

## CRIMINAL SENTENCING IN THE CRPD ERA: LESSONS FROM SINGAPORE

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### I. INTRODUCTION

On 27 April 2022, Singapore executed Nagaenthran K. Dharmalingam, a 33-year-old Malaysian who was convicted of trafficking 42.72 grams of heroin. His execution was carried out despite calls from United Nations (UN) human rights experts, including the Special Rapporteur on the Rights of Persons with Disabilities, for the government to commute his death sentence inter alia on the basis that Nagaenthran did not have access to procedural accommodations for his disability during his interrogation and death sentences should not be carried out on persons with serious psychosocial and intellectual disabilities.<sup>1</sup>

Nagaenthran's execution has put Singapore's criminal legal system, particularly in respect of its treatment of offenders with intellectual and psychosocial disabilities, under international scrutiny. In particular, those opposed to Nagaenthran's execution have argued that Singapore acted in breach of international human rights law by executing a man who is intellectually disabled. Several months after the execution, the UN Committee on the Rights of Persons with Disabilities (CRPD Committee) issued its concluding observations on Singapore's first periodic review under the UN Convention on the Rights of Persons with Disabilities (CRPD) and urged Singapore to "abolish the death penalty for persons with intellectual disabilities, persons with psychosocial disabilities and autistic persons, including for crimes not involving intentional killing".<sup>2</sup> According to the CRPD Committee, the prohibition against imposing the death penalty on persons with intellectual or psychosocial disability is "grounded on the disproportionate and discriminatory denial of fair trial guarantees and procedural accommodations".<sup>3</sup>

On the other hand, in the Court of Appeal had held that Nagaenthran's various psychosocial conditions were *not* relevant in respect of his mental responsibility for the offence. The court rejected the argument that Nagaenthran's borderline intelligence, severe alcohol use disorder and severe attention deficit hyperactivity disorder substantially impaired his mental responsibility; instead, the Court of Appeal held that "this was the working of a *criminal mind*, weighing the risks and

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<sup>1</sup> 'Singapore: UN Experts Urge Halt to Execution of Drug Offender with Disabilities' (OHCHR) <<https://www.ohchr.org/en/press-releases/2021/11/singapore-un-experts-urge-halt-execution-drug-offender-disabilities>> accessed 12 March 2023.

<sup>2</sup> Committee on the Rights of Persons with Disabilities, Concluding observations on the initial report of Singapore 2022 [CRPD/C/SGP/CO/1].

<sup>3</sup> Committee on the Rights of Persons with Disabilities, Comments on the draft General Comment No. 36 of the Human Rights Committee on article 6 of the International Covenant on Civil and Political Rights < <https://www.ohchr.org/Documents/HRBodies/CCPR/GCArticle6/CRPD.docx> > accessed 1 May 2023.

countervailing benefits associated with the criminal conduct in question”.<sup>4</sup> Had the court made the opposite factual finding, Nagaenthran could have availed himself of the statutory exception to the death penalty under the Misuse of Drugs Act 1973 (MDA), which requires the court to sentence a person to imprisonment for life instead of imposing the death penalty if the offender was suffering from such “abnormality of mind” as substantially impaired their mental responsibility for their acts and omissions in relation to the offence.<sup>5</sup>

Strikingly, given the court’s factual finding, Nagaenthran could still have been executed even if Singapore had implemented the CRPD Committee’s recommendation to abolish the death penalty for persons with intellectual disabilities, persons with psychosocial disabilities and autistic persons. This is because the issue ultimately boils down to whether the offender is considered to be sufficiently disabled to be exempted from the death penalty. For example, though the Supreme Court of the United States (SCOTUS) has banned the use of the death penalty on intellectually disabled offenders on the basis that it violates the Eighth Amendment of the United States (US) Constitution as a matter of *law*, whether a specific offender may be executed ultimately depends on whether the court determines them to be intellectually disabled as a matter of *fact*.<sup>6</sup>

In this regard, notwithstanding that the CRPD was not considered by nor binding on the Singapore court because of its adherence to a dualist approach towards international law,<sup>7</sup> its reasoning as to the relationship between Nagaenthran’s disabilities and his criminal culpability may arguably be consistent with the CRPD. Article 12(2) of the CRPD states that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. According to the CRPD Committee, this means that a disabled person should not be assumed to lack legal agency – and concomitantly, responsibility for exercising such agency – on the basis of their

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<sup>4</sup> *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 (*Nagaenthran (CA)*) at [38] and [41].

