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Does judicial caning in Singapore amount to torture?

Malcolm Wu

Major controversy arises each time the first-world state of Singapore decides to sentence a Western national to caning. In 1994, Singapore sentenced an 18-year-old American, Michael Fay, to six strokes for the vandalism of cars and the theft of road signs. This prompted public outcry, fierce calls for legislative change and even the personal petition from then American president at the time, Bill Clinton. When Singapore retained their decision, albeit reducing Fay's sentence from six strokes to four, it led to a diplomatic breakdown between the two nations.¹ Nonetheless, Singapore has not relented its practice of judicial caning. The issue resurfaced in January 2019, when a 29-year old British citizen, Ye Ming Yuen was sentenced to 24 strokes of caning along with 20-years imprisonment in Singapore for seven drug trafficking offences in 2016.² Unsurprisingly, this has caused a diplomatic row between the two nations, with the United Kingdom coming out strongly against the use of judicial caning.³ Similarly, NGOs have come out condemning judicial caning, claiming it to amount to torture under the UN Convention Against Torture (hereinafter referred to as UNCAT).⁴

This article seeks to argue that contrary to the Singapore Court of Appeal (herein SGCA)⁵ in *Yong Vui Kong v Public Prosecutor* [2015],⁶ judicial caning should still amount to torture under the UNCAT and that the peremptory norm of torture should be binding on Singapore's domestic legislation. To that effect, Part II reveals the nature and severity of judicial caning in Singapore through tracing its background, procedure and effects. Part III critically examines the Singaporean Court of Appeal's reliance on the ECtHR's jurisprudence in its assessment of torture and reveals the problems with such an approach. In response to this, Part IV reveals that it is the CAT's approach to torture that should be applied to judicial caning, yet this nonetheless requires an enforcement mechanism for it to be effective. Part V

¹ Firouzeh Bahrapour, 'The Caning of Michael Fay: Can Singapore's Punishment Withstand the Scrutiny of International Law?' (1995) 10(3) American University International Law Review 1075-1108.

² Stephen Wright, 'British ex-public schoolboy, 29, is at the centre of diplomatic row after Singapore sentences him to 'barbaric' 24 strokes of the cane on his bare buttocks over drugs offences' *The Daily Mail* (London, 11 January 2019), <www.dailymail.co.uk/news/article-6582971/British-ex-public-schoolboy-sentenced-24-strokes-cane-drugs-offences-Singapore.html> accessed 03 February 2019.

³ *ibid.*

⁴ *ibid.*

⁵ Located in the upper division of the Singapore Supreme Court, the SGCA is the nation's highest court.

⁶ [2015] SGCA 11, [2015] 2 Singapore Law Review 1129.

thus discusses the Singaporean Court of Appeal's rejection of peremptory norms while Part VI proposes the extension of the scope of the peremptory norms unto domestic legislation to nullify the legitimacy of caning.

1. Background, procedure and consequences of judicial caning in Singapore

1.1 Background

The irony lies in the fact that Singapore's practice of judicial caning was brought about by the very claimants who are petitioning to spare the rod. As a Commonwealth country, Singapore's practice of judicial caning is a remnant of British colonial history. During its colonial rule in the 19th century, caning or whipping was still practiced by the British as a form of corporal punishment. As much of English Criminal Law was absorbed by British colonies, the Indian Penal Code (1860) contained 'whipping offences' closely akin to those of England and Wales at the time.⁷ Through the enactment of the Straits Settlement Penal Code 1871, Singapore's penal code practically took after the Indian Penal Code and inherited the practice of judicial caning. However, while the United Kingdom formally abolished whipping under section 2 of the Criminal Justice Act 1948 and prison flogging under section 65 of the Criminal Justice Act 1967, Singapore expanded the scope of judicial caning to a wider range of 35 different offences.⁸ While judicial caning under British rule was reserved for offences solely concerning personal injury such as murder or rape, judicial caning is now even mandatory in Singapore for certain offences such as drug trafficking, illegal moneylending and the overstaying of one's visa by more than 90 days (illegal immigration).⁹ Indeed, the available statistics reveal that Singapore, alongside Malaysia, is one of the most active countries in applying judicial caning in terms of frequency and number of cases.¹⁰

1.2 Legal basis

Judicial caning has been codified in statute, thus attaining its legitimacy through an Act of Parliament. Sections 325-332 of the Criminal Procedure Code of Singapore stipulates its procedures and exemptions. Caning procedure requires the use of a rattan (wooden) cane of not more than 1.27 centimetres in diameter;¹¹ a specified sentencing limit of 24 strokes¹² of which they are to be carried out all in one sitting and not in instalments;¹³ and that caning can only be inflicted if a medical officer is present to certify that the offender is in a fit state

⁷ Colin Farrell, 'Judicial Caning in Singapore, Malaysia and Brunei' (*World Corporal Punishment Research*, 2019) <<https://www.corpun.com/singfeat.htm#history>> accessed 03 February 2019.

