2-2020

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Statute Law Review, 2018, Vol. XX, No. XX, 0–29
doi:10.1093/slr/hmy020

On Mandatory Criminal Sentences, Legislative Interpretation, and the Prospective Application of the Law: A View from Singapore

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ABSTRACT

Can a court find that a criminal sentence is mandatory under the penal legislation but choose, exceptionally, to apply that finding only to future cases? This raises an interesting question on the prospective application of a correct construction of legislation, requiring consideration of difficult issues surrounding not just the temporal application of the law but also the protection of the interests belonging to all citizenry, including convicted persons. Recent decisions in Singapore and elsewhere provide an opening for a more detailed inquiry to be undertaken.

1. INTRODUCTION

After having been considered and—with a few exceptions, most notably in India and the United States—doubted by many common law judges as late as in the second half of the 20th century, it is fair to say that the doctrine of prospective application or overruling of the law has experienced a renaissance of sorts. Cases at the highest level espousing a more realistic appreciation of the actual reception and application of legal rules have been the springboard for detailed academic expatiation in recent times. Indeed, there are now books devoted entirely to the study of the temporal effects of judicial decisions, some viewed through a common law lens and others containing comparative perspectives from various common and civilian legal jurisdictions.[1] Given how the

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1 See, e.g., C Sampford *Retrospectivity and the Rule of Law* (Oxford University Press 2006); B Juratowitch *Retroactivity and the Common Law* (Hart 2008); P Popelier and others (eds) *The Effects of Judicial Decisions in Time* (Intersentia 2014); E Steiner (ed) *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Springer 2015). For some other American and Commonwealth writings, see AD Woozley 'What Is Wrong with Retrospective Law?' (1968) 18 Philosophical Quarterly 40; MDA Freeman 'Standards of Adjudication, Judicial Law-Making and Prospective Overruling' [1973] CLP 166; AGL Nicol 'Prospective Overruling: A New Device for English Courts?' (1976) 39 MLR 542; K Mason 'Prospective Overruling' (1989) 63 Aust LJ 526; D Seng 'Of Retrospective Criminal Laws and Prospective Overruling: Revisiting *Public Prosecutor* v. *Tan Meng Khin & 24 Ors*' (1996) 8 SAcLJ 1; JM Finnis 'The Fairy Tale's Moral' (1999) 115 LQR 170; RHS Tur 'Time and Law' (2002) 22 OJLS 463; JP Salembier 'Understanding Retroactivity: When the Past Just Ain't What it Used to Be'

device of prospective application or overruling touches immediately on the impact the law has on its subjects, it is not surprising that, at a broad level of generality, this is an area in which different jurisdictions can potentially learn much from each other.

It has traditionally also been, put shortly, a problematic topic for common lawyers. The early reasons for rejecting the doctrine were mostly theoretical and technical—including of course the old fiction that judges did not make the law but discovered it, which led some to struggle to recognize or give effect to the expectations created by reliance on judicial pronouncements—and the accretive method of the common law did not necessarily lend itself well to the formulation of high principle, but where it *has* been accepted the focus has in modern times moved on from justification to the difficult judicial task of identifying, weighing, and protecting the interests potentially affected by a prospective ruling, which is particularly nettlesome where the interpretation of legislation is also in issue. It is in this relation that a recent criminal case in Singapore has raised a rather fresh and intriguing question for the common lawyer. Can a court find that a criminal sentence is mandatory under the penal legislation but choose, exceptionally, to apply that finding only to future cases? This article considers the possibility in the light of some judicial decisions in Singapore and other Commonwealth jurisdictions. But first, the background.

2. BACKGROUND

The criminal case mentioned, *Sim Wen Yi Ernest* v. *Public Prosecutor* ('*Ernest Sim*'),[2] involved the unlicensed importation and possession of an airsoft gun. These were offences under sections 13(2)(a) and 13(4) of the Arms and Explosives Act.[3] The former section provided that an offender 'shall be liable on conviction to a fine not exceeding $10,000 and to imprisonment for a term not exceeding 3 years', while under the latter section an offender 'shall be liable on conviction to a fine not exceeding $5,000 and to imprisonment for a term which may extend to 3 years'. Having pleaded guilty to the charges, the accused person was convicted and fined by the trial judge.

On appeal to the High Court of Singapore, See Kee Oon JC (as he then was) ruled that the correct reading of these two provisions required a fine *and* an imprisonment term to be imposed upon conviction for each of the relevant offences.[4] The precise construction of the provisions is not the subject of discussion here. What was noteworthy

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(2003) 33 HKLJ 99; M Arden 'Prospective Overruling' (2004) 120 LQR 7; J Waldron 'Retroactive Law: How Dodgy Was Duynhoven?' (2004) 10 Otago L Rev 631; A Rodger 'A Time for Everything under the Law: Some Reflections on Retrospectivity' (2005) 121 LQR 57; S Atrill '*Nulla Poena Sine Lege* in Comparative Perspective: Retrospectivity under the ECHR and US Constitution' [2005] PL 107; D Sheehan and TT Arvind 'Prospective Overruling and the Fixed-Floating Charge Debate' (2006) 122 LQR 20; R McManus 'Predicting the Past: The Declaratory Theory of the Common Law – From Fairytale to Nightmare' [2007] JR 228; P Mirfield 'A Challenge to the Declaratory Theory of the Law' (2008) 124 LQR 190; A Beever 'The Declaratory Theory of Law' (2013) 33 OJLS 421; N Duxbury '*Ex Post Facto* Law' (2013) 58 American Journal of Jurisprudence 135; W Zhuang 'Prospective Judicial Pronouncements and Limits to Judicial Law-Making' (2016) 28 SAcLJ 611; SJ Hammer 'Retroactivity and Restraint: An Anglo-American Comparison' (2018) 41 Harvard Journal of Law & Public Policy 409.

2 *Sim Wen Yi Ernest* v. *Public Prosecutor* [2016] 5 SLR 207 (HC).

3 Arms and Explosives Act (Cap 13, 2003 Rev Ed).

4 *Ernest Sim* (n 2) [55].

was that See JC held this to be a significant and unforeseeable change in the law, which would apply only to future cases and not the instant offender:

> Hitherto, a fine and imprisonment have never been imposed together for offences that are punishable under s 13(2)(a), and the sentencing structure under s 13(2)(a) has not been the subject of judicial attention. In respect of the s 13(4) offence, the only case that has dealt with the sentencing structure under this provision had held that the sentences of a fine and imprisonment were alternatives. In these circumstances, it was only fair to limit the application of the present decision to future cases.[5]

The fines imposed on the accused person were, therefore, upheld without any enhancement of the sentence, with the case not proceeding further to the Court of Appeal. This particular holding of the decision—that the prospective application device may in exceptional circumstances be used as regards the imposition (or, really, non-imposition) of a mandatory penal sentence—is binding on all the lower courts (including the District Court and Magistrate's Court) but not the High Court itself, under the rules of *stare decisis* in Singapore.

This case actually came after another High Court decision had laid down the law relating to prospective application in Singapore, so there is at least a relatively obvious starting point for any analysis. Here is how Sundaresh Menon CJ had put it (and it is worth quoting the fuller passage) in *Public Prosecutor* v. *Hue An Li* ('*Hue An Li*'):

> As has already been established, legal systems at either end of the spectrum (that is, those which adopt purely prospective overruling and those which adopt purely retroactive overruling) are apt to produce their own brands of injustice. The tension between retroactivity and prospectivity, in our judgment, is best resolved by a framework in which judicial pronouncements are, by default, fully retroactive in nature. Our *appellate* courts (that is, our High Court sitting in its appellate capacity and our Court of Appeal) nevertheless have the discretion, in exceptional circumstances, to restrict the retroactive effect of their pronouncements. This discretion is to be guided by the following factors:
>
> (a) *The extent to which the law or legal principle concerned is entrenched*: The more entrenched a law or legal principle is, the greater the need for any overruling of that law or legal principle to be prospective. This will be measured by, amongst other things, the position of the courts in the hierarchy that have adopted the law or legal principle that is to be overruled and the number of cases which have followed it. A pronouncement by our Court of Appeal which exhaustively analyses several disparate positions before coming to a single position on a point of law will be more entrenched than a passing pronouncement on that same point of law by a first-instance court. Similarly, a law or legal principle cited in a long line of cases is more entrenched than one cited in a smaller number of cases.

[5] *Ernest Sim* (n 2) [57].

(b) *The extent of the change to the law*: The greater the change to the law, the greater the need for prospective overruling. A wholesale revolutionary abandonment of a legal position (as was done in, for instance, [*Public Prosecutor v Manogaran s/o R Ramu* [1996] 3 SLR(R) 390]) is a greater change than an evolutionary reframing of the law (see, for instance, *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193, which re-examined the distinction between interpretation and implication in contract law, but by and large built on the foundations laid down by prior cases).

(c) *The extent to which the change to the law is foreseeable*: The less foreseeable the change to the law, the greater the need for prospective overruling. In *SW v UK* [(1996) 21 EHRR 363], for example, the abolition of the doctrine of marital immunity was eminently foreseeable because of past judicial pronouncements which had expressed distaste for the doctrine and progressively expanded the exceptions to it. There was therefore no need to curtail the retroactive application of the change in the legal position.

(d) *The extent of reliance on the law or legal principle concerned*: The greater the reliance on the law or legal principle being overruled, the greater the need for prospective overruling. This factor is particularly compelling in the criminal law context, where a person's physical liberty is potentially at stake. Quite apart from Art 11(1) of the Singapore Constitution, a person who conducts his affairs in reliance on the ostensible legality of his actions would be unfairly taken by surprise if a retrospective change to the law were to expose him to criminal liability.

We stress that this framework lays down a factors-based test; as such, no one factor is preponderant over any other, and no one factor is necessary before prospective overruling can be adopted in a particular case. Indeed, a first-time judicial pronouncement, despite generally not fulfilling the first three factors listed at [124] above, could conceivably warrant prospective overruling …[6]

All in all this seems a reasonably pragmatic stance; and in fact *Hue An Li*, which was decided by a three-judge bench of the High Court,[7] has been cited repeatedly with

[6] *Public Prosecutor* v. *Hue An Li* [2014] 4 SLR 661 (HC) [124]–[125] (emphasis in original). See also *Adri Anton Kalangie* v. *Public Prosecutor* [2018] SGCA 40, [70]–[72].