<sup>5</sup> Section 33B of the MDA provides that a person who is convicted of an offence punishable with death under the statute shall be sentenced to imprisonment for life if he or she was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his or her mental responsibility for his or her acts and omissions in relation to the offence.

<sup>6</sup> Ian Freckelton QC, ‘Offenders with Intellectual and Developmental Disabilities: Sentencing Challenges after the Abolition of Execution in the United States’ (2016) 23 *Psychiatry, Psychology and Law* 321; Mina Mukherjee and Alexander Westphal, ‘Shifting Diagnostic Systems for Defining Intellectual Disability in Death Penalty Cases: Hall vs. Florida’ (2015) 45 *Journal of Autism and Developmental Disorders* 2277; Paul S Appelbaum, ‘Hall v. Florida: Defining Intellectual Disability in the Shadow of the Death Penalty’ (2014) 65 *Psychiatric Services* 1186.

<sup>7</sup> *Nagaenthran a/l K Dharmalingam v Attorney-General and another matter* [2022] 2 SLR 211 at [57] (“[T]here is no basis for holding that... the Convention on the Rights of Persons with Disabilities (“CRPD”) have the force of law in Singapore absent the adoption of these principles and provisions into the domestic legislative framework. This is so because ours is a dualist regime... While the CRPD was ratified by Singapore on 18 July 2013... we reiterate that under the Westminster system of government, the Executive, which has the authority to sign treaties, may commit the State to such treaties without obtaining prior legislative approval. If treaties were self-executing, this would allow the Executive to usurp the legislative power of Parliament...”).

disability.<sup>8</sup> Indeed, Michael Perlin has called for reforms to the criminal process in light of the CRPD to eliminate the influence of sanism, which perpetuates stigmatising assumptions about persons with intellectual or psychosocial disabilities and undermines the dignity of such persons involved in the criminal process.<sup>9</sup> For instance, sanism may result in criminal sentencing decisions that are based on the mere fact that the offender is disabled without any consideration as to whether that disability justifies differential treatment.

The CRPD Committee has not explicitly addressed how criminal sentencing – and the determination of the criminal culpability of an offender with intellectual or psychosocial disability – ought to be carried out in light of the principles of the CRPD, in particular Articles 12 and 14.<sup>10</sup> This issue has also not been ventilated in the literature either. On one hand, scholarship on the criminal sentencing of offenders with intellectual and psychosocial disabilities have not fully engaged with how the CRPD should shape sentencing practices.<sup>11</sup> On the other hand, scholarship examining the CRPD in the context of criminal justice has largely focused on two other aspects of the criminal legal system: first, whether the CRPD demands the abolition of capacity-specific defences such as insanity or unsoundness of mind as well as the forced treatment of accused persons who plead such defences;<sup>12</sup> and second, whether mental health

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<sup>8</sup> Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) Article 12: Equal recognition before the law CRPD/C/GC/1, 2014, 1.

<sup>9</sup> Michael L Perlin, 'Understanding the Intersection between International Human Rights and Mental Disability Law: The Role of Dignity' in Bruce Arrigo and Heather Bersot (eds), *The Routledge Handbook of International Crime and Justice Studies* (1st edn, Routledge 2013); Michael L Perlin, *A Prescription for Dignity: Rethinking Criminal Justice and Mental Disability Law* (Ashgate Publishing Limited 2013); Michael L Perlin, "'There Must Be Some Way Out of Here'": Why the Convention on the Rights of Persons With Disabilities Is Potentially the Best Weapon in the Fight Against Sanism' (2013) 20 *Psychiatry, Psychology and Law* 462.

