of life imprisonment. The Supreme Court held that s 303 infringed art 21. Crucially, the Supreme Court held that there was no rational justification for treating those persons already serving a sentence of life imprisonment differently from other offenders. As we have seen earlier, in *Lau Kee Hoo* the Federal Court held that the mandatory death sentence did not violate art 121 of the FC. It was also argued in *Lau Kee Hoo* that the mandatory death penalty was unconstitutional as being contrary to cl (1) of art 5. In this context, it is relevant to note that in *Lau Kee Hoo*, the case of *Mithu* was cited to support that proposition. The question of law posed to the Federal Court in *Lau Kee Hoo* was: 'Whether or not the mandatory death sentence provided under s 57(1) of the Internal Security Act 1960 is *ultra vires* and violates art 5(1), 8(1) and 121(1) of the Federal Constitution'. It will be recalled that in *Lau Kee Hoo*, the respondent had been charged with having under his control in a security area without lawful excuse or authority ammunition contrary to s 57(1) of the Internal Security Act 1960 (ISA), which carries a mandatory death sentence.

[141] In answering the question posed in the negative, the Federal Court held it was clear from cl (1) of art 5 of the FC that the Constitution itself envisages the possibility of Parliament providing for the death penalty. The court went on to hold that capital punishment was not unconstitutional *per se*. In their judicial capacity, judges were in no way concerned with arguments for or against capital punishment. Capital punishment was a matter for Parliament. It was not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it was validly made. More to the point, the court agreed with the Privy Council in *Ong Ah Chuan* that there was nothing unusual in a capital sentence being mandatory and indeed its efficacy as a deterrent may to some extent be diminished if it is not. Suffian LP in delivering the judgment of the court has this to say about *Mithu*:

> We should decide cases before us in the light of our own constitution, our own law and the conditions in our own country which are not necessarily the same as conditions in other countries.

[142] A year after *Lau Kee Hoo* was decided, the Federal Court again had the opportunity to examine this important point of law. In *Che Ani Itam*, the

appellant was convicted of an offence under s 4 of the Firearms (Increased Penalties) Act 1971 and sentenced to imprisonment for life with six strokes of whipping. The question of law posed to the Federal Court was: "Whether or not the sentence of life imprisonment for the duration of natural life as provided under s 4 of the 1971 Act read with the s 2 definition of life imprisonment as amended by Act A256/1974 is unconstitutional and violates art 5(1) and art 8(1) of the Federal Constitution". The Federal Court held that the question referred to the court should be answered in the negative. The sentence prescribed in the Firearms (Increased Penalties) Act 1971 is constitutional and valid. Granted that this was not a case concerning the mandatory death penalty but in the context of the present discussion, what Raja Azlan LP observed in delivering the judgment of the court is of great relevance:

> It is now firmly established that "law" in the context of such constitutional provisions as art 5, 8 and 13 of the Constitution refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution [*Ong Ah Chuan v. Public Prosecutor* (at p 670)]. We can see nothing in the statutory provision sought to be impugned before us to infringe the proposition enunciated. **There is nothing arbitrary, fanciful or oppressive in the legislatively defined sentence for the specific offence in question committed under the 1971 Act**. Lord Diplock said in *Hinds & Ors v. The Queen* (at p 221): "In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon the offenders found guilty of the defined offence ..."
>
> [Emphasis Added]

[143] Later, in the judgment after citing the case of *Maru Ram v. Union of India* [1980] AIR SC 2147 which was decided by the Supreme Court of India and the case of *Carmona v. Ward* [1979] 99 Sct 874; 59 L Ed 2d decided by the Supreme Court of the United States of America, Raja Azlan LP held at p 115 (MLJ):

> The principle underlying these decisions apply equally in the case before us in relation to the mandatory nature of the maximum term of the sentence imposable by a specific statutory definition for a specific offence. **The Legislature in doing so no doubt had in mind the object and purpose to be achieved by such a provision and it cannot accordingly be arbitrary in any sense of the word**.
>
> [Emphasis Added]

[144] The law as derived by the line of established authorities is trite and clear in that there is nothing unusual and arbitrary in a death sentence being mandatory. There is no valid reason to depart from the established authorities, which were decided by our most eminent judges.

The Fair Trial Point: Mandatory Sentence Of Death Is Cruel And Inhuman

[145] I will now deal with the third prong. It was argued that cl (1) of art 5 prohibits the mandatory sentence of death, as it is a cruel and inhuman

punishment. By reason of the automatic sentence of death, it was argued that the appellants have been subjected to inhuman or degrading punishment or treatment. In essence, learned counsel relied on and adopted the decisions of other jurisdictions that have declared the mandatory death sentence is a cruel and inhumane punishment. According to him, there is now an "emerging recognition that the imposition of the mandatory death penalty is cruel and/or inhuman and amounted to an arbitrary deprivation of life" (citing among others *Reyes v. R*, *Fox v. R* [2002] UKPC 13, *R v. Hughes* [2002] UKPC 12, *Boyce and Joseph v. The Queen* [2005] 1 AC 400, *Watson v. R (Jamaica)* [2004] UKPC 34, *Matthew v. State of Trinidad and Tobago* [2005] 1 AC 433, *Bowe v. R* [2006] 1 WLR 1623, *Coard v. Attorney General* [2007] UKPC 7, *Woodson v. North Carolina* [1976] 428 US 280, *Attorney General v. Kigula* [2009] UGSC 6 and *Kafantayeni v. Attorney General, Constitutional Case* No 12 of 2005 [2007] MHWC 1).

[146] As I have indicated in the early part of this judgment at [9], in respect of appellant Letitia Bosman, the Court of Appeal decided that s 39B(2) of the DDA that imposed the mandatory death sentence was constitutional. At this stage, I would refer to a significant passage of the judgment of Tengku Maimun JCA (as Her Ladyship then was) on the question whether the mandatory death sentence was cruel and inhuman:

> The Constitutionality of the Mandatory Death Sentence
>
> [38] One of the cases cited by learned counsel that deserves mention is *Reyes v. The Queen* [2002] UKPC 11 where the Privy Council held that the imposition of a mandatory death penalty on all those convicted of murder was disproportionate, inappropriate and inhuman.
>
> [39] ...
>
> [40] ...
>
> [41] Firstly, on *Reyes*, we noted that the Constitution of Belize contains s 7, which reads: "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment". We do not have similar provision in our Federal Constitution. Secondly, after the amendment to the Federal Constitution, vide Act A566, which repealed the provisions concerning appeals from the Federal Court to the Privy Council with effect from 1 January 1985, any decision of the Privy Council would not be binding on us but would only be of persuasive authority. Thirdly, to accede to the invitation of learned counsel that we follow the current international trend and hold that the mandatory death sentence is degrading and unconstitutional would result in us departing from the decisions in *Ong Ah Chuan (supra)* and *Public Prosecutor v. Lau Kee Hoo* [1982] 1 MLRA 359. Fourthly, **it is trite that the function of the court is to apply the law and if at all the present law is disproportionate, cruel, inhuman, or degrading the initiative to change should come from the Legislature**.
>
> [42] In fact, the answer to the constitutional issue mounted by learned counsel for the appellant is found in *Lau Kee Hoo (supra)* where the Federal Court had to consider whether or not the mandatory death sentence provided

under s 57(1) of the Internal Security Act 1960 is *ultra vires* and violates art 5(1), 8(1), and 121(1) of the Federal Constitution.

[Emphasis Added]

[147] With respect, I entirely agree with the opinion of Her Ladyship.

[148] The essential difficulty that I have with the submissions of learned counsel is that all countries from which cases have been quoted in his written submissions have incorporated in their constitutions provision which provides "No person shall be subjected to torture, cruel, inhumane or degrading punishment" or a similar phrase as a result of their ratification of the United Nations Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT). As such, they are in a different position compared to our country, as we have never acceded to UNCAT or any other international treaty to that effect. *Reyes*, which concerned the stipulation in s 7 of the Belize Constitution that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment". *Fox v. R*, which concerned the stipulation in s 7 of the Constitution of Saint Christopher and Nevis that "[a] person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment". *R v. Hughes*, which concerned the stipulation in s 5 of the Constitution of Saint Lucia that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment". *Boyce v. The Queen*, which concerned the stipulation in s 15(1) of the Constitution of Barbados that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment". *Watson v. R*, which concerned the stipulation in s 17(1) of the Constitution of Jamaica that "[n] o person shall be subjected to torture or to inhuman or degrading punishment or other treatment". *Matthew v. State of Trinidad and Tobago*, which concerned the stipulation in s 5(2)(b) of the Constitution of Trinidad and Tobago that the Parliament could not "impose or authorise the imposition of cruel and unusual treatment or punishment". *Bowe v. R*, which concerned the stipulation in s 3 of the 1963 and the 1969 Constitutions of the Bahamas (and, subsequently, s 17 of the 1973 Constitution of the Bahamas) that "[n] o person shall be subjected to torture or to inhuman or degrading treatment or punishment". *Coard and others v. The Attorney General*, which concerned the stipulation in s 5(1) of the Constitution of Grenada that "[n]o person shall be subjected to torture or to inhuman or degrading punishment or other treatment". *Woodson v. North Carolina*, which concerned the scope of the Eighth Amendment to the US Constitution prohibiting excessive bail, excessive fines and cruel and unusual punishment. *Attorney General v. Kigula*, which concerned the stipulation in art 24 of the Constitution of Uganda that "[n] o person shall be subjected to any form of torture or cruel, inhuman or degrading treatment or punishment". *Kafantayeni v. Attorney-General*, which concerned the stipulation in s 19(3) of the Constitution of Malawi that "no person should be subjected to torture of any kind or to cruel, inhuman or degrading treatment or punishment".

[149] I would, in particular, deal in some detail with the case of *Reyes*, as it is the leading authority concerning the constitutionality of the mandatory death penalty. *Reyes* was followed in a line of subsequent Privy Council's decisions on the constitutionality of the mandatory death penalty for murder in other Caribbean jurisdictions. (See for example *R v. Hughes*, *Fox v. The Queen*, *Watson v. The Queen)*. But before moving on, let me be clear on one point. Whilst I do not at all seek to question the correctness of the decision of *Reyes* in relation to the facts of that case, it is apparent that *Reyes* was decided based on specific provisions of the written constitution in question which has no equivalent in our FC. There's another further point worth noting. While *Reyes* premised its decision on proportionality, it did not expressly consider the presumption of constitutionality. As we have seen, the present judgment deals at great length with the presumption of constitutionality and related issues arising from the application of the presumption. That's the key context to keep in mind. *Reyes* must be understood in its proper context. It will be recalled that *Ong Ah Chuan* rejected the arguments that a mandatory death penalty upon conviction for drug trafficking was arbitrary and not "in accordance with law" under cl (1) of art 9 of the Singapore Constitution, and that it offended the principle of equality before the law under cl (1) of art 12, which corresponds with cl (1) of art 8 of the FC on equality.

