

JUDGMENT Express

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Mohd Helmi Anuar Mohd Kassim
v. PP & Other Appeals

[2026] 4 MLRA

MOHD HELMI ANUAR MOHD KASSIM

v.

PP & OTHER APPEALS

Federal Court, Putrajaya

Wan Ahmad Farid Wan Salleh CJ, Azizah Nawawi CJSS, Lee Swee Seng FCJ

[Judicial Review Application Nos: 07-23-11-2024(W), 07-24-11-2024(W) & 05(RJ)-6-11-2024(C)]

22 April 2026

Constitutional Law: *Fundamental liberties — Whipping — Applications for review under r 137 Rules of the Federal Court 1995 to set aside sentences of whipping substituted under the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023 — Applicants previously convicted of drug trafficking under s 39B(1)(a) Dangerous Drugs Act 1952 and murder under s 302 Penal Code — Review premised on new evidence of death of an inmate allegedly resulting from whipping — Whether a constitutional challenge against a previous Federal Court decision was justiciable under r 137 Rules of the Federal Court 1995 where factual substratum for the challenge was unavailable at the material time — Whether punishment of whipping prescribed under s 39B(2) Dangerous Drugs Act 1952 and s 302 Penal Code violated the right to life and personal liberty under art 5(1) or the principle of proportionality under art 8(1) Federal Constitution — Whether exemption of female offenders from whipping under s 289 Criminal Procedure Code constituted unconstitutional gender discrimination under art 8(2) Federal Constitution — Whether international human rights instruments could be used to override domestic statutory penalties in absence of formal legislative incorporation*

Between 2013 and 2014, the High Court convicted Mohd Helmi Anuar Bin Mohd Kassim and Kumanaan a/l Anthony Vincent of drug trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 (“DDA”) and sentenced them to death. Separately, Sivachandran a/l S. Jayarajah was convicted of murder under s 302 of the Penal Code and sentenced to death on 28 February 2019. Following the enactment of the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023, the Federal Court allowed review applications for all three individuals in October 2024, substituting their death sentences with terms of 30 years’ imprisonment and 12 strokes of whipping for each charge. Subsequently, the applicants learned of the death of a prisoner at Pokok Sena prison on 7 October 2024, following a whipping sentence, with the death certificate recording ‘septic sequelae due to blunt force trauma to the gluteal region’. Citing this event, the applicants filed fresh review applications under r 137 of the Rules of the Federal Court 1995, seeking to set aside the whipping sentences. They contended that the punishment of whipping was unconstitutional as it constituted cruel, inhuman, or degrading treatment, carried a risk of death that violated the right to life under art 5(1), and was arbitrary or disproportionate under art 8(1) of



the Federal Constitution. Additionally, it was argued that the exemption of women from whipping under s 289 of the Criminal Procedure Code (“CPC”) was discriminatory under art 8(2). The issues before the Federal Court were (i) whether a constitutional challenge against a previous Federal Court decision was justiciable under r 137 of the Rules of the Federal Court 1995 where the necessary factual substratum for the challenge was unavailable at the material time; (ii) whether the punishment of whipping prescribed under s 39B(2) of the DDA and s 302 of the Penal Code violated the right to life and personal liberty under art 5(1) or the principle of proportionality under art 8(1) of the Federal Constitution; (iii) whether the exemption of female offenders from the punishment of whipping under s 289 of the CPC constituted unconstitutional gender discrimination under art 8(2) of the Federal Constitution; and (iv) whether international human rights instruments, such as the Universal Declaration of Human Rights, could be used to override domestic statutory penalties in the absence of formal legislative incorporation.

Held (dismissing the applicants’ applications):

Wan Ahmad Farid Wan Salleh CJ; Azizah Nawawi CJSS (Majority):

(1) While the grounds for review under r 137 of the Rules of the Federal Court 1995 were exercised sparingly, a challenge to the constitutionality of a prior decision was held to be justiciable if the factual substratum necessary to support that challenge had been unavailable at the time the original decision was made. In this instance, the death of the prisoner, which formed the basis of the applicants’ apprehension regarding their own sentences, occurred after their initial resentencing hearings, thereby justifying the review. (paras 45, 47, 48 & 103(a))

(2) The punishment of whipping under s 39B(2) of the DDA and s 302 of the Penal Code was held not to violate the Federal Constitution. The applicants failed to discharge the burden of proving that whipping was unconstitutional, as they adduced no medical evidence establishing a direct causal link between whipping and the death of the prisoner. All criminal sanctions carried a profound impact and whipping could not be singled out as uniquely “cruel, inhuman, or degrading” compared to other grave penalties such as life imprisonment or the death penalty. The determination of the moral efficacy or social desirability of specific punishments was regarded as a policy matter for Parliament rather than the Judiciary. (paras 66, 68, 74, 77, 78, 79 & 103(e)-(f), (h), (i) & (k))

(3) The exemption of women from whipping under s 289 of the CPC was held to be constitutional. Article 8(2) of the Federal Constitution was found to prohibit “unfavourable bias” but not “preferential treatment” for women, which was viewed as a positive measure rather than prohibited discrimination. The applicants failed to establish that women would have been treated similarly “but for” their gender, particularly since the law also exempted certain categories of men, such as those above the age of 50 or those sentenced to death. (paras 99, 100, 101, 102 & 103(o))



(4) In Malaysia's dualist legal system, international human rights instruments such as the Universal Declaration of Human Rights did not form part of domestic law unless formally incorporated by Parliament. Consequently, the ultimate test for constitutionality remained the Federal Constitution rather than external norms that had not been legislated into national law. (paras 83 & 103(j))

Lee Swee Seng FCJ (Dissenting):

(5) While review powers under r 137 of the Rules of the Federal Court 1995 were exercised sparingly, a challenge concerning the unconstitutionality of a sentence, raised for the first time due to fresh evidence of death resulting from such punishment, was held to fall within the rare and exceptional circumstances justifying the court's inherent power to prevent grave injustice. A sentence not in accordance with the law could not be permitted to stand, as a person once whipped could not be "un-whipped". (paras 121, 122, 123, 127, 128 & 129)

(6) The right to "life" under art 5(1) of the Federal Constitution was held to encompass more than mere physical existence. It included the right to live with human dignity and freedom from cruel, inhuman, and degrading treatment ("CIDT"). Judicial whipping, which involved institutionalised violence, splitting of the skin, and a systemic risk of complications leading to death such as septicaemia, was found to be fundamentally antithetical to those protections. The risk of death arising from whipping could not be reconciled with the State's duty to safeguard lives. (paras 134, 136, 140, 142, 146, 147, 160, 161, 162, 163, 164 & 165)

(7) Article 8(1) of the Federal Constitution was held to protect individuals against arbitrary, unfair, or excessive punishment through the principle of proportionality. Whipping as prescribed under the CPC was held to be unconstitutional because it was inherently brutal, caused permanent physical and psychological scars, and involved a degree of subjectivity and disparity in execution that militated against equal treatment under the law. (paras 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176 & 180)

(8) The Universal Declaration of Human Rights ("UDHR") was held to inform the interpretation of fundamental rights in Malaysia, particularly as s 4(4) of the Human Rights Commission of Malaysia Act 1999 mandated regard to be had to the UDHR. The prohibition of CIDT in art 5 of the UDHR was considered consistent with the protections under the Federal Constitution, and the court was regarded as being obliged to strike down domestic laws that violated these status-attaining peremptory norms of international law. (paras 195, 196, 197, 198, 199, 201, 216, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230 & 231)

(9) In his dissenting view, the punishment of whipping under the CPC and other Federal penal statutes was declared unconstitutional and struck down. The declaration operated prospectively, such that all sentences of



whipping not yet executed were to be stayed and no further sentences of whipping were to be imposed by the courts. The ruling specifically excluded whipping under Syariah law, caning in schools, and reasonable parental chastisement. (paras 231-233)

Case(s) referred to:

- A R Antulay v. R S Nayak & Anor* [1988] Supp 1 SCR 2 (refd)
Ah Thian v. Government Of Malaysia [1976] 1 MLRA 410 (refd)
Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang [1996] 2 MLRA 456; [1996] 1 MELR 289 (refd)
Alma Nudo Atenza v. PP & Another Appeal [2019] 3 MLRA 1 (refd)
ASEAN Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Sdn Bhd [2008] 2 MLRA 80 (folld)
Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2012] 1 MLRA 1 (folld)
Beatrice At Fernandez v. Sistem Penerbangan Malaysia & Anor [2005] 1 MLRA 320; [2005] 1 MELR 1 (refd)
Chong Ton Sin & Anor v. Menteri Dalam Negeri & Anor [2023] 1 MLRH 279 (refd)
Chu Tak Fai v. PP [2006] 2 MLRA 317 (refd)
Chung Chi Cheung v. R [1939] AC 160 (refd)
Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd [2004] 1 MLRA 20 (refd)
Datuk Haji Harun Haji Idris v. PP [1976] 1 MLRA 676 (refd)
Dato' Seri Anwar Ibrahim v. PP [2017] 1 MLRA 331 (refd)
Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor [2021] 2 MLRA 190 (refd)
Francis Coralie Mullin v. The Administrator, Union Territory Of Delhi AIR [1981] SC 746 (distd)
Kathi Raning v. State Of Saurashtra AIR [1952] SC 123 (refd)
Kharak Singh v. State Of Uttar Pradesh AIR [1963] SC 1295 (refd)
Kerajaan Malaysia v. Semantan Estates (1952) Sdn Bhd [2019] 1 MLRA 619 (refd)
Lai Hen Beng v. PP [2024] 2 MLRA 21 (folld)
Lee Kwan Woh v. PP [2009] 2 MLRA 286 (folld)
Letitia Bosman v. PP & Other Appeals [2020] 5 MLRA 636 (folld)
Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal [2016] 3 MLRA 1 (folld)
Mat Shuhaimi Shafiei v. PP [2014] 1 MLRA 628 (refd)
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 1 MLRA 319 (refd)
Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors [2012] 1 MLRA 134 (refd)
Munn v. Illinois [1877] 94 US 113, 142 (refd)



Nivesh Nair Mohan v. Dato' Abdul Razak Musa & Ors [2021] 6 MLRA 128 (refd)
PP v. Yuneswaran Ramaraj [2015] 6 MLRA 559 (folld)
Prem Chand Garg v. Excise Commissioner, U.P. Allahabad [1963] 1 SCR 885 (refd)
R v. Morris [1950] 2 All ER 965 (refd)
Re: Corporal Punishment By Organs Of State [1991] NASC 2 (refd)
S v. Machwili [1986] (1) SA 156 (N) Didcott J (refd)
S v. Williams And Others (CCT 20/94) [1995] ZACC 6 (9 June 1995) (refd)
State Of Andhra Pradesh v. Challa Ramkrishna Reddy & Ors [2003] 3 SCR 656 (refd)
Subramaniam Letchimanan v. The United States Of America & Another Appeal [2021] 4 MLRA 153 (refd)
Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLRA 186 (refd)
Taylor & Anor v. Lawrence And Anor [2002] 2 All ER 353 (refd)
Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor [2002] 1 MLRA 188; [2002] 1 MELR 4 (refd)
Tyrer v. United Kingdom [1979-80] 2 EHRR 1 (refd)
Vishaka And Others v. State Of Rajasthan And Others [1997] 6 SCC 241 (refd)
Yong Vui Kong v. Public Prosecutor [2015] SGCA 11 (refd)

Legislation referred to:

Animals Act 1953, s 44
Civil Law Act 1956, s 3(1)
Constitution of India, art 15(1)
Criminal Procedure Code, ss 286, 287, 288(1), (3), (4), 289, 290, 291(1), Chapter XXVII
Dangerous Drugs Act 1952, s 39B(1)(a), (2)
Federal Constitution, arts 4(1), 5(1), 8(1), (2), 160(2), (6), 162(1), (6), Sixth Schedule
Human Rights Commission of Malaysia Act 1999, s 4(4)
International Covenant on Civil and Political Rights, art 9(1)
Penal Code, ss 302, 376, 377C, 377CA, 377E, Chapter XVI
Prison Regulations 2000, reg 133(1)
Pengurusan Danaharta Nasional Berhad Act 1998, s 72
Rules of the Federal Court 1995, r 137
Universal Declaration of Human Rights, arts 3, 5

Other(s) referred to:

A Blow to Humanity — Torture by Judicial Caning in Malaysia, Amnesty International Publications, 2010, Chapters 5 and 6, pp 32-42



Counsel:**[For Review Application Nos: 07-23-11-2024(W) & 07-24-11-2024(W)]**

For the applicants: N Surendran K Nagarajan (Latheefa Beebi Koya, Shahid Adli Kamaruddin, Yu Ying Ying & Mahajoth Singh with him); M/s Daim & Gamany

[For Review Application No: 05(RJ)-6-11-2024(C)]

For the applicant: Rajesh Nagarajan (Ambbi Balakrishnan & Harsimranpreet Kaur with him); M/s Raj & Sach

[For Review Application No: 07-23-11-2024(W), 07-24-11-2024(W) & 05(RJ)-6-11-2024(C)]

For the respondent: Afzainizam Abdul Aziz (Mohd Fuad Abdul Aziz with him); AG's Chambers

Amicus Curiae for the Malaysian Bar: Athimulan Muruthiah (Collin Arvind Andrew with him); M/s Collin's Law Chambers

Watching Brief for SUHAKAM: Chanravathane S Ponnudurai; M/s SP Chanra

JUDGMENT**Wan Ahmad Farid Wan Salleh CJ (Majority):****The Factual Background**

[1] There are three related review applications before us made under r 137 of the Rules of the Federal Court 1995 ("RFC").

[2] In review Applications No 07-23-11/2024(W) ("Review No 23") and 07-24-11/2024(W) ("Review No 24"), the applicants are Mohd Helmi Anuar bin Mohd Kassim ("Helmi") and Kumanaan a/l Anthony Vincent ("Kumanaan") who were respectively originally convicted and sentenced to death for two charges under s 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"). However, both of them made applications to review the death sentence ordered by this Court pursuant to the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023 ("the 2023 Act").

[3] Pursuant to the said applications, on 16 October 2024, Helmi was resentenced to 30 years' imprisonment and 12 strokes of whipping for each of the two charges under s 39B of the DDA. On 17 October 2024, Kumanaan was resentenced to 30 years' imprisonment and 12 strokes of whipping for each of the two charges under s 39B of the DDA.

[4] For review Application No 05(RJ)-6-11/2024(C) ("Review No 6"), Sivachandran a/l S. Jayarajah ("Sivachandran") was convicted under s 302 of the Penal Code for murder and sentenced to death by the High Court on 28



February 2019. Subsequently, an appeal was filed to the Court of Appeal, and it was dismissed. At the Federal Court, Sivachandran's sentence was converted from a mandatory death penalty to 30 years' imprisonment and 12 strokes of whipping.

The Pokok Sena Incident

[5] Then, something happened.

[6] After the resentencing by this Court, the applicants came to know that a prisoner at the Pokok Sena prison, Mohd Zaidi Bin Abdul Hamid ("Zaidi"), passed away after being whipped pursuant to the sentence imposed on him. The death certificate issued by the Registrar General of Births and Deaths, dated 8 October 2024 [Exh "B"] stated the cause of death as "Septic Sequelae due to Blunt Force Trauma to the Gluteal Region".