⁸ *ibid.*

⁹ For a full list of offences punishable by caning <<https://www.corpun.com/sgjur2.htm>>.

¹⁰ Farrell (n 7).

¹¹ Criminal Procedure Code s 329(3).

¹² *ibid* s 328(6).

¹³ *ibid* s 330.

of health to undergo the punishment.¹⁴ The exemptions stipulate that women; men above the age of 50; and men sentenced to death whose sentences have not been commuted are forbidden from being caned.¹⁵

1.3 Procedure

However, when an offender is sentenced to the cane, the offender is not provided notice of when he will be subjected to his punishment, and he is only notified on the day of execution itself. While most canings are executed within the first third of the prison term, such a procedure, however, leaves the offender in a constant state of fear and mental stress, not knowing which day will be the one when his traumatic punishment will be executed.

After passing his fitness examination and administrative procedures, the offender is then stripped naked and bound to a trestle. He is bent over a pad between the front legs of the trestle, his feet secured to the front base while his hands to the back legs¹⁶ as to ensure the proper positioning of his hip to reveal the buttocks – the region as to where the caning is to be inflicted.¹⁷ To protect the kidney and lower spine area from strokes that land off-target, the offender is provided protective padding across these regions. Upon the countdown of the warder, the caning officer, trained in dealing the greatest amount of force possible, delivers the strokes. Each stroke is followed by an intermittent pause before the next to ensure that the pain of each stroke is fully-appreciated. If an offender is sentenced to a certain number of strokes, caning officers will be rotated to maintain the maximum amount of force issued in each stroke.¹⁸

1.4 Effects

The pain and suffering experienced by the offenders appear to vary according to the number of strokes they received. Michael Fay, who received four strokes, described his experience as ‘a deep burning sensation throughout my body, real pain. My flesh was ripped open.’¹⁹ On the other hand, an offender who received 15 strokes described it as ‘unbearable... My body shook with pain.’²⁰ According to a report produced by the Singapore Bar Association, ‘when the rattan hits the bar buttocks, the skin disintegrates, leaving a white line and then a flow of blood. Usually, the buttocks will be covered with blood after three strokes.’²¹ Indeed, the wounds inflicted by the cane often renders the offender unable to walk or sit properly for the first few weeks and leaves permanent scarring upon healing. In addition, the build-up of fear, humiliation and suffering may leave psychological impacts on the offenders. Perhaps

¹⁴ Criminal Procedure Code s 331.

¹⁵ *ibid* s 325.

¹⁶ Farrell (n 7).

¹⁷ *ibid*.

¹⁸ *ibid*.

¹⁹ *ibid*.

²⁰ *ibid*.

²¹ *ibid*

the most apt description comes from, the Singapore Director of Prisoners himself in a 1974 press conference where he described the reactions of the offenders post-caning:

[T]heir struggles lessen as they become weaker. At the end of the caning those who receive more than three lashes are usually in a *state of shock*. *Many will collapse*, but the medical officer and his team of assistants are on hand to revive them and to apply antiseptic to the caning wounds.²²

These illustrations of mental suffering, humiliation, and unbearable pain have formed the basis of claims from the Human Rights Watch and Amnesty International that such treatment amounts to torture under the UNCAT. It is on the basis of this claim that this article now turns to examine.

2. Singapore's position on judicial caning as torture

As per *Yong Vui Kong*, it was held that (i) caning does not amount to torture under international standards and (ii) even if it did, such standards do not apply to domestic law in an event of inconsistency between the two. The former position will be examined here while the latter position will be examined in part V.

2.1 Caning does not amount to torture under international standards

The Court of Appeal stated its position on the matter by referring to the definition of torture under the UNCAT. Ratified by the UN General Assembly on the 10th December 1984 and entered into force on the 26th June 1987, the Convention is arguably the most important international instrument prohibiting torture.

Adapting the UNCAT's definition of torture stipulated in article 1(1) to judicial caning, the relevant elements can be fleshed out as such: any act by which *severe* pain or suffering, whether physical or mental; *intentionally* inflicted on a person; for the *purpose of punishing* him for an act he has committed; when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a *public official* or other person acting in an official capacity; and that does not include pain or suffering arising only from, inherent in or incidental to *lawful sanctions*.²³

²² P M Raman, 'Branding the Bad Hats for Life' *Straits Times* (Singapore, 13 September 1974), <www.corpun.com/sgju7409.htm> accessed 03 February 2019.

²³ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series (1465) 85, <www.refworld.org/docid/3ae6b3a94.html> accessed 03 February 2010; 'For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or

In sum, judicial caning is an intentional act that inflicts physical and mental pain or suffering, for the purpose of punishment, conducted by a state-trained caning officer, legally confirmed by statute. The required elements of ‘intention’, ‘purpose’ and ‘public official’ are thus undisputable. While the SGCA maintains that judicial caning is a lawful sanction under domestic law, it ultimately recognised that the determination of whether an act is a lawful sanction for the purpose of the UNCAT resides with international jurisprudence and that judicial caning is an unlawful sanction under international law.²⁴ The Court shifted away from this argument and based its reasoning on the element of ‘severity’. For the purpose of this article’s analysis, this point of contention is whether the severity of suffering inflicted through judicial caning amounts to torture.