<sup>10</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law (n 8); Committee on the Rights of Persons with Disabilities, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities 2015.

<sup>11</sup> Syeda Hashmi, Deborah Richards and J Paul Fedoroff, 'A Descriptive Analysis of Sentencing Decisions by the Canadian Criminal Justice System of People with Intellectual Disabilities Convicted with Sexual Offences' (2021) 78 *International Journal of Law and Psychiatry* 101730; Michael Mullan, 'How Should Mental Illness Be Relevant to Sentencing' (2018) 88 *Mississippi Law Journal* 255; Perlin, *A Prescription for Dignity* (n 9) 193–215; Eunice Chua, 'Sentencing Mentally Disordered Offenders: Lessons from the US and Singapore' (2011) 23 *Singapore Academy of Law Journal* 434; Judith Cockram, 'Justice or Differential Treatment? Sentencing of Offenders with an Intellectual Disability' (2005) 30 *Journal of Intellectual & Developmental Disability* 3.

<sup>12</sup> Tina Minkowitz, 'Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond' (2014) 23 *Griffith Law Review* 434; Piers Gooding and Charles O'Mahony, 'Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia' (2016) 44 *International Journal of Law, Crime and Justice* 122; Anna Arstein-Kerslake and others, 'Human Rights and Unfitness to Plead: The Demands of the Convention on the Rights of Persons with Disabilities' (2017) 17 *Human Rights Law Review* 399; Michael L Perlin, 'God Said to Abraham/Kill Me a Son: Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence' (2017) 54 *American Criminal Law Review* 477; Meron Wondemaghen, 'Testing Equality: Insanity, Treatment Refusal and the CRPD' (2018) 25 *Psychiatry, Psychology and Law* 174; Donna Marie McNamara, 'The Insanity Defence, Indefinite Detention and the UN Convention on the Rights of Persons

courts and court diversion are compatible with the CRPD.<sup>13</sup>

Drawing on criminal sentencing jurisprudence in Singapore, this Article addresses two key questions on this issue: first, should the fact that an offender has an intellectual or psychosocial disability be a relevant consideration in the criminal sentencing process; and second, if it is a relevant consideration, how should it be taken into account in determining the appropriate sentence? While the Singapore courts were not informed or guided by the CRPD in developing the sentencing framework for offenders with intellectual and psychosocial disabilities, this Article suggests that Singapore's approach – including in Nagaenthran's case – is consistent with the principles underpinning the CRPD by adopting a multifactorial approach to the relevance of an offender's disability and attending carefully to their state of mind rather than the mere fact of their disability. Notably, in *Public Prosecutor v ASR (PP v ASR)*,<sup>14</sup> the Court of Appeal laid out a two-step sentencing framework for determining how a young offender with intellectual disability should be sentenced. Singapore's criminal sentencing jurisprudence thus offers useful insight into how sentencing courts should deal with offenders with intellectual and psychosocial disabilities in light of the CRPD in respect of whether and how such disability should be taken into account in determining the appropriate sentence.

Ultimately, this Article highlights that compliance with the CRPD in the criminal sentencing process is necessary but insufficient to realise the purpose of the CRPD, set out at Article 1, to "promote respect for [the] inherent dignity" of persons with disabilities. As Linda Steele notes, the CRPD may be of limited utility in reimagining and reforming the criminal legal system because it "reflects an ambivalence towards criminal law and criminal justice... exemplified by the focus on inequality along the lines of disability and its focus on disability institutions rather than additionally considering mainstream institutions of confinement such as prisons."<sup>15</sup> Heeding Simone Rowe and Leanne Dowse's call for greater engagement between the fields of critical disability studies and penal abolitionism,<sup>16</sup> the Article ends by reflecting on how disability justice – and the realisation of the CRPD's purpose to promote respect for the inherent dignity of disabled persons – demands a radical reimagination of criminal justice and our understanding of criminal responsibility and culpability.

The next section discusses the principles enshrined in the CRPD as they relate to the criminal legal system. Section III traces the development of Singapore's approach to

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with Disabilities' (2018) 41 Dublin University Law Journal 143.