[7] After having made known of Zaidi's death, it is only natural for the applicants to be anxious and apprehensive about their impending whipping sentence.

[8] Helmi, in the *affidavit* in support of his application for Review No 23, states *inter alia* as follows:

[5] On 7 October 2024, just 9 days prior to my resentencing, a prisoner named Mohd Zaidi bin Abd Hamid (hereinafter referred to as "Zaidi") who underwent the sentence of whipping died as a consequence of whipping. He had undergone 12 strokes of the rattan. Now produced and shown to me marked "A" a copy of the news report by Malaysiakini on 9 October 2024, entitled "Banduan Pokok Sena mati selepas hukuman sebatan, NGO tuntut siasatan".

[6] I became aware of the death of Zaidi from whipping after my resentencing hearing, I was put in extreme anxiety and fear that death may result from the whipping in the number of 24 strokes which I would have to undergo.

[7] I state and verily believe that the death of Zaidi has exposed the fact that punishment of whipping carries the risk of death.

[9] Both Kumanaan and Sivachandran have expressed the same concern in their respective affidavits in support of their applications.

The Applications

[10] The applications in Review No 23 and Review No 24 centred on the grounds that the sentence of whipping, being a cruel, inhuman or degrading punishment is in contravention of art 5 and art 8 of the Federal Constitution, and that the punishment of whipping may result in deprivation of life without sanction of law against art 5(1) as it carries the risk of death and therefore it is arbitrary and disproportionate against art 8(1).



[11] Similarly, Sivachandran in Review No 6, contended that the punishment of whipping carries a high risk of death to an individual, which violates an accused's right to life and is disproportionate to its intended purpose of reform and rehabilitation of an accused person.

[12] In essence, the three related applications before us seek to set aside the sentence of whipping on the ground that the infliction of whipping may result in death and consequently violates and infracts the applicants' rights to life under art 5 and art 8 of the Federal Constitution, as it is arbitrary and contrary to the rule of law.

The Applicants' Arguments

[13] Learned counsel for Helmi and Kumanaan, with whom learned counsel for Sivachandran deferred, citing a line of authorities that include *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Sdn Bhd* [2008] 2 MLRA 80 and *Dato' Seri Anwar Ibrahim v. PP* [2017] 1 MLRA 331, submitted that they have satisfied all of the principles enumerated therein. In short, learned counsel contended that the threshold for review under r 137 of the RFC has been met.

[14] Encik N Surendran, learned counsel for Helmi and Kumanaan, in his usual forceful self, invited us to conclude that the applications herein are *sui generis*. Learned counsel asserted that the facts are unlikely to be repeated again. His argument is this. The issue at hand involves an imminent threat to the right to life, the existence of which threat was unknown to the parties at the time the sentence was meted out. It is therefore an exceptional case.

[15] In view of the "exceptional case", learned counsel further submitted that this is an appropriate circumstance for us to exercise our inherent jurisdiction to prevent substantial injustice. In any event, there was no alternative effective remedy to the applicants within the meaning of the judgment of this Court in *Dato' Seri Anwar Ibrahim (No 2)*.

[16] Secondly, learned counsel for Helmi and Kumanaan submitted that where an order of this court, such as in the nature of these applications, which has had the effect of depriving a litigant of his fundamental rights, particularly the right to life and liberty, this Court possesses the inherent jurisdiction to correct the matter and give relief. Learned counsel relied on the judgment of the majority of the Indian Supreme Court in *A.R. Antulay v. R.S. Nayak & Anor* [1988] Supp 1 SCR 2 and submitted that this Court "is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty".

The Constitutional Challenge

[17] It is from the said premise that learned counsel Encik N Surendran mounted his attack on the constitutionality of the sentence of whipping.



[18] In a nutshell, the applicants contended that the punishment of whipping in s 39B of the DDA and s 302 of the Penal Code is unconstitutional as it may result in death and consequently violates arts 5 and 8 of the Federal Constitution.

[19] This Court is therefore urged to strike down the said provisions under art 4(1) of the Federal Constitution.

The Article 5 Argument

[20] Article 5(1) of the Federal Constitution provides that:

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

[21] Learned counsel for Helmi and Kumanaan submitted that the death certificate of Zaidi in Exh B and the statement from the Prison Department dated 10 October 2024 which is in Exh “C”, prove that the punishment of whipping may result in or carries the risk of death.

[22] For context, the statement in Exh C can be summarised as follows:

- (a) Following the preliminary post-mortem, the cause of death for the inmate (“Zaidi”) at Pokok Sena Prison on 7 October 2024 has been identified as a blood infection (sepsis).
- (b) The inmate had complained of feeling unwell on 4 October 2024, which was nine (9) days after the whipping sentence was carried out on 25 September 2024.
- (c) Following the complaint, the Prison authorities immediately conducted further examinations and provided intensive care through its medical officers. The inmate was subsequently transported to Sultanah Bahiyah Hospital on 7 October 2024 for further treatment but was tragically pronounced dead.
- (d) The Malaysian Prison Department emphasised that the punishment carried out on 25 September 2024 strictly adhered to Standard Operating Procedures (SOPs). Furthermore, the inmate had been certified ‘fit and healthy’ following a rigorous examination by prison medical officers prior to the punishment. After the sentence was carried out, the inmate received diligent post-punishment care, including daily wound dressing and regular health monitoring by the medical team.
- (e) The Prison Department has initiated an internal investigation to review whether the execution of the punishment complied with established SOPs. To date, no breaches of the SOP have been identified, and further investigations are currently ongoing.



[23] Learned counsel for Helmi and Kumanaan submitted that to cause death by whipping, which, according to him, is not permitted or sanctioned by law, is repugnant to the rule of law. Relying on the judgment of this Court in *Lee Kwan Woh v. PP* [2009] 2 MLRA 286, learned counsel highlighted that the rule of law is housed within art 5(1) of the Federal Constitution.

[24] In short, the line of argument of learned counsel is this. The right to life under art 5(1) cannot be abrogated or suspended. The extension of the argument is that if the applicants were to be whipped despite the potential risk of death, the right to life is effectively suspended. In any event, learned counsel submitted that the risk of death renders the punishment of whipping inconsistent with art 5(1).

The Article 8 Argument

[25] Before us, learned counsel attracted our attention to art 8(1) of the Federal Constitution, which provides:

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

Learned counsel's submission is this. As whipping is challenged as violating art 5(1) of the Federal Constitution, art 8(1) becomes instantly engaged. In short, the contention is that the two Articles are inextricably linked by their shared purpose since they are part of a single integrated scheme.

[26] The aforesaid submission brings us to the judgment of this Court in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 3 MLRA 1. The case carries the proposition that when any state action is challenged as violating a fundamental right, such as the right to life under art 5(1), art 8(1) will at once be engaged, such that the action must meet the test of proportionality.

[27] Learned counsel then again referred us to *Lee Kwan Woh* and submitted that the effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

[28] Seen in this context, learned counsel's position is this. Whipping as a punishment impairs the right under art 5(1) must not be "more than necessary to accomplish the objective" of the punishment contemplated under the DDA or the CPC. In short, learned counsel contended that the sentence of whipping does not satisfy as well the requirement of fairness embodied in the test of proportionality contained in art 8(1) of the Federal Constitution.

[29] Learned counsel then referred us to the Indian Supreme Court case of *Francis Coralie Mullin v. The Administrator, Union Territory Of Delhi* AIR [1981] SC 746. The case carries the proposition that any form of torture is cruel,



inhuman or degrading treatment. The Supreme Court went ahead to state that no law which authorises and no procedure which leads to such torture or cruel, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness.

The Article 162 Argument

[30] Our attention is then drawn to the application of art 160(2) of the Federal Constitution and s 3(1) of the Civil Law Act 1956 (“CLA”). Article 160(2) provides that “law” includes written law, the common law insofar as it is in operation in the Federation. This is followed by s 3(1) of the CLA, which provides that the court shall, in Peninsular Malaysia, apply the common law of England and rules of equity as administered in England on 7 April 1956.

[31] Learned counsel’s argument is this. First, learned counsel referred to *R v. Morris* [1950] 2 All ER 965, where Lord Goddard LCJ said that “Magna Carta contained a clause providing that penalties should not be excessive, and in the Bill of Rights, 1688, it was also provided that excessive fines should not be imposed, nor cruel and unusual punishments inflicted”.

[32] Secondly, learned counsel referred us to ss 286 to 289 of the CPC, which govern the legal procedures and regulations of the execution of the sentences of whipping. According to learned counsel, where there is an inconsistency between pre-Merdeka laws such as ss 286 to 291 of the CPC, and the Federal Constitution, it is mandatory for the Court to apply the law with “modifications”. This provision for modification is housed in art 162(6) of the Federal Constitution, which provides that any court applying the provision of any existing law which has not been modified on or after Merdeka Day under the Article or may apply it with such modifications as may be necessary to bring it into accord with the provisions of the Constitution.

[33] Relying on the judgment of this Court in *Letitia Bosman v. PP & Other Appeals* [2020] 5 MLRA 636, learned counsel contended that if there is any inconsistency between the provision and the Federal Constitution, then cl (6) of art 162 must be invoked to remove that inconsistency.

[34] Thirdly, learned counsel further submitted that the fact that whipping was introduced in s 39B in DDA in 2017 does not make the punishment of whipping a post-Merdeka law. According to learned counsel, the punishment of whipping was already introduced in the CPC in 1871, and the implementation of whipping in the DDA is taken from the CPC, which originated in 1871.

[35] Finally, learned counsel for the applicants further contended that the sentence of whipping is against international conventions that include art 3 of the Universal Declaration of Human Rights (“UDHR”), which provides that everyone has the right to life, liberty and security of person.



Analysis

[36] First things first. In an application of this nature, it is pertinent to identify whether the applicants have crossed the hurdle of r 137 of the RFC. Rule 137 allows this Court to make any order “as may be necessary to prevent injustice or to prevent an abuse of the process of the Court”.

[37] The law is quite trite. In *ASEAN Security Paper Mills*, this Court reiterated the proposition that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. However, that wide discretion will not be used liberally but only sparingly and in “exceptional cases”.

[38] In *ASEAN Security Paper Mills*, Zaki Azmi PCA (as the former Chief Justice then was) outlined ten instances where such a discretion should be exercised. But the Court was quick to point out that the list is not exhaustive:

By the very meaning of “inherent”, as discussed earlier, it is not wise to even attempt to list out the other instances where this court should exercise such discretion. It is best to leave the question open and decide the applications as they come before this court.

[39] Some of the instances include where the applicant had been denied the right to have his appeal heard on merits by the appellat court and where there was a clear infringement of the law. Do the applicants fall within one of these circumstances? For one, the applicants do not come to this Court to review the whipping sentence imposed. This would amount to an appeal and leave should be refused *in limine* since r 137 cannot be used as a further avenue of appeal; see *Kerajaan Malaysia v. Semantan Estates (1952) Sdn Bhd* [2019] 1 MLRA 619.

[40] However, in all fairness, the applicants do not move this Court to review the whipping sentence imposed *per se*. They go beyond that. They are mounting a challenge on the constitutionality of the relevant laws in particular the DDA and the Penal Code. The general proposition is that this Court is empowered under art 4(1) of the Federal Constitution to declare any post-Merdeka law void on the ground of being inconsistent with the Federal Constitution.

[41] Having said that, do the applicants come within the circumstances that warrant the exercise of the discretion of this Court to review its earlier resentencing decisions? The applicants are now challenging the constitutionality of the whipping sentence imposed on them. The question is, why did they not raise the same issue in their respective applications for review under the 2023 Act?

[42] This question is addressed by Helmi in para 11 of his affidavit in support of his application as follows:

For clarity, I hereby state that at the time of my resentencing on 16 October 2024, I was unaware of the circumstances of Zaidi’s death,



which had occurred very recently, and did not possess a copy of his death certificate.

[43] Kumanaan made the same averment in his affidavit in support.

[44] In para 12 of his affidavit in support of Review No 6, Sivachandran affirmed as follows:

Peguam bela saya tidak dapat membangkitkan isu kematian Zaidi akibat sebatan kerana hukuman saya dijatuhkan pada 3 October 2024, iaitu 4 hari sebelum kematian Zaidi pada 7 October 2024.

[45] In short, at the time of the resentencing applications, the applicants were not aware of Zaidi's death, which now forms the very basis of these review applications before us.

[46] When a citizen comes to the court and complains that his constitutional right has been breached — as in these applications — the court, just like when a man's liberty is at stake, must drop everything and give an immediate right for him to be heard. The alleged breach of a constitutional right must take precedent over all other court business.

[47] The only impediment is that the applicants should have raised this earlier during their resentencing applications. Unfortunately, as reflected in their respective affidavits in support, they could not do so. The material that is to be the basis of their constitutional challenge now was not available to them at the relevant time. These assertions are not seriously challenged by the learned DPP.

[48] Having that as a background, we are inclined to add another circumstance to the list stated in *ASEAN Security Paper Mills* that warrants the exercise of our discretion to review our own decision under r 137 of the RFC. Let us put it this way:

Where an applicant seeks to challenge the constitutionality of an impugned earlier decision on grounds not previously ventilated, such a challenge remains justiciable in a review application under r 137 of the RFC, provided that it is demonstrated that the factual substratum necessary to support the constitutional challenge was not available at the material time.

Whether The Sentence Of Whipping Is Constitutional

[49] Having crossed the threshold, the remaining issue to be decided is whether the resentencing decisions on the whipping were in breach of the Federal Constitution to justify the setting aside of the same.

[50] The first question that we have to ask is whether s 39B of the DDA, s 302 of the Penal Code, and the execution of sentence of whipping under the Chapter XXVII of the CPC offend arts 5 and 8 of the Federal Constitution.



[51] Let us examine the relevant provisions. The amended s 39B(2) of the DDA provides as follows:

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, be punished with whipping of not less than twelve strokes.

As stated earlier, Helmi and Kumanaan were originally convicted and sentenced to death under s 39B(1)(a) of the DDA. On the other hand, Sivachandran was convicted under s 302 of the Penal Code. The now amended s 302 states as follows:

Whoever commits murder shall be punished with death or imprisonment for a term of not less than thirty years but not exceeding forty years and if not sentenced to death, shall also be punished with whipping of not less than twelve strokes.

Are The Two Impugned Sections “Pre-Merdeka” Laws?

[52] The pertinent question is, how do we identify a pre-Merdeka law? According to art 162(1) of the Federal Constitution, the existing law in question shall continue in force “subject to any amendments made by the Federal or State law”. Hence, to establish the invocation of art 162(1) to convert a pre-Merdeka law to a post-Merdeka law, it must be shown that the existing law has either expressly or impliedly (in one form or another) been modified either by Federal or State law, as expressly suggested by art 162(1).

[53] We find support for the aforesaid proposition in the judgment of this Court in *Lai Hen Beng v. PP* [2024] 2 MLRA 21, where Tengku Maimun CJ, in delivering the judgment of this Court, stated as follows:

Hence, we take the view that until and unless it can be shown that a pre-Merdeka or ‘existing’ law has either expressly or impliedly (in one form or another) been modified either by Federal or State law as expressly suggested by art 162(1), then the assumption must remain that at the time the court or tribunal is applying the said impugned law, it has not yet been modified by legislation passed either by Parliament or the State Legislatures, as the case may be.