2.2 Severity of pain and suffering

In the Singaporean common law, there is a distinction between acts of torture, and acts of cruel, inhuman and degrading treatment (hereinafter CIDT). While Singapore’s constitution does not prohibit torture and CIDT,²⁵ ministers have publicly stated that the government condemns and abstains from torture.²⁶ Though Singapore refuses to be a signatory to the UNCAT, this condemnation of torture was stated in a ministerial debate in reference to the UNCAT and the Court has taken this to be Singapore’s undertaking of its prohibition of torture.²⁷ However, by that strain of logic, as no similar condemnation against CIDT were made by the ministers, it can be observed that Singapore is not prohibited from committing CIDT. Hence, the Court held that judicial caning must amount to torture and not that of CIDT for it to be prohibited under domestic law.²⁸

In determining if caning falls within the category of torture, the Court adopted the ECtHR’s jurisprudence and standard of assessment. The test adopted by the ECtHR stems from the well-known case of *Ireland v United Kingdom*,²⁹ where the five deep-interrogation techniques committed by British authorities on suspected Northern Ireland terrorists were assessed for torture. In the ECtHR’s assessment, it was held that acts of torture are required to reach a minimum threshold of severity greater than that of CIDT, which would reflect the *special stigma* of the ‘particular intensity and cruelty implied by the word torture’.³⁰ For an act to reach the threshold worthy of this special stigma, there are two broad factors which must be

other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions’.

²⁴ *Yong Vui Kong* (n 1) [80-82].

²⁵ *ibid* [72].

²⁶ *ibid* [27]; Singapore Parliamentary Debates, Official Report (29 July 1987) vol 49, cols 491–1492 (S Jayakumar, Minister for Home Affairs); Singapore Parliamentary Debates, Official Report (21 December 1966) vol 25, col 1053 (E W Barker, Minister for Law and National Development).

²⁷ Po Jen Yap, ‘Constitutional Fig Leaves in Asia’ (2016) 25 Pac. Rim L. & Pol’y J 430-431.

²⁸ *Yong Vui Kong* (n 1) [83].

²⁹ App no 5310/71 (ECtHR, 18 January 1978).

³⁰ *ibid* [167].

considered concurrently and as a whole: (a) the specific circumstances of each case and (b) the severity of pain and suffering inflicted.³¹

2.3 An assessment of specific circumstances of judicial caning

The Singapore Court of Appeal juxtaposed the procedures of caning alongside the specific circumstances of a string of international torture cases.³² Circumstances where torture was found in these cases included acts of indiscriminate beatings and injuries to the organs;³³ repeated electrocution;³⁴ suspension of the victim's body through his arms which have been tied behind his back (Palestinian hanging),³⁵ stripping and sodomising with a foreign object;³⁶ exposure to cold temperatures and food deprivation in confinement along with waterboarding;³⁷ and a lack of medical attention after the provision of such treatment.³⁸ The Court of Appeal then distinguished these circumstances from judicial caning for the former consisted of extra-legal, acts of 'severe and indiscriminate brutality' for the purpose of interrogation while the latter is concerned with 'the execution of a punishment prescribed by law and implemented in accordance with legal requirements'.³⁹

2.4 The severity of judicial caning

With regards to the severity of pain inflicted in judicial caning, the Court of Appeal also distinguished it from the greater severity found in the torture cases aforementioned. However, apart from this, the Court merely placed the severity of caning as greater than that of juvenile birching found in *Tyrer v The United Kingdom*⁴⁰ and lesser than that of flogging with an instrument known as a 'cat o' nine tails' found in *Caesar v Trinidad and Tobago*.⁴¹ The Court failed to clarify whether the severity of pain inflicted in caning amounts to cruel, inhuman and degrading treatment if it did not amount to torture. Rather, the Court merely stated that while caning inflicts a 'considerable level of pain and suffering', it does not amount to torture for it does not share the same severity and indiscriminate brutality found in the torture cases referred to.⁴²

While the purposes of interrogation and punishment are both prohibited under the UNCAT and should thus not serve as a distinction, this article does concede that the specific

³¹ *ibid* [162].

³² *Yong Vui Kong* (n 1) [84-88].

³³ *Prosecutor v Miroslav Kvočka et al* (Case no IT-98-30/1, Judgment of 2 November 2001).

³⁴ *Korobov v Ukraine* App no 39598/03 (ECtHR, 21 July 2011).

³⁵ *Aksoy v Turkey* App no 21987/93, (ECtHR, 18 December 1996).

³⁶ *El-Masri v The Former Yugoslav Republic of Macedonia* App no 39630/09 (ECtHR, 13 December 2012).

³⁷ *Husayn (Abu Zubaydah) v Poland* App no 7511/13 (ECtHR, 24 July 2014).

³⁸ *ibid*.