[150] The question in *Reyes* was the constitutionality of the mandatory death penalty. The Privy Council departed from the view it once held in *Ong Ah Chuan* on the constitutionality of the death penalty. Accordingly, it held that the mandatory death penalty under Belize law is unconstitutional. It is clear that the Board's departure was premised on: (i) s 7 of the Belize Constitution which contains a clause prohibiting torture or to inhuman or degrading punishment or other treatment and (ii) the courts of many other jurisdictions have held their mandatory death penalty provisions to be unconstitutional. There are two important points that require to be highlighted. First, there is an express prohibition in the Belize Constitution on torture or inhuman or degrading punishment or other treatment. This provision was expressly crafted after the European Convention of Human Rights (ECHR). Secondly, the ECHR itself was applicable to Belize right up until its independence. Therefore, it is clear that the development in Belize was heavily influenced by international human rights principles. See generally *Reyes* at [23] [24], per Lord Bingham:

> The second important development has been the advance to independent statehood of many former colonies under entrenched Constitutions expressed to be the supreme law of the state. In the majority of such countries, as in Belize, the practice was adopted of setting out in the Constitution a series of fundamental rights and freedoms, which were to be protected under the constitution. It is well-established that in drafting the chapters containing these statements of rights heavy reliance was placed on the European Convention, first in drafting the constitution of Nigeria and then in drafting those of Jamaica and many other states around the world: see *Minister of Home Affairs v. Fisher* [1980] AC 319, [1979] 3 All ER 21, at 328 of the former report; Simpson, Human Rights and the End of Empire (Oxford, 2001), pp 863-872;

> Demerieux, Fundamental Rights in Commonwealth Caribbean Constitutions (University of West Indies, 1992), p 23. In some instances, adopting the language used in art 10 of the Bill of Rights 1689, the eighth amendment to the constitution of the United States 1791 and s 12 of the Canadian Charter of Rights and Freedoms (1982), the prohibition on inhumane treatment has referred to "cruel and unusual treatment or punishment". The European Convention applied to Belize as a dependent territory of the Crown from 25 October 1953 when it came into force until 21 September 1981 when Belize became independent. On 25 September 1981 Belize adhered to the Universal Declaration, in January 1991 to the American Declaration and in June 1996 to the International Covenant (but it has not adopted the Optional Protocol to the International Covenant nor become a party to the American Convention).

[151] In my opinion, in the context of our FC, the *Ong Ah Chuan* approach is the correct approach. Unlike the Belize Constitution that was the subject matter in *Reyes*, our FC has no equivalent provision prohibiting "torture or inhuman or degrading punishment or treatment". As pertinently observed by Suffian LP in *Lau Kee Hoo*, "… there is no provision in our constitution corresponding to art. VIII of the American Constitution prohibiting 'cruel and unusual punishment' nor similar to the provision contained in s 2(b) of the Constitution of Trinidad and Tobago which was considered by the Privy Council in *Michael de Freitas v. Benny* [1976] AC 239. Nor does our Constitution contain any provision prohibiting 'torture or inhuman or degrading punishment' like s 60 of the Constitution of Rhodesia and Nyasaland which was considered by the Privy Council in *Runyowa v. The Queen* [1967] 1 AC 26".

[152] On the great reliance by the appellants on *Reyes* and other cases to emphasise the point that there is now an 'emerging recognition that the imposition of the mandatory death penalty is cruel and/or inhuman and amounted to an arbitrary deprivation of life', it is important to bear in mind our FC must primarily be interpreted within its own walls and not in the light of analogies drawn from other jurisdictions where the provisions of their Constitution are different than our own FC. On this point, the oft-cited case is the decision of the Federal Court in *Pung Chen Choon*. The key part of the judgment of the Federal Court delivered by Edgar Joseph Jr SCJ is:

> It follows that the position of the press under our Constitution is not as free as the position of the press under the Indian Constitution and more so when compared to the position of the press in England or the United States of America. This, of course, means that the Indian cases and the Privy Council case of *Leonard Hector v. A-G of Antigua and Barbuda & Ors*. relied on by the counsel for the accused, are of little relevance and need not be discussed. In saying so we are fortified by what Thomson CJ said in *Government of State of Kelantan v. Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* at p 358 col I J. What he said was this:
>
> > ... the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.

[153] Another case I would mention in particular is the case of *Loh Kooi Choon v. Government Of Malaysia* [1975] 1 MLRA 646. In the context of the present case, the key part of the judgment of Raja Azlan Shah FJ (as His Majesty then was) is at p 646:

> The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution ...

Further down on the judgment, the learned judge added:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own rights and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' - see *Adegbenro v. Akintola & Anor*. **Each country frames its constitution according to its genius and for the good of its own society**.
>
> [Emphasis Added]

[154] I note that the Singapore Court of Appeal preferred the *Ong Ah Chuan* approach and distinguished *Reyes* in *Nguyen Tuong Van v. PP* [2005] 1 SLR (R) 103. Lai Kew Chai J delivering the judgment of the Singapore Court of Appeal distinguished *Reyes* as follows:

> *Reyes v. The Queen*, an appeal from Belize, was considered and distinguished by the trial judge below. In this case, the Privy Council ruled that the mandatory death penalty for murder by shooting was unconstitutional, since "to deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which s 7 [of the Constitution of Belize] exists to protect". Section 7 of the Belize Constitution provides that "[n] o person shall be subjected to torture or to inhuman or degrading punishment or treatment". There is no equivalent in our Constitution nor in any local Act of Parliament. This was a ground for distinguishing *Reyes v. The Queen.*
>
> The case was decided in the light of the various international norms that had been "accepted by Belize as consistent with the fundamental standards of humanity"- at [27]. The Privy Council considered the content of a plethora of international arrangements for the protection of human rights, including the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights, the American Declaration of the Rights and Duties of Man, and the American Convention on Human Rights. These arrangements, together with a wealth of jurisprudence emanating from national, regional and international courts, showed that an integral part of the prohibition against cruel and inhuman treatment or punishment was

> proportionality and individualised sentencing. It was against this background that the Privy Council ruled s 102(3)(b) of the Belize Criminal Code, which referred to "any murder by shooting", to be indiscriminate and therefore void.

[155] A similar approach was taken in *Yong Vui Kong* where the Singapore Court of Appeal declined to expand the scope of cl (1) of art 9 of the Constitution to include a prohibition against inhuman punishment. In *Yong Vui Kong*, the Court of Appeal refused to read into the Singapore Constitution a prohibition against inhuman punishment saying that such a prohibition was not expressly provided for. Chief Justice Chan Sek Keong's observations on this issue are set out below:

> We agree that domestic law, including the Singapore Constitution, should, as far as possible, be interpreted consistently with Singapore's international legal obligations. There are, however, inherent limits on the extent to which our courts may refer to international human rights norms for this purpose. For instance, reference to international human rights norms would not be appropriate where the express wording of the Singapore Constitution is not amenable to the incorporation of the international norms in question, or where Singapore's constitutional history is such as to militate against the incorporation of those international norms (in this regard, see further [61] - [72] below). In such circumstances, in order for our courts to give full effect to international human rights norms, it would be necessary for Parliament to first enact new law (as the drafters of the UDHR hoped States would do) or even amend the Singapore Constitution to expressly provide for rights which have not already been incorporated therein. Both of these measures are, as Lord Bingham observed in *Reyes* at [28] (reproduced in the preceding paragraph), well within the prerogative of a sovereign State. In short, the point which we seek to make is this: where our courts have reached the limits on the extent to which they may properly have regard to international human rights norms in interpreting the Singapore Constitution, it would not be appropriate for them to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions.

[156] We follow the principle that an international instrument is only applicable in Malaysia if it is incorporated into our domestic law. This position had been explained by Raus Sharif FCJ (as he then was) in the case of *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2012] 1 MLRA 1:

> On the issue whether this court should use 'international norms' embodied in the UNDRIP to interpret art 5 and 13 of the Federal Constitution I have only this to say. International treaties do not form part of our law, unless those provisions have been incorporated into our law. We should not use international norms as a guide to interpret our Federal Constitution. Regarding the issue of determining the constitutionality of a statue, Abdul Hamid Mohamad PCA (as he then was) in *PP v. Kok Wah Kuan* [2007] 2 MLRA 351 had this to say:
>
> > So, in determining the constitutionally or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh*

Kooi Choon v. Government Of Malaysia [1975] 1 MLRA 646 (FC) said: The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.

[157] In the case of *AirAsia Berhad v. Rafizah Shima Mohamed Aris* [2014] 5 MLRA 553, the Court of Appeal emphasised that a rule of international law can only become part of municipal law if and when it is transformed into municipal law by the passing of local legislation.

[158] In my opinion, the fact that the impugned provisions are in clear and unambiguous terms means that no resort can usefully be had to international instruments to interpret or modify the domestic law (see *Garland v. British Rail Engineering Ltd* [1983] 2 AC 751, 771 and *Ahmad v. Inner London Education Authority* [1978] QB 36). Until incorporated by domestic legislation, international treaty obligations do not form part of domestic law (see *R v. Secretary of State for the Home Department, Ex p Brind* [1991] 1 AC 696, 721-722). Malaysia is not party to international conventions - most notably - the European Convention on Human Rights and the International Covenant on Civil and Political Rights. The fact that the Executive had chosen not to sign, accede or ratify those (and hence the impossibility of Parliamentary ratification thereof) clearly suggests that those international principles ought not to be considered applicable in the Malaysian legal context.

[159] Based on all the foregoing reasons, the appellants have failed to show any violation of cl (1) of art 5. The provisions in question were validly made in accordance with the law. The law, which provides death penalty though mandatory, does not offend art 5 the FC.

[160] Finally, I come to the Pre-Merdeka law point.

The Pre-Merdeka Laws Point

[161] This is only relevant in relation the appellant Pubalan Peremal. I have expressed my opinion to the effect there is no inconsistency between s 302 of the Code which prescribed the mandatory death sentence and art 5, 8 and 121 of the FC. Hence, there is no necessity to undertake constitutional modification of s 302 under cl (6) of art 162 to bring it into accord with art 121, 5 and 8 respectively. The pre-conditions for the exercise of modification power do not exist. The court has no power to modify s 302 of the Code pursuant to cl (6) of art 162 because such a power arises only when a law is inconsistent with the FC. The power to modify is not a power to modify every existing law.

Conclusion

[162] In the present case, I am not persuaded that the mandatory death penalty under s 39B of the DDA and s 302 of the PC is inconsistent with art 5, 8 and 121 of the FC. Premised on all the above discussion, the appellants failed to show any infringement of their rights as guaranteed by the Federal Constitution. Both the impugned provisions are valid and binding law.

[163] For that reason, these four appeals on the constitutionality of the mandatory death penalty are dismissed.

[164] My learned sister Justice Rohana Yusuf (PCA), my learned brothers Justice Abang Iskandar Abang Hashim (CJSS), Justice Vernon Ong and Justice Abdul Rahman Sebli, my learned sisters Justice Zaleha Yusof, Justice Zabariah Mohd Yusof and Justice Hasnah Mohammed Hashim have read my judgment in draft and have expressed their agreement with it and have agreed to adopt the same as the majority judgment of the court.

Nallini Pathmanathan FCJ (Dissenting):

(Constitutionality of the Mandatory Nature of the Death Penalty under the pre-amended s 39B of the Dangerous Drugs Act 1952 and under s 302 of the Penal Code for murder)

Introduction

[165] In these four appeals, the principal issue that arises for consideration is the constitutional validity of s 39B of the Dangerous Drugs Act 1952 (prior to its 2017 amendment) ('DDA') and s 302 of the Penal Code ('PC'), in so far as these statutory provisions provide for the mandatory punishment of death with no possibility of any alternative form of punishment. It is important to emphasise that the issue before us is not whether the death penalty itself is unconstitutional. It is the lack of any alternative to the mandatory death penalty that comes under scrutiny in this appeal.

[166] More precisely, the question which arises for consideration is whether s 39B of the DDA (prior to its 2017 amendment) and s 302 of the PC infringe the guarantee contained in art 5(1) of the Federal Constitution ('FC') which provides that "no person shall be deprived of his life or personal liberty save in accordance with law". A consideration of whether art 5(1) FC has been infringed necessitates a similar enquiry in relation to art 8(1) FC.

Preliminary Matters

[167] The four appellants here appeal against convictions for offences carrying the mandatory death penalty. Letitia Bosman ('Letitia'), Jorge Crespo Gomez ('Gomez') and Benjamin William Hawkes ('Hawkes') were convicted and sentenced to death for trafficking in dangerous drugs under s 39B(2) DDA, while Pubalan Perumal ('Pubalan') was convicted and sentenced to death for murder under s 302 PC.

[168] This judgment deals solely with the constitutionality question.

The Appellants' Challenge

[169] Although three of the appeals deal with s 39B DDA and Pubalan's appeal deals with s 302 PC, the substratum underlying these appeals is similar,

namely whether the statutory imposition of the mandatory death penalty with no possibility of an alternative punishment, is unconstitutional.