[7] The frequency of three-judge panels of the High Court hearing Magistrate's Appeals has increased in recent years. The reasons for this are mentioned by Andrew Phang Boon Leong JA in *Chew Eng Han* v. *Public Prosecutor* [2017] 2 SLR 1130 (CA) [47] and Chao Hick Tin JA in his extra-curial speech 'The Art of Sentencing – An Appellate Court's Perspective' (Sentencing Conference 2014: Trends, Tools & Technology) (Singapore, 10 October 2014) paras 36–42. As at the time of writing, at least 13 reported decisions have been issued in the last four years by such multi-member panels (*Hue An Li* (n 6); *Mohammed Ibrahim s/o Hamzah* v. *Public Prosecutor* [2015] 1 SLR 1081 (HC); *Mohamad Fairuuz bin Saleh* v. *Public Prosecutor* [2015] 1 SLR 1145 (HC); *Public Prosecutor* v. *Ng Sae Kiat* [2015] 5 SLR 167 (HC); *Chew Soo Chun* v. *Public Prosecutor* [2016] 2 SLR 78 (HC); *Sim Yeow Kee* v. *Public Prosecutor* [2016] 5 SLR 936 (HC); *Koh Yong Chiah* v. *Public Prosecutor* [2017] 3 SLR 447 (HC); *Public Prosecutor* v. *Lam Leng Hung* [2017] 4 SLR 474 (HC); *Chinpo Shipping Co (Pte) Ltd* v. *Public Prosecutor* [2017] 4 SLR 983 (HC); *Public Prosecutor* v. *Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707 (HC); *Amin bin Abdullah*

approval by the Court of Appeal and represents the current law in Singapore.[8] For present purposes, we can note that the expressed position may not be very materially different from that theorized in England, at least in terms of the starting point taken by the law and also the conceptual willingness in allowing limited inroads to be made in identified and exceptional circumstances on a case-by-case basis.[9] Underlying any potential exercise of discretion is the recognition that people are generally entitled to order their lives and affairs based on the currency of laws prevailing at the time.[10] The reasoning in the cases can, therefore, be said to draw direct strength from a core thread of fidelity to the rule of law.[11]

Returning to the *Ernest Sim* case, it appears from the written judgment that although See JC certainly received submissions on the law regarding prospective overruling, counsel there may not have drawn his full attention to another earlier High Court authority. *Poh Boon Kiat* v. *Public Prosecutor* ('*Poh Boon Kiat*')[12] had touched on a similar substantive question: did convictions under sections 140 and 146 of the Women's Charter[13] give rise to a mandatory or discretionary term of imprisonment? The relevant language provided that the offender 'shall be liable on conviction to imprisonment for a term not exceeding 5 years and shall also be liable to a fine not exceeding $10,000'. After considering those provisions in their textual and legislative context, Menon CJ held that the section 140 and 146 offences were punishable by a mandatory imprisonment term, and that, so far as the sentencing precedents had assumed an imprisonment term to be discretionary, those precedents were incorrect and not to be relied on when assessing the appropriate starting point for the sentencing of such offences.[14] Significantly, Menon CJ remarked that 'once I found that on a true interpretation of the statute, a custodial sentence was mandatory, I doubt it would have been open to me on any basis to hold that I would not impose a custodial sentence'.[15] Reading these words in the context of the full judgment, he was effectively saying that he did not think that the

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v. *Public Prosecutor* [2017] 5 SLR 904 (HC); *Public Prosecutor* v. *Yeo Ek Boon, Jeffrey* [2018] 3 SLR 1080 (HC); the composite decision in *Tay Wee Kiat* v. *Public Prosecutor* [2018] SGHC 42 and [2018] SGHC 114). For a critical discussion, see A Singh, 'Sentencing Reform in Singapore: Are the Guidelines in England and Wales a Useful Model?' (2018) 30 SAcLJ 175 paras 11–21.

8 See, e.g., *L Capital Jones Ltd* v. *Maniach Pte Ltd* [2017] 1 SLR 312 (CA); *Chang Kar Meng* v. *Public Prosecutor* [2017] 2 SLR 68 (CA); *Ng Kean Meng Terence* v. *Public Prosecutor* [2017] 2 SLR 449 (CA); *Adri Anton Kalangie* (n 6). A thorough account of the Singapore position can be found in GKY Chan 'Prospective Overruling in Singapore: A Judicial Framework for the Future?' in E Steiner (ed) *Comparing the Prospective Effect of Judicial Rulings Across Jurisdictions* (Springer 2015).

9 In Singapore, Sundaresh Menon CJ anticipated the tension between the prospective and retroactive effect of changes to the law to continue being resolved on a case-by-case basis ('Challenges to the Rule of Law for the Judiciary and the Profession with a Focus on Singapore' (World Bar Conference 2014) (Queenstown, New Zealand, 4 September 2014) para 44). That being said, recent rulings have suggested that, contrasted with criminal cases, civil cases presenting exceptional circumstances justifying invocation of the doctrine of prospective overruling were likely to be few and far between (*Maniach* (n 8) [71]; *Adri Anton Kalangie* (n 6) [39]).

10 See, e.g., *Abdul Nasir bin Amer Hamsah* v. *Public Prosecutor* [1997] 2 SLR(R) 842 (CA) [51]; *Hue An Li* (n 6) [124]; *Adri Anton Kalangie* (n 6) [30].

11 As Sundaresh Menon CJ pointed out, the foremost concern of the rule of law is to enable its subjects to rationally plan their affairs around stable rules ('Challenges to the Rule of Law for the Judiciary and the Profession with a Focus on Singapore' (World Bar Conference 2014) (Queenstown, New Zealand, 4 September 2014) para 44). But see also text at n 95 ff.

12 *Poh Boon Kiat* v. *Public Prosecutor* [2014] 4 SLR 892 (HC).

13 Women's Charter (Cap 353, 2006 Rev Ed).

14 *Poh Boon Kiat* (n 12) [57] and [59].

15 *Poh Boon Kiat* (n 12) [114].

mandatory imprisonment term could be avoided by the use of the prospective application or overruling technique.

There is, therefore, seemingly a conflict of opinion between *Ernest Sim* and *Poh Boon Kiat*, but as a matter of authority (both were High Court decisions), the former is likely to be the one that binds the lower courts on the issue. The result there rested precisely on the resolution of this question, whereas in *Poh Boon Kiat*, the court clearly indicates that the same outcome would have been arrived there on an alternative analysis.[16] There is little doubt though that it would be helpful for the prospectivity point to be clarified with definitiveness. A bone of contention occasionally arising after a conviction is whether the prescribed punishment is, based on the legislative provision in question, mandatory or merely discretionary, and this has hitherto troubled the courts in a number of Commonwealth jurisdictions, including Singapore, Malaysia, Pakistan, Trinidad and Tobago, and the Bahamas.[17]

3. DISCUSSION

Distilled to its essence, the issue can be framed as follows: should the proper construction of penal legislation on the mandatoriness of a sentence apply with full effect to the offender in the instant case, or is there a judicial discretion to apply such a construction only prospectively? This is the focus of the present article. It does not set out to evaluate the desirability of the prospective application or overruling device (which has been extensively covered elsewhere),[18] although references will be made where appropriate to specific aspects of the debate.

The starting point is, as described in the excerpt above, that judicial pronouncements in the common law generally have both prospective and retroactive effect and will apply to the litigants in the instant case. The default position is, therefore, that a convicted person in Singapore will be sentenced on the law as it is ruled to be in his or her case, *not* as it exists at some point in time prior thereto.

In at least one exceptional scenario, however, the court may hold that its sentencing ruling is to apply only in respect of future cases (i.e. prospectively), meaning that the instant offender falls to be sentenced based on the law standing prior to that ruling. The exceptional circumstance alluded to is where the ruling effects a fundamental and unforeseen change in law. It used to be said in Singapore that such a change derogated from the offender's legitimate expectation that he or she should have been punished in a different (often less severe) manner—the appeal court had even once declared that certain types of legitimate expectations might in suitable circumstances be deserving of

[16] *Poh Boon Kiat* (n 12) [114].

[17] See, e.g., *Ng Chwee Puan* v. *R* (1953) 19 MLJ 86 (HC); *Public Prosecutor* v. *Lee Soon Lee Vincent* [1998] 3 SLR(R) 84 (HC); *Chng Gim Huat* v. *Public Prosecutor* [2000] 2 SLR(R) 360 (HC); *Public Prosecutor* v. *Loo Kun Long* [2003] 1 SLR(R) 28 (HC); *Nguyen Tuong Van* v. *Public Prosecutor* [2005] 1 SLR(R) 103 (CA); *Public Prosecutor* v. *Mahat bin Salim* [2005] 3 SLR(R) 104 (HC); *Lim Li Ling* v. *Public Prosecutor* [2007] 1 SLR(R) 165 (HC); *Poh Boon Kiat* (n 12); *Ernest Sim* (n 2); *Public Prosecutor* v. *Man Bin Ismail* (1939) 8 MLJ 207 (HC); *Public Prosecutor* v. *Lee Ah Sam* (1949) 15 MLJ 236 (CA); *Khor Seek Pok* v. *Public Prosecutor* (1958) 24 MLJ 170 (HC); *Public Prosecutor* v. *Wahab* (1964) 30 MLJ 265 (HC); *Darus* v. *Public Prosecutor* (1964) 30 MLJ 322 (HC); *Public Prosecutor* v. *Hew Yew* [1972] 1 MLJ 164 (HC); *Abu Seman* v. *Public Prosecutor* [1982] 2 MLJ 338 (HC); *Philip Lau Chee Heng* v. *Public Prosecutor* [1988] 3 MLJ 107 (HC); *Public Prosecutor* v. *Leonard Glenn Francis* [1989] 2 MLJ 158 (HC); *The State* v. *Said Akbar* PLD 1956 Pesh 110; *Samsoondar Ramcharan* v. *The Queen* [1973] AC 414 (PC); *Jones* v. *Attorney-General of the Commonwealth of The Bahamas* [1995] 1 WLR 891 (PC).

[18] See, e.g., the writings at n 1.

protection, even though they might not have acquired the force of a legal right[19]—but more recently, prospectivity, in the sentencing context, has been viewed as a concession extended in exceptional cases in order to avoid serious and demonstrable injustice to the offender at hand, whose case had been arbitrarily selected for the calibration of the new sentencing framework, and who had faced unique pressures in the criminal justice process.[20] It is for this aspect of fairness and justice that an appellate court in Singapore even begins to consider applying a fresh sentencing approach *in futuro* only; conceivably, examples of a serious and demonstrable injustice might be where an accused person had, after receiving legal advice on the possible punishment in light of historical sentencing trends for similar cases, pleaded guilty, elected not to file an appeal, or decided to discontinue certain defences or lines of argument.

In the area of criminal sentencing in Singapore, the device of prospective overruling or application has historically been used in cases where the courts have replaced existing sentencing benchmarks or tariffs with new ones, *all of which were or are within the terms of the authorizing legislation*. The last part is important: it means that those sentencing guidelines which are replaced *but (exceptionally) made applicable to the instant offender* are facially within the competence of the courts. Consider the following instances in Singapore:

a. In *Hue An Li*, the change in sentencing benchmark for causing death by negligent driving—to apply only with prospective effect—was the erstwhile default sentence of a fine giving way to a more severe starting point of a term of imprisonment. At all relevant times, though, the legislation concerned would technically have permitted fines and/or custodial terms to have been imposed.
b. In *Chang Kar Meng* v. *Public Prosecutor*,[21] the Court of Appeal found that the existing imprisonment benchmarks for rape and robbery were unduly lenient and therefore proposed a higher range of custodial punishments, which was to apply only prospectively to future cases of rape and robbery. Again, though, the old benchmarks (which *were* relevant to the sentencing of the present offender) were within the statutory limits.
c. In *Public Prosecutor* v. *BDA*,[22] the High Court signalled that the indicative range of imprisonment terms for aggravated outrage of modesty would be higher in the future but excepted the instant offender from it. However, it is clear that the old guidelines (which *were* made applicable to him) also kept within the legislative range. (Incidentally, this was perhaps one of those 'rare' instances mentioned by the Court of Appeal where a first instance court had to consider the prospectivity of a new sentencing framework.[23])

[19] *Abdul Nasir* (n 10) [55]. Viewed through the Hohfeldian prism, this judicial statement may present an elusive amorphism: what then is the exact interest and in what manner could (or should) it be protected? (cf. Duxbury, *Ex Post Facto Law* (n 1) 140). Whatever it may be, it should not be conflated with the doctrine of substantive legitimate expectation in Singapore (as to which see *Chiu Teng @ Kallang Pte Ltd* v. *Singapore Land Authority* [2014] 1 SLR 1047 (HC); *SGB Starkstrom Pte Ltd* v. *Commissioner for Labour* [2016] 3 SLR 598 (CA), discussed in S Menon 'The Rule of Law: The Path to Exceptionalism' (2016) 28 SAcLJ 413 paras 26–29; K Chng 'An Uncertain Future for Substantive Legitimate Expectations in Singapore: *SGB Starkstrom Pte Ltd v Commissioner of Labour*' [2018] PL 192).

[20] *Adri Anton Kalangie* (n 6) [58].

[21] *Chang Kar Meng* v. *Public Prosecutor* [2017] 2 SLR 68 (CA).

[22] *Public Prosecutor* v. *BDA* [2018] SGHC 72.

[23] *Adri Anton Kalangie* (n 6) [67].