[54] There is no doubt in our mind that s 302 of the Penal Code and s 39B(2) of the DDA (the “two impugned sections”) had been amended (in one form or another) by the passing of the 2023 Act. By giving the discretion to the Court to impose the sentence of imprisonment and whipping, the 2023 Act had modified, by Federal law, the two impugned sections.

[55] It is for this reason that we are of the view that the two impugned sections have now become a post-Merdeka law which challenge is subject to art 4(1) rather than art 162.



The Core Issue

[56] Having said that and as can be seen in *Ah Thian v. Government Of Malaysia* [1976] 1 MLRA 410, this Court is empowered under art 4(1) to determine whether the punishment of whipping under s 39B of the DDA and s 302 of the Penal Code and for that matter ss 286 to 289 of the CPC is unconstitutional for being inconsistent with arts 5 and 8. Suffian LP, sitting as the Federal Court Judge in the said criminal application, held that the power of Parliament “is limited by the Constitution, and they cannot make any law they please”.

[57] This brings us to the core issue in these review applications — which is whether the punishment of whipping violates arts 5(1) and 8(1) of the Federal Constitution on the ground that it imposes a punishment that is cruel, inhuman and degrading, and whether the punishment of whipping which carries the risk of death may result in deprivation of life against art 5(1) and is therefore disproportionate against art 8(1).

[58] What is the judicial approach when interpreting the fundamental rights guaranteed in the Federal Constitution as can be seen in arts 5(1) and 8(1)? The answer, we believe, can be found in the judgment of this Court in *Lee Kwan Woh*. Gopal Sri Ram FCJ in delivering the judgment of this Court, was of the view that it is the duty of a Court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under the Constitution. This “prismatic interpretation” of the Constitution, according to the learned Judge, “gives life to the abstract concepts such as ‘life’ and ‘personal liberty’ in art 5(1)”.

[59] The Federal Court then held that:

When art 5(1) is read prismatically and in the light of art 8(1), the concepts of ‘life’ and ‘personal liberty’ housed in the former are found to contain in them other rights. Thus, ‘life’ means more than mere animal existence and includes such rights as livelihood and the quality of life.

This prismatic approach was reiterated by this Court in *Alma Nudo Atenza*. In fact, in *Alma Nudo Atenza*, this Court went even one step ahead and stated that the concept of “law” in art 5(1) so as to be “*in tandem* with the concept of rule of law”.

[60] In this context, we have taken the liberty to summarise the applicants’ main argument as follows:

The punishment of whipping under the impugned sections being a cruel, inhuman or degrading punishment is in contravention of arts 5 and 8 of the Federal Constitution, and that the punishment of whipping may result in deprivation of life without sanction of law against art 5(1) and carries the risk of death being arbitrary and disproportionate against art 8(1).



It is based on this main argument that the applicants are inviting this Court to set aside the resentencing orders on whipping on the ground of their unconstitutionality.

[61] We now refer to the Indian Supreme Court case of *Francis Coralie Mullin* cited by Encik N Surendran in arguing that whipping is a form of torture and is therefore unconstitutional, being in contravention with arts 5(1) and 8(1) of the Federal Constitution. To begin with, unlike the applicants in these review applications, Ms Francis Coralie, a British national, was held under preventive detention and was never convicted of any crime. During her detention, she was restricted from seeing her lawyer or her 5-year-old daughter more than once a month, which she argued was a form of mental torture.

[62] The difference between punitive detention and preventive detention was highlighted by the Supreme Court. In these review applications, the applicants were duly convicted. In that sense, *Francis Coralie Mullin* can be distinguished.

[63] However, even if we were to extend the proposition so as to apply to punitive detention, the question is, could the sentence of whipping be considered as a process that treats a human being as less than human and therefore arbitrary, unfair and unreasonable, making it unconstitutional?

The Case Of Zaidi Revisited

[64] The applicants relied heavily on what happened to Zaidi at the Pokok Sena Prison in arguing that the punishment of whipping carries a high risk of death to an individual, which violates their right to life under art 5(1) and is disproportionate to its intended purpose of reform and rehabilitation of an accused under art 8(1).

[65] With respect, we are not persuaded with this contention. We will now explain our reasons.

[66] First, we wish to highlight that the burden is upon a person, in this case, the applicants, who seek to establish the unconstitutionality of statutes to show that there has been a clear transgression of the constitutional principles. Raus Sharif PCA (as the former CJ then was) in delivering the judgment of the Court of Appeal in *PP v. Yuneswaran Ramaraj* [2015] 6 MLRA 559 explained the burden as follows:

There is always a presumption in favour of constitutionality of statutes. The courts can declare a statute to be an invalid piece of legislation but the burden is upon a person who attacks it to show that there has been a clear transgression of the constitutional principles.

[67] We hereby affirm the aforesaid proposition.

[68] Secondly, have the applicants discharged this burden? While the death certificate cites “septic sequelae due to blunt force trauma”, the applicants



have failed to show any causal link or clear medical evidence connecting the punishment of whipping to the specific outcome that befell Zaidi.

[69] In the absence of such medical evidence, it is therefore clear to us that the proximate cause of death of Zaidi was not the punishment itself but a novus actus interveniens, if at all, in the form of subsequent medical mismanagement. The whipping, therefore, served merely as the causa *sine qua non*. The progression from treatable sepsis to fatal septic sequelae indicates, again, if at all, a breach in the duty of care by medical officers. This intervening negligence, if indeed it was, was the effective cause of the fatality, thereby severing the causal link between the prescribed punishment and the ultimate outcome.

[70] We say “if at all” because, for one, there was a clear gap of nine days between the carrying out of the whipping sentence on Zaidi and the first complaint of him feeling unwell. To say that the death was a direct result of the sentence of whipping without any clear medical evidence would amount to surmise and conjecture. With respect, this Court is not in the position to indulge in any speculative exercise. We can only reiterate with approval what was said by Abdul Hamid Mohamad JCA (as the former CJ then was) in the Court of Appeal case of *Telekom Malaysia Kawasan Utara v. Krishnan Kutty Sanguni Nair & Anor* [2002] 1 MELR 4; [2002] 1 MLRA 188:

A finding based solely on conjecture, surmise or suspicion is a finding based on no evidence.

[71] Thirdly, the applicants did not adduce any medical evidence in their respective affidavits that they are not fit to undergo the whipping sentence imposed on them, to the effect that the sentence, if carried out, would run the risk of death, which deprives their right to life. We have to underline that the punishment of whipping under the impugned sections (or under any other written laws) does not aim to cause death in the same way as a death sentence to deprive the right to life.

[72] The aforesaid is manifested in s 290 of the CPC, which requires the presence of the medical officer to certify that the offender is in a fit state of health to undergo the punishment of whipping, and it shall be stopped if the medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence.

[73] Fourthly, we are of the view that a single incidental risk of mortality remotely associated with the administration of whipping is insufficient to discharge the burden of proving unconstitutionality. It must be recognised that nearly all sanctions within our criminal justice system carry a profound and devastating impact—whether psychological, emotional, physical or financial. The potential for an adverse outcome does not, in itself, strip a penalty of its legal legitimacy. To hold otherwise would be to render any rigorous penal measure constitutionally suspect simply because it carries an inherent degree of hardship or risk.



[74] We begin by observing that the determination of what is “oppressive, cruel, and degrading” is inherently a matter of subjective moral judgment and public policy. Such determinations are, by their nature, better suited for the elected legislature than the judiciary. Even if we were to accept that the phrase “in accordance with law” in art 5(1) grants this Court the latitude to review the reasonableness, proportionality or inherent justice of the impugned sections, we are of the firm view that whipping does not fall within the ambit of a “cruel, oppressive, and degrading” penalty in the constitutional sense.

[75] Below is our explanation.

[76] By their very purpose, penalties are designed to be punitive. To isolate whipping as uniquely “cruel” or “degrading” is to ignore the reality that all forms of lawful punishment, to some degree, infringe upon the personal dignity and comfort of the individual.

[77] To conclude that whipping is uniquely oppressive or degrading while other grave sanctions remain permissible would require an exercise in legal gymnastics — a “willing suspension of disbelief” as coined by Samuel Taylor Coleridge — whereby the Court must ignore the far more permanent and profound consequences of the death penalty or natural life imprisonment. Whipping cannot be logically categorised as more oppressive than the total deprivation of liberty, the seizure of property, preventive detention or the terminal finality of the capital sentence.

[78] In our considered view, ultimately, the task of weighing the moral efficacy or social desirability of a specific punishment belongs to Parliament, which reflects the collective conscience of the electorate. For the Judiciary to substitute its own subjective moral preferences for the deliberate policy choices of the Legislative branch would be to overstep its constitutional bounds. In the absence of a clear violation of the express letter of the law, it is not the function of this Court to act as a moral arbiter or a “super-legislature” in the guise of constitutional interpretation.

[79] This proposition is affirmed by the majority judgment in *Letitia Bosman*, which established that the formulation of policy regarding the constitutionality of the mandatory death penalty falls outside the judicial remit. Such controversial matters, according to *Letitia Bosman*, that involve competing moral and social considerations, are exclusively and inherently for Parliamentary determination.

[80] To borrow the phrase of Azahar Mohamed, Chief Judge of Malaya in *Letitia Bosman*, with a bit of modification, the doctrine of separation of powers is liable to be subverted and the rule of law undermined if, on a question of social and political judgment, opponents of the punishment of whipping achieve through the courts what they could not achieve in Parliament.

[81] Consequently, this Court declines to encroach upon this clear legislative domain.



[82] Fifthly, learned counsel for the applicants submitted that regard must be made to international conventions in interpreting fundamental rights. Our attention was then drawn to art 3 of the Universal Declaration of Human Rights and art 9(1) of the International Covenant on Civil and Political Rights. Both articles speak of the right to life, liberty and security of person.

[83] With respect, it is trite that international treaty obligations do not form part of our domestic law until and unless it is incorporated by Parliament in our legislation. If any authority is needed for the aforesaid proposition, it can be found in the judgment of this Court in *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2012] 1 MLRA 1, where it was held that:

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.

In short, the ultimate acid test of constitutionality is the Constitution itself and not any other reference outside it.

[84] Applying the authorities and principles above, we hold that the applicants failed to discharge the burden to show that there is a clear violation of their right to life under art 5 of the Federal Constitution.

[85] Accordingly, since there is no violation of art 5(1), there is no necessity to undergo the proportionality test housed in art 8(1).

[86] However, for the sake of completeness, we will also address the issue of proportionality in the context of the sentence of whipping. The question that arises is whether the sentence is disproportionate under art 8(1) of the Federal Constitution?

[87] To reiterate, learned counsel for the applicants submitted that the sentence of whipping does not satisfy the requirement of fairness embodied in the test of proportionality contained in art 8(1).

[88] The question is whether the requirement of equal protection of the law housed in art 8(1) means that all laws passed by Parliament must apply universally, so that the Parliament cannot create differences as to the persons to whom they apply. This question is addressed by this Court in *Majlis Agama Islam Wilayah Persekutuan v. Victoria Jayaseele Martin & Another Appeal* [2016] 3 MLRA 1 when Raus Sharif PCA (as the former CJ then was), in delivering the judgment of the majority, reiterated the well-established proposition in interpreting art 8(1) and held that a law that discriminates is good law if it is based on reasonable or permissible classification.

[89] However, the classification, as intimated in *Victoria Jayaseele*, should have rational relation to the object sought to be achieved by the impugned section for it to become a valid law. The question as to whether a particular classification was rational or not is to be determined by looking at the object and intent of



such laws. In the context of the instant case, in order to appreciate the real intent and object of the law, it was crucial to look at the whole scheme of the Act 846.

[90] What then is the objective of Act 846? The preamble of the Act states as follows:

An Act to amend the Penal Code, the Firearms (Increased Penalties) Act 1971, the Arms Act 1960, the Kidnapping Act 1961, the Dangerous Drugs Act 1952, the Strategic Trade Act 2010 and the Criminal Procedure Code in order to abolish the mandatory death penalty, to vary the sentence relating to imprisonment for natural life and whipping, and to provide for matters connected therewith.

It is clear to us that the objective of Act 846 is primarily to abolish the mandatory death penalty and to substitute it with imprisonment and, if not sentenced to death, with whipping. In short, it gives the discretion to the courts, based on the facts and circumstances of each case to impose the appropriate sentence.

[91] It is pertinent to note that initially s 39B(2) of the DDA was amended by the Dangerous Drugs (Amendment) Act 2017 from a mandatory death sentence to empowering a court with the discretion to impose a punishment of death or imprisonment for life and whipping of not less than fifteen strokes for the offence of drug trafficking.

[92] The objective could be gleaned from the Hansard dated 30 November 2017 in Dewan Rakyat, when the then Minister in the Prime Minister's Department, Dato' Sri Azalina Dato' Othman Said, introduced the Dangerous Drugs (Amendment) Bill 2017:

Cadangan pindaan ini digubal dengan teliti dengan mengambil kira niat utama kerajaan, untuk melindungi kepentingan awam, public interest dengan memberikan mesej pencegahan yang serius dan meningkatkan keberkesanan operasi bagi agensi penguat kuasa termasuk PDRM, Agensi Antidadah Kebangsaan, Jabatan Kastam Diraja Malaysia dan Agensi Penguat kuasa Maritim Malaysia dalam membanteras masalah pengedaran dadah dalam negara Malaysia.

[93] Subsequently, it was again amended by Act 846 to lower the number of whippings to twelve strokes.

[94] In its legislative wisdom, Parliament — while recognizing the necessity of judicial discretion upon the abolition of the mandatory death penalty — determined that a term of imprisonment should be accompanied by the sentence of whipping. This reflects a deliberate legislative choice to provide an alternative punitive measure to the capital sentence originally faced by the applicants.

[95] In our view, the impugned measure satisfies the proportionality test for the following reasons:



- (a) Legitimate Objective: The objectives underlying Act 846 are of sufficient importance to warrant the measure.
- (b) Rational Connection: The discretion afforded to the Court to impose whipping bears a rational nexus to these stated objectives. The principles of consistency and fairness in sentencing are maintained, based on category and severity, taking into account the primary intention of the Government which is to protect the public interest by giving a serious deterrent message and increasing the operational effectiveness of enforcement agencies.
- (c) Proportionality of the Measure: The punishment is proportionate when read in conjunction with the safeguards prescribed in Chapter XXVII of the CPC. We note that the law mandates the presence of a medical officer (s 290) and strictly regulates the size of the instrument (s 288(3)) and the maximum number of strokes, capped at 24 for adults as can be seen in s 288(1).
- (d) Statutory Consistency: Given that s 288(1) of the CPC sets the maximum at 24 strokes, the prescription of a 12-stroke minimum under s 39B of the DDA and s 302 of the Penal Code is, in our assessment, a balanced and proportionate exercise of legislative power.

[96] In view of the aforesaid, we hold that the impugned sections in the DDA and Penal Code have passed the proportionality test under art 8(1) of the Federal Constitution.

Whether Article 8(2) Is Infringed

[97] Encik Athimulan Muruthiah, who appeared for the Malaysian Bar as *amicus curiae*, submitted that s 39B(2) of the DDA read together with s 289 of the CPC is inconsistent with art 8(2) of the Federal Constitution on the ground that it exempts females from being imposed with the sentence of whipping and that the respondent failed to point out to any provision in the Federal Constitution that expressly authorises discrimination on the ground of gender.