[170] The main grounds on which this challenge is brought are:

(i) The mandatory nature of the sentence imposed, particularly as it relates to death which is final, irreversible and absolute in nature, with no alternative punishment infringes art 5(1) of the FC;

(ii) The mandatory death penalty violates the right to life under art 5(1) of the FC because it infringed the appellants' right to a fair trial, in that they were deprived of the benefit of sentencing, an essential component of a fair trial. In sentencing, the court hears the appellants' representations on the appropriate punishment in relation to his or her specific case, ie mitigation after which the court takes into account the particular circumstances of the case, the evidence and other relevant factors prior to meting out sentence. With the mandatory death penalty, the accused is afforded no such opportunity. As such, the sentence of death imposed is arbitrary as it leaves no discretion to tailor the punishment to the offence;

(iii) The mandatory penalty violates the requirement of equal treatment in art 8(1) of the FC in that it is again, arbitrary and disproportionate and fails to take into consideration to the widely varying circumstances in which a conviction of trafficking in drugs was made out in each case;

(iv) The power to determine the measure of punishment is a judicial power. By removing the courts' discretion to determine sentence and imposing a mandatory penalty, s 39B DDA violates the doctrine of the separation of powers and encroaches into judicial power under art 121 of the FC;

(v) Political and public opinion, as well as judicial decisions and legal reasoning and thinking in most other jurisdictions have shifted away from the death penalty.

The Respondent's Replies

[171] The Attorney-General in response, submits in summary as follows:

(i) As the DDA is a pre-Merdeka law, it is not subject to art 4(1) FC and cannot be struck down or held invalid. It is an existing law falling under art 162(6) FC, and can only be applied with modifications as necessary to bring it into accord with the FC;

(ii) Following on from *PP v. Kok Wah Kuan* [2007] 2 MLRA 351, a law cannot be struck down on the basis that it violates the doctrine of the separation of powers. The jurisdiction of the courts is as

conferred by Federal law. The court is bound by law and cannot exceed its sentencing power provided by statute;

(iii) The constitutional validity of the mandatory death penalty has been previously determined in *Ong Ah Chuan v. Public Prosecutor And Another Appeal* [1980] 1 MLRA 283, *PP v. Lau Kee Hoo* [1982] 1 MLRA 359 and *Che Ani Itam v. Public Prosecutor* [1983] 1 MLRA 351. In all of these cases, the imposition of the mandatory death penalty was found not to violate art 5 and 8 nor encroach upon judicial power under art 121 FC;

(iv) The legislative purpose of the mandatory death penalty in s 39B DDA is to address the mischief of the non-uniformity and insufficiency in sentencing. The penalty was made mandatory in the national interest;

(v) The right to life in art 5(1) is not absolute and can be taken away by law. Whether a law is harsh and unjust is a matter of policy for the Legislature to determine;

(vi) Article 8 FC does not require all persons in all circumstances to be treated alike. Reasonable classification is permitted if it is based on intelligible differentia and shows a nexus between the basis of classification and the object; and

(vii) Political pronouncements to abolish the death penalty do not create legitimate expectations.

The Law Relating To The FC

[172] It is judicious to commence with a brief restatement of the principles to be applied when construing the FC.

Principles To Be Applied In Construing The FC

[173] A valuable starting point must be the recent decision of this court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1 ('*Alma Nudo*') where the constitutionality of s 37A DDA was considered, and struck down for violating art 5(1) read together with art 8(1) FC. The former Chief Justice of Malaysia Richard Malanjum CJ, with respect, in an expertly crafted and cogently reasoned judgment, set out the well-entrenched principles to be applied when interpreting the FC:

(i) The FC is the supreme law of the land and is in a class of its own *(sui generis)*. To that extent, it cannot be interpreted according to the ordinary canons of statutory construction, but is construed and governed by its own principles of interpretation (see *Lee Kwan Woh v. PP* [2009] 2 MLRA 286 at para 7, per Gopal Sri Ram FCJ (as he then was) and *Hinds v. The Queen* [1976] 1 All ER 353 at 359);

(ii) Judicial precedent plays a lesser part than in the case in ordinary statutory interpretation; more importantly, as the constitution is a living piece of legislation, constitutional provisions are construed broadly and generously, not narrowly nor rigidly (per Raja Azlan Shah LP in *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1980] 1 MLRA 18); see also *Merdeka University Bhd v. Government Of Malaysia* [1981] 1 MLRH 75, where Abdoolcader J (as he then was) reiterated that a "... constitution should be construed with less rigidity and more generosity than other statutes ...", relying on the Privy Council decision in *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21 and *Attorney-General of St Christopher, Navis and Anguilla v. Reynolds* [1979] 3 All ER 129;

(iii) A prismatic approach is to be adopted when interpreting the fundamental rights provisions under Part II of the FC (see *Lee Kwan Woh v. PP* (above) at para 8 per Gopal Sri Ram FCJ (as he then was);

(iv) And in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2007] 2 MLRA 847 Hashim Yusoff FCJ approved the passage in the judgment of Gopal Sri Ram JCA (as he then was) in *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2006] 2 MLRA 396, citing in turn the joint dissenting judgment in the Privy Council case of *Prince Pinder v. The Queen* [2002] UKPC 46 where it was emphasised that "... a vitally important function of the court is to interpret constitutional provisions with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford ..." To that extent, provisos to these rights are to be construed narrowly so as not to derogate from the substance of those fundamental rights.

(v) In like manner, in *Teh Cheng Poh v. Public Prosecutor* [1978] 1 MLRA 321 Abdoolcader J (as he then was) held that in applying constitutional law, the court must look behind the label to the substance.

[174] Bearing in mind these well-settled principles of constitutional interpretation as comprising the basis for the ensuing analysis, I turn to the specific issue at hand, namely the constitutionality of the mandatory nature of the death penalty prescribed in ss 39B DDA and 302 PC.

The Law Relating To The Constitutionality Of The Mandatory Death Penalty In Relation To Articles 5 And 8 of the FC

[175] The first point to note is that there is a presumption of constitutional validity of the two impugned sections, namely ss 39B DDA and 302 PC, in relation to the imposition of the mandatory death penalty. The presumption of

constitutional validity is robust and the burden of proof lies on the appellants to prove otherwise.

[176] However, that is not to say that the presumption is unassailable. The presumption of constitutionality cannot be applied to render a law that is invalid, valid. In such event, the impugned provisions must yield to the superior force of art 5(1) read with art 8(1) FC. That is the second point.

[177] Thirdly, the impugned statutory provisions here need to be examined independently and not by way of comparison with other like provisions. To that extent, each statutory provision will be considered separately.

Article 5(1) FC

[178] Article 5(1) FC reads:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[179] In *Alma Nudo* (above), art 5(1) FC was described as '... the foundational fundamental right upon which all other fundamental rights enshrined in the FC draw their support'. (See also the South African Constitutional Court's judgment at para 84 in *State v. Makwanyane* [1995] 1 LRC 269).

[180] A deprivation of the right to life necessarily results in the cessation of all other rights. To that extent, it is final, absolute and irrevocable.

[181] It is this finality that renders the death penalty unique and requires that art 5(1) FC be given a substantive rather than a literal or perfunctory reading.

[182] The key to construing art 5(1) FC for the purposes of the current appeals lies in the proviso 'save in accordance with law'. What then is the meaning to be accorded to this phrase?

What Does 'Law' In The Proviso To Article (1) FC Mean?

[183] If the proviso to art 5(1) FC, namely "save in accordance with law" is accorded a literal or perfunctory reading, it would suggest that so long as the Legislature has followed the established procedure for the enactment of a statute, then the deprivation of a person's life or personal liberty is permissible and valid. Taken to its logical conclusion, such an interpretation would sanction for example, a law that provided for a sentence of death for petty theft, or for life imprisonment for a minor road traffic offence. While such an enactment of law is highly unlikely, it is a plausible and possible consequence of allowing for such a perfunctory or literal interpretation of the phrase 'save in accordance with law'. Such an interpretation is therefore untenable.

[184] Secondly, all statutes or 'law' are subject to art 4 FC. This means that all enacted law must comply with the FC. So the term 'law' in the proviso 'save in accordance with law' must refer to law that is constitutionally valid and not simply any regularly promulgated/enacted law.

[185] In the present context, it means that the deprivation of life under s 39B DDA, and separately s 302 PC, must be valid from a constitutional viewpoint. This in turn means that these two statutory provisions should pass the test of constitutional validity as provided under art 4 FC. To that extent, the term 'law' gives rise to a somewhat circular definition.

[186] What can be surmised ultimately is that 'law' in the proviso "save in accordance with law" does not mean just any law validly enacted by Parliament. In other words, mere compliance with the requisite procedure prescribed for the enactment of statutes is in itself insufficient. It does not authorise Parliament to enact any legislation depriving life or liberty contrary to the FC itself or to the rule of law.

[187] If 'law' is not to be accorded a literal meaning what is the definition to be accorded to the term? This is a question that is well-settled in our jurisprudence.

[188] As stated variously in *Lee Kwan Woh v. PP* (above), *Alma Nudo* (above), *Badan Peguam Malaysia v. Kerajaan Malaysia* [2007] 2 MLRA 847, *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2012] 6 MLRA 375 and *PP v. Gan Boon Aun* [2017] 3 MLRA 161, the term 'law' in the proviso to art 5(1) encompasses:

(i) 'Law' as defined in art 160(2) FC, namely written law, the common law in so far as it is in operation in the Federation or any part thereof, any custom or usage having the force of law in the Federation or any part thereof;

(ii) 'Common law' as defined under s 66 of the consolidated Interpretation Acts of 1948 and 1967 as 'the common law of England';

(iii) The rule of law (see paras 103 - 104 of *Alma Nudo* (above)) which requires that 'law' must therefore be clear, stable, generally prospective, of general application, administered by an independent Judiciary and which incorporates the right to a fair trial; and includes

(iv) The rules of natural justice.

[189] This last aspect relating to natural justice is specifically borne out by *Ong Ah Chuan v. Public Prosecutor And Another Appeal* [1980] 1 MLRA 283, where in dealing with arts 9 and 12 of the Singapore Constitution which are in *pari materia* with art 5 and 8 of the FC, the need for compliance with the rules of natural justice were expressly specified by Lord Diplock.

[190] From the foregoing synopsis and study relating to the term 'law' in the proviso to art 5(1) FC, it is evident that any such law must be in accordance with the rule of law, including all its integral components and in both its procedural and substantive dimensions (see *Lee Kwan Woh* (above)). It should incorporate elements of justice, fairness, due process and proportionality.

[191] Put another way, it cannot be law that warrants being struck down under art 4 FC for infringing any constitutional provision in the Federal Constitution. State action in depriving an individual of life must therefore be both substantively fair and proportionate.

[192] Applying these principles to the 'law' in question, namely s 39B DDA, it follows that the deprivation of 'life' so prescribed in s 39B DDA must be both substantively and procedurally fair.

[193] The same reasoning would apply with respect to s 302 PC.

[194] If such deprivation of life as is prescribed by law, ie, ss 39B DDA or 302 PC, are not substantively or procedurally fair or infringe the tests set out in the provisions of the FC protecting fundamental or human rights in Part II, then it would follow that they do not fall within the ambit of 'law' as envisaged in art 5(1) FC and ought to be struck down.

[195] However, a consideration of whether a statute infringes art 5(1) FC is not complete without deliberation on art 8(1) FC.

[196] As stated earlier, 'law' in art 5(1) FC has to be law that conforms to the provisions of the Constitution such that it is not liable to be struck out under art 4 FC. It therefore follows that art 8 FC, being a part of the Constitution also cannot be infringed in determining whether the mandatory death penalty is in accordance with 'law'.

Articles 5(1) And 8(1) FC

[197] This brings into play art 8(1) of the FC, which is an essential hurdle that the relevant statute has to clear, in order to be held to be valid, constitutionally. That this is so is expressly stipulated in *Alma Nudo* (above) relying, *inter alia*, on *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* [2006] 2 MLRA 396 at para 8 per Gopal Sri Ram JCA (as he then was) and approved in *Badan Peguam Malaysia v. Kerajaan Malaysia* (above) at para 86 and *Lee Kwan Woh* (above) at para 12.