This is what I mean by the device of prospective overruling or application of the law usually being utilized where the courts are updating their sentencing *benchmarks* or *guidelines*. It appears that, apart from the decision in *Ernest Sim*, no Singapore court had previously used the prospective overruling device to knowingly impose a sentence it had found to be legislatively impermissible. Some may possibly see an analogy with *Abdul Nasir bin Amer Hamsah* v. *Public Prosecutor* ('*Abdul Nasir*'), in which the Court of Appeal applied its fresh ruling—that 'life imprisonment' as used in the penal statute meant imprisonment for the remainder of the convicted person's natural life, as opposed to the hitherto understood 20-year term—only with prospective effect from the date of the decision.[24] Importantly, however, the ranging words 'imprisonment for life' and their conjugates *were not defined by legislation at the time* and instead left up to judicial interpretation.[25] This is the context behind a seemingly unbounded statement in *Abdul Nasir*, captured in italics below:

> We were certainly not suggesting that the practice of 20 years' imprisonment had represented the state of the law on life imprisonment at any time. But, on an analogous reasoning with prospective judicial overruling, *if the first-time interpretation of a particular punishment as prescribed by law would result in an expanded meaning, contrary to what could be reasonably and legitimately expected all along, then such a judicial pronouncement must also be given prospective effect to prevent prejudice and injustice to the accused*.[26]

Understood in its correct setting, this statement was *not* about—and therefore should not be unwittingly applied to—the knowing imposition of an impermissible punishment going against the face of the statutory wording. It follows from this also that I cannot agree with tendering *Abdul Nasir* as certain authority for the proposition that prospective overruling is potentially always available when a court is departing from a settled interpretation of a statute (more on this later).[27]

(A) Pure Prospective Application Not Possible?

The next two sections of this article cover some of the Singapore and Commonwealth cases which might be thought to support the opposing positions in *Ernest Sim* and *Poh Boon Kiat*. I then proceed in the last section to discuss the normative principles that point to what is believed to be the correct answer, before closing with a few reflections on the proper resolution of what many are likely to acknowledge as the more difficult cases.

Let us turn first to the camp which says that a court has always to impose a mandatory sentence—that is, to invariably apply the correct construction of a sentencing provision—even in respect of the instant offender, without regard to the device of prospective application of the law. This is the rule suggested in *Poh Boon Kiat* and it

[24] *Abdul Nasir* (n 10) [51].

[25] The term has since been defined at section 54 of the Penal Code (Cap 224, 2008 Rev Ed) and section 2(1) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

[26] *Abdul Nasir* (n 10) [58] (emphasis added). See also *R* v. *Newsome* [1970] 2 QB 711 (CA) 718–19.

[27] *Contra* Zhuang, *Prospective Judicial Pronouncements* (n 1) para 43.

finds indirect support in an older authority, also of the Singapore High Court. *Public Prosecutor* v. *Lee Soon Lee Vincent* ('*Vincent Lee*')[28] involved a man who had driven under the influence of alcohol. On account of a previous conviction for drink-driving, he was deemed a repeat offender. The central issue was whether the relevant legislation required the infliction of mandatory imprisonment on repeat offenders. The district judge said she was bound to apply an earlier interpretation taken by Yong Pung How CJ in an unrelated High Court case, to the effect that a custodial term was not mandatory for repeat offenders. She therefore exercised her discretion to sentence the offender to merely a fine and a disqualification order. The prosecution appealed, contending that under the legislation, a term of imprisonment was mandatory for a repeat offender. It was Yong CJ who heard the appeal. He accepted the prosecution's submissions that a custodial sentence *was* indeed mandatory and declined to follow his earlier decision on the point. The offender thus had to serve an additional imprisonment term.[29] Despite the fact that an earlier authority (decided by no less than the Chief Justice) was ostensibly in his favour, it does not appear the offender pushed for the correct interpretation of the statute to apply only with prospective effect, nor does the written decision discuss the issue of prospectivity at all. One can possibly infer from the judgment that such an argument would *not* have succeeded, seeing how Yong CJ was of the view that his earlier decision had to be rectified to prevent setting an unwelcome precedent,[30] which strongly suggests an immediacy of application of the correct ruling.

Further insight may be gleaned from *Seng Foo Building Construction Pte Ltd* v. *Public Prosecutor* ('*Seng Foo*').[31] The interesting issue there was whether fines imposed for multiple offences committed by an offender were subject to the one-transaction rule. That rule is generally understood to require that, where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive. After a thorough analysis, Menon CJ in the High Court held that, in Singapore, the one-transaction rule could be incorporated within the sentencing matrix *only where the court was dealing with multiple imprisonment terms or community work or service orders*, because concurrency of those types of punishment was expressly provided for by statute. In contrast, the legislation did *not* provide for any ability to impose concurrent sentences of fines—which were, therefore, inevitably cumulative.[32] *Seng Foo* appears to be the first reasoned local decision on this point, and represents somewhat of a departure from an existing understanding harboured in some quarters and obtained (rightly or wrongly) from a few older cases; indeed in *Seng Foo* itself the prosecution submitted (erroneously, as it turned out) that the court could and should apply the one-transaction rule when imposing fines for more than one offence. There is no specific mention in *Seng Foo* about whether the aforesaid ruling was to apply only with prospective effect.

[28] *Public Prosecutor* v. *Lee Soon Lee Vincent* (n 17).

[29] *Vincent Lee* (n 17) [38] and [40]. There has since been a divergence of opinion in the High Court on this issue, the resolution of which will likely require intervention by Parliament or the Court of Appeal (see *Chong Pit Khai* v. *Public Prosecutor* [2009] 3 SLR(R) 423 (HC) [24]; *Choo Kok Hwee* v. *Public Prosecutor* [2014] 3 SLR 1154 (HC) [11]; *Pua Hung Jaan Jeffrey Nguyen* v. *Public Prosecutor* [2017] 5 SLR 1120 (HC) [17]).

[30] *Vincent Lee* (n 17) [12].

[31] *Seng Foo Building Construction Pte Ltd* v. *Public Prosecutor* [2017] 3 SLR 201 (HC).

[32] *Seng Foo* (n 31) [68].

The outcome on this issue also raised the spectre of disproportionate and excessive punishments being imposed in the aggregate where fines were involved. Two ameliorating possibilities were discussed by Menon CJ in *Seng Foo*. The first was a court imposing no separate penalty in respect of one or more of the multiple offences, like the position in England. That prospect was dismissed because the existence of section 306(1) of the Criminal Procedure Code[33] posed an insuperable obstacle, providing effectively as it did that a sentence had to be imposed for every offence the offender was charged with.[34] The second possibility centred on whether the principles of fairness and proportionality undergirding the one-transaction rule could nevertheless find traction through the potential application of the *totality* principle. That remediating avenue was accepted. It was adjudged competent for a court to adjust individual fines so that the cumulative fine was sufficient and proportionate to the offender's overall criminality, but even then there was an important caveat: *any such adjustment would have to be subject to any contrary statutory provisions having mandatory force*.[35]

Taken broadly and in the correct spirit, these points collectively guide one to the conclusion that every conviction of an offence must lead, without exception, to the imposition of a sentence, which if provided by written law to be of a strict mandatory nature has to be handed down in accordance with the dictates of legislation to the exclusion of any judicial power to reduce, vary, or commute the sentence. In my view, therefore, while the court in *Seng Foo* did not expressly address the prospectivity issue as it did in *Poh Boon Kiat*, it is possible to deduce from the judgment some support for the principle that a criminal sentence found to have mandatory force must apply with immediate effect, without regard to any judicial desire to temper the punishment through common law techniques like prospective application or overruling.

(B) Pure Prospective Application an Option?

As mentioned, the opposite approach was taken in *Ernest Sim*, where a mandatory sentence was not imposed on the instant offender. Authority in direct support appears relatively scarce but a few decisions of the Privy Council offer an additional perspective. For reasons that will become apparent, I propose to go through these cases in some detail.

Matthew v. *State of Trinidad and Tobago* ('*Matthew*')[36] sets the stage. In Trinidad and Tobago, the statutory punishment for murder is a mandatory death sentence. The offender in *Matthew* had been convicted of murder and sentenced to death in December 1999. His appeal against conviction was dismissed by the Court of Appeal of Trinidad and Tobago in December 2000, but in January 2004, he obtained leave to appeal against sentence. Meanwhile, in November 2003, a three-to-two majority of the Board separately ruled in *Roodal* v. *State of Trinidad and Tobago* ('*Roodal*')[37] that a statutory provision imposing the mandatory death sentence as the sequela to murder—*the very same provision under which the offender in Matthew had been convicted*—had to be modified so

[33] Criminal Procedure Code (n 25).

[34] *Seng Foo* (n 31) [70].

[35] *Seng Foo* (n 31) [75] and [80]. As an aside, in Singapore, the totality principle also applies in respect of multiple sentences of *caning*: see *Ho Sheng Yu Garreth* v. *Public Prosecutor* [2012] 2 SLR 375 (HC) [133].

[36] *Matthew* v. *State of Trinidad and Tobago* [2005] 1 AC 433 (PC).

[37] *Roodal* v. *State of Trinidad and Tobago* [2005] 1 AC 328 (PC).

as to make the death sentence discretionary, in order to conform with the Constitution of Trinidad and Tobago ('Trinidadian Constitution'). In other words, the mandatory death sentence was ruled unconstitutional in *Roodal*. Subsequently, *Matthew* came on for hearing. The Board gave judgment in July 2004. In a *volte face* it held, by a five-to-four majority, that *Roodal* had been wrongly decided and that the mandatory death penalty *was* constitutional. Nevertheless it could not be ignored that the offender in *Matthew* had been given to understand, in consequence of *Roodal* (decided just eight months previously), that he could expect a judge to reconsider his death sentence at a resentencing exercise. It would be a cruel punishment to now execute him when he had earlier been informed (correctly at the time) of the prospect of persuading a judge to impose a lesser sentence and that possibility was then taken away.[38] The Board in *Matthew* thus exercised the power purportedly available to it under section 14(2) of the Trinidadian Constitution—which *inter alia* allowed a court to make such orders as it considered appropriate for the purpose of enforcing the constitutional protection against cruel and unusual treatment or punishment—to set aside the sentence of death and impose a life imprisonment term instead.[39]

Ramdeen v. *State of Trinidad and Tobago* ('*Ramdeen*')[40] came before the Board some years later. The offender in question had been convicted of murder and sentenced to death (the mandatory punishment) in July 2008. The Court of Appeal of Trinidad and Tobago dismissed her appeal against conviction in February 2010. An appeal against sentence would not have been permitted under the domestic legislation because the mandatory death sentence was a sentence fixed by law. Then, in 2013, two significant events happened: the Board granted her leave to appeal against conviction, and she also applied for permission to appeal against sentence on the ground that the execution of the death sentence more than five years after her conviction would constitute inhuman punishment, relying on the authority of *Pratt* v. *Attorney-General for Jamaica* ('*Pratt*').[41] Her case exercised the Board on two difficult questions: whether the court had jurisdiction to entertain an appeal against sentence, and whether (and if so how) the court should exercise any such jurisdiction. By three to two, the Board held that it did have the requisite jurisdiction for two reasons: it was seised of the matter as there was already an appeal against conviction properly before the Board, and it was the appellate process, culminating in her appeal to the Board, which had led to the passage of time that would now make the execution of the sentence *prima facie* inhuman, according to the principle laid down in *Pratt*. In these circumstances, the offender would be granted permission to appeal against sentence, with her death sentence to then be commuted to life

[38] Contrast this perhaps with the re-sentencing exercise discussed in *Kho Jabing* v. *Public Prosecutor* [2016] 3 SLR 135 (CA) [129], where the Court of Appeal of Singapore said that, until the legal process had drawn to a close, there could not be any basis for the offender to assert any expectation, let alone a legitimate one, that he or she would only face the lower and not higher sentence. See also *Adri Anton Kalangie* (n 6) [57] (in relation to the applicability of updated sentencing guidelines).

[39] *Matthew* (n 36) [31]–[32].

[40] *Ramdeen* v. *State of Trinidad and Tobago* [2015] AC 562 (PC).