³⁹ *Yong Vui Kong* (n 1) [85].

⁴⁰ *Tyrer v The United Kingdom* App no 5856/72 (ECtHR, 25 April 1978).

⁴¹ (Series C, no 123, Judgment of 11 March 2005) Inter-American Court of Human Rights, *Yong Vui Kong*, (n 1) [90].

⁴² *Yong Vui Kong* (n 1) [91].

procedures and exemptions of judicial caning do distinguish it from acts of indiscriminate brutality. As set out in sections 325-332 of Singapore's Criminal Procedure Code, caning is reserved only for specific crimes and for medically fit males between the age of 18 to 50. The area of infliction is away from the victim's organs with padding provided to the nearest organs for protection, and the buttocks arguably provide the most protection from bone damage than any other part of the body that is away from the organs. A victim must also receive all his strokes in one sitting, which could be interpreted as the government's concession in limiting the duration and extension of one's suffering. In addition, the provision of medical attention is legally required during the execution and post-punishment. These are indeed evidence of a specific punishment, served to a specific victim category, within a specific duration, for a specific set of crimes. One could hardly classify this as indiscriminate when contrasting it to the torture cases aforementioned. This article also concedes that the severity of pain and suffering inflicted in caning does not amount to that of the acts committed in the torture cases above. Indeed, the article goes so far as to concede that under ECtHR's standards, caning may very well fall below the threshold of torture due to the reasons provided above by the Court of Appeal. The problem with the Court of Appeal's judgment, however, lies in the fact that they have used the ECtHR's jurisprudence in distinguishing acts of torture from acts of CIDT for an improper and unintended purpose.

Improper and unintended purpose

While the ECtHR distinguishes acts of torture from acts of CIDT, both acts are prohibited under Article 3 of the European Convention of Human Rights. It reads: 'No one shall be subjected to torture or inhuman or degrading treatment or punishment.'⁴³ Similarly, the UNCAT as well as all other regional conventions against torture prohibit both acts of torture and acts of CIDT. Thus, when the test of 'severe and indiscriminate brutality' is assessed by the ECtHR to distinguish acts of torture from that of CIDT, it is not for the purpose of granting legitimacy or condoning acts of CIDT that happen to fall below the threshold of torture, but to attach the extra layer of condemnation, the 'special stigma', to the state that has allowed such acts to occur within its territory. Hence, the threshold of 'severe and indiscriminate brutality' found in the international torture cases referred to by the Singaporean Court of Appeal is not fit for determining if caning should be prohibited. Indeed, the irony is revealed when the brutality of an act must be 'indiscriminate' in addition to being severe for it to be deemed worthy of prohibiting. If that were indeed the test for prohibition, states could easily circumvent such a test by taking any of those acts found in those torture cases aforementioned and qualifying them with specific procedures much like the ones found in judicial caning.

⁴³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols no 11, 14*, 4 November 1950, ETS 5 <<https://www.refworld.org/docid/3ae6b3b04.html>> accessed 03 February 2019.

Moreover, it is evident that the threshold of ‘severe and indiscriminate brutality’ is set to be concerningly high and not fit for the purpose of determining if a state should prohibit a certain treatment or punishment due to the pain and suffering it inflicts on its citizens. This begs the question, what test should the Singaporean Court of Appeal adopt for the purposes of determining if caning should be prohibited? Supporters of the cane may point out that the threshold may be too low if the Court of Appeal does not stick to the ECtHR’s threshold of torture. It has been held in *Bouyid v Belgium* that a slap by a police officer is sufficient to warrant degrading treatment that is prohibited under Article 3 of the European Convention of Human Rights.⁴⁴ This article suggests a compromise, that the Singaporean Court of Appeal should implement the assessment of caning under the alternative purpose-based approach of torture, in its legislature and in common law, as interpreted by the drafters of the UNCAT and the Committee against Torture (CAT).⁴⁵

3. Adoption of the CAT’s interpretation of torture

3.1 *Purpose-based approach v distinct severity approach*

The difference in interpretation between the ECtHR and the CAT hinges upon what the defining criterion of torture is – the purpose, or the distinct severity of the treatment. Under the purpose-based interpretation, if inhuman treatment was carried out pursuant to one of the purposes listed in Article 1(1), such as punishment or interrogation, the inhuman treatment would amount to torture. The severity of pain and suffering of inhuman treatment would suffice to constitute torture. Under the distinct-severity interpretation, the severity of pain and suffering of torture is required to be distinct from and higher than that of inhuman treatment to reflect its special stigma. Manfred Novak, the UN Special Rapporteur on Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, states that the drafters of the UNCAT and the CAT take the former position, while the ECtHR takes the latter:

A thorough analysis of the travaux préparatoires of articles 1 and 16 of the Convention as well as a systematic interpretation of both provisions in light of the practice of the Committee against Torture leads one to conclude that the decisive criteria for distinguishing torture from cruel, inhuman and degrading treatment may best be understood to be the purpose of the conduct and the powerlessness of the victim, rather than the intensity of the pain or suffering inflicted.⁴⁶

The reason for the different positions adopted by the CAT and the ECtHR can be determined by tracing the drafting of Article 1(1) of the UNCAT in light of the conflicting views on

⁴⁴ App no 23380/09 (ECtHR, 28 September 2015).