[98] Article 8(2) reads as follows:

Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

The application of art 8(2) is explained by this Court in *Lai Hen Beng*. It was held that it is for the attacking party to overcome the presumption by demonstrating how the impugned provision violates any one or more of the limbs of cl (2).



The use of the word ‘only’ in art 8(2) requires that the alleged discrimination is specific to any of the grounds mentioned in cl (2).

[99] To begin with, s 289 of the CPC does not only exempt females from being imposed with the sentence of whipping, but it also exempts males sentenced to death and males who are considered to be more than 50 years old (except males sentenced to whipping under s 376, 377C, 377CA or 377E of the Penal Code). It does not exclude women “only”.

[100] It is well-settled that all legislative differentiation is not necessarily discriminatory. So, when does a discrimination show its ugly head? Discrimination, in our view, arises when there exists an element of unfavourable bias and it is in that sense that the expression has to be understood in this context. Hence the phrase “unfavourable bias”. This proposition can be seen in the judgment of Patanjali Sastri CJ in the Indian Supreme Court in the case of *Kathi Raning v. State Of Saurashtra AIR [1952] SC 123*.

[101] The Indian academic reference of Durga Das Basu, *Commentary on the Constitution of India*, 8th edn, Vol 2, (India: Wadhwa and Company, 2007), explains the scope of the term “discrimination” under art 15(1) of the Constitution of India that the constitutional mandate is infringed only where the females would have received same treatment with males “but for their sex”. According to the learned editors, in English law “but for-sex” test has been developed to mean that no less favourable treatment is to be given to women on a gender-based criterion, which would favour the opposite sex and women will not be deliberately selected for less favourable treatment because of their sex. In this context, we are of the view that while art 8(2) of the Federal Constitution prohibits a discriminatory treatment, it does not prohibit a preferential treatment of women which is a positive measure in their favour.

[102] Consequently, we find that the applicants have failed to satisfy the threshold of the word ‘only’ as stipulated in art 8(2), which requires a showing that the alleged discrimination is based solely on one of the prohibited grounds. In this context, the exemption of females from the sentence of whipping does not constitute an unfavourable bias against males; rather, it serves as a form of preferential or special treatment—a positive measure specifically carved out in favour of women. Furthermore, the applicants have failed to demonstrate that females would have been subject to the same treatment ‘but for’ their gender. Accordingly, the challenge under art 8(2) cannot be sustained.

Conclusion

[103] For the reasons aforesaid, our conclusion is as follows:

- (a) The list outlined in *ASEAN Security Paper Mills* is not exhaustive. A challenge on the constitutionality of an impugned earlier decision of the Federal Court on the ground not previously ventilated, can still be made under r 137 of the RFC, provided that it can be shown



that the factual substratum necessary to support the constitutional challenge was not available at the time when the earlier decision was made.

- (b) Section 39B(2) was initially amended by the Dangerous Drugs (Amendment) Act 2017 and later the 2023 Act. Section 302 of the Penal Code was amended by the 2023 Act. In the result, the two impugned sections have now become a post-Merdeka law which is subject to art 4(1) rather than art 162 of the Federal Constitution.
- (c) In interpreting the fundamental rights guaranteed under the Federal Constitution, the duty of the Court is to adopt a prismatic approach.
- (d) If the right to life under art 5(1) is challenged, art 8(1) will at once be invoked, such that the action must meet the test of proportionality.
- (e) The burden is upon a person who attacks the impugned statutory provision to show that there has been a clear transgression of the constitutional principles.
- (f) There was no medical evidence before the Court to suggest that the cause of Zaidi's death was the punishment of whipping itself. There was therefore no causal link between the prescribed punishment and the ultimate outcome.
- (g) In any event, the applicants have failed to adduce any medical evidence that the sentence of whipping, if carried out on them would run the risk of death, which deprives their right to life.
- (h) All criminal sanctions carry a profound and devastating impact whether psychological, emotional, physical or financial. Whipping should not be singled out.
- (i) It is ultimately for Parliament to decide on the moral efficacy or social desirability of a specific punishment. The doctrine of the separation of power dictates that it is not for the courts to substitute their own subjective moral preferences for the deliberate policy choices of the Legislative branch.
- (j) In a dualist legal system such as Malaysia, international treaties do not automatically become local law upon ratification; they only gain domestic legal effect once Parliament formally incorporates them into national legislation.
- (k) In the circumstances, the applicants have failed to discharge the burden to show that there is a clear violation of their right to life under art 5 of the Federal Constitution.



- (l) Since art 5(1) is not violated, there is no necessity to undergo the proportionality test housed in art 8(1).
- (m) However, and for the sake of completeness, even if art 8(1) is invoked, the impugned sections in the DDA and Penal Code have passed the proportionality test.
- (n) The mandatory whipping provisions are a balanced and proportionate exercise of legislative power because they serve the legitimate public interest of deterrence through a rational, fair, and strictly regulated sentencing framework.
- (o) As to art 8(2) of the Federal Constitution, the challenge cannot be sustained because the applicants have failed to prove that the whipping exemption for women was based solely on gender discrimination rather than a valid form of preferential treatment, nor did they show that women would otherwise have faced the same sentencing.

[104] For the aforesaid reasons, all the three applications are dismissed.

[105] I have had the opportunity of reading the grounds of judgment prepared by Lee Swee Seng, FCJ. However, having carefully considered the reasons set out therein, I respectfully find myself unable to concur with His Lordship's conclusion.

[106] My learned sister Hajah Azizah Haji Nawawi, CJSS, has read my judgment in draft and has agreed with the view expressed herein, save for a few amendments which I have incorporated in the final version.

Lee Swee Seng FCJ (Dissenting):

[107] These 3 Review Applications before the Federal Court raised a singular question of constitutional importance on whether whipping under the relevant penal statutes and the Criminal Procedure Code ("CPC") is unconstitutional as in violation of art 5(1), art 8(1) and (2) of the Federal Constitution and in breach of art 5 of the Universal Declaration of Human Rights ("UDHR").

[108] The 3 accused persons had already been resentenced pursuant to the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023 (Act 847). Mohd Helmi Anuar bin Mohd Kassim ("Helmi") and Kumanaan a/l Anthony Vincent ("Kumanaan") were originally sentenced to death for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA"). Their sentences of death were revised on 16 October 2024 and 17 October 2024, respectively, in the resentencing proceedings to 30 years of imprisonment and 12 strokes of whipping for each charge. As both Helmi and Kumanaan were convicted of 2 charges each, they were to receive 24 strokes of whipping each.



[109] Sivachandran a/l S Jayarajah (“Sivachandran”) was originally sentenced to death under s 302 of the Penal Code for murder and under Act 847 the Federal Court on 3 October 2024, resented him to 30 years imprisonment and 12 strokes of whipping.

[110] On 14 November 2024, all 3 accused persons who had been resented, filed their respective Notices of Motion supported by their own affidavits, seeking to invoke the inherent powers of the Federal Court under r 137 of the Rules of the Federal Court 1995. They wanted to prevail upon the Federal Court to set aside the whipping imposed as part of the mandatory minimum strokes that the Federal Court shall hand down if they are spared the death penalty.

[111] The brief grounds in support of their Review Applications may be summarised as follows:

- (i) The sentence of whipping is now proved to carry the risk of death as evidence in the death of an inmate Mohd Zaidi bin Abdul Hamid (“Zaidi”) on 7 October 2024;
- (ii) As a result, the sentence of whipping violates the applicant’s fundamental right under art 5(1) of the Federal Constitution which provides that no person shall be deprived of his life or personal liberty save in accordance with law. The infliction of whipping may result in the deprivation of their life not in accordance with the law;
- (iii) Further the sentence of whipping is disproportionate to the crime committed and has serious long-term consequences both physically and psychologically and as it may result in death, it violates art 5 and art 8(1) of the Federal Constitution;
- (iv) That whipping is inconsistent with the universally recognised international human rights norm of the prohibition against cruel, inhuman and degrading punishment under the Universal Declaration of Human Rights (“UDHR”) that Malaysia as a member State of UN has pledged to uphold;
- (v) That whipping of men generally below the age of 50 when women are spared is a discrimination not permitted on ground of gender under art 8(2) of the Federal Constitution and so whipping should be discarded; and
- (vi) The punishment of whipping contained in s 39B of the DDA 1952 and Chapter XXVII of the CPC is unconstitutional as it is violative of art 5 and 8 of the Federal Constitution read with art 162(6) of the Federal Constitution.



Whether A Sentence That Is Wrong In Law Would Be Amenable To A Review Under Rule 137 Of The Rules Of The Federal Court 1995

[112] It is a fact that the Federal Court in exercising its extended jurisdiction in the light of Parliament legislating that the death penalty should not be mandatory, had passed the revised sentence of imprisonment and mandatory whipping of 12 strokes in substitution of the death penalty for all 3 convicted accused persons.

[113] Based on the fresh evidence not then available, that whipping may cause death as was the case of one prisoner Mohd Zaidi Bin Abdul Hamid on 7 October 2024 as a result of the infliction of judicial whipping at the Pokok Sena prison, the applicants invoked the review powers of the Federal Court under r 137 of the Rules of the Federal Court 1995 and prayed for the sentence of whipping to be set aside on ground that it is unconstitutional.

[114] Rule 137 of the Rules of the Federal Court 1995 (“RFC 1995”) provides as follows:

“Inherent powers of the Court.

For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.”

[115] In *Chu Tak Fai v. PP* [2006] 2 MLRA 317, the Federal Court held that it is trite and well settled that the Federal Court being the apex court has the jurisdiction and power to hear and review any matter under r 137 of the RFC 1995:

“The Federal Court, as the apex court, does have the jurisdiction and power to hear and review any matter brought before the court under r 137 provided that such an exercise can only be undertaken sparingly and only in rare and exceptional circumstances where there is no alternative remedy available to prevent an injustice or to prevent an abuse of the process of the court.”

[116] The Federal Court, as the apex court of last and final resort, would be endowed with inherent powers to prevent injustice in very limited and exceptional circumstances only. See the Federal Court case of *MGG Pillai v. Tan Sri Dato’ Vincent Tan Chee Yioun* [2002] 1 MLRA 319. This is to achieve the dynamic and desired balance between finality in its decision and the fallibility of all human decision-making that may well result in a grave injustice or serious miscarriage of justice to a litigant. In a perfectly imperfect world where everything is far from perfect, we strive as best as we can to approximate and achieve the best possible verdict.

[117] The Federal Court in *ASEAN Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 2 MLRA 80 (“*ASEAN Security Paper*



Mills”), speaking through Zaki Tun Azmi PCA (later CJ) said with sagacious simplicity that r 137 of the RFC 1995:

“...does not actually confer the jurisdiction to hear any application or to make any order to prevent injustice or abuse of the process of the Court. It is merely a reminder that this court has that inherent jurisdiction.”

[118] A less-than-perfect judgment of the apex court does not justify re-opening the case for a further refinement of the verdict or even a reversal of it. It is only when to allow the judgment to stand would be an affront to all the basic notions of fairness and justice, including breach of natural justice and indeed would be visiting an applicant with a grave injustice that the apex court may be constrained to move to disturb an earlier decision of its own.

[119] This tension between finality and fairness was captured in the English Court of Appeal’s case of *Taylor & Anor v. Lawrence And Anor* [2002] 2 All ER 353, referred to by our Federal Court in *Chu Tak Fai v. PP* [2006] 2 MLRA 317, where Lord Woolf CJ said as follows:

“The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen.”

[120] Naturally and needless to say, this review power should be used sparingly and cautiously and in the rarest of rare situations. In *ASEAN Security Paper Mills (supra)*, Zaki Tun Azmi PCA (later CJ) cautioned as follows:

“However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for whatever purpose. The court must not be too eager to invoke the rule.”

[121] Assuming for a moment that the sentence of whipping is unconstitutional, it would mean that the sentence is not in accordance with the law. Should a sentence not in accordance with the law be allowed to be carried out and suffered or endured by a convicted accused person? The answer has to be a resounding “No” as a grave injustice would have been inflicted on the convicted accused person, which cannot be reversed.

[122] Here, we are not debating whether a sentence is manifestly excessive which, if it has been passed by the Federal Court, would be final and the mere fact that another Federal Court may disagree with the previous Federal Court would not justify a subsequent Federal Court exercising its review powers.



[123] However, here, very pointedly, the challenge is on the unconstitutionality of the sentence of whipping, which if proved, would render the sentence of whipping unlawful. A convicted accused person should not be made to suffer an unlawful sentence be inflicted on him, for that would be to cause a grave injustice to him. On that ground alone, this Federal Court is seized of its review powers to deploy them to prevent a grave injustice if the punishment of the sentence of whipping has not been carried out yet. A person whipped cannot be un-whipped! The *dicta* in the Indian Supreme Court case of *A.R. Antulay v. R.S. Nayak & Anor* [1988] Supp 1 SCR 2, paras 53-54 referred to by learned counsel for the first and second applicants came to my mind:

“In our opinion, we are not debarred from re-opening this question and giving proper directions and correcting the error in the pre-sent appeal, when the said directions on 16 February 1984, were violative of the limits of jurisdiction and the directions have resulted in deprivation of the fundamental rights of the appellant, guaranteed by arts 14 and 21 of the Constitution... It was directed to try the appellant under the directions of this Court, which was in derogation of art 21 of the Constitution... We are of the opinion that **this Court is not powerless to correct its error which has the effect of depriving a citizen of his fundamental rights and more so, the right to life and liberty. It can do so in exercise of its inherent jurisdiction in any proceeding pending before it without insisting on the formalities of a review application.** Powers of review can be exercised in a petition filed under art 136 or art 32 or under any other provision of the Constitution if the Court is satisfied that its directions have resulted in the deprivation of the fundamental rights of a citizen or any legal right of the petitioner... In support of the contention that an order of this Court be it administrative or judicial which is violative of fundamental right can always be corrected by this Court when attention of the Court is drawn to this infirmity, it is instructive to refer to the decision of this Court in *Prem Chand Garg v. Excise Commissioner, U.P., Allahabad (supra)*”.

[Emphasis Added]

[124] Where a challenge made in a review application straddles issues of breach of the fundamental liberties provisions of the Federal Constitution, the ears of the Court would be pricked to hear the applicants, for if there is such a breach as contended, then it must not be ignored. The Indian Supreme Court in *Prem Chand Garg v. Excise Commissioner, U.P. Allahabad* [1963] 1 SCR 885 had the opportunity to weigh in on this issue and said:

“But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws.”

[125] The fact that the Federal Court’s review jurisdiction may be exercised to avert a grave injustice to the applicant has been recognised in a multitude of cases. In *Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor* [2021] 2



MLRA 190, Harmindar Singh Dhaliwal FCJ observed that the court is obliged to rectify the error where the final judgment causes grave injustice which is apparent on the face of the record in the rarest of the rare cases, so as to ensure that public interest of ensuring justice prevails over certainty and finality of decision.

[126] In *Nivesh Nair Mohan v. Dato' Abdul Razak Musa & Ors* [2021] 6 MLRA 128, the Federal Court allowed the application for review on the ground of breach of natural justice, setting aside the decision of the earlier panel of the Federal Court in dismissing the appeal. Accordingly, an order of rehearing of the appeal was granted.