[41] *Pratt* v. *Attorney-General for Jamaica* [1994] 2 AC 1 (PC). On current law, this is not a legitimate ground in Singapore affording constitutional relief against the mandatory death sentence: see *Jabar bin Kadermastan* v. *Public Prosecutor* [1995] 1 SLR(R) 326 (CA). For a colourful perspective on delay historically in the execution of death sentences in Jamaica, see J Campbell 'Murder Appeals, Delayed Executions, and the Origins of Jamaican Death Penalty Jurisprudence' (2015) 33 Law & Hist Rev 435.

imprisonment pursuant to the Board's exercise of the power contained in section 14(2) of the Trinidadian Constitution, similar to what had been done in *Matthew*.[42]

Lord Mance JSC (as he then was) and Lord Sumption JSC dissented strongly in *Ramdeen*. Their point essentially was that any valid commutation of the mandatory death sentence pursuant to the section 14(2) power could result only from an originating constitutional motion brought by the offender to the High Court of Trinidad and Tobago, and this not having been done the Board could not, in the present appeal against conviction, arrogate to itself the High Court's original jurisdiction. This is a key holding to which we will return. It is clear that the two judges realized its import, for they then had to consider whether *Matthew* was erroneous in having assumed there the constitutionality of the Board's exercise of the section 14(2) power. Surprisingly, they answered that question in the negative; *Matthew* was confined to its very exceptional facts and explained as an instance of a prospective application of the law:

> In circumstances where a court itself has put first one meaning, and then another, on legislation it seems to me wholly appropriate that the court should have power, by a prospective order, to protect those who have suffered clear detriment by relying on its first ruling, and this is particularly so when the other party is the prosecution in criminal proceedings. That in my view is the clear rationalisation of the decision in *Matthew's* case.[43]

The minority's reasoning in this passage is not unappealing although it must contend with two difficulties. The first is that *Matthew* itself does not expressly state that prospective change was the basis of the decision, a fact pointed out by Lord Neuberger of Abbotsbury PSC who was one of the majority judges in *Ramdeen*; he nevertheless says this might well be a justification for the reasoning in *Matthew*,[44] so there is seemingly no disagreement here with the general proposition extracted by the minority. (It may be noted that Lord Toulson did mention, in a subsequent case, that the *Ramdeen* majority did not regard it as tenable to explain *Matthew* as a case of prospective overruling.[45] I do not read this later comment to oppugn the proposition on prospective application advanced by the *Ramdeen* minority, for Lord Toulson immediately went on to explain that the untenableness arose because prospective application did not form the basis of the actual decision in *Matthew*. In other words, Lord Toulson's concern appeared to be over how the older case was read, not with the correctness of the minority's proposition.)

The second difficulty obtrudes more uncomfortably and is not squarely confronted by Lord Mance and Lord Sumption JJSC in their minority judgment in *Ramdeen*. Their initial conclusion in that case, that the Board had no jurisdiction under section 14(2) to commute the sentence where no constitutional motion had been brought, appears at odds with their hypothesized rationalization that the Board could or should have applied the change in law only prospectively and, as a result of this, become able to

[42] *Ramdeen* (n 40) [51].

[43] *Ramdeen* (n 40) [91].

[44] *Ramdeen* (n 40) [65].

[45] *Hunte* v. *State of Trinidad and Tobago* [2015] UKPC 33, [60].

commute the sentence to life imprisonment. What form of authority could the Board possess in that hypothesis to allow it to do so? The minority judgments offer no particular indication. One possibility which I raise here (and will be discussed more fully below) could be the court's inherent power to act in the furtherance of justice, which although a somewhat forced answer—not least because any power, however benignant or innately sourced, could only be exercised legitimately if the court were actually seised of jurisdiction—is nevertheless consistent with the minority's sentiment that it would be appropriate for a court to be empowered to issue a prospective order to protect those who had suffered clear detriment.

Such was the turbid state of the law when, less than a year after *Ramdeen* was decided, the Board heard *Hunte* v. *State of Trinidad and Tobago* ('*Hunte*').[46] Having been convicted of murder, sentenced to death, and had their appeals dismissed below in the Trinidad and Tobago courts, two offenders made their final appeals to the Board. They appealed against their convictions and, in the event those proved unsuccessful, sought leave to appeal against their sentences. One of the very vital issues up for consideration was whether the Board had the jurisdiction to commute the mandatory death sentences. Seeing how this and other related questions had previously divided the Board in *Roodal*, *Matthew*, and *Ramdeen*, it might not come as a surprise that *Hunte* was also decided by a split committee (six to one). What did arrive as a bolt out of the blue to some was that *Hunte* took the step of overruling *Ramdeen*, which had been handed down just a few months earlier. The Board held that it did *not* have the necessary jurisdiction under section 14(2) of the Trinidadian Constitution to commute the sentence, because no constitutional motion had actually been brought and there was (naturally) no appeal therefrom to the Board. *Ramdeen* was consequently overruled with immediate effect. One key reason was that:

> [The] issue concerns the constitutional power of the judiciary to interfere by way of appeal with a lawful sentence. If the Board is persuaded that it has taken to itself a judicial power which it does not possess, it would be damaging to respect for the rule of law to continue to exercise a purported judicial power contrary to the provisions of the Constitution.[47]

In a separate palinode, Lord Neuberger concurred with this view and also voiced his concern that such an arrogation of power would potentially place the executive and the judiciary in conflict on a point of constitutional law on which the judiciary took the view that its position was legally wrong.[48] The Board therefore refused the offenders leave to appeal against their sentences. Here ends this particular chapter of the law as the relevant holding in *Hunte* was recently applied by a unanimous Board in *Lendore* v. *Attorney General of Trinidad and Tobago*.[49]

I had earlier adverted to the possibility of the Privy Council possessing an *inherent* power to grant relief against the mandatory sentences; this could perhaps explain the

[46] *Hunte* (n 45).

[47] *Hunte* (n 45) [68].

[48] *Hunte* (n 45) [78].

[49] *Lendore* v. *Attorney General of Trinidad and Tobago* [2017] 1 WLR 3369 (PC) [12].

minority's attempt in *Ramdeen* to rationalize *Matthew* as a case of prospective application of the law, in order to justify the commutation of the sentence in *Matthew* itself. In this, we can recall how sometimes it is said, without any unkindness at all, that necessity is the mother of invention. However, it must now be the case that whether or not one agrees with the necessary birth of an inherent power here, according to *Hunte* the child would have been illegitimate. In the light of that decision, it is clear that the minority judges in *Ramdeen* could not validly have preserved *Matthew* as an authority once it was found that the section 14(2) power was unexercisable where no originating constitutional motion had been brought. In addition, none of the judgments in *Hunte*, majority or minority, mention the inherent powers or jurisdiction possibility; it may even be precluded by the language the committee used. Lord Toulson, speaking for the majority, emphasized that the Board's powers and jurisdiction were statutory and, in this case, no more or less than what the Court of Appeal of Trinidad and Tobago possessed. In his judgment, given that that court could not have validly entertained, and did not so entertain, any appeal against the mandatory death sentences (because those were fixed by law), the Board could not now grant leave to appeal against sentence and order commutation; to do so would not only be to grant an appeal when there was no decision of the Court of Appeal to appeal against, *it would also be making an order which the Court of Appeal had no jurisdiction to make*.[50] Even Baroness Hale of Richmond, who dissented and said that the Board did have the jurisdiction and power to commute the death sentences, would have approached the matter on the footing that the Board was only using the *existing* jurisdiction it had in an appeal against conviction to prevent a very serious violation of the appellant's constitutional rights.[51] Her judgment does not indicate that she considered, or was asked, whether there was an alternative basis on which the Board could act.

All this should not I think detract from the view that usage generally of the prospective application device is founded in the court's inherent power, under the common law, to do whatever is necessary to serve the interests of justice. What it does do is remind us of an important qualification: the inherent power is subject to the doctrine of parliamentary (or constitutional) sovereignty.[52] This particular limitation is the reason why, properly analysed, it is unlikely the Board had any inherent power or jurisdiction to issue a prospective ruling in the cases above. Having found that any commutation of the mandatory death sentences could occur only if and when the procedures expressly prescribed by the Trinidadian Constitution had been followed, and given that the legality of those procedures had not been impugned on any recognized ground, it would have been constitutionally unprincipled for the Board to permit the circumvention of that process by holding that commutation was nevertheless possible through an exercise of its inherent power or jurisdiction. That would be akin, paraphrasing Lord Toulson, to the Board rubbing a lamp and magicking into existence a jurisdiction which under the Trinidadian Constitution it did not have.[53]

[50] *Hunte* (n 45) [51] and [56].

[51] *Hunte* (n 45) [102].

[52] *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 (HL) [69]; *Cadder* v. *HM Advocate* [2010] 1 WLR 2601 (SC) [59].

[53] *Ramdeen* (n 40) [54].

Even as one agrees that this particular instance of transmogrification should be outlawed, however, it shows to my mind that the limits of the court's inherent powers are not always so necessarily constrained. More generally, a scenario warranting the use of an inherent power might be where the written law had failed to expressly provide for any recognized process for obtaining relief or other outcomes of justice, or where such a process (even if extant) contained an unintended lacuna in its scope or operation, which would result in grave and irreparable injustice or unfairness caused to the offender. In the following section, I consider specifically the question whether the courts should possess or use any power, inherent or otherwise, to declare that legislation requiring the imposition of a mandatory sentence is to apply only prospectively to future cases.

(C) Discussion

Out of the foregoing bricolage of Privy Council cases may be received two relevant propositions, one more established than the other. It is clear that a sentence—even a sentence purportedly mandated by written law—may be varied by a court if it should otherwise possess the power and jurisdiction to do so. This in essence reflects no more or less than the truism that the legislature has, in the usual and ordinary course, plenary authority and ability to lay down binding rules *as well as exceptions thereto* (sometimes unknowingly in the case of the latter) which are to be faithfully interpreted and applied by the judiciary, although many will freely admit that the death sentence cases above represent an extreme example of the blurred lines that can lead even the highest courts astray—the difficulty there was coming to terms with a realization that constitutional relief against execution of the harshest penalty a criminal offender can ever receive was only available through some but not other avenues. It is also an illustration of the heightened complexity when constitutional interpretation and principles are in play.

The second proposition, hypothesized by the minority in *Ramdeen* and which remains untested fully, is that a judicial ruling on legislation touching upon the imposition of a mandatory sentence may potentially be applied only prospectively and not to the instant offender, where the court itself had in a previous decision set forth one meaning on the legislation and was now putting another meaning forward. (Implicitly this is intended to apply only in respect of decisions of co-ordinate courts.) The sin identified is judicial error at the highest levels, and the salve prescribed is prospective application or overruling in order to protect any person who had suffered or was likely to suffer clear detriment by relying on the earlier ruling. As mentioned earlier, the validity of this second proposition was not seemingly denied by the majority in *Ramdeen*. The decision in *Ernest Sim* also supports its existence.

In this section, I offer a defence that the second proposition as postulated does not entirely account for the legislative imperative and may also have overlooked an aspect of the public interest which deserves greater consideration. For reasons that will be explained shortly, it is thought that the correct reading of a legislative provision on the mandatory or discretionary nature of a criminal punishment should apply to the offender in the instant case with full effect, leaving no room for any judicial discretion to apply such a reading purely prospectively. I mention, parenthetically, that the following discussion assumes the constitutionality of the legislative provision in question, and I also do not broach in any significant manner the necessity or propriety of a

mandatory penal outcome,[54] each of which are important matters that may have to be considered in individual cases.