⁴⁵ The body of independent experts tasked with monitoring the implementation of the UNCAT.

⁴⁶ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, UN doc E/CN 4/2006/6 [39].

torture held between the European Commission and European Court of Human Rights building up to the inception of the UNCAT. In the *Greek Case*, the European Commission held the position that the severity of pain and suffering distinguishing inhuman treatment from other treatment, included that of torture, and that in the further distinction of inhuman treatment from torture, the defining criterion is the *purpose* of such conduct.⁴⁷ The Commission's reasoning argued Novak, formed the source of inspiration of the definition of torture under the UNCAT.⁴⁸ Hence, when the Commission applied this definition to the five deep-interrogation techniques committed by British authorities on suspected Northern Ireland terrorists in *Ireland v United Kingdom*,⁴⁹ it similarly found that such conduct amounted to torture for it involved inhuman treatment for the purpose of interrogation.

On the other hand, as mentioned above, the ECtHR in *Ireland*, rejected this approach and required a higher threshold of severity of pain and suffering than that of inhuman treatment. It was held that such a distinction would attach a special stigma to torture, signalling it to be the deliberate inhuman treatment causing very serious and cruel suffering.⁵⁰ This would do well to show that acts of torture are one level graver than acts of inhuman treatment. Their justification for such a distinction was based upon the last sentence of Article 1 of the Declaration of Human Rights 1975 (UNDHR), which states that torture amounts to an 'aggravated' form of cruel, inhuman and degrading treatment.⁵¹ Indeed, the Court of Appeal used this justification in their distinction as well.⁵²

These conflicting views were reflected during the drafting of Article 1(1), when the United Kingdom and the United States of America sought to bring the definition of torture closer in line with the decision of the ECtHR in *Ireland v United Kingdom*.⁵³ They tried to do so by proposing to qualify the severity of torture with the addition of '*extremely* severe pain and suffering'.⁵⁴ Switzerland on the other hand, advocated for the position that no distinction should be made between the severity of pain and suffering found in inhuman treatment and that of torture.⁵⁵ The qualification of 'extreme' in front of severe pain and suffering was however omitted in the final draft. Furthermore, the sentence stipulating torture as an 'aggravated' form of CIDT found in the UNDHR, was deliberately deleted in the drafting of

⁴⁷ European Commission of Human Rights, *The Greek Case: Denmark v Greece*, App no 3321/67; *Norway v. Greece* App no 3322/67; *Sweden v. Greece* App no 3323/67; *Netherlands v Greece* App no 3344/67; Strasbourg: The Commission, 1970 Print.

⁴⁸ M Novak, UN Convention against Torture, A commentary, Oxford Commentaries on International Law (2008) 20-24.

⁴⁹ Report of the Commission of 25 January 1976, App. No. 23-1, European Commission of Human Rights.

⁵⁰ *Ireland* (n 28).

⁵¹ Novak (n 48).

⁵² *Yong Vui Kong* (n 1) [83].

⁵³ Novak (n 48) 45.

⁵⁴ *ibid.*

⁵⁵ *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Summary Prepared by the Secretary-General in Accordance with Commission Resolution 18*, U N ESCOR Commission on Human Rights., UN doc E/CN 4/1314/add1 (1979).

the UNCAT. Thus, these omissions may be interpreted to imply that the UNCAT's defining criterion of torture follows that of the European Commission of Human Rights in *the Greek Case* and *Ireland v United Kingdom*; that the inhuman treatment carried out pursuant to one of the purposes listed in Article 1(1), such as state punishment or interrogation, would amount to torture.⁵⁶

3.2 Judicial caning under a purpose-based approach

Under such an interpretation then, the severity of pain and suffering of judicial caning need only amount to that of cruel, inhuman and degrading treatment for it to amount to torture. As mentioned earlier, it is undisputed that the purpose of judicial caning is that of state punishment, which falls within one of the listed categories of Article 1(1). Noting Novak's further required element of the 'powerlessness of the victim under state control', this is evident when the offender is caned under detention by state-trained caning officers, through the process of stripping him naked, bending him over, and subduing all of his four limbs to a trestle. Intuitively, such a procedure could be said to be a 'serious violation of a person's human right to integrity and dignity.'