[198] Authority for this proposition can also be found outside the jurisdiction, particularly in India where there is substantive similarity in the constitutional provisions relating to life and personal liberty. Articles 14 and 21 of the Indian Constitution are substantially similar, although not *in pari materia*, to art 8 and 5 FC respectively. Having said that, our art 8 FC draws its origin from the Indian provision, which in turn takes its roots from the Irish Free Constitution and the American Constitution, as expounded further on in the judgment.

[199] In the renowned Indian case of *Maneka Gandhi v. Union of India* [1978] 1 SCC 248 a seven-Judge Bench of the Indian Supreme Court explained that a statute which simply stipulates a procedure for depriving a person of his life or personal liberty did not meet the requirements of the Indian Constitution equivalent of our art 5(1) FC. Although art 21 of the Indian Constitution is

not *in pari materia* with art 5 FC, in that the Indian provision contemplates that there is to be no deprivation of life or personal liberty except in accordance with procedure prescribed by law, the underlying concept is essentially similar.

[200] In the context of the Indian art 21, it was stated that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary.

[201] Bhagwati J observed (at p 281, para 5):

> "Principally, the concept of reasonableness must be projected in the procedure contemplated by art 21, having regard to the impact of art 14 on that article."

[202] Article 14 of the Indian Constitution is the equivalent of our art 8 FC.

[203] In short, it was held that where life was deprived by reason of law, the assessment of whether such law was fair, just and reasonable necessarily involved assessing it in light of art 14 as well as art 21 of the Indian Constitution.

[204] The legal reasoning there, when considered in the context of the Federal Constitution, means that an evaluation of whether 'law' in art 5(1) FC is substantively and procedurally fair, just and reasonable and not arbitrary or oppressive, necessarily involves a consideration of whether such law infringes the protection afforded by art 8 FC. And this in turn is because if the 'law' in issue is neither just, fair nor reasonable it contravenes art 8 FC for being arbitrary and oppressive.

[205] Is s 39B DDA 'law' that is substantively and procedurally fair just and reasonable or is it arbitrary and oppressive? The section prescribes only one punishment, namely the mandatory death penalty for 'trafficking', which is accorded an extremely broad definition encompassing a wide variety of activities, which are classified together as justifying one single punishment.

[206] Similarly s 302 PC prescribes only one punishment namely the mandatory death penalty for 'murder' that encompasses a wide series of circumstances within which the offence may be committed.

[207] So the question here is whether these statutory provisions accorded with the constitutional interpretation given to the term 'law' both in art 5(1), and again in art 8(1), as the latter is automatically 'engaged' or invoked when a constitutional challenge is brought in respect of such legislation.

[208] The additional legal basis for the engagement of art 8(1) FC, when considering a constitutional challenge under art 5(1) FC, is to be found, again, in *Maneka Gandhi v. Union of India* (above). There, Beg CJ explained that the varying provisions of the fundamental rights portion of the Indian Constitution in Part III, were to be read and interpreted cumulatively rather than disparately, or in a compartmentalised manner. I can do no better than to set out what the then Chief Justice of India held in this context:

> ... **Articles dealing with different fundamental rights contained in Part III of the Constitution do not represent entirely separate streams of rights which do not mingle at many points. They are all parts of an integrated scheme in the Constitution. Their waters must mix to constitute that grand flow of unimpeded and impartial Justice** (social, economic and political), Freedom (not only of thought, expression, belief, faith and worship, but also of association, movement, vacation or occupation as well as of acquisition and possession of reasonable property), of Equality (of status and of opportunity, which imply absence of unreasonable or unfair discrimination between individuals, groups and classes), and of Fraternity (assuring dignity of the individual and the unity of the nation), which our Constitution visualises. **Isolation of various aspects of human freedom, for purposes of their protection, is neither realistic nor beneficial but would defeat the very objects of such protection**.
>
> **We have to remember that the fundamental rights protected by Part III of the Constitution, out of which art 14, 19 and 21 are the most frequently invoked, form tests of the validity of executive as well as legislative actions when these actions are subjected to judicial scrutiny …**
>
> [Emphasis Added]

[209] The coherent judicial reasoning in *Maneka Gandhi v. Union of India* (above) is directly relevant to the mode of interpretation and application of the constitutional provisions as set out in Part II of our FC. In determining a constitutional challenge to a statute relating to art 5(1) FC, the court is not restricted in its assessment of constitutional validity, to art 5(1) FC alone, or disparately from art 8(1) FC.

[210] The constitutional provisions of Part II are not to be treated as being housed in independent compartments with no nexus or overlap between each. On the contrary, it is both permissible, and indeed actively counseled, that the impugned legislation should be tested, not only against the term 'law' in art 5(1) FC, but against other relevant constitutional provisions relating to fundamental rights, of which art 8(1) FC is singularly pertinent.

[211] But reverting to our FC, the strongest argument requiring that the subject legislation complies not only with art 8 FC, but the Constitution as a whole, is to be found in art 4 FC, which allows the striking out of legislation that is not in conformity with the FC. It follows from art 4 FC that a transgression of art 8 FC will result in the relevant legislation being struck down.

[212] In the present context therefore, s 39B DDA and s 302 PC require examination and analysis to ascertain whether they infringe art 8 FC, which houses the doctrine of proportionality. This in turn requires a comprehension of the scope and ambit of art 8(1) FC.

Article 8(1) Of The Federal Constitution

[213] Article 8(1) FC provides:

> All persons are equal before the law and entitled to the equal protection of the law.

[214] The term 'law' as used twice (and to that extent a tautology) in art 8(1) FC must bear the same meaning as 'law' in the proviso to art 5(1) FC. This comprises yet another reason why a constitutional challenge to s 39B DDA and s 302 PC in relation to the mandatory deprivation of life, ought to encompass not only art 5(1) FC which is directly relational, but also art 8(1) FC, which similarly contemplates that 'law' is not unjust nor arbitrary, but substantively fair and proportionate.

What Does Article 8(1) FC Stipulate?

[215] Article 8(1) FC takes its roots from the American and Indian Constitutions. One of our most eminent and erudite judges, Abdoolcader J (as he then was), in *PP v. Datuk Harun Haji Idris & Ors* [1976] 1 MLRH 611 succinctly explained the bipartite constitutional provision as follows:

> 'Equality before the law' means the equal subjection of all persons to the law *(Raja Surapayalsingh v. Uttar Pradesh Government* at p 690) but **'equal protection of the law' does not mean that all law must be uniform**, and as judicially interpreted in the United States of America and India **it means that a law may not discriminate for or against a person or class unless there is a rational basis for such discrimination**.
>
> The general basic principle culled from the authorities and judicially determined, succinctly put, is that art 8(1) permits reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question.
>
> [Emphasis Added]

[216] The first part of art 8(1) FC, which stipulates that all persons are equal before the law reflects what is arguably the most fundamental aspect of the rule of law as expounded by *Dicey*, that no man however high he may be, is above the law. All are equal before the law.

[217] However, the instant appeals relate to the second part of art 8(1) FC, which prohibits discrimination in legislation, unless there is reasonable classification. It is this second part of art 8(1) FC that comprises the doctrine of proportionality.

[218] In *PP v. Datuk Harun Hj Idris* (above) Abdoolcader J further explained the singular importance and effect of art 8(1) FC. It was pointed out that art 8(1) FC is omitted from the provisions of art 149(1) FC which in turn provides for the validity of legislation against subversion made under that provision, notwithstanding its inconsistency with art 5, 9 or 10 which relate to fundamental liberties under Part II FC. Therefore, even a law enacted pursuant to art 149(1) is still subject to challenge under art 8(1) FC. It underscores the inviolability of art 8(1) that it was not excluded.

[219] The full ambit of art 8(1) is not appreciated without a consideration of art 8(2). The latter provides:

> Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law ...

[220] Therefore, there can be no discrimination against a citizen in respect only of religion, race, descent or place of birth under any law (save as expressly permitted), and any such discrimination cannot be validated by the doctrine of reasonable classification as permitted under art 8(1).

[221] In a case that is not covered by art 8(2), the case is determined under the general provisions of art 8(1).

[222] Taken as a whole, art 8(1) and (2) provide that the State cannot discriminate or pass unequal law, but if such law are so enacted, then they must be reasonable and not arbitrary. By reason of art 8(2), such discrimination on the grounds of religion, race, descent or place of birth alone cannot be a reasonable ground of discrimination.

[223] More recently in *Alma Nudo* (above), this court emphasised that art 8 houses the doctrine of proportionality. It was held that in construing other provisions of the FC, regard must be had to the 'humanising and all-pervading' provision of art 8(1) relying, *inter alia*, on *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia* (above) at para 8 as approved in *Badan Peguam Malaysia v. Kerajaan Malaysi* a (above) at para 86 and *Lee Kwan Woh* (above) at para 12. This court re-affirmed the doctrine of proportionality as the test to be used when determining whether State action, be it in the form of executive action, or legislation, is arbitrary or excessive, to the extent that it infringes fundamental rights.

Penal Provisions And Article 8(1) Of The FC - Sentencing And Proportionality

[224] How does art 8(1) apply in the context of a penal provision in a criminal statute?

[225] The doctrine of proportionality when considered in the context of the present appeals has two aspects. They relate to whether the imposition of the mandatory death penalty as the sole punishment for 'trafficking in dangerous drugs' or 'murder' is:

(i) Discriminatory or meets the criterion of reasonable classification or does not. This involves a consideration of whether it has been enacted on the basis of intelligible differentia having a rational nexus to the object or policy of the legislation in question;

(ii) A proportionate punishment for the crime. This involves a consideration of whether the punishment is commensurate to the gravity of the offence in every case.

First Aspect Of Article 8(1): Reasonable Classification

[226] As applied to the instant appeals, the question is whether:

(i) Section 39B DDA is discriminatory in that it provides for the mandatory death penalty for 'trafficking in dangerous drugs' in respect of a vast range of activities without reasonable classification, or whether it is constitutionally sound in that the statutory provision permits of, or allows for, reasonable classification as it is founded on intelligible differentia having a rational relation with the object of the statute;

(ii) Similarly, whether s 302 PC, is discriminatory in that it provides for the sole punishment of the mandatory death penalty for the wide range of circumstances in which the offence of murder may be committed without reasonable classification, or whether the provision permits of, or allows for reasonable classification.

[227] In this context, it warrants emphasis that art 8(1) FC may be violated, even though the law may, on its face be equal, if in substance, unequal or different things are treated equally.

[228] In considering this issue, the decision of the Indian Supreme Court in *Mithu v. State of Punjab* [1983] 2 SCR 690 is instructive. The question which arose for consideration there was whether a provision of the Indian Penal Code, imposing the mandatory death penalty, infringed art 21 of the Indian Constitution, which is substantively similar to our art 5(1) and reads:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

[229] The statutory provision in issue provided for the punishment of mandatory death for murder by a convict serving life sentence. ("Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death.")

[230] Referring to *Maneka Gandhi v. Union of India* (above), *Sunil Batra v. Delhi Administration* [1978] 2 SCR 621 and the case of *Bachan Singh v. State of Punjab* [1980] 2 SCC 684, which upheld the death penalty, Chandrachud CJ held that the constitutional guarantee relating to life and personal liberty had been expansively interpreted by judicial case law such that it was no longer possible to simply accept that it was for the Legislature to provide punishment, and for the courts to impose it. Extreme illustrations were given, for example, a law providing that an accused is prohibited from giving evidence in self-defence would be struck down for violating art 14 and 21 (our art 8(1) and 5(1)).

[231] Chandrachud J then concluded that the last word on the question of justice and fairness does not rest with the Legislature. It was for the courts to determine whether the law by which a person is deprived of his life or liberty is fair, just and reasonable, and not arbitrary or capricious.