(i) Judicial-Legislative Divide

This is a particularized variant of the separation of powers argument. In the first place, knowingly applying a patently incorrect reading of the legislative provision in this context would be *ultra vires* on the part of the court, which simply has no discretion to impose an obviously wrong and unlawful sentence,[55] or to disapply a legislatively mandated punishment.[56] All of this is trite. Even in a most exceptional case where judicial mercy is appropriately dispensed, the lowest sentence imposable is the legislative minimum.[57] George Wei J, sitting in the High Court of Singapore, recently declared that the presence of a practice, even one previously established or recognized by the apex court of the land, does not provide a basis to establish jurisdiction as a matter of law where none exists; *for practice cannot trump law*.[58] What was said there about jurisdiction could be said for the existence of a power. Indeed, reasoning from principle, if one accepts that the court's sentencing powers are devolved from the legislature, as they are said to be in Singapore, then the limits and application of those powers must be strictly accountable to and in accordance with the legislative wording,[59] subject to any question of constitutionality.[60] Any act to the contrary risks an irretrievable breach of the division between the legislature and the judiciary.

In the specific context of sentencing in Singapore, this means that it is for society (represented by Parliament) to determine a lawful punishment—whether fixed or

[54] Apart from the more obvious philosophical treatments from penological and constitutional doctrine, there is a longstanding critical debate on the interaction between time and the criminal law: see, e.g., M Kelman 'Interpretive Construction in the Substantive Criminal Law' (1981) 33 Stanford L Rev 591; E Melissaris 'The Chronology of the Legal' (2005) 50 McGill LJ 839, 858–59; T Chowdhury 'Time Frames and Legal Indeterminacy' (2017) 30 Canadian Journal of Law & Jurisprudence 57, 66; T Chowdhury 'Temporality and Criminal Law Adjudication's Multiple Pasts' (2017) 38 Liverpool L Rev 187.

[55] See, e.g., *R* v. *H* [2012] 1 WLR 1416 (CA) [124]–[125]; *R* v. *Seow Png* (1937) 6 MLJ 49 (CCA); *Chiaw Wai Onn* v. *Public Prosecutor* [1997] 2 SLR(R) 233 (HC) [54]; *Mahat bin Salim* (n 17) [12]; *Philip Lau Chee Heng* (n 17) 109–10; *Khirul Ihsan bin Hussain* v. *Public Prosecutor* [1999] 3 MLJ 397 (HC) 400.

[56] See, e.g., *R* v. *Pinnell* [2012] 1 WLR 17 (CA) [24]; *Lendore* (n 49) [30]; *Kanagasuntharam* v. *Public Prosecutor* [1991] 2 SLR(R) 874 (CCA) [14]; *Ramanathan Yogendran* v. *Public Prosecutor* [1995] 2 SLR(R) 471 (HC) [122]–[123]; *Nguyen Tuong Van* (n 17) [53]; *Faisal bin Tahar* v. *Public Prosecutor* [2016] 4 SLR 501 (HC) [27]; *Wali Bhuiya* v. *Ahizuddin* PLD 1956 Dacca 106, 107; *Public Prosecutor* v. *Lee Lam* (1952) 18 MLJ 86 (HC) 88; *Loh Sek Ngee* v. *Public Prosecutor* (1952) 18 MLJ 91 (CA); *Hew Yew* (n 17); *Abu Seman* (n 17) 343.

[57] *Chew Soo Chun* (n 7) [28]; *Cheang Geok Lin* v. *Public Prosecutor* [2018] 4 SLR 548 (HC) [11].

[58] *Sun Electric Pte Ltd* v. *Sunseap Group Pte Ltd* [2017] SGHC 232, [120]. In this case, it was held that only the Registrar of Patents, and not the High Court, possessed the original jurisdiction to revoke a patent, going unapologetically against more than a dozen prior authorities that had assumed otherwise. See also *Public Prosecutor* v. *Lam Leng Hung* [2018] 1 SLR 659 (CA) [268].

[59] *Chng Wei Meng* v. *Public Prosecutor* [2002] 2 SLR(R) 566 (HC) [42]; *Mohammad Faizal bin Sabtu* v. *Public Prosecutor* [2012] 4 SLR 947 (HC) [37]–[45]; *Prabagaran a/l Srivijayan* v. *Public Prosecutor* [2017] 1 SLR 173 (CA) [60]. The courts can but beseech the legislature to consider affording them increased sentencing powers in respect of offences which the courts think are egregious or may be occurring with greater deleterious frequency (see, e.g., *Seow Png* (n 55); *Public Prosecutor* v. *Tan Fook Sum* [1999] 1 SLR(R) 1022 (HC) [36]; *Pua Hung Jaan Jeffrey Nguyen* (n 29) [60]; *Public Prosecutor* v. *BDB* [2018] 1 SLR 127 (CA) [139]).

[60] In Singapore, a prescribed mandatory sentence and its imposition may (like any other statutory law) be successfully challenged if that is inconsistent with the written constitution: *Ong Ah Chuan* v. *Public Prosecutor* [1981] AC 648 (PC); *Nguyen Tuong Van* (n 17) [57] and [73]; *Yong Vui Kong* v. *Public Prosecutor* [2015] 2 SLR 1129 (CA) [38]. See also generally *Ellis* v. *Minister for Justice and Equality* [2016] IEHC 234.

within a range—that takes into account the prevailing societal conditions, and for the impartial arbiters (represented by the courts) to respect that social and moral judgment on punishment and apply it in every appropriate case.[61] It is worth quoting Lord Morris of Borth-y-Gest in *Runyowa* v. *The Queen* ('*Runyowa*'):

> A legislature may have to consider questions of policy in regard to punishment for crime. For a particular offence a legislature may merely decree the maximum punishment and may invest the courts with a complete discretion as to what sentence to impose—subject only to the fixed maximum. There may be cases, however, where a legislature deems it necessary to decree that for a particular offence a fixed sentence is to follow. As an example a legislature might decide that upon conviction for murder a sentence of death is to be imposed. A legislature might decide that upon conviction of some other offence some other fixed sentence is to follow. A legislature must assess the situations which have arisen or which may arise and form a judgment as to what laws are necessary and desirable for the purposes of maintaining peace, order and good government. It can hardly be for the courts unless clearly so empowered or directed to rule as to the necessity or propriety of particular legislation. Nor can it be for the courts without possessing the evidence upon which a decision of the legislature has been based to overrule and nullify the decision. As Quenet A.C.J. said … if once laws are validly enacted it is not for the courts to adjudicate upon their wisdom, their appropriateness or the necessity for their existence.[62]

To my mind, this understanding, at least so far as might be thought to similarly reflect the state of Singapore law—the passage above has been cited approvingly by the Court of Appeal[63]—is not successfully challenged by *Bowe* v. *The Queen*.[64] There a view was expressed that the Privy Council in *Runyowa* had effectively abdicated its duty of constitutional adjudication.[65] The accusation may, respectfully, have overstated things.

Runyowa was a case where the Board had received full argument on the compliance of the mandatory death penalty with the Constitution of the Federation of Rhodesia and Nyasaland.[66] Lord Morris, who delivered the decision, recognized in the passage above that the courts could rule as to the necessity or propriety of particular legislation if they were clearly empowered or directed to do so. Given that any parliamentary legislation could only have been curially attenuated on constitutional grounds, a fact of which the Board must assuredly have been aware, Lord Morris' words should be read as acknowledging the supremacy of the constitution. Now, placed side by side with

[61] *Yong Vui Kong* v. *Public Prosecutor* [2010] 3 SLR 489 (CA) [122]; *Yong Vui Kong* (n 60) [101]; *Faisal bin Tahar* (n 56) [27]. See also *Whelan* v. *Minister for Justice, Equality and Law Reform* [2008] 2 IR 142 (HC) [48]–[62] (decision upheld on appeal in *Whelan* v. *Minister for Justice, Equality and Law Reform* [2012] 1 IR 1 (SC)); YL Tan and SC Mohan (gen eds) *Criminal Procedure in Singapore and Malaysia* (LexisNexis 2017) ch XVII paras 351–52.

[62] *Runyowa* v. *The Queen* [1967] 1 AC 26 (PC) 49.

[63] *Public Prosecutor* v. *Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA) [72].

[64] *Bowe* v. *The Queen* [2006] 1 WLR 1623 (PC).

[65] *Bowe* (n 64) [40]. Lord Bingham of Cornhill had earlier called *Runyowa* a decision 'made at a time when international jurisprudence on human rights was rudimentary' (*Reyes* v. *The Queen* [2002] 2 AC 235 (PC) [45]).

[66] The independent nations of Malawi, Zambia, and Zimbabwe today.

some recent Privy Council decisions, it can be admitted that the reasoning in *Runyowa* was simple on an important point. It was urged upon the Board (which accepted the argument) that if the death penalty was not *per se* an inhuman or degrading mode or description of punishment, any contention that the mandatory death penalty was unconstitutional based on considerations of proportionality (or the lack thereof) was bound to fail. To read this fairly, what I think it shows is that a comparatively thin conception of constitutional adjudication was being employed. The Board, it has to be remembered, was dealing with the mandatory punishment prescribed for particularly egregious offences of arson, not some other crime of a minor or petty nature. There was nothing necessarily absurd or arbitrary or grossly disproportionate on the facts and the judges in *Runyowa* had no need or luxury for building and disassembling men of straw. This admittedly may not have resembled the thick mantle of review with which the Privy Council has draped itself in more recent cases. But it ought not to be taken as an effective abdication of duty, not at the time and maybe not even today when there is universally still a genuine *modus vivendi* on the necessity and propriety of the death penalty and the extent to which a national judiciary will defer to the legislature's views on the matter.[67]

Consideration of the question of deference is further enriched by a passage found in *R* v. *Guiller*, one which has been repeatedly cited by the Supreme Court of Canada with approval:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the Charter is properly a judicial function the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.[68]

What, it can be asked, warrants treating the construction of legislation on the mandatoriness of a sentence differently from an adjudicative ruling on other issues, such that the former should have to apply invariably to the instant offender? The distinction lies in the unique and (from one angle) extreme nature of the inquiry: a mandatory sentence pertains to the legally directed infliction of an ordained punishment after a crime has been committed, something which is (or must be assumed to be) exhaustively prescribed by the legislature and may not therefore be varied by an exercise of judicial discretion unless provided for in the written law.[69] The very fact was used by

[67] For example, Professor Thio Li-ann, writing less than a decade ago, noted that an objective observer could only conclude that the matter remained controversial and unsettled and fell within a global 'margin of appreciation' ('"It is a Little Known Legal Fact": Originalism, Customary Human Rights Law and Constitutional Interpretation' [2010] SJLS 558, 567).

[68] *R* v. *Guiller* (1985) 48 CR (3d) 226 (DC) 238 (cited in *Luxton* v. *R* [1990] 2 SCR 711, 725; *R* v. *Goltz* [1991] 3 SCR 485, 502; *Hinchey* v. *R* [1996] 3 SCR 1128 [34]; *Latimer* v. *R* [2001] 1 SCR 3 [77]; *Lloyd* v. *R* [2016] 1 SCR 130 [45]).

[69] See, e.g., *Juma'at bin Samad* v. *Public Prosecutor* [1993] 2 SLR(R) 327 (HC) [43]; *Mohamad Fairuuz* (n 7) [76]. Some instances in Singapore where an otherwise mandatory punishment may be varied by a court are found in sections 325, 328, and 331 of the Criminal Procedure Code (n 25) (mandatory sentence of caning not permissible for certain categories

Lord Rodger of Earlsferry to rule unconstitutional a mandatory sentence (there, death) in Saint Lucia; he said, 'it is because the law requires, rather than merely authorises, the judge to impose the death sentence *that there is no room for mitigation and no room for the consideration of the individual circumstances of the defendant or of the murder*'.[70] The unconstitutionality was in Saint Lucia and not Singapore and the arguments accepted in that case cannot easily be transposed locally, but Lord Rodger's pithy statement on the nature of a mandatory sentence is unflinchingly accurate. And as one then moves towards the *other* end of the scales, to consider the scenario where legislation does actually grant a court an express discretion to impose punishments within a stipulated range, it will be realized that the replacement of one sentencing *benchmark* by another (within the legislative limits, of course) *is* something that constitutes a legitimate flex of judicial power and may consequently be applied purely prospectively in an additional demonstration of the judicial remit. There lies the difference. If this first reason were to be summarized, it would be that, save where permitted under the written law, any exemption of the instant offender from a mandatory sentence is unacceptably adverse to and impliedly excluded by the method, as well as the constitutional milieu, in which the system of criminal sentencing is understood to work.