The next step is to determine if the severity of pain and suffering inflicted in judicial caning amounts to that of CIDT. Recalling the effects of judicial caning in part one, while caning is inflicted on the buttocks and away from any organs, the pain often collapses if not leaves offenders in a state of shock. While the effects of the rattan cane have not been assessed by international courts, in *Osbourne v Jamaica*,⁵⁷ it was held that the sentencing and inflicting of ten strokes of a tamarind birch (bundle of leafless twigs) to a detainee amounted to severe pain and suffering constituting that of CIDT. Similarly, in *Caesar v Trinidad and Tobago*, the victim was sentenced to 15 lashes of flogging with a cat o' nine tails (multi-tailed whip) and the Inter-American Court of Human Rights held this to be torture.⁵⁸ While judicial caning in Singapore does not involve the use of the cat o' nine tails in *Caesar*, an arguably more painful tool than the rattan, the effects and severity of the rattan is objectively harsher than that of the tamarind birch used in *Osbourne*. It is, therefore, fair to argue that if the severity of the pain and suffering of judicial caning were to be assessed under the UNCAT, it would be somewhere in between that of birching and flogging. As the effects of caning include humiliation, permanent scarring, an immense state of shock and unbearable pain, the standards of CIDT are met. As the severity of caning amounts to that of CIDT and it is carried out with the purpose of punishment, it would amount to torture under the approach of Novak and the drafters of the UNCAT.

⁵⁶ Novak (n 48).

⁵⁷ Committee on Civil and Political Rights, *Osbourne v Jamaica*, Communication 759/1997, 15 March 2000.

⁵⁸ *Caesar* (n 41) [73].

4. Justifications for a purpose-based approach:

4.1 *Arbitrary distinction between torture and inhuman treatment for the purpose of prohibition*

While a distinction between degrading and inhuman treatment may be easier to draw, it is notoriously hard to distinguish the severity between inhuman treatment and torture.⁵⁹ Perhaps, this explains why the CAT makes no distinction between the severity of pain found in inhuman treatment and in torture. However, there is also something oxymoronic about determining whether a form of treatment is *more severe* than inhuman treatment. As Evans argues, it is a purpose-based approach would 'eliminate the rarely remarked upon linguistic nonsense of having to determine what is more 'severe' in terms of suffering than inhuman treatment.'⁶⁰ The severity of pain and suffering between torture and CIDT can be observed to be largely an arbitrary distinction for the purpose of attaching special stigma to an already prohibited act.

It is even more ironic then, when the Singaporean Court of Appeal uses such a distinction, not for the purpose of adding extra condemnation to an act, but to legitimise it. As an advocator of a purpose-based approach to torture, Evans states that such an approach would also eliminate the argument of 'It's not so bad: it's not torture, it's only inhuman...'⁶¹ The argument put forth by the Singaporean Court of Appeal is precisely such an argument that Evans seeks to eliminate. If the Singapore Court of Appeal seeks to determine whether the severity of pain and suffering of judicial caning would warrant its prohibition, it should not need to go beyond determining if such pain and suffering is inhuman.

4.2 *ECtHR's shift towards a purpose-based approach*

While the ECtHR still maintains its approach as per *Ireland*, recent case law seems to reveal that the European court is shifting its position significantly towards that of the CAT's. In *Selmouni v France*,⁶² the ECtHR held that certain acts which have previously held to be 'inhuman and degrading' instead of 'torture' could be construed differently according to modern day standards. As the protection of human rights and fundamental liberties are being subjected to increasing standards, the European Court reasoned that it would need to assess such breaches in the future with greater firmness.⁶³ This shift towards a purpose-based approach can further be observed in *Salman v Turkey*⁶⁴ and *Ilhan v Turkey*⁶⁵ where the ECtHR had expressly endorsed and stressed the significance of the purpose of an act in distinguishing torture from CIDT. Hence, while judicial caning may not constitute torture

⁵⁹ Malcolm D Evans, 'Getting to Grips with Torture', (2002) 51 (2) *The International and Comparative Law Quarterly*, 370.

⁶⁰ *ibid* 383.

⁶¹ *ibid*.

⁶² App no 25803/94 (ECtHR 28 July 1999).

⁶³ *ibid*.

⁶⁴ App no 21986/93 (ECtHR 27 June 2000) [114-116].

⁶⁵ App no 22277/93 (ECtHR 27 June 2000) [85-88].

under the Singaporean Court of Appeal's assessment of ECtHR standards, there may very well be a possibility that the ECtHR itself may find judicial caning to constitute torture in accordance with a purpose-based approach and the increasing standards of human rights protection.

4.3 Logical coherence

In spite of these justifications, one may still claim that the Singapore Court of Appeal has the right to choose which definition and interpretation of torture judicial caning should be assessed under. However, if the Court of Appeal is willing to infer an implied prohibition of torture through the minister's speech in pursuance to the UNCAT, should it not be the interpretation of torture under the UNCAT that the Court should refer to? For these reasons, this article takes the position that a purpose-based approach to torture should be adopted by the Singapore Court of Appeal, especially when it pertains to the legitimacy of judicial caning. Nonetheless, even if judicial caning amounts to torture under such an approach, the Singaporean Court of Appeal maintains that it is not obliged to follow international law.