Second Aspect Of Proportionality: Punishment Must Fit The Crime

[232] As emphasised by the Privy Council in *Matadeen v. Pointu* [1999] 1 AC 98, treating like cases alike and unlike cases differently is integral to equality before the law, and a general axiom of rational behaviour. Following from this concept, in the context of penal provisions, another central aspect of art 8(1) FC is that the punishment must fit the crime.

[233] The notion that criminal penalties should be proportionate to the gravity of the offence committed is long-established. An illuminating account of its history was given by Lord Bingham in *Bowe v. The Queen* [2006] UKPC 10 at [30] (see also Gray, "*Mandatory Sentencing around the World and the Need for Reform*" New Criminal Law Review, Vol 20, Number 3, p 391 at 409, 416-417).

[234] The idea is as old as Western civilisation and has been traced to the Code of Hammurabi in 1760 BC. Chapter 14 of the Magna Carta states that "A free man is not to be amerced for a small offence save in accordance with the manner of the offence, and for a major offence according to its magnitude". The prohibition on "cruel and unusual punishments" in the English Bill of Rights 1689 was intended as a prohibition not only against unauthorised punishments but also against disproportionate penalties. The Eighth Amendment to the Constitution of the United States, adopted in 1791, was directed against the imposition of excessive and disproportionate penalties. Courts have a long-standing power to quash a penalty which is excessive and out of proportion *(R v. Northumberland Compensation Appeal Tribunal ex parte Shaw* [1952] 1 KB 338 at 350, *R v. Barnsley Metropolitan Borough Council, Ex p Hook* [1976] 3 All ER 452 at 456).

[235] Thus, "it is and has always been considered a vital precept of just penal law that the punishment should fit the crime" (per the Eastern Caribbean Court of Appeal in *Spence v. The Queen and Hughes v. The Queen (Unreported)*, quoted with approval by the Privy Council in *Bowe v. The Queen* (above)).

[236] Many Commonwealth jurisdictions apply a principle of proportionality, to a greater or lesser extent, in assessing the constitutional validity of sentences *(Gray* (above) at 418). The doctrine of proportionality requires that the penalty be commensurate to the crime. A number of Privy Council decisions on the constitutionality of the mandatory death penalty for the offence of murder offer helpful guidance on this issue.

[237] The leading case is *Reyes v. The Queen* [2002] 2 AC 235, an appeal concerning the constitutionality of the mandatory death penalty prescribed in the Criminal Code of Belize. Lord Bingham began by recognising that "the

crime of murder embraces a range of offences of widely varying degrees of criminal culpability ... all killings which satisfy the definition of murder are by no means equally heinous". It covers, for instance, at one extreme "the sadistic murder of a child for sexual gratification", and at the other "the mercy-killing of a loved one suffering unbearable pain in a terminal illness" (at [11]).

[238] Given that the class of offences falling within the definition of murder vary widely in character and culpability, as the House of Lords selected committee on murder and life imprisonment observed in 1989, "it is wrong that they should attract the same punishment". Since there are no limits to the variety of circumstances which may lead a man to commit murder, "attempts to confine the mandatory death sentence to those categories of murder that are most reprehensible will always fail to meet these objections" *(Watson v. The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472 at [33]). The difficulty with prescribing a mandatory punishment for such a wide-ranging offence was elaborated by Sir James Stephen in his *History of the Criminal Law of England*, Vol 2 (1883) at 87-89 (quoted in *Reyes* (above) at [34]):

> [I]t is practically impossible to lay down an inflexible rule by which the same punishment must in every case be inflicted in respect of every crime falling within a given definition, because the degrees of moral guilt and public danger involved in offences which bear the same name and fall under the same definition must of necessity vary... The fact that the punishment of death is not inflicted in every case in which sentence of death is passed proves nothing more than that murder, as well as other crimes, has its degrees, and that the extreme punishment which the law awards ought not to be carried out in all cases.

[239] A mandatory penalty for murder gives rise to the particular problem that it precludes any consideration of the individual circumstances of the offence. As Stewart J, sitting in the Supreme Court of the United States, starkly highlighted in *Woodson v. North Carolina* [1976] 428 US 280 at 304 (quoted in *Reyes* (above) at [34]):

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offence excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

[240] The Privy Council in *Reyes* (above) took into account two important developments relevant to the issue. The first development was the adopting of a series of international human rights instruments, starting with the universal declaration of human rights in 1948, which included the right to life, the right to equality, and the right not to be subjected to inhuman or degrading punishment. The second development was the practice in newly-independent

former British colonies, to set out in their Supreme Constitutions a series of fundamental rights and freedoms to be protected. The international instruments were regarded as relevant in considering the norms accepted by Belize as consistent with the fundamental standards of humanity (at [27]). This did not mean that effect was given to treaties not incorporated into the domestic law; "but the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the Constitution, that it does" (at [28]).

[241] Against these considerations, it was found that "consideration of the culpability of the offender and of any potentially mitigating circumstances of the offence and the individual offender should be regarded as a *sine qua non* of the humane imposition of capital punishment" (at [27]). Where the law goes beyond mere authorisation and requires the judge to impose the death penalty, there is no room for mitigation or for the considering the individual circumstances of the defendant or the crime committed *(R v. Hughes* [2002] 2 AC 259 at [47]). The mandatory sentence of death was thus held to be incompatible with the freedom from inhuman or degrading treatment, in that it precluded judicial consideration of the circumstances (at [43]):

> But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed. To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which s 7 exists to protect.

[242] The decision in *Reyes* (above) was followed in a line of subsequent Privy Council's decisions on the constitutionality of the mandatory death penalty for murder in other Caribbean jurisdictions *(R v. Hughes* (above); *Fox v. The Queen* [2002] 2 AC 284; *Watson v. The Queen* (above)). The position was succinctly put in *Watson v. The Queen* (above) at [33]:

> To condemn a man to die without giving him the opportunity to persuade the court that this would in his case be disproportionate and inappropriate is to treat him in a way that no human being should be treated.

[243] In like manner, in this jurisdiction, judicial case-law has similarly been expansively judicially interpreted such that it is no longer tenable to construe art 5(1) FC literally. The meaning of 'life' and 'personal liberty' have been interpreted as encompassing the various essential aspects of life from ranging from the rudimentary needs of livelihood, education, shelter, locomotion to the more advanced aspects of 'life' and 'personal liberty' such as the right to a fair trial *PP v. Gan Boon Aun* [2017] 3 MLRA 161, and access to justice

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 MLRA 20). The array of rights is not exhaustive and remains open to further judicial interpretation as novel situations arise.

[244] It therefore follows that while it is the Legislature that is responsible for, and enacts law, and to that extent determines as a matter of policy the nature of the law and the commensurate punishment for it, the Legislature's rights are not infinite/boundless, and the Judiciary is entitled, under art 4 FC, to examine such law, when challenged, to ascertain that they are just, fair and reasonable as envisaged under art 5(1) and 8(1).

[245] Reverting to the instant appeals, can it be said that there is a reasonable basis for placing all persons who have been convicted for 'trafficking in drugs' as defined under the DDA, within the same class, for the purposes of punishment? Is the classification premised on intelligible differentia bearing a coherent/rational nexus to the object or policy of the DDA?

[246] A study of the DDA will disclose that the Legislature has enacted the statute with a very wide definition of 'trafficking'. The term encompasses a vast array of activities including "... manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug ...".

[247] It also makes it an offence for a person to be punished in respect of the trafficking of varying quantities of dangerous drugs. The DDA does not stipulate any minimum quantity of drugs required to establish the offence of trafficking, *albeit* a statutory minimum weight is stipulated in order to invoke the presumption of trafficking under s 37(da). In other words, in terms of both the range of activities, and the weight of drugs concerned, the ambit of the offence is very wide.

[248] The policy and object of the DDA is clear, namely to put an end to the dissemination of dangerous drugs in the country or to rid the country of this scourge. However, it is equally clear that by very reason of the wide ambit of these statutory provisions, the range of circumstances in which a person is charged and convicted of trafficking diverges greatly.

[249] By way of example, convictions in the court range from persons who are routinely referred to as 'drug mules', who carry relatively small quantities of a proscribed drug, due to impecuniosity, ignorance or desperation to, at the other extreme, persons who strategise, plan and set up drug 'factories' at various hidden locations with a view to 'cooking' or manufacturing huge quantities of a cocktail of drugs, for consumption by large segments of the public, and who earn vast profits from their illicit activities. In between these two extremes are persons who 'traffic' for a variety of reasons with different levels of culpability.

[250] Notwithstanding these huge disparities in the circumstances of the commission of the offence, the quantity involved and the types of persons involved, they are all grouped together in one large class as 'traffickers' who are all consequently subject to the sole mandatory punishment of death.

[251] With the greatest of respect, it defies common sense to contend, even momentarily, that all these persons who fall within the vast definition of 'trafficking' have been classified, for the purposes of punishment only, on the basis of intelligible differentia, with a rational nexus to the object of the DDA. This is because there is no intelligible criteria for classifying them together for the purposes of imposing the same punishment of mandatory death, save for the purposes of establishing culpability for the offence of trafficking. In other words, while the rationale for classification may have basis for the purposes of establishing 'trafficking' so as to ensure that the wide range of activities are caught, this ought not to extend to punishment, which is a distinct and separable aspect of the crime. As such, it cannot be said that the classification is reasonable in so far as punishment or sentencing is concerned.

[252] The ultimate policy and object of the DDA is to prohibit the spread or perpetration or trading in drugs. To that end, the classification of a wide range of activities to enable the prosecution of all persons involved in the drug trade is tenable. And equally so for the purposes of proving guilt, given the difficulties otherwise involved in establishing the offence of 'trafficking'.

[253] However, to impose the same mandatory extreme and final punishment of death, to all persons falling within that range, lacks any rational basis. The diversity of persons and circumstances, not to mention the quantity of drugs involved, precludes such classification. On the contrary, such an imposition is irrational, arbitrary and capricious.

[254] The imposition of the death penalty as the sole punishment for trafficking, being unreasonable, unjust, unfair and devoid of any rational classification, infringes art 8(1) FC.

[255] It follows therefore that s 39B DDA is similarly violative of art 5(1) FC namely the right not to be deprived of life save in accordance with law. The law being arbitrary, capricious and therefore neither fair nor proportionate, does not qualify as 'law' contemplated under art 5(1) FC. Any deprivation of life pursuant to such law is therefore unconstitutional.

Section 302 Of The Penal Code

[256] The Penal Code was passed in 1936 (FMS Cap 45). Offences were classified according to their subject-matter, defining them comprehensively and prescribing punishment which was considered to be commensurate with the offence at that time. Is the prescription of the mandatory death penalty as the sole sentence for the full range of circumstances under which the offence of murder is committed, justified pursuant to art 8(1) and 5(1) FC today?

[257] It is important to emphasise that it is not the issue of culpability for the offence of murder that is under judicial scrutiny here. It is the sole mandatory punishment for a wide range of circumstances within which such an offence is committed that is under consideration.

[258] As with 'trafficking' in drugs, the circumstances within which the offence of murder may arise vary greatly. It may range from a situation where a person is provoked and responds violently so as to cause death, to a carefully planned and strategised commission of the offence with a clear and perceptible intention to kill, on the one hand to a situation where a loved one in pain is allowed to pass on by the provision of drugs, as explained by Bingham LJ in *Reyes* (above). As long as the commission of the offence falls within s 302 PC, it amounts to murder and the single punishment for these widely varying circumstances resulting in a killing is death.

[259] Does the punishment satisfy the constitutional requirement of proportionality?

[260] The test to be applied again is whether the prescription of the mandatory death penalty satisfies the test of being premised on intelligible criteria with a rational nexus to the object of the statute. The object of the statute here is clear, namely to punish the offender for taking the life of another in the manner defined within s 302. But the section defining murder clearly encompasses a wide range of circumstances. Once again, this is reasonable for the purposes of culpability or the legal finding of guilt in relation to the commission of the offence.

[261] However, in so far as punishment is concerned, it is difficult to ascertain intelligible differentia with a rational nexus to the object of the statutory provision, in the imposition of the mandatory death penalty. The nexus between these widely varying circumstances in the commission of the offence is only the death of the victim. The other circumstances giving rise to the commission of the offence, are so varied that they defy classification into any form of intelligible differentia.