(ii) A Matter of Statutory Construction

The second reason for the correct reading of legislation in this particular context having to apply to the immediate offender is that the righting of an incorrect reading should not technically be viewed or treated as a change in the law, as that phrase is used when one speaks of prospective application. In many orthodox predicates, there is a key difference between judge-made law and legislation: the former possesses a quality (some might say quiddity) of uncertainty which lends itself to change, in the sense used above, in that it is developed and refined in incremental fashion over time; whereas for legislation its true meaning is in theory generally fixed at the point of commencement and immutable until the language is otherwise properly varied pursuant to legislative authorization.[71] Naturally, the last part of this statement in respect of legislation cannot be taken *tout court*, for the decided cases by and large bear out Lord Rodger's assessment that legislation is interpreted dynamically and given contemporary meanings in light of movements in public opinion,[72] but it does not then mean that *all* legislation must have meanings that vary linearly or cyclically with time and the evolution of social customs and mores.[73] This is fundamental. I do not doubt that the inquiry is on some level bound up with the different theories of statutory and constitutional interpretation

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of persons, the court then having discretion to impose additional imprisonment terms of not more than 12 months) and section 33B of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) (certain classes of drug offenders may be sentenced to life imprisonment and possibly caning, in place of the death penalty). In England, see, e.g., section 109(2) of the Powers of Criminal Courts (Sentencing) Act 2000 (discussed in *R* v. *Turner (No 2)* [2002] 2 Cr App R (S) 160 (CA)) and section 224A of the Criminal Justice Act 2003 (discussed in *R* v. *Saunders* [2014] 1 Cr App R (S) 258 (CA)).

70 *R* v. *Hughes* [2002] 2 AC 259 (PC) [47] (emphasis added). See also *R (Wellington)* v. *Secretary of State for the Home Department* [2009] AC 335 (HL) [67].

71 *Spectrum Plus* (n 52) [38].

72 Rodger, *A Time for Everything under the Law* (n 1) 74–75. See also Philip A Joseph, 'Review: Constitutional Law' [2006] NZ L Rev 123, 146–47.

73 See, e.g., *Public Prosecutor* v. *Tan Meng Khin* [1995] 2 SLR(R) 420 (CA) [13].

on offer (such as originalism or contextualism or purposivism) since the resulting construction may turn on the one favoured. The point I am suggesting is that each theory may need to be accommodative and recognize nuances in approach depending on the nature and use of the legislation in question.[74]

If this gives rise to any complaint of unprincipled inconsistency then let me say that one cannot be overly doctrinaire about the matter. Legislation comes in a variety of forms. Whether the meaning of the word 'family' as used in a statute dating back to the Great War needs to be updated by judicial fiat for currency in the 21st century[75] is a quite different inquiry from whether, on a plain construction and use of the syntax and semantics of a penal statute, a particular punishment is mandatorily required for persons committing an offence. Resolution of the first question, in view of the open-ended nature and use of the legislative decree there, may possibly result in a change in the law that justifies its prospective application[76]; resolution of the second, which involves a discrete treatment of the closed wording, should not. Arden LJ once said extra-curially that, with probable certainty, the concept of prospective overruling should not be used in cases where the decision turned purely on the construction of a statute.[77] That statement may be thought to sweep too widely over disparate areas of law—the exact issue actually generated a split in the House of Lords[78]—but in my opinion (and this is to take the argument at its narrowest), the issue of the mandatoriness of a punishment

[74] Reference may be had to Lord Wilberforce's speech in *Royal College of Nursing of the United Kingdom* v. *Department of Health and Social Security* [1981] AC 800 (HL) 822 and Arden LJ's judgment in *Howard de Walden Estates Ltd* v. *Aggio* [2008] Ch 26 (CA) [30]–[31].

[75] *Fitzpatrick* v. *Sterling Housing Association Ltd* [2001] 1 AC 27 (HL), discussed in Rodger, *A Time for Everything under the Law* (n 1) 75; SM Cretney and FMB Reynolds 'Limits of the Judicial Function' (2000) 116 LQR 181. See generally also D Greenberg (ed) *Craies on Legislation* (11th edn Sweet & Maxwell 2017) ch 21; R Ekins 'Updating the Meaning of Violence' (2013) 129 LQR 17; N Duxbury *Elements of Legislation* (Cambridge University Press 2012) 229–31.

[76] Quite apart from the conclusion in this article that a court should never fail to impose what it finds to be a mandatory sentence, I do not necessarily agree with an absolutist view that *all* rules of statutory source cannot have their application temporally manipulated by a court, by reason of the court always lacking the power to deny a legislative rule (*contra* K Low and K Loi 'Bridging the Great Divide between Mistakes of Law and Fact in Restitution: Is the Bridge Safe to Cross?' (1999) 11 SAcLJ 321, 340; B Juratowitch 'Questioning Prospective Overruling' [2007] NZ L Rev 393, 412; Juratowitch, *Retroactivity* (n 1) 214–15; B Juratowitch 'The Temporal Effect of Judgments in the United Kingdom' in P Popelier and others (eds) *The Effects of Judicial Decisions in Time* (Intersentia 2014) 176). The legislature is many things but hardly omniscient, which results in some deliberate discretion having often to be invested in the executive or judicial branches regarding the application or operation of legislation; the said rule mandated by Parliament may contain an undefined term or a procedural opening, each of which may with the effluxion of time conceivably admit of possible changes in understanding on at least some levels (including its application at any particular point in time). Having said that and on a slightly separate note, there is a conceptual struggle, as yet undecided in Singapore, about whether some sort of limited effect may be given to a statutory provision found to be unconstitutional, notwithstanding the written constitution having rendered it void *ex tunc* (for the uncertainty in Malaysia, see *Public Prosecutor* v. *Dato' Yap Peng* [1987] 2 MLJ 311 (SC); *Mamat bin Daud* v. *Government of Malaysia* [1988] 1 MLJ 119 (SC); *Repco Holdings Bhd* v. *Public Prosecutor* [1997] 3 MLJ 681 (HC); *Public Prosecutor* v. *Lee Ming* [1998] 4 MLJ 113 (HC); *Public Prosecutor* v. *Jamil bin Jilap* [2000] 5 MLJ 311 (HC)). For a recent discussion on legislative gaps in Singapore, see Y Goh 'Where Judicial and Legislative Powers Conflict: Dealing with Legislative Gaps (and Non-gaps) in Singapore' (2016) 28 SAcLJ 472; and for two Singapore perspectives on the limited recognition of an unconstitutional statutory provision, see K Low, K Loi, and S Wee 'Towards a Maintenance of Equality (Part I): A Study of the Constitutionality of Maintenance Provisions that Sexually Discriminate' (1998) 19 Sing L Rev 45, 67–70 and 'Towards a Maintenance of Equality (Part II): The Effects of Unconstitutionally' (1999) 20 Sing L Rev 103, 128–30; Chan, *Prospective Overruling in Singapore* (n 8) 376–79.

[77] Arden, *Prospective Overruling* (n 1) 11.

[78] In *Spectrum Plus* (n 52), Lord Steyn and Lord Scott of Foscote viewed prospective overruling to be generally inapplicable where the interpretation of a statute was concerned (at [45] and [125]), whereas Lord Nicholls of Birkenhead, Lord Hope of Craighead, and Baroness Hale of Richmond were unwilling to close off the possibility altogether (at [39], [74], and [162]). See also *Lai* v. *Chamberlains* [2007] 2 NZLR 7 (SC) [141].

does gives rise to a specific and localized instance where the decision turns exclusively on the statutory construction of a closed directive, such that the correct meaning, as proffered by the court in any given case, should *ex hypothesi* apply to the offender in that case itself. Now, this is not to discount the unfortunate possibility that some legislative wording might be so ambiguous as to give rise to a real uncertainty on the issue (and in such instances the doubt should naturally be resolved in favour of the accused person), but if a court *does* satisfy itself after due inquiry that the punishment is mandatory, it should have to hand that down in fulfilment of its constitutional duty to faithfully construe and apply the sentencing legislation, such being the one (and only) carrying action that ensures biting effect to the legislative intent on the type and quantum of punishment to be laid down for the offence.

(iii) Is there a Legitimate Expectation?

Let me travel to a third reason. The question whether a particular punishment is mandatory or discretionary ordinarily arises in a case where the legislation expressly provides for the different types of punishment a judge is to impose. But the analysis is sometimes apt to elide a crucial point: as early on as when the criminal charge is filed, perhaps even before that moment, the offender should already be (or be taken as) aware of the possibility that every one of those different punishments—*regardless of the mandatory-discretionary distinction*—could very well apply to him or her. Generally, as such, can there really be any rightful expectation on the part of the offender that the referenced punishment will never materialize?[79] Professor J W Harris once expressed a similar concern when speaking broadly on criminal liability:

> A more important assumption underlying the objection to retrospectivity is that it is unjust to punish someone who had good reason to believe that his conduct was not contrary to law when he engaged in it. This justification for the ban on retrospectivity goes no further than the consideration of justified reliance. *It does not extend to cases where no-one could have acted on the faith of his conduct being exempt from criminal liability.*[80]

This deemed awareness of the offender means that one traditional requirement for pure prospectivity is left unsatisfied—there can be no unfairness caused to an offender if there were no *legitimate* expectation to begin with.[81] From a protective perspective as

[79] As Lord Morris of Borth-y-Gest once said, 'Nor do I know of any procedure under which someone could be told with precision just how far he may go before he may incur some civil or some criminal liability. Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot where they may fall in' (*Knuller (Publishing, Printing and Promotions) Ltd* v. *Director of Public Prosecutions* [1973] AC 435 (HL) 463). I quote these words, not to express a view either way on the rectitude of the outcome of the case where they were spoken, but to show that the interests of the offender *and also of the public and the victim* ought always to be fully considered by a court when arriving at its decision.

[80] JW Harris 'Towards Principles of Overruling—When Should a Final Court of Appeal Second Guess?' (1990) 10 OJLS 135, 175 (emphasis added). See also *Yong Vui Kong* v. *Public Prosecutor* [2010] 3 SLR 489 (CA) [114]; JR Spencer 'Precedent and Criminal Cases in the House of Lords' [1986] Camb LJ 361, 362; RL Lippke 'Retroactive Sentencing Changes: Exploring the Complications' (2018) 38 OJLS 147, 155–56.