5. Rejection of the peremptory norm of torture on domestic legislation

It is pertinent to note that Singapore is not a signatory to the UNCAT. As such, from a strictly voluntarist viewpoint of international law, Singapore is not bound to follow its definitions and prohibitions of torture. However, the fundamental concept of peremptory norms or *jus cogens* in international law could nonetheless bring Singapore under the obligation of to abstain from torture. The concept of peremptory norms was introduced under Article 53 of the Vienna Convention on the Law of Treaties 1969 (VCLT)⁶⁶ to govern international treaty relationships between states and their freedom to contract into certain obligations. Indeed, Article 53 of the VCLT states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁶⁷

It argues that there are a set of international rules or norms that are of a superior hierarchal order in which they are of a non-derogable nature. Unlike convention rules which requires consent of the parties to be bound by their obligations and customary international law

⁶⁶ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series vol 1155, 331 <www.refworld.org/docid/3ae6b3a10.html> accessed 3 February 2019.

⁶⁷ *ibid.*

which allows states to avoid norms if they have ‘persistently objected’ to their application since inception, a peremptory norm is non-derogable even if the parties have not expressly bound themselves or objected to the peremptory norm in question. Hence, if two states enter into a treaty with obligations that are in violation of a peremptory norm, these obligations will be void.

Peremptory norms, however, are not exclusively catalogued, but they emerge as a reflection of social and political attitudes of the time. Amongst the established peremptory norms of genocide, enslavement and others, there exists a peremptory norm prohibiting torture and cruel, inhuman and degrading treatment.⁶⁸ The issue with peremptory norms, however, lies with its scope. As a principle developed to nullify any incompatible treaty obligations contracted into by two or more states, its scope *prima facie* does not extend to nullify any incompatible domestic legislation. In other words, peremptory norms were formulated to deal with inter-state obligations, not intra-state ones. However, as Singapore is not a signatory to the UNCAT, and acts of torture and CIDT are not prohibited in her constitution, the only mode of recourse is if the scope of the peremptory norm of torture extends to its domestic legislation to nullify the legitimacy of judicial caning.

In *Prosecutor v Anto Furundzija*,⁶⁹ the International Criminal Tribunal for the former Yugoslavia (ICTY) sought to do just that. The Court stipulated, albeit in obiter, that should a state’s domestic affairs violate the peremptory norm of torture, such a violation would produce direct legal effects on its domestic legislation which would ‘internationally delegitimize any legislative, administrative or judicial act authorising torture’.⁷⁰ Some argue that this statement is an over-extension of the purpose of peremptory norms which was not envisaged in the drafting of the VCLT. However, while peremptory norms were originally formulated to govern treaty relations, the ICTY reasoned that in order to give effect to the overall purpose of prohibiting torture, it is insufficient and even contradictory to only limit the enforcement of the norm to treaty obligations while state-enforced torture remains unaffected. Nonetheless, the extension of *jus cogens* to the remit of domestic legislation is still relatively new and its legitimacy is often debated. Particularly as enforcement mechanisms do not operate well (if at all) in international law, the acceptance of *jus cogens* on domestic legislation is determined by states themselves.

In *Yong Vui Kong*, the SGCA held that the peremptory status of a norm neither binds nor take precedence over its domestic legislation should there be an inconsistency between them.⁷¹ The Court reasoned that owing to its dualistic framework,⁷² international law and

⁶⁸ Commentary to art 26 (5) Report of the ILC, GAOR, Supp no 10(A/56/10) 208.

⁶⁹ *Prosecutor v. Anto Furundzija (Trial Judgement)*, IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998.

⁷⁰ *ibid* [155].

⁷¹ *Yong Vui Kong* (n 1) [53].

⁷² *Public Prosecutor v Tan Cheng Yew and another appeal* [2013] 1 SLR 1095, [56].

peremptory norms would not form part of domestic law to give rise to rights and obligations until they are expressly incorporated by domestic legislation. This can be observed when the Court stated that the elevation of torture to a non-derogable status within the international legal system does not automatically cause a similar status-elevation within its domestic legal system.⁷³ With regards to the extension of the scope of a peremptory norm to nullify domestic legislation, the Court relied on similar arguments mentioned above, stating that the concept of peremptory norms was ‘meant to govern the *international* relations between states, and there was no suggestion that it would also have some special or extraordinary effect at the intra-state level.’⁷⁴ As such, when a domestic court has reached an ‘irreconcilable conflict’ between the international legal system and its own, it is obliged to apply domestic legislation.⁷⁵ This begs another question: should the scope of peremptory norms extend to the realm of domestic legislation?

6. Extension of the scope of a peremptory norm to domestic legislation

The poignancy of such a scenario may be seen if peremptory norms worked to nullify a treaty enforcing torture created by two states while remaining silent when these two states each draft national legislation condoning and enforcing torture. As pointed out by academic Erika de Wet in ‘The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary law’,⁷⁶ she reveals that the main violations are not found within treaties which facilitate the use of torture. Rather, these violations are often the result of the acts of state organs and state officials.⁷⁷ If the purpose of a peremptory norm is to enshrine the protection of a value so intrinsically held by the international community, a value that resides in any person irrespective of which country (s)he was born into, then it does not go far enough if the remits of such protection is only limited to inter-state treaty obligations while state-ordained acts, which serves as the bulk of torture violations, remain unaffected.

