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Counterblast: Escaping the gallows Singapore style

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The four-year long struggle by Yong Vui Kong to challenge his mandatory death sentence reveals how life and death decisions can turn on legal niceties. For instance, on 20 November 2009, the President of the Republic of Singapore turned down Yong's plea for clemency and this news was conveyed to the prisoner's brother by his then lawyer three days later. Along with this sad information, he was told that his brother would be hung on 4 December 2009. Yong's brother then engaged the respected human rights advocate, M. Ravi, who was granted an interview with the prisoner two days prior to the scheduled execution. Ravi, as a matter of urgency, filed a motion challenging the constitutionality of capital punishment and at the same time sought a stay of execution so that his arguments would not be, tragically, moot. On 3 December 2009, the day before the gallows would swing, Woo Bih Li J heard an urgent stay application to enable the appeal questions to be argued at a later date. After listing a series of procedural particularities that may have denied the court jurisdiction or capacity, the judge stated that 'fortunately for Yong' there existed an additional enabling provision in the Criminal Procedure Code (revised edition 2012, chapter 68, Section 251); that while no appeal could act as a stay of execution, the court could put a stay on carrying through the sentence on such terms 'as to security for the payment of any money or the performance or non-performance of any act, or the suffering of any punishment … as to the court seem reasonable' (Yong Vui Kong v. Public Prosecutor ([2009] SGHC 274) at [3]). The stay was granted. After this determination, Ravi had the following hurdles to jump: (i) to have an extension of time granted to appeal; (ii) to argue that a further appeal was possible following on from the convention that the accused had given up his right to appeal having preferred to seek clemency; and (iii) to argue the merits of an appeal in a jurisdiction where challenges on constitutionality had never previously been successful. Even as Yong's life depended on the procedural determination of one judge, one day before he would have been killed for a crime he continues to deny, the life of the prisoner ongoing was maintained through years of unsuccessful legal argument.

What makes this life and death legality even more tenuous are the details of the decision points in the prisoner's application to allow an appeal on constitutional legality (Yong Vui Kong v. Public Prosecutor ([2009] SGCA 640)). When considering whether the High Court judge had the power she claimed to grant a stay of execution, the Court of Appeal said 'no'. Instead, it ruled that the stay application should have been attached to the appeal, which the prisoner's lawyer had omitted to do, and that failure was enough in the prosecution argument to deny the stay application. If such had been the outcome of that motion before the High Court, the prisoner almost certainly would have hung, as the Court of Appeal reiterated the extraordinary position that appeal applications at law do not have the ancillary effect of delaying judgment.

This case reveals many things about the mandatory death penalty. There is not time here to critically canvass the issues of individual and constitutional integrity raised by the prisoner in the long journey of challenging the original sentence: questions such as the fundamental right to life, the constitutionality of cruel and unusual punishments, the impact of customary international law, and the questionable deterrent effect of such mandatory sentences.[i] Rather, this comment has confined itself to the somewhat disturbing executive, judicial and legislative history of Yong's struggle to escape the gallows. If we reflect on the position around late 2009 and early 2010:

- The prosecutor was vigorously arguing for the sentence to be carried out.
- The executive, through the mouth of the Law Minister, was telling the public that mercy in this case would stimulate future crime.
- The judiciary was denying all grounds of appeal, both procedural and legal.
- The prerogative of mercy was being determined by executive decision making which the court refused to review, while at the same time denying the prisoner access to the materials before the cabinet and the President in making their decision, denying the application of procedural fairness.

When commenting on the rationale behind the legislative move to create the recently-enacted saving conditions from which Yong may yet benefit, the Law Minister deflected suggestions that the government was applying a more lenient approach to human rights and said that the reform did no more than reflect the government's regular statutory review procedures, whereby laws may be 'tweaked' to improve their operation.[ii] Even so, the irony cannot be lost. The court very recently accepted that Yong was acting in no greater capacity than a low-level courier; they accordingly commuted his sentence to life imprisonment and 15 strokes of the cane. The vehicle for returning the decision to the court was a certificate of substantive assistance which is both determined and awarded by the prosecutorial agencies which would have previously seen to it that Yong was executed. The legislation enabling this executive determination was drafted and passed by a similar government to that which had previously resisted clemency because of its argued (but unsubstantiated) negative deterrent effect.

Reference

Tan, J. (2012) 'Death penalty change came from review, not activists: Shanmugam' (5 November) Yahoo! Newsroom. Available at: http://sg.news.yahoo.com/death-penalty-change-came-from-review-not-activists-shanmugam.html (accessed 3 October 2013).

[i] All these matters were the subject of judicial determination particularly in the Court of Appeal decision Yong Vui Kong v. Public Prosecutor and another matter ([2010] SGCA 20). At another time we will analyse and critique the soundness of several such decisions.

[ii] In an interview with Yahoo Singapore before the amendments were passed, the Law Minister said of this review process, in denying that it had been a result of activist campaigning: 'This is something we do continuously. We monitor to see firstly, is it necessary, because it's a serious penalty. Secondly, is it effective? And, thirdly, are there tweaks or changes that need to be done to this system. . . . Any responsible government will do this – which is what we are doing' (Tan 2012).