[81] Whether *actual* reliance on an older rule should conclusively preclude retroactivity of the new rule is discussed in Juratowitch, *Retroactivity* (n 1) 44–48 and Chan, *Prospective Overruling in Singapore* (n 8) 369. It appears also that the Singapore Court of Appeal in *Maniach* (n 8) [72] was looking (without success) for actual reliance when deciding whether to restrict the retroactive effect of its decision.

well it must be doubted whether the courts ought to recognize any such expectation in one who would set about criminal activity with a willingness to bear only some, but not other, types of punishment, each of which would have been set forth plainly in the legislation;[82] that does not seem the correct way to motivate the necessary abidance to law in right-minded people. Indeed, this argument would seem even stronger where there can be inferred a degree of premeditation, such as where a corporate entity arranges its tax affairs in an unpermitted manner or plays fast and loose with employment regulations.[83]

Public Prosecutor v. *Adri Anton Kalangie*[84] offers a close example. The offender had imported a quantity of drugs into Singapore which would ordinarily have warranted the death penalty, but the prosecution decided to proceed on non-capital charges. This was not controversial. The interesting thing was that Lee Seiu Kin J in the High Court was asked to apply what defence counsel perceived to be a more severe sentencing approach for drug importation *only to future cases*, and not to the immediate offender, on the basis that the uplift in sentencing benchmark had resulted from a change in law after the date of commission of the offence. Counsel may have been encouraged to do so by the number of cases lately deploying or at least considering the prospective overruling technique—one observes without any disfavour at all that it appears an increasingly employed stratagem[85]—but in this instance the court flatly rejected the argument. One of the reasons it did so was that the accused person could not have harboured any legitimate expectation of a lower sentence. In Lee J's words:

> the Accused could not have "relied" on the cases that had been decided pre-*Suventher*,[86] given that he had actually imported a quantity of drugs that would ordinarily attract the death penalty … it did not lie in his mouth to argue that he had any legitimate expectation of receiving a more lenient sentence based on the pre-*Suventher* cases.[87]

This was likewise seen as a significant fact when the case was taken to the Court of Appeal, which concluded that *Suventher* could not be said to have brought about a change in the law *on which the accused had relied at the time he committed the offence*.[88]

[82] See, e.g., *Ding Si Yang* v. *Public Prosecutor* [2015] 2 SLR 229 (HC) [103] ('An imprisonment term is always on the cards'); *Adri Anton Kalangie* (n 6) [57] ('it is not entirely clear if an individual can even, at the time of commission of the offence, be said to have a legitimate expectation as to the sentence that he will receive in the event that he is subsequently successfully prosecuted for the offence, save that the sentence should be within the relevant statutorily-prescribed range'). This is also something faintly alluded to (albeit in different contexts) by Lord Bridge of Harwich in *R* v. *Shivpuri* [1987] AC 1 (HL) 23 and Lord Rodger of Earlsferry in *R (Uttley)* v. *Secretary of State for the Home Department* [2004] 1 WLR 2278 (HL) [40]. See further Waldron, *Retroactive Law* (n 1) 645–46; Sampford, *Retrospectivity* (n 1) 85; Juratowitch, *Retroactivity* (n 1) 54 and 195.

[83] Without being inconsistent, one might also argue that the deliberate and planned nature of business activity under different circumstances (e.g. availing oneself of a published tax ruling) could actually point *against* giving retroactive or retrospective effect to a judgment. This illustrates the fact-sensitive nature of the inquiry when a court is asked to evaluate a case for prospectivity (cf. HKSAR v. *Hung Chan Wa* [2006] 3 HKLRD 841 (CFA) [29]).

[84] *Public Prosecutor* v. *Adri Anton Kalangie* [2017] SGHC 217.

[85] See, e.g., *Ding Si Yang* (n 82); *Lee Chee Keet* v. *Public Prosecutor* [2016] 4 SLR 1316 (HC); *Adri Anton Kalangie* (n 84); *Ng Kean Meng Terence* (n 8); *Yeo Ek Boon, Jeffrey* (n 7); *Tay Wee Kiat* v. *Public Prosecutor* [2018] SGHC 42.

[86] *Suventher Shanmugam* v. *Public Prosecutor* [2017] 2 SLR 115 (CA).

[87] *Adri Anton Kalangie* (n 84) [32].

[88] *Adri Anton Kalangie* (n 6) [77].

(iv) Systematicity

Apart from these three reasons, I am going to analyze the point a bit further along the lines of what Professor Jeremy Waldron called the systematicity of the law.[89] According to him, in some cases, a retroactive change in the law is objectionable because, by affecting the status of the relevant act, it also affects the way the action figures in a whole systematic array of laws and legal procedures. As an example, he uses a statute newly establishing a historical act to be a crime at the time it was done, even if the act were *not* in fact an offence at that point in time. No one in the historical timeframe would know that they should seek legal advice or secure evidence; victims or bystanders would not know to approach the police; nor would the police themselves and prosecutors know to begin their investigations. Other formal procedures and protections ordinarily engaging after the alleged commission of an offence would also not have been followed through, since none then could have formally recognized it to be a crime.

Professor Waldron's systematicity analysis shows what can, at root, go wrong with a retroactive statute. Although his frame of reference centres on the legislative expression of the law, I think it is worthwhile to test, in the very specific context here, the retroactive or retrospective effect of a judicial decision against the general theory he espouses: that is, by evaluating its validity against the systematic integrity of the whole body of laws appurtenant to the action in question and which imbue that action with legal significance.[90]

Does, then, an appellate court's immediate correction of a prior erroneous ruling on the mandatory nature of a punishment, with its unabashed retroactive effect, stand its ground? By this time there are no investigations left to conduct, the evidence is all gathered, the trial process has run its course, the factual findings have been made. None of this should reasonably have been affected or done differently even if the relevant actors had suspected the previous construction to be dubious and due for correction, or, to take it a step further, even if they had actually gotten wind of the upcoming issuance of a corrective ruling. What about prejudice to other persons finally convicted of similar offences? Unlikely, since their concluded cases should not be reopened for scrutiny and compliance with the fresh ruling. The retroactive or retrospective effect of a judicial decision generally does not impact cases which have been finally determined.[91] The undertaking of any resentencing exercise in such cases could even amount to unfair and impermissible double punishment.[92]

Could the prosecution have charged differently? Possibly, for it has to have acted lawfully, without being arbitrary or taking into account irrelevant considerations; the expected sentence *may* have constituted one legitimate factor in the prosecution's charging decision, although the courts in Singapore have also said that there is no rule that an offender has to be prosecuted for the most serious offence possible.[93] But how, even then, could the accused person complain of real prejudice if the prosecution

[89] Waldron, *Retroactive Law* (n 1) 636–37.

[90] Waldron, *Retroactive Law* (n 1) 638.

[91] See, e.g., *Graham* [1999] 2 Cr App R (S) 312 (CA) 315; *A* v. *The Governor of Arbour Hill Prison* [2006] 4 IR 88 (SC) [36]–[38]; *Cadder* (n 52) [60], [62] and [102]; *R* v. *Johnson* [2017] 4 WLR 104 (CA); *Public Prosecutor* v. *Ong Say Kiat* [2017] 5 SLR 946 (HC); *Pram Nair* v. *Public Prosecutor* [2017] 2 SLR 1015 (CA) [170].

[92] So far as Singapore is concerned, on the basis of *Public Prosecutor* v. *Adith s/o Sarvotham* [2014] 3 SLR 649 (HC) [23]–[27] and other relevant authorities cited therein.

[93] *Ramalingam Ravinthran* v. *Attorney-General* [2012] 2 SLR 49 (CA) [51]–[53].

had already chosen to proceed on a less serious charge and not for some other graver offence, thinking (albeit mistakenly) that the expected punishment was only discretionary and not mandatory? We are really left only with the accused person who might have conducted his or her case or defence differently—for instance, by not entering a guilty plea—were it known then that a prescribed sentence was actually mandatory and not merely discretionary. Ordinarily, the unfairness caused through lack of foreknowledge of a newly minted ruling could persuade a court to tilt the balance in his or her favour in a case where the application of an updated, stricter sentencing *benchmark* or *tariff* was weighed against a continued adoption of the existing position, or where there existed a powerful probability that the offender would if forewarned have led more evidence at trial to try and prove that a particular condition for reduced punishment had been satisfied.[94] But with the imposition of mandatory sentences, there is something else which features in the equation: a clearly directed imperative on punishment, issued by the legislature, leaving no residual space for dissent or discretion, one that therefore has to be affirmed and given effect to and which no court or executive agency (clemency aside) possesses the necessary democratic legitimacy to deny in all but the most exceptional situations (read unconstitutionality or state necessity). The rule of law demands that laws be transparent and accessible, yes, but the maintenance of the overall integrity of the constitutional order, the bedrock on which the mode of government and legal relationships are constructed, is arguably of equal and possibly greater importance. Nothing that is worthy of protection can be built without the proper environment. As the Supreme Court of Canada declared in one of the most consequential constitutional cases ever to come before it:

> The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in s. 23 of the *Manitoba Act, 1870* and s. 52 of the *Constitution Act, 1982*, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force and effect.
>
> ***Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life.*** "The rule of law in this sense implies … simply the existence of public order." (W. I. Jennings, *The Law and the Constitution* (5th ed. 1959), at p. 43). As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" (quoted by Lord Wilberforce in *Carl-Zeiss-Stiftung* v. *Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All E.R. 536 (H.L.), at p. 577). According to Wade and Phillips, *Constitutional and Administrative Law* (9th ed. 1977), at p. 89: "… the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions".[95]

[94] *Kho Jabing* (n 38) [115]–[119].

[95] *Re Manitoba Language Rights* [1985] 1 SCR 721, 748–49 (emphasis added in bold italics).

The justices there were dealing with the vacuum created by the invalidation of almost all the written laws of Manitoba enacted since 1890. They had to be found unconstitutional and void because they were promulgated only in English and not French. But the immediate result of that would be anarchy and chaos, something the rule of law and the court, as its protector, could not tolerate. A total breakdown in legal order was completely antithetical to the democratic conception of government. The impugned laws were, therefore, deemed temporarily valid for the minimum time necessary for them to be translated, re-enacted, printed, and published, ensuring a continuation of the positive order. Now the point of this is not to suggest that the occasional failure to hand down a mandatory sentence rises to a comparable state of emergency. Far from it. But I do want to offer a thought here. Our structures, and strictures, of limited government are designed to pull through in every normal circumstance. They do not shy from those who would seek to bend power to their means without the legitimacy associated with proper observance of process and obtainment of the requisite consent. Nor do they vanish whenever a hard case calls out to be decided. This normative order, as the Supreme Court of Canada said, is preserved and embodied in the positive order of laws. Shall we then begin to ignore, even deliberately cast aside, a seemingly plain but incredibly fundamental rule that the legislative directive is a command of the demos to which everyone—including the executive and the judiciary—is subject? It would take something really quite exceptional (I have mentioned unconstitutionality and state necessity as examples) to depart from this basic precept of the separation of powers principle.[96] I do not view the individualized unfairness caused by reliance on a mistaken ruling on the nature of a sentence (i.e. a ruling that it is discretionary when really it is mandatory) to amount to such a reason for tearing up the playbook; and especially not when the punishment already exists in the legislation and there is thus always a real chance that a court will apply it. To be absolutely clear again, we are not talking here about a situation where the maximum punishment is retroactively increased between the time of the crime and the time of sentencing.[97] On balance, I see the systematic integrity of the body of constitutional and criminal justice laws being enhanced, not lessened, by a corrective ruling on the mandatory nature of a punishment having invariably to bind the offender with immediate effect.

(v) Constitutional Interference?

For completeness, we should consider the potential interference with the *nulla poena sine lege* provision in Article 11(1) of the Singapore Constitution,[98] which reads:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

[96] The primacy of the separation of powers principle recently led the Singapore Court of Appeal to describe it as a bedrock of the written constitution of Singapore: *Lam Leng Hung* (n 58) [283]. See also *Lim Meng Suang* v. *Attorney-General* [2015] 1 SLR 26 (CA) [189].

[97] Cf. Juratowitch, *Retroactivity* (n 1) 46–47 and 54.

[98] Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint).

A possible argument is that the infliction of a mandatory punishment, which a court had previously declared (albeit erroneously) to be merely discretionary, would be contrary to what was 'prescribed by law' at the time the offence was committed, and thus impermissible by the terms of the second limb of Article 11(1). And, further, since 'law' is defined in Article 2 to include the common law in operation in Singapore, the contention should not be dismissed outright.

Nevertheless it cannot in my view succeed upon a proper appreciation of the surrounding text and context. The Singapore Constitution is to be interpreted purposively: one has essentially to consider the possible interpretations of the provision concerned and to compare them against the legislative purpose sought to be attained, giving thought and due weight to the ordinary meaning of the provision in its context and, if permitted, any relevant insights derived from extraneous material.[99] Here, the first hurdle faced by the hypothesized argument is that the general definition of 'law' only applies *where the context does not otherwise require*,[100] and the plain and ordinary meaning of 'prescribed by law' connotes that it is legislation that may prescribe, by formal edict.[101] The latter is harmonious with the general meaning of 'prescribed' as used in the Singapore Constitution ('prescribed by the Act in which the word occurs or by any subsidiary legislation made thereunder …').[102] Further support for this understanding of the phrase 'prescribed by law' is evidenced by how the words *prescribed* and *law* are used proximately elsewhere in the Singapore Constitution. Disregarding variances in drafting, the relevant articles[103] all point to the conclusion that, where the Singapore Constitution speaks of a legal prescription, it relates to the promulgation of legislation (or the legislation itself) and not to any judicial instruction.