Yet, there have been some prominent advocates for the extension of peremptory norms to domestic legislation. Judge Antonio Augusto Cancado Trindade, former president of the Inter-American Court of Human Rights and a judge of the International Court of Justice, takes such a position.⁷⁸ He claims that the recent developments of *jus cogens*, such as that

⁷³ *Yong Vui Kong* (n 1) [35].

⁷⁴ *ibid* [36].

⁷⁵ *ibid* [35].

⁷⁶ Erika De Wet, ‘The Prohibition of Torture as an International Norm of *jus cogens* and its Implications for National and Customary law’ (2004) 15(1) *EJIL* 97-121 <<http://www.ejil.org/pdfs/15/1/349.pdf>> accessed 03 February 2019.

⁷⁷ *ibid* 99.

⁷⁸ Antonio Augusto Cancado Trindade ‘*Jus Cogens: The Determination and the Gradual Expansion of its Material Content in Contemporary International Case-Law*’ <www.oas.org/dil/esp/3%20-%20cancado.lr.cv.3-30.pdf> accessed 03 February 2019.

found in *Auto Furundzija*, should allow the international community to lay claim to any juridical act in the world that has violated a peremptory norm.⁷⁹ This, he claims, has paved the way to the creation of a whole new body of *jus gentium*, known as the International Law for humankind.⁸⁰ This new body of international law is borne not out of the ‘will of the states’ but from the human conscience in response to the aspirations of humankind for the protection of human rights, wherever they may be violated. Trinidad argues that such a development of international law is the right one, for it can finally resolve the problem of the traditional voluntarist approach to international law, where the legality of the acts of States would not be determined by its express acceptance to a treaty obligation but by the determination of fundamental human rights. This position would indeed resolve the current problem where Singapore is able to escape its obligations in prohibiting acts of torture or CIDT by claiming that it has not ratified the UNCAT.

This article agrees with Judge Trinidad’s view of the role of international law and peremptory norms. The right to freedom from torture and inhuman treatment is a fundamental one, which no civilised state ought to ignore, and which no human being should be denied. The extension of peremptory norms to domestic legislation would empower the international community to take meaningful steps against nations who violate these fundamental human rights. At the same time, the international community would then be afforded the shield of a strict voluntarist approach to international law and the argument that they did not expressly bind themselves to uphold these fundamental human rights. Although Trinidad’s position is inspiring and certainly more progressive than others, his arguments remain more normative than legally binding. Unfortunately, this leaves the Singaporean Court of Appeal to decide for itself whether domestic legislation ought to be bound to *jus cogens* norms.

Conclusion

Whilst the Singaporean Court of Appeal’s decision to infer an implied prohibition of torture in Singapore is progress, relying on the distinction between torture and inhuman treatment to justify the legitimacy of caning is a classic case of going ‘two steps forward, one step back’. What does it really say when Singaporean ministers came out vehemently against torture in debating the UNCAT, yet the Singaporean Court of Appeal condones inhuman treatment? For the purpose of prohibition, is inhuman treatment really any different from torture? If the Singaporean Court of Appeal is willing to infer a prohibition of torture yet justifies caning through the backdoor of inhuman treatment, these express ministerial proclamations against torture appear to ring a tad hollow. As demonstrated above, the Singaporean Court of

⁷⁹ *ibid* 10.

⁸⁰ *ibid* 27.

Appeal's use of the ECtHR's higher threshold of torture should be disregarded, for such a threshold was not meant to assess the prohibition of an act. If the Singaporean Court of Appeal is serious in determining whether judicial caning should be prohibited, it should adopt a purpose-based approach, where the test of infliction of *inhuman treatment* for the *purpose of punishment* is more apt. Accordingly, judicial caning would amount to torture under such a test, bringing it under the implied prohibition of torture that Singapore maintains.

Nonetheless, the SGCA, in rejecting the peremptory norm of torture, has held that domestic law and interpretation should be adhered to in an event of inconsistency between that and international law. As such, this article takes the position that peremptory norms, though initially formulated to govern inter-state obligations, should extend to states' domestic legislation. Not doing so would defeat the purpose and efficacy of a peremptory norm, especially within the realm of torture, where the bulk of violations are not inter-state but intra-state. Nonetheless, from the stance taken by the SGCA in *Yong Vui Kong*, coupled with the fact that jus cogens norms and international law lack proper enforcement mechanisms, it remains unlikely that Singapore will recognise the scope of jus cogens norms on domestic law. Just as Singapore strives towards recognition as an economically prosperous nation globally, its protection of fundamental human rights must not lag behind. While some may take pride in their nation's maintenance of harsh laws, there is much more to be said about a country which maintains the absolute protection of fundamental human rights. Confirming statements from the UN, the international community, and the NGOs, this article urges Singapore to recognise that judicial caning does indeed amount to torture, and that it gives effect to the primacy of the peremptory norm prohibiting torture.