[262] If, as in *Bachan Singh v. State of Punjab* (above), the option of another punishment or series of punishments had been included in the statute with the discretion accorded to a judge to determine an appropriate sentence, then it could have been argued that there was reasonable classification, as the option of meting out punishment in accordance with the gravity of the circumstances giving rise to the offence would have been in place. That is not the case here. The result is a statutory provision meting out a single, irrevocable and final punishment that treats persons in clearly unequal or different categories in like manner. As such, the mandatory death penalty specified in s 302 PC infringes art 8(1) FC and accordingly art 5(1) FC for not being fair, just and reasonable. It is, on the contrary, arbitrary, unjust and capricious, as it imposes a like punishment for persons in widely varying categories with no reasonable basis or intelligible criteria to do so.

Consequences Of The Lack Of Proportionality In Section 39B DDA And Section 302 PC

[263] What is the net effect on the appellants as a consequence of the finding of a lack of proportionality in these two statutory provisions? The consequence is that despite the disparity in the widely varying circumstances in which the offence occurred, the perpetrators are dealt with identically. As stated earlier, where unequal or different things are treated as if they were identical, this in itself can amount to an infringement of art 8(1) FC.

[264] An infringement of art 8(1) FC results in the relevant provisions under scrutiny being struck down for unconstitutionality as envisaged under art 4 FC.

Punishment Disproportionate To The Offence

[265] The consequence of the breaches of art 8(1) (and art 5 FC) is that the mandatory death penalty cannot be considered a proportionate punishment to meet the varied circumstances in which the offence was committed.

[266] The accused is deprived of the opportunity to allow for a consideration of the circumstances giving rise to the commission of the offence, as well as any facts in mitigation. Neither is the accused given any explanation or reasons for imposing the finality of the death penalty. All these matters are rendered nugatory and superfluous, notwithstanding the widely differing reasons and circumstances in which the offence of 'trafficking' or 'murder' was committed.

[267] If the punishment in these two statutory provisions was not the mandatory death penalty, but an alternative between imprisonment for life and the death penalty, the convicted persons would be accorded an opportunity to be heard in respect of the circumstances in which the offence was committed. Other mitigating factors could be raised and given consideration by the court.

[268] The court, having deliberated on the same, could then exercise its judicial discretion and determine and give reasons as to why, in each particular case, an accused was given life imprisonment or the death sentence. The rules of natural justice would have been complied with, where such an alternative remains available to the courts.

[269] The requirement of fairness and proportionality in the context of the deprivation of life would then have some meaning and could be given practical effect. That is not the case where the mandatory death penalty is imposed, as there is no option, nor opportunity, for the courts to take any of these matters into consideration. The deprivation of life, having to be imposed mandatorily, would be a robotic or mechanical exercise undertaken by the courts at the behest of the Legislature.

[270] In the Indian case of *Bachan Singh v. State of Punjab* (above) the issue for consideration was whether that part of the statutory provision providing an alternative punishment of death for murder was constitutional. The normal

punishment for murder was life imprisonment with the alternative of death if the circumstances warranted it. In holding that the alternative punishment of death was constitutional, the Supreme Court of India speaking through Sarkaria J gave the following reasons: (a) that the death sentence provided for was an alternative to the sentence of life imprisonment; (b) that special reasons had to be given for departing from the normal sentence of life imprisonment; and (c) the accused was entitled to be heard on the question of sentence.

[271] In other words, the reasoning of the Indian Supreme Court was that if the statutory provision did not provide the death sentence as an alternative penalty but as a mandatory one, then there was no possibility of the accused being heard on sentence, or for the court to exercise its judicial discretion in determining which was the appropriate sentence, or for reasons to be given by the court for the imposition of such a final and irrevocable sentence. The failure of the Legislature to provide for these fundamental matters was found to violate the equivalent of our art 5(1) and 8(1) FC.

[272] Chandrachud CJ eloquently put it thus:

> ... The Legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a preordained sentence of death... For us, law ceases to have respect and relevance when it compels the dispensers of justice to deliver blind verdicts by decreeing that no matter what the circumstances of the crime, the criminal shall be hanged by the neck until he is dead.

[273] In similar tenor, in the instant appeals, the imposition of the mandatory death penalty as the sole punishment for the offences concerned does not allow for:

(i) the imposition of a penalty commensurate with the circumstances of commission of the offence;

(ii) an opportunity to be heard by the accused as to why the death penalty is not warranted in the particular circumstances of his case;

(iii) any other mitigating circumstances.

[274] To that extent, the statutory provisions cannot be said to satisfy the constitutional safeguards in art 5(1) or 8(1) FC. As such, the consequences of the application of a law that is inherently not fair or proportionate, afford further basis for striking down these provisions imposing the mandatory death penalty for a contravention of those articles.

[275] The need for proportionality in punishment was also forcefully articulated in the Indian case of *Vikram Singh v. Union of India* [2010] 3 SCC

56. In that case, the appellants sought to challenge the constitutional validity of a provision of the Indian Penal Code, on the grounds that it prescribed a sentence of death, alleged to be in violation of the Indian art 21, which is similar to our art 5(1) FC.

[276] The court rejected the proposition of the appellants that the statutory provision imposed a mandatory death sentence, as death was only one option before the trial court. The alternative punishment available was the imposition of a sentence of imprisonment for life. Therefore, there was no violation of art 21 (the equivalent of our art 5(1) FC), as the death penalty was only an option.

[277] Despite dismissing the instant appeal on this ground, Chief Justice Thakur addressed the general issue of proportionality. He stated that merely because courts are generally deferential to the Legislature on matters of punishment, it did not follow that penalties that are "shockingly disproportionate" to the gravity of the underlying offence are immune from constitutional intervention. He went on to enumerate the guiding considerations in relation to the doctrine of proportionality:

(i) firstly, the general principle is that punishment must be proportionate;

(ii) secondly, that there exists a presumption that the Legislature (unlike the courts) is best positioned to propose punishment;

(iii) thirdly, that the courts must defer to the wisdom of the Legislature in this regard unless the prescription is outrageously disproportionate to the offence or so inhuman or brutal that it would be unacceptable by any standard of decency; and

(iv) this standard is further raised in cases where the prescription is one of death - the court defers to the high standard of judicial care that is applied to the death penalty, in line with evolving jurisprudence on the issue.

[278] These prescriptions comprising the core of the decision on the doctrine of proportionality are most useful in the context of the present appeals. They may be accurately applied in the context of our FC when considering a challenge to a penal provision under art 5(1) and 8(1) FC. The primary point to be gleaned is that a penal statute is open to constitutional review on the grounds of proportionality as housed in art 8(1) FC.

The Imposition Of The Mandatory Death Penalty - Usurpation Of Judicial Power Or An Issue Relating To Sentencing Or Punishment That Falls Within The Purview Of The Legislature?

[279] Another line of argument that overlaps the preceding arguments but still falls for consideration is whether the imposition of the mandatory death penalty effectively usurps judicial power in relation to punishment and/or sentencing.

[280] There is authoritative and well-respected case law that holds that the enactment of legislation including punishment, is not solely within the exclusive purview of the Judiciary, and that the imposition of a mandatory penalty does not *per se* amount to an incursion of judicial power. The rationale being that the Legislature is better placed to determine these matters in relation to policy and societal needs. This is indeed true, as is borne out by the FC and a considerable body of case law on the subject.

[281] However, the issue here is whether that precludes judicial scrutiny of such law absolutely, more particularly in relation to the punishment of the mandatory death penalty. In the preceding paragraphs, I have concluded that the imposition of the mandatory death penalty is unconstitutional for infringement of art 5(1) and 8(1) FC. The same issue is now examined from the perspective of the limits of legislative and judicial powers.

[282] The source of Parliament's legislative power in the field of punishment for criminal offences is art 74 read with the Ninth Schedule of the FC. Item 4 of the Federal List provides for 'civil and criminal law', including in para (h) "creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law".

[283] In *Hinds v. The Queen* [1977] AC 195 at 225 - 226, Lord Diplock explained the distribution of powers between the Legislature, Executive and the Judiciary in respect of punishment for criminal offences. The power conferred upon Parliament to make law for peace, order and good government "enables it not only to define what conduct shall constitute a criminal offence but also to prescribe the punishment to be inflicted on those persons who have been found guilty of that conduct by an independent and impartial court established by law". The Executive has the power to carry out the punishment and to regulate the conditions under which the punishment is carried out, subject to any restrictions imposed by law. The Judiciary, having determined the criminal liability of the accused based on the law, has a duty to pass sentence according to law (s 183 of the Criminal Procedure Code ('CPC')).

[284] The power to prescribe punishment is an integral part of legislative power to enact offences *(Mohammad Faizal Sabtu v. PP* [2012] 4 SLR 947 at [43]). This is because the question of what punishment is appropriate for society with regard to a particular crime is a matter of policy involving differing views on the moral and social issues involved (see *Lau Cheong v. HKSAR* [2002] 2 HKLRD 612 at [105]; and *Yong Vui Kong v. PP* [2010] 3 SLR 489 at [49]).

[285] In the course of exercising its legislative power, Parliament may prescribe a fixed punishment to be imposed on all offenders convicted of a particular offence or conditional upon the occurrence of some contingency. This would encompass a mandatory penalty. Alternatively, it may fix a range of punishments up to a maximum in severity, with or without a minimum leaving

it to the court to determine the appropriate punishment within the permissible range, given the circumstances of the particular case. (see *Hinds* (above) at para 226).

[286] In short, since the power to stipulate punishments for offences is a part of legislative power, the prescription of any kind of punishment for an offence cannot be viewed as a trespass or usurpation of judicial power (see *Mohammad Faizal* (above at para 120). There is no encroachment of judicial power so as to transgress the doctrine of the separation of powers.

[287] The relative roles of the Legislature and the Judiciary was aptly described by Lord Bingham in the often-cited case of *Reyes* (above):

> In a modern liberal democracy it is ordinarily the task of the democratically elected Legislature to decide what conduct should be treated as criminal, so as to attract penal consequences, and to decide what kind and measure of punishment such conduct should attract or be liable to attract... The ordinary task of the courts is to give full and fair effect to the penal law which the Legislature has enacted.

[288] Similarly the High Court of Australia in *Palling v. Corfield* [1970] 123 CLR 52 upheld the constitutionality of a statutory provision providing a fixed punishment for an offence. The argument that it offended the separation of powers doctrine was rejected:

> ... If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded: nor in my opinion, is there any judicial power or discretion not to carry out the terms of the statute.

[289] Barwick CJ emphasised that whether such a discretion is given to the court is a legislative decision and does not amount to a breach of the Constitution.

[290] Sentencing power, which is the focus of the present appeals, was considered in detail in *Mohammad Faizal* (above) by the erudite then Chief Justice of Singapore, Chan Sek Keong. He emphasised that sentencing has not historically been considered a facet of judicial power, and only became a feature of English sentencing in the last century:

> ... The discretion to determine the measure of punishment to impose on the offender was thus not a birth right that accompanied the creation of the Judiciary as a separate organ of state. On the contrary, it was initially assumed that the role of the judge was simply, to paraphrase Montesquieu's words, to pronounce the punishment that the law inflicted for the offence in question... the judicial discretion to determine the sentence to impose on an offender is a relatively modern legislative development. **It was the Legislature that, through statute, vested the courts with the discretionary power to punish offenders in accordance with the range of sentences prescribed by the Legislature. Historically, the sentencing power was neither inherent nor integral to the judicial function as the measure and range of punishments**

to be imposed for a specific offence or a specific class of offences was determined by legislation.

[Emphasis Added]

[291] Thus, the power to prescribe punishment is part of the legislative power while the courts' power is to exercise its sentencing discretion as conferred by statute to select the appropriate punishment *(Prabagaran Srivijayan v. PP And Other Matters* [2017] 1 SLR 173 at [60]).