[127] This Court also would bear in mind that the evidence of death attributed to whipping was not available then when the substituted sentence of 12 strokes of whipping was imposed by the Federal Court. This is not a case where an accused person was sitting on his rights and suddenly woke up one day and decided to challenge the constitutionality of whipping.

[128] Understandably the challenge here is that of the constitutionality or otherwise of the sentence of judicial whipping raised for the first time after the Federal Court had exhausted its resentencing powers under the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023. Whilst such a challenge may not fit into the suggested pigeon holes enumerated in *ASEAN Security Paper Mills (supra)*, the Federal Court there explained that the list of instances enumerated justifying a review application is by no means exhaustive and they are more in the nature of examples, such that the categories for invoking the review powers of the Federal Court are not closed, as it observed as follows:

“[41]... By the very meaning of “inherent”, as discussed earlier, it is not wise to even attempt to list out the other instances where this court should exercise such discretion. It is best to leave the question open and decide the applications as they come before this court. Inherent jurisdiction is not something conferred by the statute but which it has by its very nature of being a court to enable it to do justice and prevent injustice.”

[129] I am of the considered view that these review applications would come within the rare exception and thus within the inherent powers of the Federal Court to hear and ought not to be dismissed in limine.

Whether A Sentence Of Whipping Would Violate Article 5(1) Of The Federal Constitution In That It Is A Cruel, Inhuman And Degrading Punishment

[130] Article 5(1) of the Federal Constitution provides as follows:

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

[131] It has been held by the Court of Appeal in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLRA 186 that the right to “life”



under art 5(1) is meant more than mere animal existence. The majority, quoting from the dissenting judgment of Field J in *Munn v. Illinois* [1877] 94 US 113, 142 (24 L Ed 77, 90) with respect to the 14th Amendment to the US Constitution on the due process clause, it is said that the inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed.

[132] The opinion expressed by Field J in *Munn v. Illinois* (*supra*) was adopted by the Indian Supreme Court in *Kharak Singh v. State Of Uttar Pradesh AIR* [1963] SC 1295 where it was held that “the provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organs of the body through which the soul communicates with the outside world.”

[133] “Life” in art 5(1) of the Federal Constitution is more than a mere physical existence, and the Court of Appeal in *Tan Tek Seng* (*supra*) went on to expound as follows:

“[62] In my judgment, the Courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither should they wear blinkers when approaching a question of Constitutional interpretation. They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. **Such an objective may only be achieved if the expression “life” in art 5(1) is given a broad and liberal meaning.**

[63] Adopting the approach that commends itself to me, I have reached the conclusion that **the expression “life” appearing in art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment.**”

[Emphasis Added]

[134] The Court of Appeal went on to hold that the right to “life” includes right to livelihood. “Life” under art 5(1) is life in all its fullness with all its attendant amenities, such as the right to clean air, water, and even a right to education. The “right to life” is the practical flip side to the “prohibition against deprivation of life” save in accordance with the law. By extension, it would include the right to live with human dignity and freedom from cruel, inhuman and degrading treatment (“CIDT”).

[135] The Constitutional Court of South Africa in *S v. Williams and Others (CCT 20/94)* [1995] ZACC 6 (9 June 1995) that held that juvenile judicial whipping violates constitutional rights to dignity and freedom from cruel, inhuman or



degrading punishment has this compendious dictionary meanings of CIDT as follows:

[24] The Oxford English Dictionary defines 'cruel' as "causing or inflicting pain without pity," 'inhuman' as "destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous" and 'degrading' as "lowering in character or quality, moral or intellectual debasement." In South African case law, definitions of 'cruel, with regard to treatment or punishment are rare. The phrase "cruel treatment" has been used in the context of abuse of animals and has been described variously as "wilfully caus[ing] pain without justification... intention of causing it unnecessary suffering; "deliberate act causing substantial pain and not reasonably necessary in all the circumstances."

[136] It would include a right not to be exposed to undue risk of succumbing to septic sequelae or septicaemia that may set in because of the exposed wounds arising from being whipped that may take weeks to heal. This is consistent with the approach the courts have taken that fundamental liberties' provisions in the Federal Constitution would be interpreted "generously and liberally." See *Lee Kwan Woh v. PP* [2009] 2 MLRA 286.

[137] As such, no one has the right to hit or hurt or harm another unless that person consents to reasonable force being used against him as in a physical boxing match or a game of football or soccer. When injury is done to another, that gives rise to a civil wrong or the tort of assault and battery and the criminal wrong under Chapter XVI Offences Affecting the Human Body under the Penal Code.

[138] The same is true where the free movement of a person or his liberty is concerned. He can go anywhere in a public place in the State and any restraint has to be by express or implied consent. A person wrongly restrained would have a civil cause of action in the tort of false imprisonment and, in the case of a criminal wrong, that of wrongful restraint and wrongful confinement under the Penal Code.

[139] The State may deprive a person of his liberty by a term of imprisonment after a court of law has convicted him of a crime and sentenced him in accordance with the law. For the State to justify whipping a person in accordance with a sentence passed under the law, it must satisfy the requirement that what is inflicted is no more than reasonable chastisement and that it does not militate against his "right to life" protection.

[140] The whipping that is being meted out under s 288 of the Criminal Procedure Code ("CPC") is inflicted with a rattan cane of not more than half an inch in diameter and the cane would land on the designated spot on the buttocks with such force that when the cane is lifted up, the skin would tear and blood would ooze out. In fact, the skin would split open, and the wounds would be exposed such that the healing is as painful as the caning. A medical officer has to be present throughout to certify that the convicted accused is able to take the caning physically and the medical officer would also certify how



many strokes of whipping the prisoner can take, as stated under reg 133(1) of the Prison Regulations 2000. Whipping is not by instalments and so if it is certified that the prisoner can only take 3 strokes, the balance, say 9 strokes in the case of a minimum of 12 strokes sentence, would not be meted out even after the prisoner has recovered. See s 289 CPC.

[141] The result of being whipped in such a manner as prescribed under the CPC and the Prison Regulations 2000 is such that some may have difficulty standing for long if they are doing a manual job, and some may be wheelchair-bound and not able to do the work they had previously been doing to support the family. See Chapters 5 and 6 of *A Blow to Humanity — Torture by Judicial Caning in Malaysia*, Amnesty International Publications 2010 at pp 32 — 42.

[142] The exposed wounds, if not properly treated, may become septic such that if infection sets in and septicaemia results then the accused person may die of organ failure arising from blood poisoning.

[143] Section 288(4) CPC also provides another kind of whipping with a light rattan in the way of school discipline as follows:

“In the case of an accused sentenced to whipping for an offence under ss 403, 404, 406, 407, 408, 409 or 420 of the Penal Code, or a youthful offender, whipping shall be inflicted in the way of school discipline with a light rattan.”

[144] Two incidents, one in Pokok Sena prison and another in Taiping prison, were brought up from the affidavits filed with the focus being on the incident in Pokok Sena which the Minister in charge of Law and Institutional Reform acknowledged that the incident did happen. The cause of death to one prisoner, Mohd Zaidi bin Abdul Hamid, as stated in the death certificate, was that of “septic sequelae to [*sic*] blunt force trauma to the gluteal region” from being whipped.

[145] The Human Rights Commission of Malaysia, or more popularly called by its abbreviated name SUHAKAM, in its findings said that Zaidi’s death was linked to infected whipping wounds and inadequate medical care. This is not surprising as prisons are not known to be a very clean and hygienic place, and medical care may be slow in coming and not to mention a long queue to be attended to.

[146] The risk of death that a convicted prisoner is exposed to through whipping cannot be reconciled with the State’s duty to safeguard lives under art 5(1) of the Federal Constitution. In the case of *S v. Williams And Others (supra)*, the Constitutional Court of South Africa observed as follows:

“The simple message is that the state must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that **the punishment must respect human dignity and be consistent with the provisions of the Constitution.**”

[Emphasis Added]



[147] The fact that a medical officer has to be present before and during the whipping is testament to the inherent health and safety risk involved. No one can deny that in a matter of subjective assessment, mistakes can be made. Even if there is one death caused, that would be one too many. It is not a case of a swallow does not make a summer, but that every life, even that of a convict sentenced to be whipped, has inherent worth and dignity as part of the human race where all are created equal and are also equal before the law and subject to equal treatment of the law in art 8(1) of the Federal Constitution.

[148] In fact, for a medical officer to be present to certify that a prisoner is fit enough to be whipped and to confirm the number of whippings a prisoner can endure is a participation of the State in breach of International Medical Ethics. Principle 2 of the UN Principles of Medical Ethics declares in no uncertain terms as follows:

“It is a **gross contravention of medical ethics**, as well as an offence under applicable international instruments, for health personnel, particularly physicians, **to engage, actively or passively, in acts which constitute participation in, complicit in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment.**”

[Emphasis Added]

[149] Our own Malaysian Medical Council’s Code of Professional Conduct 2019 has this important reminder to all medical practitioners as follows:

“3. CONDUCT DEROGATORY TO THE REPUTATION OF THE MEDICAL PROFESSION

The medical practitioner is expected at all times to observe proper standards of personal behaviour in keeping with the dignity of the profession.

3.1 Respect for Human Life

The utmost respect for human life should be maintained even under threat, and no use should be made of any medical knowledge contrary to the laws of humanity.

The practitioner **must not countenance, condone or participate in the practice of torture or other forms of cruel, inhuman or degrading procedures, whatever the offence of which the victim of such procedures is suspected, accused or guilty**, and whatever the victim’s beliefs or motives, and in all situations, including armed conflict and civil strife. The practitioner **must not provide any** premises, instruments, substances or knowledge to facilitate the practice of torture or other forms of cruel, **inhuman or degrading treatment** or to diminish the ability of the victim to resist such treatment.

A practitioner engaged in a prison or in places of detention must provide professional care in the interest and well-being of the inmates.”

[Emphasis Added]



[150] The medical profession, true to its mission to respect, save and protect human life, has taken a principled stand against any cruel, inhuman and degrading punishment against even a criminal and whatever the offence the prisoner is convicted of. No punishment of whipping can be carried out without their presence and passive participation, and it would not be appropriate to drag the medical profession into witnessing and approving of that which it is said the law has approved and sanctioned.

[151] The medical profession is quick to appreciate that human life is the same everywhere and worthy of protection and so is human dignity and worth, even though a member of the human race may have done a despicable act. To descend to inflicting a cruel, inhuman and degrading punishment on the criminal because he has perpetrated such an act on his victim would be to descend to the level of the criminal that the penal system seeks to rehabilitate.

[152] Human pain and suffering are universal, and international law, and in particular international human rights law is the same everywhere. It is a recognition, no matter how late in the day, that we are all made of the same clay and that at the core of each life is a precious wonder!

[153] Some states may take longer to accept the reality of whipping being a cruel, inhuman and degrading punishment, even when their colonial masters, who first introduced it, have long since abandoned it in their own countries. The judiciary, as the defender of its Constitution, must be at the forefront of aligning its human rights values with that of international norms as long as these norms do not conflict with its own Constitution.

[154] The United Kingdom abolished whipping and flogging as judicial punishments by its Criminal Justice Act 1948. India did the same in its Whipping Act 1955. As was said by the Supreme Court of Namibia in *Ex parte. Attorney-General, In Re: Corporal Punishment by Organs of State* [1991] NASC 2:

“What may have been acceptable as a just form of punishment some decades ago, may appear to be manifestly inhuman and degrading today. Yesterday’s orthodoxy might appear to be today’s heresy.”

[155] I have not heard anyone suggesting that to outlaw whipping as a constitutional and lawful punishment would be contrary to our Federal Constitution. Neither have I heard anyone seriously believing that to outlaw whipping as a punishment would cause a rampant rise in violent crime. In fact, if there is anything to go by it is in the candid reply of the Minister in the Prime Minister’s Department (Law and Institutional Reform) to a question raised on whether the Government had in mind any reform to the judicial sentence of whipping in particular after considering the death that took place in the Pokok Sena prison in 2024 after a prisoner was whipped. The Dewan Rakyat Report of 29 August 2025 titled “Mesyuarat Kedua, Penggal Keempat, Parlimen Kelima Belas 2025” or “Second Meeting, Fourth Term, Fifteenth Parliament 2025” reads with respect to Answer to Question 12 as follows:



“JAWAPAN: YB DATO’ SRI AZALINA OTHMAN SAID, MENTERI DI JABATAN PERDANA MENTERI (UNDANG-UNDANG DAN REFORMASI INSTITUSI)

Tuan Yang di-Pertua,

1. Untuk makluman Ahli Yang Berhormat, Kerajaan MADANI sentiasah komited dalam melaksanakan reformasi terhadap sistem perundangan dan pentadbiran keadilan jenayah negara yang lebih berperikemanusiaan dan progresif. Sehubungan dengan itu, Bahagian Hal Ehwal Undang-Undang, Jabatan Perdana Menteri (BHEUU, JPM) sedang meneliti keperluan pemansuhan hukuman sebat mandatori, sejajar dengan pendekatan semasa yang memberi lebih ruang kepada budi bicara kehakiman dalam menentukan bentuk dan kadar hukuman yang sesuai.
2. Untuk makluman Ahli Yang Berhormat juga, Hukuman sebat telah dilaksanakan di Malaysia sejak zaman penjajahan British dan kemudiannya dikekalkan dalam pelbagai undang-undang selepas kemerdekaan. Penelitian awal mendapati terdapat 57 peruntukan di bawah Kanun Keseksaan [Akta 574] yang memperuntukkan hukuman sebat. Daripada jumlah tersebut terdapat 26 kesalahan yang menetapkan hukuman sebat mandatori. Selain daripada Akta 574 terdapat Akta-akta lain yang memperuntukkan hukuman sebat mandatori, antaranya Akta Dadah Berbahaya 1952 [Akta 234], Akta Imigresen 1959/63 [Akta 155], Akta Senjata Api (Penalti Lebih Berat) 1971 [Akta 37] dan Akta Kesalahan Seksual Terhadap Kanak-Kanak 2017 [Akta 792].
3. Hukuman sebat di Malaysia dilaksanakan secara fizikal menggunakan rotan yang dikenakan ke atas bahagian punggung pesalah oleh pegawai penjara yang terlatih. Kanun Tatacara Jenayah [Akta 593] memperuntukkan bahawa seorang pegawai perubatan perlu hadir semasa pelaksanaan hukuman untuk memastikan kesihatan pesalah tidak terjejas secara serius. Namun begitu, **terdapat kebimbangan yang semakin meningkat terhadap kesan jangka panjang akibat pelaksanaan hukuman ini yang berpotensi membawa mudarat fizikal serta psikologi kepada banduan, termasuk isu akses kepada rawatan perubatan selepas sebatan.**
4. Kerajaan mengambil maklum akan satu insiden yang dilaporkan oleh Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM), di mana seorang banduan di Penjara Pokok Sena, dilaporkan meninggal dunia selepas menjalani hukuman sebat pada tahun 2024. Kerajaan turut menyedari insiden ini membangkitkan persoalan serius terhadap akses kepada rawatan perubatan dan pemantauan kesihatan selepas pelaksanaan hukuman. Dalam hal ini, **banyak negara Komanwel lain seperti United Kingdom, Afrika Selatan, India dan Kanada telah mengambil langkah untuk memansuhkan hukuman sebat kerana ianya dilihat sebagai bentuk hukuman yang kejam, tidak berperikemanusiaan dan menjatuhkan maruah manusia (cruel, inhuman and degrading punishment).**