<sup>13</sup> Michael L Perlin, "'There Are No Trials Inside the Gates of Eden': Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence' in Bernadette Mcsherry and Ian Freckelton (eds), *Coercive Care: Rights, Law and Policy* (Routledge 2013); Priscilla Ferrazzi, Terry Krupa and Rosemary Lysaght, 'Mental Health Courts, Court Diversion, and Canada's Obligations under the United Nations Convention on the Rights of Persons with Disabilities' (2013) 32 Canadian Journal of Community Mental Health 43; Linda Steele, *Disability, Criminal Justice and Law: Reconsidering Court Diversion* (Routledge/Taylor & Francis Group 2020).

<sup>14</sup> [2019] 1 SLR 941; [2019] SGCA 16.

<sup>15</sup> Steele (n 13) 63.

<sup>16</sup> Simone Rowe and Leanne Dowse, 'Enabling Penal Abolitionism: The Need for Reciprocal Dialogue between Critical Disability Studies and Penal Abolitionism', *The Routledge International Handbook of Penal Abolition* (Routledge 2021).

the criminal sentencing of offenders with intellectual or psychosocial disabilities, in particular the sentencing framework established in *PP v ASR*. Drawing on Singapore's experience, Section IV identifies the key features of a criminal sentencing process that is consistent with the CRPD and considers the CRPD's limits in realising disability justice in the criminal legal system. Section V concludes.

## II. THE CRPD AND THE CRIMINAL LEGAL SYSTEM

In December 2006, the United Nations General Assembly adopted the CRPD which the then UN Secretary-General Kofi Annan hailed as the "dawn of a new era" for the world's largest minority.<sup>17</sup> Article 1 of the CRPD sets out its purpose to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their *inherent dignity*." This idea of the inherent dignity of disabled persons is central to the CRPD.<sup>18</sup> Paragraph 8 of the Preamble to the CRPD recognises that discrimination against any person on the basis of disability is a violation of the *inherent dignity and worth* of the human person. According to Michael Perlin, the CRPD has "significant and robust connections" with therapeutic jurisprudence, particularly in the criminal context, as both stress the concept of dignity in the legal process.<sup>19</sup>

Informed by this concept of the inherent dignity of disabled persons, the CRPD propagates the human rights model of disability which "encompasses the values for disability policy that acknowledges the human dignity of disabled persons."<sup>20</sup> Put simply, the human rights model of disability prohibits the denial or restriction of the human rights of a disabled person on the basis of the existence of an impairment.<sup>21</sup> The CRPD thus seeks to overcome the medical model of disability, which regards disability as "an impairment that needs to be treated, cured, fixed or at least rehabilitated".<sup>22</sup> Under the medical model, many governments have justified the denial or restriction of the human rights of disabled persons on the basis of their disability; for example, disabled persons have been deprived of the right to make decisions about their lives – be it their health, education or even housing – on the basis that they lack the ability to do so.

Article 12(1) of the CRPD confronts this pernicious problem by expressly enshrining the right of disabled persons to equal recognition before the law. As a corollary, Article 12(2) obliges state parties to recognise the disabled person's legal capacity on an equal basis with others in all aspects of life. This would include in the criminal context.

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<sup>17</sup> Lauding disability convention as 'dawn of a new era,' UN urges speedy ratification, UN NEWS (2006), <https://news.un.org/en/story/2006/12/203222-lauding-disability-convention-dawn-new-era-un-urges-speedy-ratification> (last visited Oct 22, 2021).

<sup>18</sup> "This dignitary perspective compels societies to acknowledge that persons with disabilities are valuable because of their inherent human worth rather than their net marginal product." Michael Ashley Stein, 'Disability Human Rights' (2007) 95 California Law Review 75, 106.

<sup>19</sup> See Perlin, "'There Are No Trials Inside the Gates of Eden': Mental Health Courts, the Convention on the Rights of Persons with Disabilities, Dignity, and the Promise of Therapeutic Jurisprudence" (n 13).

<sup>20</sup> Theresia Degener, 'Disability in a Human Rights Context' (2016) 5 Laws 35, 3.