[292] Pertinently, this does not mean that Parliament's legislative power to prescribe punishments for offences is unlimited. It is not the case that any legislation concerning the exercise of sentencing powers cannot constitute a breach of the separation of powers *(Prabagaran* (above)) at [59]-[62]). Legislative provisions have been held to be unconstitutional for trespassing onto the sentencing function of the courts *(Mohammed Faiizal* (above) at [51]).

[293] There are certain broad limitations to Parliament's legislative power in enacting sentencing provisions:

(i) While Parliament may prescribe a punishment by enacting a law of general application, it cannot by law dictate the punishment to be imposed on individuals in a particular case *(Liyanage v. The Queen* [1967] 1 AC 259);

(ii) While Parliament may decide whether to confer sentencing discretion upon the courts in respect of an offence, it cannot transfer such a discretion to a body which is not constituted as a court according to the Constitution *(Hinds v. The Queen* (above)); and

(iii) Parliament cannot empower the Executive to choose between available penalties in a particular case *(Deaton v. Attorney-General and the Revenue Commissioners* [1963] IR 170); and

(iv) It is also impermissible for Parliament to empower the Executive to make administrative decisions which directly affect the actual sentence eventually imposed by a court of law *(Prabagaran Srivijayan v. PP* (above)).

[294] What may be gleaned from these cases is that the provision by Parliament of a mandatory penalty for an offence does not offend the separation of powers doctrine, as there is no usurpation of judicial power. The fact that the court is not able to exercise a judicial discretion in respect of a particular offence, because the punishment has been stipulated in a mandatory form, does not in itself amount to a transgression of judicial powers.

[295] In short, neither the enactment of s 39B DDA nor s 302 PC by the Legislature, in itself, amounts to a usurpation of judicial powers.

[296] However that does not mean, as stated earlier, that the Legislature is absolutely free to legislate as it deems fit. It is circumscribed, as all three arms of Government are, by the FC. As such, while a mandatory penalty may be imposed, such punishment is open to judicial scrutiny in relation to whether it is consonant with or falls within the purview of the FC, when a challenge is made to the effect that it is unconstitutional. Whether a statutory provision conforms to the provisions prescribed in the FC remains the function of the Judiciary. And nowhere is this more clearly articulated than in art 4 FC, which houses the doctrines of the separation of powers and the rule of law. It allows the Judiciary to retain a check and balance on both the Executive and the Legislature by striking down law that does not conform to the FC.

[297] If the statutory provision is found to infringe the FC, then the court, exercising its powers under art 4(1) FC is free to strike down such provision as being incompatible with the FC (see *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 4 MLRA 554 and *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 2 MLRA 1. In short, the legislative power of Parliament to prescribe punishment is subject to judicial scrutiny to ensure that it does not transgress the supreme law of the land.

[298] It is, in other words, simply insufficient to state, that it is for the Legislature to legislate on punishment and for the courts to execute the same. It falls upon the judicial arm to make the determination as to whether the punishment sanctioned is consistent with the provisions and underlying principles of the FC.

[299] If the statutory provision is found to infringe the FC, then the court, exercising its powers under art 4(1) FC is free to strike down such provision as being incompatible with the FC. (See *Semenyih Jaya* (above) where Zainun Ali FCJ stated at para 75 "With the removal of judicial power from the inherent jurisdiction of the Judiciary [referring to the 1988 amendment to the FC], that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in art 4(1)." Her Ladyship unequivocally stated in paras 112-114 that where a law is inconsistent with the FC, the courts may strike it down. Paragraphs 112-114 of *Semenyih Jaya* are set out below for ease of reference: "[112] Thus, within the ambit of art 13 and 121 of the Federal Constitution, the premise of a constitutional challenge is art 4(1) of the Constitution. [113] By virtue of art 4(1) of the Federal Constitution, this court may hold the provisions of any law passed after Merdeka as void and of no effect if such law are inconsistent with the Federal Constitution. [114] Our Federal Constitution affirms the polemic that judicial power is exercisable only by judges sitting in a court of law; and that the judicial process is administered by them and no other." See also *Indira Gandhi Mutho* (above) at paras 34-38 of Zainun Ali FCJ's judgment). In short, the legislative power of Parliament to prescribe punishment is subject to judicial scrutiny to ensure that it does not transgress the supreme law of the land.

Ong Ah Chuan v. Public Prosecutor

[300] The case of *Ong Ah Chuan v. Public Prosecutor And Another Appeal* [1980] 1 MLRA 283 ('*Ong Ah Chuan*'), a decision of the Privy Council has been held up as the answer to all challenges relating to the constitutionality of the death sentence as well as the constitutionality of the mandatory death penalty (see *Public Prosecutor v. Lau Kee Hoo* [1982] 1 MLRA 359 and *Mohammad Faizal* (above)).

[301] *Ong Ah Chuan* (above) addressed, *inter alia*, the question of whether the mandatory death sentence for 'trafficking in drugs' under the Misuse of Drugs Act of Singapore conflicted with arts 9(1) and 12(1) of the Constitution of the Republic of Singapore. Articles 9(1) and 12(1) are equivalent to art 5(1) and 8(1) FC. In short, the arguments put forward in that appeal were similar to the propositions undertaken here.

[302] In holding that the death sentence prescribed under the statute was constitutional, Lord Diplock speaking for the Privy Council emphasised that they were in no way concerned with arguments for or against capital punishment. They appreciated that where a criminal law provides for a mandatory sentence for an offence, there is a possibility that there would be 'considerable variation' in moral blameworthiness notwithstanding the similarity in so far as legal guilt was concerned. The Privy Council went on to emphasise that in murder, which they described as a crime 'often committed in the heat of passion, the likelihood' of such disparity was very real. And then homing in on the nub of their reasoning they differentiated trafficking in drugs in the following manner:

> ... it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed. But art 12(1) of the Constitution is not concerned with equal punitive treatment for equal moral blameworthiness; it is concerned with equal punitive treatment for similar legal guilt.

[303] It is here that the legal reasoning warrants full judicial scrutiny. It is, with respect, misconceived to categorise the wide range of quantum of drugs commencing from the possession of 15g of heroin to the large scale of manufacture and transport of kilograms of the same drug as being equivalent 'crimes' of which the motive is cold calculated greed. It is not tenable to classify the different circumstances as set out above in the same category and maintain that this amounts to a rational classification for purposes of punishment. It may well be sufficient for the purposes of ascertaining culpability for conviction, but not more.

[304] The further and arguably greater concern is the statement that art 12(1) of the Singaporean Constitution is concerned with "equal punitive treatment for similar legal guilt". With the greatest respect, this amounts to conflating the dual and separate concepts of:

(i) Convicting a person of guilt under a particular statutory provision; and

(ii) Imposing a standard mandatory punishment of death for a widely disparate series of circumstances giving rise to liability.

[305] Their Lordships were effectively holding that notwithstanding whether a person is a drug mule found in possession of, and transporting the minimum quantity of drugs, or as stated earlier, manufacturing huge quantities of a cocktail of drugs, that makes no discernible difference and warrants the single most extreme, irrevocable and final punishment of death.

[306] Put another way, their reasoning was that there was no infringement of the principle that persons are entitled to the equal protection of the law under art 12(1) of the Singaporean Constitution, when convictions based on such differing bases were treated in like manner. And the basis or factor cementing these disparate situations was that trafficking in drugs was an "evil and profitable a crime". Further, that: "... A primary object of imposing a death sentence for offences that society regards with particular abhorrence is that it should act as a deterrent; particularly where the offence is one that is committed for profit by an offender who is prepared to take a calculated risk. There is nothing unusual in a capital sentence being mandatory. Indeed its efficacy as a deterrent may be to some extent diminished if it is not ..."

[307] Again, the entire basis of the second part of art 8(1) FC was, with the greatest respect, unheeded by concluding that the two entirely disparate situations were the same. It is to be borne in mind that the widely varying circumstances warranting a conviction for trafficking are premised to a large extent by the use of presumptions and definitions to enable convictions to be more readily procured, in the interests of putting an end to an abhorrent and damaging phenomenon, the drug trafficking trade.

[308] However, in the course of doing so, it cannot be forgotten that the entirety of the persons involved in various facets of this abhorrent trade subsist at various levels. At the top of the hierarchy sit the persons who craft, engineer and ensure the continued existence of what has become an industry. At the bottom of the pyramid, if it may be put thus, sit the drug mules who vary, as I have emphasised earlier, from ill-educated, ignorant, poverty-stricken individuals to more shrewd and canny carriers who comprehend what they are doing but again are driven by need to do so.

[309] There is nothing unconstitutional in convicting all of them for 'trafficking' as defined under s 2 DDA. It is in point of fact essential that all persons involved in the trade are brought to book and such activities prohibited and punished. But the issue here goes to the type and extent of punishment warranted given the clear and different degrees of involvement that bears directly on levels of culpability. Like offenders should be dealt with in like manner. In *Ong Ah*

Chuan (above) efforts were made to paper over the stark differences and levels of culpability in trafficking in dangerous drugs.

[310] However, the decision was followed *in toto* by this court in *PP v. Lau Kee Hoo* (above) in 1983. When *Lau Kee Hoo* was being heard by this court, the case of *Mithu* (above) was pending in the Indian Supreme Court. Decision had not been delivered as yet, so this court did not have the benefit of the reasoning of the Indian Supreme Court in *Mithu* (above), which has been outlined and relied upon above.

[311] This court instead adopted the reasoning in *Ong Ah Chuan* (above), a Privy Council decision, in determining whether the mandatory death penalty prescribed under s 57(1) of the Internal Security Act 1960 for the offence of having ammunition under one's control in a security area without lawful excuse or authority, was constitutional.

[312] However, it should be borne in mind that these decisions were delivered in the 1980s'. The ever-turning wheels of time and the evolution of jurisprudence on human rights altered the somewhat narrow and inflexible view adopted in *Ong Ah Chuan* (above). Some 20 years later, in *Reyes* (above) Lord Bingham of Cornhill delivering the judgment of the Privy Council rejected the approach adopted in *Ong Ah Chuan* (above). He stated:

> ... Limited assistance is to be gained from such decisions of the Board as *Runyowa v. The Queen* [1967] 1 AC 26 and *Ong Ah Chuan v. Public Prosecutor And Another Appeal* [1981] AC 648, made at a time when international jurisprudence on human rights was rudimentary and the Board found little assistance in such authority as there was.

[313] And in *Watson* (above), Lord Diplock's *dicta* that there was nothing unusual in a death sentence being mandatory was termed as being "no longer acceptable". The decision in *Ong Ah Chuan* (above) has been "strongly criticised".

[314] Given the visible recoil by the Privy Council itself, and ensuing jurisprudence, against the legal reasoning in *Ong Ah Chuan* (above) justifying the imposition of the mandatory death penalty, this court cannot be faulted for re-visiting the legal rationale and coherence in that case.

[315] Departure from *PP v. Lau Kee Hoo* (above) is warranted to the extent that it adopted *in toto* the reasoning in *Ong Ah Chuan* (above), without any modification.

[316] As I have concluded that, *Ong Ah Chuan* (above) is incorrect in this aspect, namely the constitutionality of the mandatory death penalty, it follows that the imposition of the single, irrevocable and final penalty of death on all manner of persons found to be 'trafficking' in dangerous drugs as defined under s 2 DDA is contrary to the doctrine of proportionality as stipulated in art 8(1) FC. Section 39B DDA is unconstitutional and is therefore struck down.

[317] The consequence is that the pre-1983 provision, which confers upon the court the discretion to mete out either life imprisonment or alternatively the death penalty, is restored. Therefore s 39B should now read as follows:

> (2) Any person who contravenes any of the provisions of sub-section (1) shall be punished with death or life imprisonment.

[318] It is pertinent to note that the Dangerous Drugs (Amendment) Act 2017 lends force to my contention that the mandatory death penalty is unconstitutional. It reads:

> (2) Any person who contravenes any of the provisions of sub-section (1) shall be guilty of an offence against the Act and shall be punished on conviction with death OR imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes.