5. Walau bagaimanapun, **Kerajaan mengambil maklum bahawa buat masa ini, tiada kajian yang komprehensif dan menyeluruh pernah dijalankan di Malaysia mahupun di negara-negara ASEAN yang lain berkaitan keberkesanan hukuman sebat dan hukuman sebat mandatori dalam mencegah seorang pesalah daripada melakukan kesalahan yang sama ataupun kesalahan-kesalahan jenayah yang lain pada masa hadapan.** Satu Mesyuarat Khas Kajian Pemansuhan Hukuman Sebat Mandatori yang dipengerusikan oleh YB Timbalan Menteri (Undang-Undang dan Reformasi Institusi) telah diadakan pada 23 Jun 2025 melibatkan pelbagai agensi termasuk Kementerian Dalam Negeri (KDN), Jabatan Penjara Malaysia, Kementerian Kesihatan Malaysia, Pejabat Ketua Pendaftar Mahkamah Persekutuan, Polis Diraja Malaysia (PDRM), Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM), dan Majlis Peguam. Dalam Mesyuarat Khas tersebut, pelbagai pandangan dan cadangan telah dikemukakan termasuk kebimbangan mengenai impak jangka panjang hukuman sebat dan keperluan untuk kajian menyeluruh bagi menilai keberkesanan dan kewajaran mengekalkan aspek mandatori hukuman tersebut.
6. Dalam hal ini, selaras dengan dasar Kerajaan MADANI yang berteraskan prinsip keinsanan, keadilan dan akauntabiliti, satu kajian menyeluruh kini sedang dilaksanakan bagi meneliti keberkesanan hukuman sebat mandatori di Malaysia. Kajian ini diselaras oleh BHEUU, JPM melalui penubuhan Jawatankuasa Kecil Kajian Pemansuhan Hukuman Sebat Mandatori yang akan mengemukakan laporan dan syor kepada Jawatankuasa Semakan dan Kajian Pembaharuan Undang-Undang Jenayah (Criminal Law Reform Committee — CLRC), untuk penelitian lanjut, sebelum dibawa kepada YB Timbalan Menteri (Undang-Undang dan Reformasi Institusi) dan seterusnya kepada YB Menteri di Jabatan Perdana Menteri (Undang-Undang dan Reformasi Institusi) bagi pertimbangan dasar sebelum ianya dikemukakan bagi pertimbangan Jemaah Menteri.
7. Kerajaan MADANI percaya bahawa dalam membina sistem keadilan jenayah yang moden dan progresif, pendekatan menghukum perlu diseimbangkan dengan prinsip keinsanan, pemulihan dan keberkesanan jangka panjang. **Sebarang perubahan dasar akan mengambil kira kehendak Perlembagaan Persekutuan, komitmen antarabangsa, realiti sistem keadilan kita dan aspirasi rakyat Malaysia.**

Sekian, terima kasih.”

[Penekanan Diberikan]

[156] The above, when translated into English, would read as follows:

“ANSWER: THE HONOURABLE DATO’ SRI AZALINA OTHMAN SAID, MINISTER IN THE PRIME MINISTER’S DEPARTMENT (LAW AND INSTITUTIONAL REFORM)



Mr Speaker Sir,

1. For the information of the Honourable Member, the MADANI Government is always committed to reforming its legal system and the nation's administration of criminal justice in making it more humane and progressive. In line with that, the Legal Affairs Division of the Prime Minister's Department (BHEUU, JPM) is currently studying the need to repeal the sentence of mandatory whipping, consistent with current approaches which gives more room for judicial discretion in determining the type and length of appropriate sentence.
2. For the further information of the Honourable Member, the sentence of whipping was introduced in Malaysia since the days of British colonial rule and thereafter found its way into various legislation since Merdeka. A preliminary examination revealed that there are 57 provisions under the Penal Code [Act 574] that provides for whipping. From that number there are 26 offences that attract mandatory whipping. Besides Act 574 there are other Acts that provide for mandatory whipping such as the Dangerous Drugs Act 1952 [Act 234], the Immigration Act 1959/63 [Act 155], the Firearms (Increased Penalties) Act 1971 [Act 37] and the Sexual Offences Against Children Act 2017 [Act 792].
3. The sentence of whipping is carried out physically in Malaysia by way of a caning at the buttocks of the offender by a trained prison officer. The Criminal Procedure Code [Act 593] provides that a medical officer is required to be present when whipping is executed to ensure that the health of offender is not seriously affected. However, **there is a growing concern regarding the long term consequences of whipping with its potential for physical as well as psychological harm to the prisoner including the issue of access to medical treatment after the whipping.**
4. The Government takes note of one incident reported by the Malaysian Human Rights Commission (SUHAKAM) where a prisoner in Pokok Sena Prison was reported to have died after being whipped in 2024. The Government is aware that the incident had raised serious questions of access to medical treatment and health monitoring after the execution of the whipping sentence. In this respect, **many Commonwealth countries like the United Kingdom, South Africa, India and Canada have taken steps to repeal the punishment of whipping as it is seen as a cruel, inhuman and degrading punishment.**
5. In any event, **the Government takes note that for the moment, there has been no comprehensive and thorough study done in Malaysia or for that matter in other ASEAN countries regarding the effectiveness of the punishment of whipping and mandatory whipping in deterring an offender from committing the same offence or other criminal offences in the future.** A Special Meeting on the Study to Abolish the Mandatory Whipping Sentence chaired by the Right Honourable Deputy Minister (Law and Institutional Reform) was held on 23 June 2025 involving various agencies including the Home Affairs Ministry (KDN), the Prison Department Malaysia, the Health Ministry Malaysia, the Chief Registrar's office of the Federal Court of Malaysia, the Royal



Malaysian Police (PDRM), the Malaysian Human Rights Commission (SUHAKAM) and the Bar Council. In that Special Meeting various views and proposals were expressed including the fear of the long-term impact of the punishment of whipping and the need for a comprehensive study on the effectiveness and justification to retain the mandatory aspect of the punishment of whipping.

6. In this respect, consistent with the policy of the MADANI Government based on the principle of humanity, justice and accountability, a comprehensive study is now being carried out to assess the effectiveness of the mandatory punishment of whipping in Malaysia. This study is coordinated by BHEUU, JPM through the establishment of a Subcommittee on the Study of the Abolition of the Mandatory Punishment of Whipping which will present its report and recommendations to the Criminal Law Reform Committee — CLRC, for further study before it is brought to the Honourable Deputy Minister (Law and Institutional Reform) and thereafter to the Honourable Minister in the Prime Minister's Department (Law and Institutional Reform) for its policy consideration before it is presented for consideration by the Cabinet Ministers.
7. The MADANI Government believes that in developing a modern and progressive criminal justice system, the sentencing approaches must be balanced with the principles of humanity, rehabilitation and long-term effectiveness. **Any change in policy will take into consideration the requirements of the Federal Constitution, international commitments, the realities of our justice system and the aspirations of the citizens of Malaysia.**

Thank you.”

[Emphasis Added]

[157] One would have thought that since the executive itself is uncertain of the deterrent effect of whipping and the growing concern of the long-term physical and psychological effects on prisoners who had been whipped, there would be a moratorium on whipping until a comprehensive and thorough study is being done and its proposals and recommendations submitted to the stakeholders for deliberation.

[158] The United Kingdom had undertaken a comprehensive study and published in its Cadogan Report of 1938 and in 1960 the Advisory Council on the Treatment of Offenders reviewed the decision abolishing corporal punishment in the United Kingdom and it pointed out that “there is no evidence that corporal punishment is an especially effective deterrent either to those who have received it or to others.”

[159] Further in *S v. Williams And Others (supra)* the Constitutional Court of South Africa noted as follows:

“[81]... In *S v. Motsoesoa Page J*, in an exhaustive analysis of the law in relation to corporal punishment, arrived at the conclusion that corporal punishment



serves no useful deterrent function, on the contrary, “its effect is likely to be coarsening and degrading rather than rehabilitative.” In his judgment he also referred to an article by Professor Kahn on Crime and Punishment 1910-1960:

“Even making the utmost allowances for extraneous factors such as changes in population and in the efficiency of the police force and prosecuting authorities, it seems reasonable to conclude that the deterrent effect of compulsory whipping is nowhere to be seen. If this is so, its retention can only be attributed to some spirit of retribution or revenge.”

[160] I agree with learned counsel for the Bar Council who had submitted an amicus brief that the judicial application of whipping is a punishment involving severe physical trauma, humiliation and the systemic risk of complications leading to death (as can be seen in the cases of custodial death) and is fundamentally antithetical to the right to live with human dignity and freedom from CIDT.

[161] A convicted accused person until his death, whether natural or via the sentence of death, is very much a human person who is entitled to all his rights as protected under the fundamental liberties provision of the Federal Constitution and such liberties are not abrogated or suspended save for his liberty of movement that is being curbed via a sentence of imprisonment in accordance with the law.

[162] Like all human persons, he is to be treated with dignity and respect and not to be humiliated or to have pain or injuries inflicted on his body. It was thus recognised by the Indian Supreme Court in *State of Andhra Pradesh v. Challa Ramkrishna Reddy & Ors* [2003] 3 SCR 656 as follows:

“Right to Life is one of the basic human rights. It is guaranteed to every person by art 21 of the Constitution and not even the State has the authority to violate that Right. **A prisoner, be he a convict or under-trial or a detenu, does not cease to be a human being. Even when lodged in the jail, he continues to enjoy all his Fundamental Rights including the Right to Life guaranteed to him under the Constitution.** On being convicted of crime and deprived of their liberty in accordance with the procedure established by law, prisoners still retain the residue of constitutional rights.”

[Emphasis Added]

[163] A convicted prisoner is entitled to be protected from any physical harm that may be caused to him by a fellow inmate or from being physically bashed up or sodomised. He is entitled to medical treatment if he is sick as part of the “right to life” protection housed in art 5(1) of the Federal Constitution.

[164] For all the injuries arising from being whipped with the scourge and scars of it remaining forever, such a punishment is cruel, inhuman and degrading punishment and has long been outlawed in the country of origin in the UK. In the European Court of Human Rights’ case of *Tyrer v. United Kingdom* [1979-80] 2 EHRR 1 at para 33, it was observed as follows:



“The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being. Furthermore, **it is institutionalised violence; that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State.** Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment — whereby **he was treated as an object in the power of the authorities** — constituted an assault on precisely that which is the main purpose of art 3 **to protect, namely a person’s dignity and physical integrity...** The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender.”

[Emphasis Added]

[165] It was observed in *S v. Williams And Others (supra)* at para [68] that “... An enlightened society will punish offenders, but will do so without sacrificing decency and human dignity.” The punishment of whipping is unsafe, brutal, torturing, excessive and violates art 5(1) where “the right to life” protects against all unnecessary risk of death as well as the long term disabilities, both physical and psychological, that may arise as a result of the whipping.

Whether A Sentence Of Whipping Would Be Disproportionate Under Art 8(1) Of The Federal Constitution

[166] Article 8(1) of the Federal Constitution is the embodiment of all that is just, fair and reasonable in that the law provides for its even application to all without discrimination. No one is above the law. It also protects all against arbitrary actions of the State and against unfair, oppressive or excessive punishment. The expression used in international human rights lingo is protection against CIDT.

[167] Article 8(1) houses the universal principle of proportionality such that what may be legitimate in terms of punishment may well degenerate into disproportionate punishment in that the lawful power of the State to punish for a crime committed may be exercised unlawfully when the punishment becomes disproportionate to the gravity of the offence committed. Thus, the power of the State to wield punishment for a crime for both retributive and rehabilitative purpose must not in the process inflict permanent scars, extreme pain where the skin tears, blood oozes out and a deep wound takes time to heal with some suffering long term deleterious effects. All punishment of the State must pass the test of proportionality.

[168] The fact that, through the centuries, some extreme forms of punishment have been discarded and removed from the criminal statute books may be attributed to the humanising influence of the law. While punishment is retributive in the offender receiving the full wrath of the State and serves to restrain others from falling foul of the law, it also serves a rehabilitative purpose



in reforming the offender to leave his life of crime and to be a contributing and responsible member of society.

[169] The scars from being whipped are not just physical but psychological as well. Proponents of whipping would say that it is the most powerful deterrence against committing further crimes. The question is whether the prisoner can return to a normal life when he has difficulty standing and sitting for long hours and in some cases cannot work as usual because of the physical disability arising from being whipped. Would the punishment be proportionate to the offence committed? See *A Blow to Humanity — Torture by Judicial Caning in Malaysia*, Amnesty International Publications 2010 at pp 32-42.

[170] Whilst the legislature as a matter of policy would decide on the type of punishment to be meted out based on the gravity of the offence and the propensity of the offence being committed with violence and physical injury to the victims, one is permitted to ask under the Federal Constitution if a prescribed punishment is proportionate to the gravity of the offence. Extreme examples do help to illustrate a point. Some antiquated examples of the past may be raised, such as cutting off the hands or dismemberment of the body or being thrown to the wild beasts in an amphitheatre, and immediately there would be a revulsion against such a punishment simply because it would be disproportionate to the gravity of the offence. The Romans may have given us the legacy of Roman Law, but hardly have any States copied its practice of crucifixion — a most excruciating form of death — reserved for treason, insurrection and the like. We know when the line has been crossed such that the punishment would be clearly cruel, inhuman, and degrading even if the State were to sanction it.

[171] If one day the legislature should decide to turn back the hands of the clock and prescribe burning at the stake or drowning or stoning to death as a means of carrying out the death sentence rather than the traditional hanging method, would the court wring its arms in despair and say that is a policy matter for the legislature and we cannot interfere? Surely the Courts would be allowed to intervene where the punishment is disproportionate to the crime, for then it would be unconstitutional and unlawful and ought to be struck down. For so long as a punishment is cruel, inhuman and degrading, the Courts, if so satisfied, would intervene to strike down the punishment for violating the proportionality principle enshrined and embedded in our Federal Constitution in art 8(1).

[172] In *Ahmad Tajudin Ishak v. Suruhanjaya Pelabuhan Pulau Pinang* [1996] 1 MELR 289; [1996] 2 MLRA 456, CA, Abdul Malek Ahmad JCA spoke of the powerful combined effect of art 5(1) and art 8(1) of the Federal Constitution as follows:

“... the far-reaching provisions of arts 5(1) and 8(1) of the Federal Constitution (“the Constitution”). **The combined effect of these two articles is to strike down any arbitrary or harsh and unfair action which adversely affects the**



quality of life. See *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLRA 186 and *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1996] 1 MELR 142; [1996] 2 MLRA 212.”

[Emphasis Added]

[173] The CPC provides in s 291(1) for those who could not be whipped to be brought back to court for resentencing for a longer term of imprisonment of not more than 2 years. The Legislature acknowledges that there is a way to substitute for the inability to carry out the whipping, which is with a further term of imprisonment of not exceeding 2 years.

[174] There is much subjectivity and disparity where the sentence of whipping is concerned, where, in its execution, a convicted accused would only receive so many strokes of whipping as the medical officer may certify that he can endure without risk to life. Such a certification is subjective to begin with and since a prisoner cannot be whipped in stages, a person sentenced to 15 strokes of whipping and another to 12 strokes and yet another to 5 strokes may all end up with only 2 strokes of whipping each because the medical officer certified so and further that no sentence of whipping shall be executed by instalments. See s 289 CPC.