<sup>21</sup> *ibid* 4. ("The human rights model of disability defies the presumption that impairment may hinder human rights capacity.")

<sup>22</sup> *ibid* 2.

Legal capacity comprises a person's ability to (i) hold rights and duties (legal standing) and (ii) exercise those rights and duties (legal agency).<sup>23</sup> As set out in the CRPD Committee's General Comment No. 1, legal capacity is distinct from mental capacity and should not be conflated with each other. Broadly speaking, mental capacity refers to the decision-making skills of a person, which the CRPD Committee observes "naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors".<sup>24</sup> Yet, far too often, the legal capacity of disabled persons have been denied or restricted on the basis that they lack mental capacity by reason of their intellectual or psychosocial disability. The CRPD Committee makes clear that such laws, policies and practices must be reformed because they fall foul of Articles 5 and 12 of the CRPD.<sup>25</sup>

The recognition of the right to legal capacity is "essential for access to justice" and "in order to seek enforcement of their rights and obligations on an equal basis with others, persons with disabilities must be recognised as persons before the law with *equal standing* in courts and tribunals".<sup>26</sup> In this regard, the CRPD Committee has clarified that declarations of unfitness to stand trial or non-responsibility in criminal justice systems on the basis of an accused person's disability and the detention of disabled persons on this basis are contrary to Article 14 of the CRPD and should be abolished.<sup>27</sup> Some have however criticised the CRPD Committee's call to abolish such defences, with Perlin going so far as to describe it as "the single most wrongheaded (and potentially destructive) statement uttered by any supporter of the CRPD since its initial drafting".<sup>28</sup>

Others, like Tina Minkowitz, have applauded the CRPD Committee's recommendations, noting that "a negation of criminal responsibility that is based on insanity or mental incapacity... undermines the equal recognition of persons with disabilities before the law as individuals with mutual obligations towards others and an equal right to participate in defining and negotiating those obligations".<sup>29</sup> At the same time, informed by Article 5 of the CRPD, she proposes that the determination of a disabled person's criminal responsibility should be "addressed with both formal and substantive equality measures".<sup>30</sup> On one hand, as a matter of formality equality, disability-specific defences that negate criminal responsibility should be abolished. On the other hand, as a matter of substantive equality, diversity in decision-making should be accommodated when adjudicating culpability to realise substantive equality for

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<sup>23</sup> Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) Article 12: Equal recognition before the law (n 8) para 13.

<sup>24</sup> Committee on the Rights of Persons with Disabilities General comment No. 1 (2014) Article 12: Equal recognition before the law (n 8) para 13.

<sup>25</sup> *ibid* 32.

<sup>26</sup> *ibid* 38.

<sup>27</sup> Committee on the Rights of Persons with Disabilities Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities (n 10) para 16.

<sup>28</sup> Perlin, 'God Said to Abraham/Kill Me a Son' (n 12) 480. See also Jillian Craigie, 'Against a Singular Understanding of Legal Capacity: Criminal Responsibility and the Convention on the Rights of Persons with Disabilities' (2015) 40 International Journal of Law and Psychiatry 6; Wondemaghen (n 12).

<sup>29</sup> Minkowitz (n 12) 447.

<sup>30</sup> *ibid* 455.

offenders with disabilities in the criminal process. This would, for example, require the factfinder to consider the accused's perceptions, beliefs and worldview rather than simply assume that the accused was not able to form the subjective intent to commit an offence because they have an intellectual or psychosocial disability.<sup>31</sup>

The disagreement between Perlin and Minkowitz however may not be as dire as it seems. Perlin's principal concern with the abolition of disability-specific defences is in respect of the grave consequences it would have *ceteris paribus* as more offenders with intellectual and psychosocial disabilities would end up incarcerated and "lead to torture... at the hands of both prison guards and other prisoners".<sup>32</sup> However, Minkowitz's proposal is not confined only to the abolition of disability-specific defences; instead, she emphasises that while disabled offenders should not be exempted from imprisonment on the basis of their disability, the state must carry out their sentence "subject to reasonable accommodation and in compliance with the objectives and principles of the CRPD".<sup>33</sup>