[319] It is clear from the foregoing that by inserting an option to the mandatory death penalty, notwithstanding its circumscribed nature, s 39B(2) now provides an alternative punishment to the death penalty. The fact that it may indicate a shift in legislative thinking has no relevance, with respect, to the issue of whether there is a contravention of art 8 or art 5 of the FC. That is a purely legal issue for determination by the courts. And that is the issue before this court. This court is not with great respect, called upon to determine a point of policy, or societal change.

[320] The issue of whether legislative response is proportionate or disproportionate from the Malaysian societal viewpoint is also not in issue here. It is a purely legal question of whether art 5 and art 8 of the FC has have or have not contravened. Under the FC, the Judiciary is bound, under art 4 to determine this issue. Not Parliament.

[321] The issue of whether there has been a contravention as provided under art 4 FC does not, with respect, mandate a judge to inflict his or her personal views in place of Parliament.

[322] There are clear criteria which have been set out under the law to ascertain the issue, and the test has been set out and applied *in extenso* as I have indicated previously. So there can be no question of a judge's personal opinion substituting that of Parliament. To suggest that a judge's personal opinion may supplant that of Parliament, does, again with great respect, grave injustice to art 4 and the judicial oath. Our FC requires that the Judiciary exert a check and balance in relation to, *inter alia*, the law enacted by Parliament, under the doctrine of separation of powers enshrined in art 4.

[323] That duty has to be fulfilled, as the Judiciary is the arm entrusted with safeguarding the FC.

[324] Undertaking that duty cannot amount to judicial supremacy because by undertaking this task, the Judiciary is conforming to the doctrine of

constitutional supremacy. Judicial supremacy ought not to be conflated with constitutional supremacy. Judges too are bound by the doctrine of the separation of powers. They cannot intrude into matters best left to Parliament. But the constitutionality of a statute is very much an issue of, and for, the judicial arm. To state that the constitutionality of a statute or statutory provision should be left entirely to Legislative/Parliament amounts to subscribing to the doctrine of parliamentary sovereignty rather than constitutional supremacy, which governs Malaysia.

[325] The argument for s 302 PC, the punishment for murder, is the same. There is no rational basis for classifying the vastly varying circumstances giving rise to the offence of murder in one category. It offends art 8(1) FC. It is therefore unconstitutional and accordingly struck down.

Issues (d) And (e)

[326] The Attorney General makes the point that as the DDA is a pre-Merdeka law, it is not open to this court to strike it down under art 4. It is pertinent to note that while the DDA was a law enacted before Merdeka Day known then as the Dangerous Drugs Ordinance 1952. However s 39B was only inserted in 1975 vide the Dangerous Drugs Amendment Act 1975. So s 39B DDA cannot be said to be pre-Merdeka law. And it is solely that section that the appellants seek to strike down as being unconstitutional under art 4 FC with respect to the three appeals relating to Letitia, Gomez and Hawkes.

[327] The position with regards to Pubalan's appeal relates to the PC. Since the enactment of the PC pre-Merdeka on 27 March 1936, the punishment for murder under s 302 PC has been, and continues to date to be, the mandatory death sentence. As pre-Merdeka law, s 302 cannot be declared void or invalid as opposed to post-Merdeka law, which is subject to being struck down for inconsistency with the FC under art 4. This is because art 4 provides for law passed after Merdeka Day.

[328] In the face of any such inconsistency in a pre-Merdeka law, art 162(6) is invoked to remove that inconsistency. Article 16 (6) provides:

> Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of the Constitution.

[329] If Pubalan's challenge is successful, that part of s 302 PC relating to the mandatory death penalty will have to be modified by a process of judicial interpretation and pronouncement. (See *Assa Singh v. Mentri Besar Johore* [1968] 1 MLRA 886; and *Datuk Seri S Samy Vellu v. S Nadarajah* [2000] 3 MLRH 111).

[330] The optimum solution is to modify s 302 PC such that the sentence affords the court the option of punishment of either life imprisonment or the death penalty. Such modification permits the court to make a decision as to the

most appropriate punishment to be meted out in accordance with the particular facts and circumstances of each case. The proposed modified provision would read:

> Punishment for murder
>
> 302. Whoever commits murder shall be punished:
>
> (a) With imprisonment for life; or
>
> (b) Death.

[331] Ultimately, the point is that judicial deference should be exercised where it relates to moral and social issues on which there are differing views, since Parliament is the democratically elected body. Nevertheless, the Judiciary has a constitutional role to ensure that law are consistent with the Federal Constitution. Judicial deference does not absolve the court from carrying out this function and duty. The independent function of the Judiciary is a cornerstone of democracy. The Judiciary should not be stigmatised as undemocratic (see *A v. Secretary of State for the Home Dept* [2004] UKHL 56).

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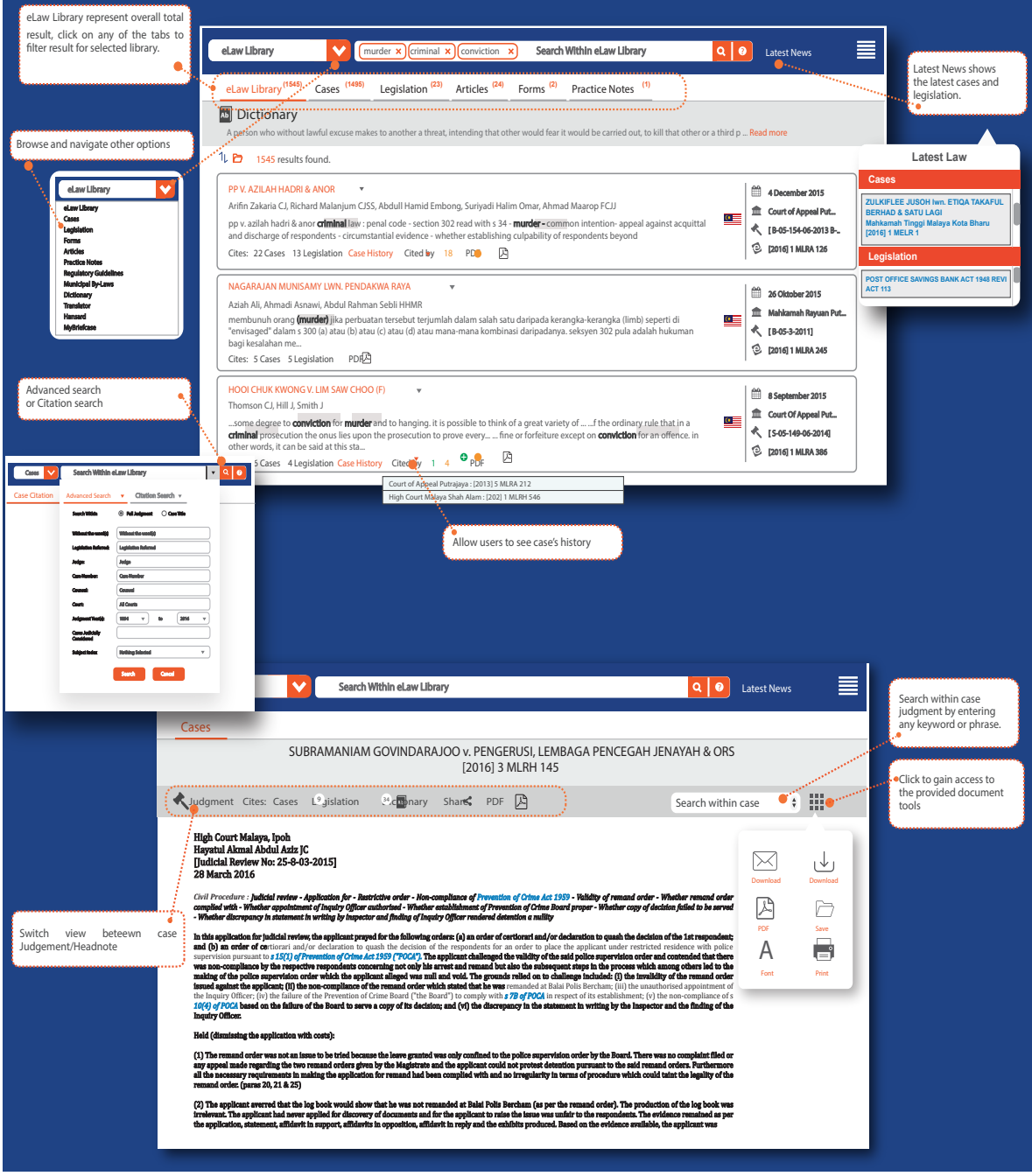

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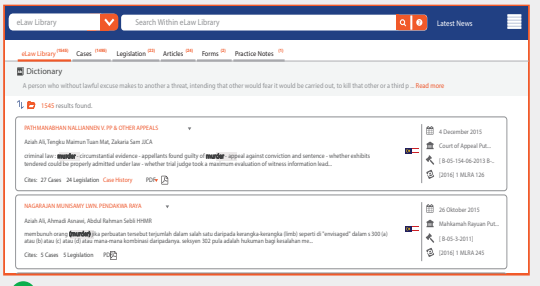

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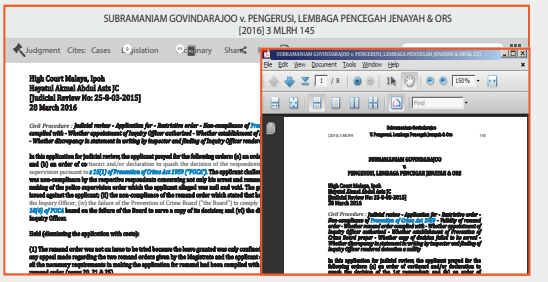

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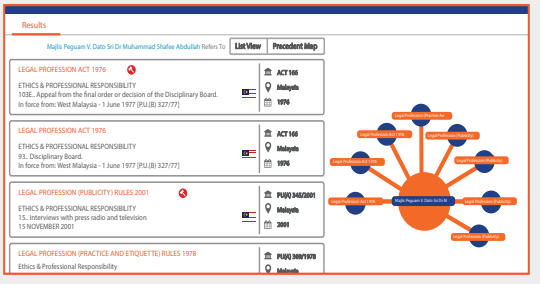

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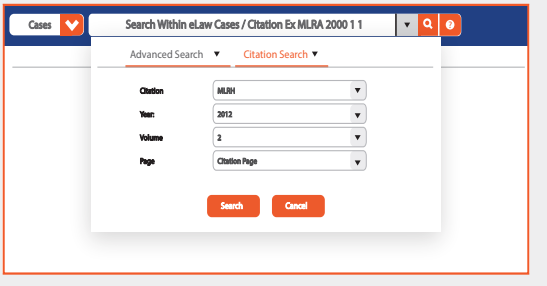

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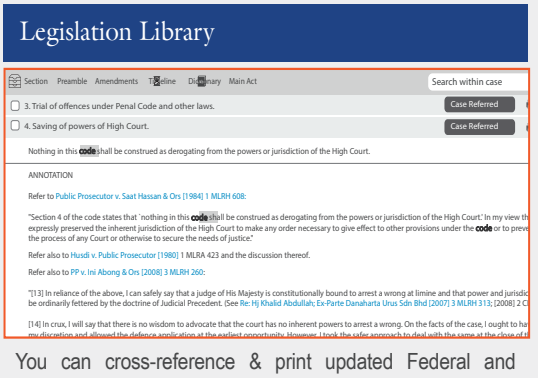

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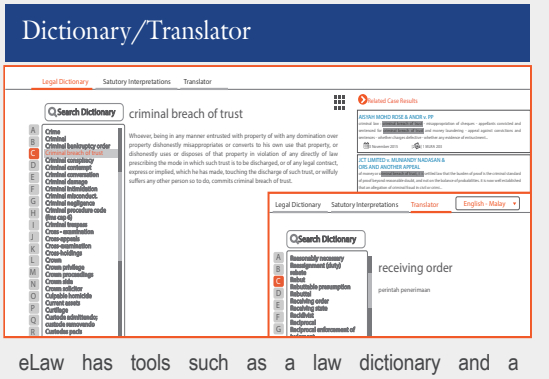

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