[175] Likewise, the degree of pain inflicted and the ensuing suffering, which is proportional to the force with which the rattan cane hits the buttocks with different execution officers using varying force to inflict the whip on the buttocks of the accused persons in carrying out the sentence imposed.

[176] All these various subjective elements resulting in the disparity of whipping militate against the equal treatment under the law mandated under art 8(1) unlike a term of imprisonment, which is objectively verifiable and hence can be calculated to the day for the length of imprisonment imposed.

[177] SUHAKAM in a quick and urgent response to the death at the Pokok Sena Prison of an inmate as a result of being whipped, issued the following clarion call on the Government to abolish Corporal Punishment as follows:

“SUHAKAM CALLS FOR THE ABOLITION OF CORPORAL PUNISHMENT KUALA LUMPUR (22 October 2024) — The Human Rights Commission of Malaysia (SUHAKAM) expresses its deepest concern over the recent death of an inmate at Pokok Sena Prison, reportedly after corporal punishment by whipping. We extend our heartfelt condolences to the family of the deceased and reaffirm our unwavering commitment to the protection of human rights.

SUHAKAM unequivocally opposes all forms of corporal punishment, including whipping, as they violate fundamental human rights and human dignity. The severe physical and psychological harm caused by corporal punishment is a direct contradiction to international human rights standards as prescribed by art 5 of the Universal Declaration of Human Rights and art 7 of the International Covenant on Civil and Political Rights, both of



which provide that no one shall be subjected to torture or to cruel, inhuman or degrading punishment.

Further, art 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT) defines torture to include “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted.” Corporal punishment clearly falls under this definition and should be regarded as inhumane and degrading.

The CAT, adopted in 1984 by the General Assembly Resolution of 1984 and now ratified or acceded to by 117 states, represents a global commitment to abolish torture and inhumane treatment. Unfortunately, Malaysia remains amongst the minority nations that have yet to be a party to CAT, despite the moral obligation to uphold the dignity and rights of all individuals in the penal system. Even within ASEAN, countries such as Indonesia, the Philippines, Thailand, Cambodia, and Vietnam have already acceded to the CAT, setting an example for the region. SUHAKAM urges Malaysia to join these nations in taking a firm stance against torture, including corporal punishment by acceding to CAT.

In light of the recent tragedy at Pokok Sena Prison, we call on the Government to immediately abolish all forms of corporal punishment, including those codified in the Penal Code, the Criminal Procedure Code, the Prisons Act, and related legislation. Furthermore, corporal punishment in schools, which normalizes violence against children, must also be outlawed to safeguard the mental and physical well-being of future generations.

This incident underscores the urgency of comprehensive reform. We call on authorities to conduct a full, independent, and transparent investigation into the circumstances surrounding the death, ensuring that those responsible are held accountable. However, addressing this incident in isolation is insufficient. Malaysia must reform its criminal justice system and abandon harmful, outdated practices like corporal punishment in favour of rehabilitative approaches that respect human dignity.

SUHAKAM advocates for a justice system based on deterrence, rehabilitation and the inherent dignity of every person. Measures that emphasize justice, accountability and public safety, without resorting to violence, are essential to creating a just society. These measures must be aligned with Malaysia’s international human rights obligations and a commitment to justice, fairness, and humanity.

SUHAKAM will continue to monitor this case closely and engage with the relevant authorities to push for reforms that align with international standards. Abolishing corporal punishment is not merely a legal obligation but a moral necessity to uphold justice, human rights, and the dignity of all.”

[178] Something within us tells us that it would be cruel to inflict excruciating pain on another and the fact that the offender has been found guilty of a violent crime does not make him deserving of the pain and exposed wounds that may take weeks or months to heal as a result of being whipped, not to mention the long-term physical and psychological effects. It is inhuman and degrading as



a form of punishment. Even in our relation to animals which act on instincts rather than based on conscious will, the law enjoins us to treat them humanely for there is punishment if we treat them cruelly and cause them pain and suffering.

[179] Thus, the Animals Act 1953 has a provision in s 44 that reads:

“Penalty for cruelty to animals

44.(1) Any person who-

- (a) cruelly beats, kicks, ill-treats, overrides, overdrives, overloads, tortures, infuriates or terrifies any animal;
- (b) causes or procures or, being the owner, permits any animal to be so used;
- (c) being in charge of any animal in confinement or in course of transport from one place to another neglects to supply such animal with sufficient food or water;
- (d) by wantonly or unreasonably doing or omitting to do any act, causes any unnecessary pain or suffering, or, being the owner, permits any unnecessary pain or suffering to any animal;
- (e) causes, procures or, being the owner, permits to be confined, conveyed, lifted or carried any animal in such manner or position as to subject it to unnecessary pain or suffering;

...

commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both.”

[Emphasis Added]

[180] Whilst the refrain is often heard in violent crimes that the offender had behaved and acted worse than an animal, we risk becoming like the prisoner we seek to punish if the punishment is cruel, inhuman and degrading. Whipping as prescribed under the CPC is cruel, inhuman and degrading and violates the protection under art 8(1) of the Federal Constitution.

Whether A Sentence Of Whipping Would Violate Article 8(2) Of The Federal Constitution In That A Female Cannot Be Whipped

[181] From time immemorial, it has been recognised that men and women are constituted differently, not just physically but physiologically and emotionally. The men’s role, consistent with being endowed with greater physical strength and endurance, is that of the protector and provider of the family. In early civilisations, it is the men that would venture into the jungle to hunt or work



in and cultivate the fields and to bear the heat of the noon-day sun. He would also, in his foray into the jungle, fight and fend off the wild beasts.

[182] No one begrudges the fact that physically a man is generally endowed with greater physical strength and speed when pursuing or being pursued by the wild animals. Likewise, in ancient days, it is the men that were recruited into the army to fight invaders.

[183] The women's role was that of the gentler parent, nourishing and nurturing new-born babes in the homes and fulfilling the supportive role of raising children. Emotionally, women perhaps would cry more easily and be less enduring of external pain inflicted on them, though they themselves may be better able to endure the internal pain of child-bearing and delivery.

[184] Whipping has generally been viewed as not suitable for being inflicted on a woman, not only because she is constituted differently and more delicately when compared to a man, but also that it is feared that the act of whipping may cause severe interference with the child-bearing ability of a woman and the pain that is already inherent in delivery.

[185] Surely the Court can take judicial notice of all the above. The fact that whipping in men is done on almost fully exposed buttocks was also deemed to be out of sync with the modesty of a woman. Coupled with this is the fear that a woman may not be able to endure the pain that is associated with whipping and the extreme emotional trauma that accompanies it.

[186] The differential treatment in the light of the above is not constitutionally discriminatory. The rationale is that the law has long recognised from time immemorial the different impact corporal punishment may have on women, and thus the exemption is a form of special treatment having regard to the physical and physiological differences between the sexes rather than adverse discrimination.

[187] All that art 8(1) of the Federal Constitution requires is that like must be treated alike and the law is applied without discrimination to all similarly circumstanced irrespective of their gender.

[188] Whilst it is true that art 8(2) expressly states that "... there shall be no discrimination against citizens on the ground only of gender.", I have not heard of any Courts that have interpreted art 8(2) as requiring women to be whipped on ground of identical treatment in all circumstances, especially where the law provides for protective measures for one gender based on reasonable and objective criteria. The exemption is not seen as conferring an unfair advantage but as a legislative choice to mitigate the severity of punishment for women.

[189] In any event, there is an intelligible differentia or distinguishing mark between the genders within the formula set out in the Federal Court case of *Datuk Haji Harun Haji Idris v. PP* [1976] 1 MLRA 676 at p 682, where Suffian



LP distilled the test as follows in determining whether a discrimination is permitted:

“Equality before the law guaranteed by art 8 does not mean that all laws must be general in character and universal in application. The legislature may make laws in respect of a group or a class of persons provided that the grouping or classification is:

- (a) rational;
- (b) **founded on an intelligible differentia (distinguishing mark) which distinguishes persons that are grouped together from others that are left out of the group;**
- (c) there must be a policy or object sought to be achieved by that Act; and
- (d) there must be a nexus between the basis of classification and the object of the Act.”

[Emphasis Added]

[190] In the Federal Court cases of *Beatrice AT Fernandez v. Sistem Penerbangan Malaysia & Anor* [2005] 1 MELR 1; [2005] 1 MLRA 320 the appellant applied in the High Court for a declaration for wrongful termination on account of a term in the Collective Agreement which provided that the employer has a right to terminate the appellant who was a flight stewardess if she became pregnant was in contravention of art 8. The High Court and the Court of Appeal rejected her application, and the Federal Court, in dismissing the appellant’s leave to appeal, held that the provision in the Collective Agreement was not in contravention of art 8. In dismissing the leave to appeal to the Federal Court, the Federal Court observed as follows:

“15. It is not difficult to understand why airlines cannot have pregnant stewardesses working like other pregnant women employees. We take judicial notice that the nature of the job requires flight stewardesses to work long hours and often flying across different time zones. They have to do much walking on board flying aircraft. It is certainly not a conducive place for pregnant women to be.

...

18. In the circumstances, in construing art 8 of the Federal Constitution, our hands are tied. The equal protection in cl (1) of art 8 thereof extends only to persons in the same class. **It recognises that all persons by nature, attainment, circumstances and the varying needs of different classes of persons often require separate treatment.** Regardless of how we try to interpret art 8 of the Federal Constitution, we could only come to the conclusion that there was obviously no contravention. We are also in agreement with the views expressed by Suffian LP in *Datuk Haji Harun Haji Idris v. PP* [1976] 1 MLRA 676 on this point.”

[Emphasis Added]



[191] See also the Federal Court case of *Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd* [2004] 1 MLRA 20 where s 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 which immunised the appellant from injunctive relief was held not to have contravened art 8(1) Federal Constitution as such a prohibition against an injunctive relief was necessary to ensure that the object of the Act was not frustrated which is to promote the revitalisation of the nation's economy by way of allowing the appellant to acquire non-performing loans from the banks with a view to maximising recovery values.

[192] The way the relevant provision in s 289 of the CPC is worded is such that one can immediately discern that females and males above 50 years of age would be more vulnerable physically, such that they may be at health and even life risk if they be given the cane. Section 289 CPC reads:

“No sentence of whipping shall be executed by instalments, and none of the following persons shall be punishable with whipping:

- (a) **females;**
- (b) males sentenced to death;
- (c) **males** whom the Court considers to be **more than fifty years of age**, except males sentenced to whipping under ss 376, 377C, 377CA or 377E of the Penal Code.”

[Emphasis Added]

[193] Whilst the exemption of women from whipping is not discriminatory, yet it is clear that the legislature's aversion for any risk that whipping may visit upon the fairer sex underscores the need to re-assess what has been traditionally accepted of the picture of the macho-man who must be man-enough to endure all physical pain flowing from the punishment reserved for those who had no compunction in inflicting physical pain and trauma on others with tragic consequences. Understandably, the need for retributive justice is real but there is also the reality of what Mahatma Gandhi observed that an eye for an eye would only make the whole world blind.

[194] The Human Rights Committee's General Comment No 28 and the CEDAW Committee's General Recommendation No 33 reject “protective” rationales that perpetuate stereotypes. Accordingly, they highlighted that the exemption of women only reflects the acknowledged inhumanity of whipping, rather than any lawful differentiation.

Whether Whipping Is In Violation Of The Universal Declaration Of Human Rights Which Malaysia Has Incorporated Into Its Human Rights Paradigm By Virtue Of Section 4(4) Human Rights Commission of Malaysia Act 1999

[195] As part of the international community and a member State of the United Nations, Malaysia subscribes to and has on numerous occasions endorsed the principles enshrined in the United Nations' Universal Declaration of Human



Rights 1948 (“UDHR”). In fact, Malaysia has given statutory recognition and endorsement to the UDHR by incorporating the human rights protected under it into our corpus of law in the Human Rights Commission of Malaysia Act 1999 for so long as these rights are not inconsistent with our Federal Constitution.

[196] The UDHR is not a treaty, but it is considered an authoritative interpretation of the human rights obligations in the UN Charter to which Malaysia, as a member state, subscribes. Unlike a treaty, which has to be incorporated into the domestic law of a State normally by legislation to that effect, the nature of the UDHR is that it informs and infuses the interpretation of human rights that are already in a State’s constitution. There is a legitimate expectation that all member States would act consistently with the human rights enshrined in the UDHR, for it is a document that gives expression to what is innate and inherent in being human.

[197] When the Malaysian Human Rights Commission was established under the Act for the protection and promotion of human rights in Malaysia, our Parliament specifically and significantly singled out the UDHR as our guiding light dispelling all darkness that may arise from perversion of such rights by providing in s 4(4) of the Act as follows:

“For the purpose of this Act, regard shall be had to the Universal Declaration of Human Rights 1948 to the extent that it is not inconsistent with the Federal Constitution.”

[198] Our Malaysian Courts, consistent with our international commitments, would, where relevant, refer to the UDHR as both an aspirational as well as a foundational document spelling out the basic human rights of all persons by virtue of being human and derived from the inherent dignity and worth of the human person. In the Court of Appeal’s decision in *Subramaniam Letchimanan v. The United States Of America & Another Appeal* [2021] 4 MLRA 153, it was observed as follows:

“[72] We understand that **where fundamental liberties and human rights are concerned the courts are more prepared to take a robust approach in incorporating international human rights norms into the domestic law** even though a particular Convention has not been ratified or incorporated into domestic law by legislation.

[73] Our courts **tend to be more flexible if the Convention to which we are not a party yet nevertheless promotes principle of fundamental liberties enshrined in our Federal Constitution and the Rule of Law or that it is embodied in the United Nation Universal Declaration of Human Rights (‘UDHR’) which values are not inconsistent with our Federal Constitution.**”

[Emphasis Added]



[199] art 5 of the UDHR is clear:

“Article 5

No one shall be subjected to torture or to **cruel, inhuman or degrading treatment or punishment.**”

[Emphasis Added]

[200] The Indian Courts have no compunction in resorting to International conventions and norms when interpreting the scope of fundamental liberties provisions in its Constitution. This is exemplified in the Indian Supreme Court case of *Vishaka And Others v. State Of Rajasthan And Others* [1997] 6 SCC 241, where at p 251 JS Verma CJ opined as follows:

“14. The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law. The High Court of Australia in *Minister for Immigration and Ethnic Affairs v. Teoh* 128 Aus LR 353 has recognised the concept of legitimate expectation of its observance in the absence of a contrary legislative provision, even in the absence of a Bill of Rights in the Constitution of Australia.”

[201] Our Court of Appeal in *Mat Shuhaimi Shafiei v. PP* [2014] 1 MLRA 628 followed the same approach in para [87] thereof. I cannot see how art 5 of the UDHR is inconsistent with our Federal Constitution which guarantees the same freedom under art 5(1) of the Federal Constitution. In fact, in the Recital to the adoption of the ASEAN Human Rights Declaration (“AHRD”) dated 19 November 2012, Malaysia, together with the other ASEAN Member States, reiterated as follows:

“REITERATING ASEAN and its Member States’ **commitment to the Charter of the United Nations, the Universal Declaration of Human Rights**, the Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN Member States are parties as well as to relevant ASEAN declarations pertaining to human rights.”