This debate hints at Steele's criticism of the CRPD as "anti-disability-specific" but not "anti-carceral" in that reliance on the CRPD "risks only further entrenching criminalised disabled people in the mainstream criminal justice system, rather than delivering us a world beyond prison".<sup>34</sup> Indeed, neither Perlin nor Minkowitz seem to have considered the potential role of penal abolition in advancing disability justice.<sup>35</sup> This Article returns to the limitations of the CRPD in transforming the criminal legal system and the relationship between disability justice and penal abolition in Section IV.

Whereas the above discussion has focused on the question of criminal *responsibility* (in terms of whether an accused with intellectual or psychosocial disability should be convicted of a crime), this Article turns to consider the issue of criminal *culpability* (in terms of what the appropriate sentence should be meted out to an offender with intellectual or psychosocial disability who is convicted of a crime). Given the numerous disability-specific practices in criminal sentencing such as the doctrine of diminished responsibility and the recognition of intellectual and psychosocial disability as a mitigating factor, it is important to consider whether these practices are compliant with the CRPD and if not, how they should be reformed.

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<sup>31</sup> *ibid* 456–457.

<sup>32</sup> Perlin, 'God Said to Abraham/Kill Me a Son' (n 12) 481.

<sup>33</sup> Minkowitz (n 12) 458.

<sup>34</sup> Steele (n 13) 73.

<sup>35</sup> See, for example Liat Ben-Moshe, *Decarcerating Disability: Deinstitutionalization and Prison Abolition* (University of Minnesota Press 2020); Shannon Dodd and others, 'The Forgotten Prisoners: Exploring the Impact of Imprisonment on People with Disability in Australia' [2022] *Criminology & Criminal Justice* 17488958221120896; 'Crippling Abolition' (*The Abolition and Disability Justice Coalition*, 6 August 2020) <<https://abolitionanddisabilityjustice.com/opening/>> accessed 6 May 2023; Maya Goldman and Lucy Trieshmann, 'The Breaking Point: A Critical Disability Analysis of Abolition' (2021) 169 *University of Pennsylvania Law Review*; Rowe and Dowse (n 16).

### III. SENTENCING OF OFFENDERS WITH INTELLECTUAL AND PSYCHOSOCIAL DISABILITIES IN SINGAPORE

As a former British colony, Singapore adopts the Westminster system of constitutional government and criminal sentencing is a matter that involves all three branches of government. First, the legislature enacts legislation which prescribes the sentencing scheme for offences. Second, the judiciary exercises its sentencing discretion to determine the appropriate sentence for the individual offender based on the facts of each case and the statutory scheme. Finally, the relevant executive agency – be it the prison, the probation officers, etc – carries out the sentences imposed by the court.

Nagaenthran's execution has put Singapore's criminal legal system in the spotlight, with British billionaire Sir Richard Branson – who also serves as a commissioner on the Global Commission on Drug Policy – suggesting that the execution has “cast serious doubts on Singapore's willingness to uphold international law”.<sup>36</sup> Given the separation of powers in respect of criminal sentencing, this criticism should be directed at the Singapore legislature, rather than the judiciary, because the death penalty is prescribed as a mandatory punishment for the offence of drug trafficking for which Nagaenthran was convicted. The judiciary has no discretion in this regard and there are only two statutory exceptions, one of which is the partial defence of diminished responsibility, where the court is similarly required – as a matter of statute – to impose a sentence of life imprisonment instead of the death penalty.<sup>37</sup>

As the imposition of the death penalty on offenders with intellectual or psychosocial disability has received significant academic attention,<sup>38</sup> this Article focuses instead on the court's exercise of sentencing discretion more generally in relation to this group of offenders. Though Singapore ratified the CRPD in 2013, the judiciary's approach to the criminal sentencing of so-called “mentally disordered” offenders (which is used to refer to those with intellectual or psychosocial disabilities) does not appear to have been influenced or informed by the CRPD.<sup>39</sup> There is no diversion programs to provide such offenders with treatment and support at the pre-arrest or pre-plea stage.<sup>40</sup> However, the court has the discretion to impose probation or community sentences, including mandatory treatment orders, if certain statutory requirements are satisfied.<sup>41</sup>

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<sup>36</sup> Richard Branson, 'Stop the Killing of Nagaenthran Dharmalingam' (*Virgin.com*, 8 November 2021) <<https://virgin.com/branson-family/richard-branson-blog/stop-the-killing-of-nagaenthran-dharmalingam>> accessed 4 May 2023.