There has been one case in Singapore which expressly concluded that 'law' in Article 11(1) includes a judicial pronouncement or interpretation of legislation creating criminal liability. Remember, however, that Article 11(1) is dual-limbed (the first prohibits punishment for an act or omission that was not *punishable by law* when it was done or made; the second prohibits any punishment greater than what was *prescribed by law* at the time of commission of the offence), and we can properly distinguish *Public Prosecutor* v. *Manogaran s/o R Ramu* ('*Manogaran*').[104] From both the substance *and* conclusion of the case—namely, that a previous interpretation of a statute should not be retrospectively reversed if the new judicial interpretation would either *create criminal*

[99] *Tan Cheng Bock* v. *Attorney-General* [2017] 2 SLR 850 (CA) [35]–[54].

[100] Constitution (n 98) Art. 2(1).

[101] Tun Suffian LP, an acknowledged exponent of constitutional law who was involved in various official capacities during the time the Constitution of the Federation of Malaya (the forerunner of the Singapore Constitution) was prepared and promulgated, wrote distinctly that the second limb of Art. 7(1) of the Malaysian Constitution (equivalent to Art. 11(1) of the Singapore Constitution) was addressed to the retrospective application of *parliamentary legislation* (Mohamed Suffian bin Hashim *An Introduction to the Constitution of Malaysia* (2nd edn 1976) 211). See also Abdul Aziz Bari *Malaysian Constitution – A Critical Introduction* (Other Press 2003) 150.

[102] Constitution (n 98) Art. 2(9), read with Interpretation Act (Cap 1, 2002 Rev Ed) section 2(1).

[103] Constitution (n 98) Art. 19(6)(c), Art. 19B(4)(b), Art. 39(1)(a), Art. 108(2), Art. 111(2F), and Art. 148F(10A).

[104] *Public Prosecutor* v. *Manogaran s/o R Ramu* [1996] 3 SLR(R) 390 (CA). This is probably not the only instance of conflation relating to the bipedalled Art. 11(1) (or its Malaysian equivalent, Art. 7(1) of the Federal Constitution): see *Tuang Pik King* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1989] 1 MLJ 301 (HC) 303; LA Sheridan 'Federation of Malaya Constitution: Parts Two and Three' (1959) 1 Mal L Rev 175, 178; LA Sheridan (ed) *Malaya and Singapore, The Borneo Territories: The Development of their Laws and Constitutions* (Stevens & Sons 1961) 56; Seng, *Of Retrospective Criminal Laws* (n 1) 41; KS Kow *Sentencing Principles in Singapore* (Academy Publishing 2009) para 1.014.

liability for the first time or *extend criminal liability*—it was clearly the *first* limb of Article 11(1) which exercised the court in *Manogaran* and which is the subject of the definitional ruling.[105] Nothing there is directly relevant to the second limb.

It is noteworthy that there are many more decisions which point to the second limb of Article 11(1) offering only protection against retrospective or retroactive *legislation*, not judicial decisions. For instance, a line of authority would permit the application of judge-made sentencing benchmarks or guidelines to an offender even where such benchmarks or guidelines are *more severe* than those existing at the time of commission of the offence (provided always that the actual sentence handed down is still within the types and range of punishment prescribed by statute).[106] Yet other courts, when scrutinizing alleged infringement of the second limb by certain statutory material, directly or obliquely suggest that that limb is a prohibition on retroactive or retrospective *legislation*.[107]

As alluded to earlier, the second limb of Article 11(1) entrenches the *nulla poena sine lege* and *lex gravior* principles. It is at once an unwavering restriction on government—guarding against the institutional creation and imposition of criminal penalties not legally prescribed as imposable ones at the time the offence was committed[108]—and a rigid protection of one's right to expect and receive only that punishment which was legally prescribed into existence at the time of the offence, without fear of additional reprisal or retribution under the guise of *ex post facto* laws. We must, however, situate this protection in its proper context. In Singapore, the general prescription of the nature and magnitude of punishments exigible by the courts is a function exclusive to the legislature.[109] Because the prohibition in the second limb relates to the punishment a person is to receive, it can be contended that that limb contains an implied reference to the standing of the legislature (and, by extension, legislation) to set down limits on the sufferance of punishment.[110] Admittedly, the *first* limb speaks also of a power

[105] *Manogaran* (n 104) [75]–[76].

[106] *Madhavan Peter* v. *Public Prosecutor* [2012] 4 SLR 613 (HC) [185]–[186]; *Adri Anton Kalangie* (n 6) [46] and [57]. *Contra Seow Wei Sin* v. *Public Prosecutor* [2011] 1 SLR 1199 (HC) [26].

[107] *Wee Harry Lee* v. *Public Prosecutor* [1979–1980] SLR(R) 464 (HC) [60]; *Public Prosecutor* v. *Tham Wing Fai Peter* [1988] 1 SLR(R) 345 (HC) [14]–[15]; *Public Prosecutor* v. *Tan Teck Hin* [1992] 1 SLR(R) 672 (CCA) [45]; *Ho Sheng Yu Garreth* (n 35) [109] and [112]. For cases on Art. 11(1)'s direct cousins (i.e. Art. 7(1) of the Malaysian Federal Constitution and Art. 6 of the 1956 Pakistan Constitution), see *Public Prosecutor* v. *Hun Peng Khai* [1984] 2 MLJ 318 (HC) 320 and 325–26; *Savrimuthu* v. *Public Prosecutor* [1987] 2 MLJ 173 (SC) 174–76; *Nordin Yusmadi bin Yusoff* v. *Public Prosecutor* [1997] 3 MLJ 754 (CA) 758–60; *Kalipada Shaha* v. *The State* PLD 1959 SC (Pak) 322, 325.

[108] *Abdul Nasir* (n 10) [49].

[109] *Lam Leng Hung* (n 58) [280] and [282].

[110] Some might question this premise using the example of the crime of contempt of court, which until recently had its contours delineated chiefly through judicial decisions (it was fully inducted into the Singapore statute book in 2016 pursuant to the Administration of Justice (Protection) Act (Act 19 of 2016)). Could it not be said before then that a common law decision might 'prescribe' a punishment for the purposes of Art. 11(1)? In my view, however, the premise remains sound. The crime of contempt was anomalous in being the only one in Singapore not based fully on statute; that has now been addressed. Even before it was put entirely on a statutory footing, however, the Singapore Constitution and other written law already provided from the Republic's early days that the courts had power to punish for contempt (see Constitution (n 98) Art. 14(2); Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) section 7; State Courts Act (Cap 321, 2007 Rev Ed) section 8; Criminal Procedure Code (Cap 68, 1985 Rev Ed) section 320; Rules of Court (R 5, Cap 322, 2014 Rev Ed) order 52). Although this legislation did not spell out the range of the fines and imprisonment terms that could have been imposed for contempt in the higher courts—this naturally led judges to have to exercise their discretion reasonably when calibrating the punishment, following guidelines laid down in past cases—it does not begin to follow that the growing body of case law since the Republic's

conceptually reserved to Parliament—the creation of liability for an offence—and no one has yet seriously questioned the ruling in *Manogaran* broadening the meaning of 'law' in the first limb to include judicial decisions. But that does not necessarily dictate, by parity of reasoning, that the second limb should similarly be widened to encompass court rulings within its ambit of protection. However desirable it may be thought to extend the scope of the second limb to defeat retroactive judicial decisions, this purport has to be compared against the explicit language of the provision. Here the words used are 'prescribed by law'. Their ordinary meaning cannot reasonably bear the additional association. It cannot, moreover, be said that the protection conferred by the second limb would otherwise be rendered nugatory or illusory, for there would remain a perfectly legitimate and sound purpose to be served by the second limb, which is to shield against certain types of retroactive and retrospective legislation. That has always constituted a fundamental (and potent) right belonging to all persons within its sphere of operation. I therefore do not believe that a non-inclusion of judicial decisions within the offered protection would amount to any tabulated legalism or a gratuitous denial of a generous reading to the constitutional language, against the Privy Council's imploration in *Ong Ah Chuan* v. *Public Prosecutor*.[111] It has, instead, to do with the proper construction of the article, with its object viewed against its express text and with due credit given to the constitutional roles of the legislature and the judiciary.

4. CONCLUDING THOUGHTS

This article defends the position that a mandatory punishment has always to apply to the offender at hand in spite of the existence of a prior erroneous ruling stating the punishment to be discretionary. Space has permitted only the more pressing issues and arguments to be addressed, with the result that not all of the opposition is exhaustively covered. Still, before ending I ought to address possibly the most instinctively unsatisfying aspect about the matter. The minority in *Ramdeen* identified, which I fully acknowledge, the clear detriment suffered by an offender who has placed faith in what turns out to be an apex court's misstep. As mentioned, he or she may have been persuaded into taking certain procedural actions in litigation which would not have seemed so attractive with the benefit of hindsight. There will surely be a very great disappointment on the part of the offender when that misstep is corrected for the first time in his or her case. Pretending that this is otherwise would be unrealistic and inhuman. But is it likely to be a frequent occurrence in Singapore? Hopefully not, and certainly there appears no discernible trend as justifies the fashioning of an overreaching, non-statutory exception to allow the court a roaming license to say that mandatory sentences aren't always, well, mandatory.

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founding thus 'prescribed' the punishment for contempt. Aside from being patent judicial legislation, it is hard to contemplate how any such general prescription in the form of a fixed sentence or rigid maxima or minima could have been validly laid down by a court to be applied to the populace at large for all present and future infringements, when in every case the primary role of a sentencing court is to undertake an individualized evaluation accounting for the offender's circumstances. A preferable view, therefore, is not that the common law decisions prescribed the punishment for contempt of court in Singapore, but that the then-existing legislation, in not stipulating any limits to the fines or imprisonment terms that could be imposed, implicitly prescribed an unlimited range of monetary or custodial sentences which could validly be visited on offenders and which was subject only to a court's power to moderate the punishment in its reasonable and proper discretion.

111 *Ong Ah Chuan* (n 60) 669–70. See also *Attorney-General of The Gambia* v. *Jobe* [1984] 1 AC 689 (PC) 700.

Instead it is suggested, prophylactically, that in each case where the mandatory nature of a sentence is in dispositive issue it may be advisable for the dispute to be raised to a higher court for resolution as a question of law of public interest. This could serve as a prompt check on error and greatly limit future instances of reliance on mistaken rulings. For the exceptional cases where an injustice would still obtain, I have earlier endeavoured to show that a clinical resolution of the issue of mandatory sentences is, unlike some other questions, generally susceptible only to considerations of a firmly legal and constitutional character, rather than to any untethered policy analysis.[112] In my view, a deep reflection on the constitutional order on which our laws and systems are founded should impel the conclusion that the solution for this remaining group of cases resides in an exercise of the clemency power. This is no discreditable thing. Any true injustice relating to the mandatoriness of a sentence which was caused by reliance on an earlier faulty judicial decision would seem to fall into that narrow but indubitably extant category of cases where, in the interests of the public welfare, a punishment mandated by the law should be prevented from taking its course,[113] and ought to compel the executive to consider extremely seriously the issuance of some form of reprieve to that particular offender. Borrowing the words of Sopinka J, it is where the courts are unable to provide an appropriate remedy, in cases the executive sees as unjust, that the executive is permitted to dispense mercy.[114] This in my estimation would be the path most faithful to the separation of powers principle but which at the same time also sufficiently assuages the concern of the public to see that just and equitable results are the overall outcome of our brand of administration of criminal justice.

[112] Cf. Percy v. *Hall* [1997] QB 924 (CA) 951–52.

[113] *Yong Vui Kong* v. *Attorney-General* [2011] 2 SLR 1189 (CA) [74].

[114] *Sarson* v. *R* [1996] 2 SCR 223, 248. See also *Baker* v. *The Queen* [1975] AC 774 (PC) 783–84.