[Emphasis Added]

[202] In adopting the AHRD, Malaysia further reaffirmed as follows:

“3. REAFFIRM further our **commitment to ensure that the implementation of the AHRD be in accordance with our commitment to the Charter of the United Nations, the Universal Declaration of Human Rights**, the Vienna Declaration and Programme of Action, and other international human



rights instruments to which ASEAN Member States are parties, as well as to relevant ASEAN declarations and instruments pertaining to human rights.”

[Emphasis Added]

[203] General Principle Nos 11 and 14 of the AHRD read as follows:

“11. Every person has an inherent right to life which shall be protected by law.
No person shall be deprived of life save in accordance with law.

14. No person shall be subject to torture or **to cruel, inhuman or degrading treatment or punishment.**”

[Emphasis Added]

[204] We no longer can take refuge in the fact that words are what they are — aspirational and laudatory, but divorced from reality. Words are not political gimmicks to make one look and feel good and acceptable in the international arena or amongst one’s peers. When words are incorporated into an international instrument, be it via a soft law approach, each member state may hold the other accountable for their actions that are not in sync with international law norms and values.

[205] It is no longer a case where in exercising our sovereignty, no one may dictate to us what we should do with our own laws which may be inconsistent with customary international law norms. Under the mechanism of Universal Periodic Review (“UPR”) member states are constrained to submit their national reports that form the baseline for future accountability such that the pressure of global opinion is brought to bear on member states to encourage binding domestic legislative change. As stated by the Office of the High Commissioner for Human Rights, the UPR is a unique mechanism of the Human Rights Council that calls each UN Member State to undergo a peer review of its human rights records every 4.5 years.

[206] Such a mechanism does not interfere with the inherent powers of the Courts to strike down legislation that are found to be violative of human rights norms under its own Constitution, regard being had to international instruments that Malaysia has sworn to uphold. Viewed against that backdrop, the question of whether Malaysia is a monist or dualist state fades into insignificance, for the question then is whether we can ignore the values and principles that we have boldly and proudly declared in the presence of many witnesses to uphold, defend, protect and promote.

[207] Having reiterated and reaffirmed our commitment to the UDHR when adopting the AHRD, we cannot now be renegeing and resiling from it and more so when the rubber meets the road. Words are more than pious platitudes; they are life-sustaining and promoting when they are followed through with actions. Otherwise membership of UN or for that matter ASEAN would degenerate into belonging to a club of mutual admiration and adulation where words in a Declaration on human rights mean nothing.



[208] The norms of international law and in particular international human rights law, do not become less of a law just because some States do not recognise them. It is, of course, true that there may be little of direct sanction for non-compliance but the same applies even for a Convention or Covenant or Treaty law that a state has ratified. One cannot ignore what are international human rights norms for to do so would risk isolation and even jeopardising one's standing and credibility in the community of nations. Instead of aligning oneself with international order, one may be alienated from the community of humane states. To ignore international human rights norms is to risk becoming an outcast among nations.

[209] Malaysian Courts have in various instances referred to the UDHR and the International Covenant on Civil & Political Rights ("ICCPR") in assessing the constitutionality of domestic law such as in the Court of Appeal cases of *Mat Shuhaimi Shafie v. PP* [2014] 1 MLRA 628 at para [88], *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors* [2012] 1 MLRA 134 at para [55] and in the High Court case of *Chong Ton Sin & Anor v. Menteri Dalam Negeri & Anor* [2023] 1 MLRH 279 at para [38]. Our Courts are conscious that these international instruments are at best soft law but they are nevertheless referred to as a guide in interpreting what are essentially rights arising from being mere humans and not animals or robots.

[210] Such an approach had been advanced by Justice Michael Kirby, who when as the President of the Court of Appeal of New South Wales (as he then was), wrote in 'The Australian Use of International Human Rights Norms: From Bangalore to Balliol — A View from the Antipodes (1993) 16 UNSWLJ 363 at p 366, to explain regarding what has now come to be popularly referred to as the 'Bangalore Principles on the Domestic Application of International Human Rights Norms' as follows:

"...But the truly important principles enunciated at Bangalore asserted that fundamental human rights were inherent in human kind and that they provide 'important guidance' in cases concerning basic rights and freedoms from which judges and lawyers could draw for jurisprudence 'of practical relevance and value'.

The Bangalore Principles acknowledged that in most countries of the common law such international rules are not directly enforceable unless expressly incorporated into domestic law by legislation. But they went on to make these important statements:

... 'There is a **growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law — whether constitutional, statute or common law — is uncertain or incomplete**';

... 'It is within the proper nature of the judicial process and well-established judicial functions for **national courts to have regard to international obligations which a country undertakes — whether or not they have been incorporated into domestic law — for the purpose**



of removing ambiguity or uncertainty from national constitutions, legislation or common law’.”

[Emphasis Added]

[211] The above bullet points are paras 4 and 7 of the Bangalore Principles. Paragraph 10 of the Bangalore Principles, dated 26 February 1988, further recognised that judges and lawyers have a special contribution to make in the administration of justice in fostering universal respect for fundamental human rights and freedoms.

[212] The above approach can be traced back to the dicta of Lord Atkin in *Chung Chi Cheung v. R* [1939] AC 160 at p 168, who when speaking for the Privy Council, said this:

“... It must be always remembered that so far at any rate as the courts of this country are concerned international law has no validity save in so far as its principles are accepted and adopted by our own domestic law. There is no external power that imposes its rules upon our own code of substantive law or procedure. The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and having found it they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.”

[213] The Malaysian Human Rights Commission (SUHAKAM) tasked with advising and assisting the Government on protecting and promoting human rights in Malaysia and in recommending to the Government with regard to the subscription or accession of treaties and other international instruments in the field of human rights under s 4(1) of the Human Rights Commission of Malaysia Act 1999, immediately called for the abolition of corporal punishment. Indeed, it was highlighted in *S v. Williams And Others (supra)*:

“[66]...In keeping with international trends, there has been a gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers. Sentences have been passed with rehabilitation in mind.”

[214] In *S v. Machwili* [1986] (1) SA 156 (N), Didcott J expressed the view that:

“When an adult is flogged on the other hand, especially when he is flogged not *in lieu* of but in addition to being sent to gaol, nothing is achieved but revenge. Such is gained at a cost, what is more. Society’s standards suffer. It stoops to the level of the criminal whom it punishes. It behaves with the same sort of barbarism as that which it condemned in him.”

[215] SUHAKAM, in its “2021-2025 Strategic Plan” at p 17, continued to advocate for the following:



“SUHAKAM will continue to advocate for the accession to the remaining 6 treaties which are:

- (i) International Convention on the Elimination of All Forms of Racial Discrimination (ICERD);
- (ii) International Covenant on Civil and Political Rights (ICCPR);
- (iii) International Covenant on Economic, Social and Cultural Rights (ICESCR);
- (iv) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT);
- (v) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW);
- (vi) International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED).”

[216] While SUHAKAM may only suggest and recommend to the Government of the day, the Court, consistent with its constitutional role as expressed in its Judges’ oath of office as set out in the Sixth Schedule to the Federal Constitution to “preserve, protect and defend its Constitution,” is mandated to strike down any law that is inconsistent with the Federal Constitution as being void, to the extent of its inconsistency under art 4(1). See the Federal Court case of *Lai Hen Beng v. PP* [2024] 2 MLRA 21.

[217] We must not be shackled by the past, no matter how sacred it was when corporal punishment was first introduced pre-independence, sending the chills down the spine of those who have the slightest inkling to involvement in a serious crime. The time has come to remove the relics of the past and to discard it when its presence cannot be justified when measured against the human rights norms enshrined in our own Federal Constitution and against international human rights norms and standards.

[218] We appreciate the fact that many actions once accepted and approved have now become abhorrent in the light of evolving and even enlightened appreciation of what is humane in line with the principle of non-discrimination and the dignity and worth of the human person. Men had to fight for the abolishment of slavery, though it had become deeply entrenched in society, with trading in slaves being no different from trading in commodities. Now, slavery is constitutionally prohibited in almost all democratic states. Likewise, women’s right to vote and to education, and even in leadership positions in both the public and private sectors.

[219] Whilst our ability to love makes us human, it is our capacity to love that makes us humane. The antidote to all CIDT is a more humane approach in abolishing it, lest we become more like the person we seek to punish. Friedrich Nietzsche cautiously calls us to consider this in “Beyond Good and Evil”



at Part 4 Epigrams and entr'actes para 146: "Whoever fights with monsters should see to it that he does not become one himself. And when you stare for a long time into an abyss, the abyss stares back into you." In coming down hard on harrowing and heinous crime we must not become like the person we seek to punish. The danger becomes more real when we seek to inflict the greatest pain in the whipping on those who had deliberately caused unmitigated pain to their victims.

[220] The provisions with respect to whipping under our Federal penal statutes and the CPC are unconstitutional as they are in violation of and inconsistent with art 5 of the UDHR which is part of the constitutional framework of human rights in Malaysia.

Whether Whipping Is Contrary To Customary International Law With Respect To Torture And CIDT

[221] The protection of basic human rights accorded to individuals under the UDHR has attained the status of customary international law at least with respect to:

The prohibition of torture, cruel or inhuman treatment (Art 5);

The prohibition of slavery (Art 4);

The right to life (Art 3);

Non-discrimination (Art 2);

Equality before the law (Art 7);

Fair trial rights (Art 10) and

Freedom of thought, conscience, and religion (Art 18).

[222] Even the Singapore Court of Appeal case of *Yong Vui Kong v. Public Prosecutor* [2015] SGCA 11 accepted the fact that the prohibitions against torture have become a peremptory norm of international law, though not part of its domestic law, as follows:

"27. There is strong evidence that the prohibition against torture is now a peremptory norm of international law. The vast majority of states in the world accept that torture is contrary to international law.."

[223] The UDHR is being referred to in many Conventions and Covenants because it is the primary international document that spells out what is already self-evident and sacrosanct. It is no longer a question of whether it is universally enforceable but rather one in which member states have to be accountable through the UPR exercise under the UN Human Rights Council's process.

[224] Nation-states that do not sign up to any Conventions or Covenants would still, under the UN Charter and UDHR, undergo the full UPR review every 4-5



years, in which they receive recommendations from other states on any UDHR rights. More than that, they are expected to respond point-by-point (“support” or “note” recommendations) and must report on implementation at the next cycle.

[225] The strength and likewise the weakness of international law is in the peer influence in the pressure, posturing and positioning in a system of mutual accountability where every State is subject to the scrutiny of others, where its human rights record is concerned.

[226] Every member State is bound by the UN Charter and its Declaration, as there is no opt-out or opt-in mechanism since it is not a Convention or Covenant or Treaty. There is no option of refusing to ratify a Declaration because it does not need any ratification. The UN Charter and the UDHR are immediately binding on all nation-States and those that do not abide by it risk international sanction and being sidelined as a pariah state. No nation-State can ignore it by declaring that it has not ratified it. It is not a case of being proud of being immune from it but rather preparing to get ready for its implementation.

[227] The UDHR records what is self-evident and universally accepted among nation States in that the principles and prohibitions therein have become, if they were not already, customary international law or *jus cogens*. The Vienna Convention on the Law of Treaties 1969 in art 53 explains that a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. Thus, the principles of equality before the law, prohibition on torture/CIDT, fair trial rights, freedom of religion or belief or conscience, freedom of expression and freedom from slavery are part of customary international law.

[228] Professor Hurst Hannum, a professor of International Law at The Fletcher School of Law and Diplomacy, Tufts University, Medford, MA, USA wrote in his article “The UDHR in National and International Law” in *Health and Human Rights* 3(2), 144-158, published in 1998 by the President and Fellows of Harvard College as follows:

“It is clear that principles initially considered by the international community to be “only” goals or aspirations can develop into binding norms over time, if they become accepted as customary international law. During the 1993 World Conference on Human Rights, Malta called on all states “to implement and enforce in a concrete manner the principles and purposes of the UN Charter and the Universal Declaration of Human Rights,” thus implying equality between the two documents and the binding nature of both. On the twentieth anniversary of the adoption of the Declaration, a major international conference of nonGovernmental organizations proclaimed unequivocally that the Universal Declaration “constitutes an authoritative interpretation of the Charter of the highest order, and has over the years become part of customary international law.” A Governmental conference held in the



same year, at which 84 states were represented, observed that the Declaration “constitutes an obligation for the Members of the international community,” although there was no elaboration of the precise nature of this obligation. The International Law Institute adopted a declaration in December 1969 which affirms that there is an “obligation” on states to guarantee respect for human rights that flows from the recognition of human dignity in the UN Charter and the Universal Declaration of Human Rights. In 1994, the International Law Association observed that **the Declaration “is universally regarded as an authoritative elaboration of the human rights provisions of the United Nations Charter and concluded that “many if not all of the rights elaborated in the...Declaration... are widely recognized as constituting rules of customary international law.”**

[Emphasis Added]

[229] The conference of non-Governmental organisations referred to was the Montreal Statement of the [non-Governmental] Assembly for Human Rights [1968], reprinted in: *Journal of International Commission of Jurists Review* 9 (1968): 94.

[230] As part of the international community and comity of nations, we must give customary international law its due place in our own local jurisprudence in as much as we expect other nations to. We set for ourselves the same high standard as we expect of others, as we constantly benchmark our approaches and appreciation of human rights to that set by the General Assembly of that august body, the United Nations in its UDHR and its Human Rights Council’s mechanism of UPR.

Pronouncement

[231] For all the reasons given above, the punishment of whipping under the CPC and other Federal penal statutes is hereby declared and struck down as being unconstitutional in violation of art 5(1) and art 8(1) of the Federal Constitution and our nation’s commitment to the principles enshrined in the UDHR and in particular the prohibition of CIDT which has attained the status of customary international law.

[232] This declaration of its unconstitutionality shall be prospective in its application and is confined only to whipping under the CPC and the Federal penal statutes. All sentences of whipping not yet executed on a convicted accused person shall not be executed and henceforth no sentence of whipping shall be ordered by the Courts.

[233] This judgment does not apply to whipping under Syariah law, which is not the subject before this Court and which affected parties have not been heard and which punishment appears to be executed differently from that of whipping under the CPC and the Federal criminal statutes. It also does not apply to caning in schools for disciplinary offences nor to reasonable chastisement at home by parents of their children as part of their perceived parental right to discipline children.



Postscript

[234] Today, we join the ranks of those nation states that have removed whipping from their statute books, not because we are less protective of those whose lives have been maimed or lost, but that no matter the crime we must treat even its worst perpetrators with dignity and respect for human life.

[235] It is a recognition that in a very imperfect society, we have to set up penal institutions to keep from society by incarcerating members of the human race convicted of physically harming and even destroying the life of others. To go beyond that and to impose whipping may well render us no different from those we seek to punish. The pain inflicted through whipping is effected with vindictive vengeance. We are judged not merely by how we treat the most vulnerable in our children but also the most vile and violent in a life of crime.

[236] In as much as it takes a whole village to raise a child, it would take the whole community to restore and rehabilitate one of its members that has gone astray down the wide road that leads to destruction. We might well have gone down that road too if not for some restraining and redeeming influences in our lives. We stand in solidarity with all lives bruised, battered and broken and while the wounds may heal, the scars remain.