<sup>37</sup> Section 33B of the MDA (n 5).

<sup>38</sup> See generally, Marc J Tassé and John H JD Blume, *Intellectual Disability and the Death Penalty: Current Issues and Controversies* (ABC-CLIO 2017); Michael L Perlin, *Mental Disability and the Death Penalty: The Shame of the States* (Rowman & Littlefield 2013); Richard J Wilson, 'The Death Penalty and Mental Illness in International Human Rights Law: Toward Abolition' (2016) 73 *Washington and Lee Law Review* 1469; Allison Freedman, 'Mental Retardation and the Death Penalty: The Need for an International Standard Defining Mental Retardation' (2014) 12 *Northwestern University Journal of International Human Rights* [i].

<sup>39</sup> For a general overview of Singapore's approach to the sentencing of “mentally disordered” offenders, see Chua (n 11).

<sup>40</sup> Kumaralingam Amirthalingam, *Criminal Justice and Diversionary Programmes in Singapore*, 24 *CRIM LAW FORUM* 527–559, 553–554 (2013) *cf.* Richard D Schneider, 'Mental Health Courts and Diversion Programs: A Global Survey' (2010) 33 *International Journal of Law and Psychiatry* 201.

<sup>41</sup> Chua (n 11) 460.



In determining the appropriate sentence, the Singapore courts engage in a two-step inquiry. First, the court must first decide which sentencing principle – deterrence, incapacitation, rehabilitation or retribution – is the dominant one which will narrow the relevant sentencing options. Second, the court determines the most appropriate sentence based on what the dominant sentencing principle is. If the dominant sentencing principle is rehabilitation, then the court may choose from the available rehabilitation options be it probation, mandatory treatment or community service. Alternatively, the court may sentence the offender to imprisonment for an appropriate length of time based on what would best serve the public interest and also rehabilitate the offender.

In sentencing offenders with intellectual or psychosocial disabilities, the Singapore courts have held that “the existence of a mental disorder on the part of the offender is always a relevant factor.”<sup>42</sup> However, the sentencing court must grapple with what has been described as the “paradox of sentencing the mentally ill”, where the existence of an intellectual or psychosocial disability can be a “mitigating consideration or point towards a future danger that may require more severe sentencing.”<sup>43</sup> In addition, courts must also grapple with the “tension between the sentencing principles of specific and general deterrence on the one hand, and the principle of rehabilitation on the other” where the disability is sufficiently serious and causally related to the commission of the offence.<sup>44</sup>

This section examines how the Singapore courts have negotiated these challenges in determining the dominant sentencing principle and also the appropriate sentence in a series of recent cases involving the sentencing of offenders with either an intellectual or psychosocial disability.

#### *A. Determining the dominant sentencing objective*

In *Public Prosecutor v Low Ji Qing*,<sup>45</sup> the Court of Appeal summarised the applicable principles when sentencing a “mentally disabled” offender based on past cases. First, the existence of a mental disorder on the part of the offender is generally a relevant factor in the sentencing process.<sup>46</sup> However, the manner and extent of its relevance depends on the circumstances of each case, in particular, the nature and severity of the mental disorder.<sup>47</sup>

Second, the starting point in the sentencing process is the principle of deterrence. On one hand, the element of general deterrence may be accorded full weight in some circumstances, such as where the disability is not serious or is not causally related to the commission of the offence, and the offence is a serious one.<sup>48</sup> On the other hand,

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<sup>42</sup> *Lim Ghim Peow v Public Prosecutor* [2013] 4 SLR 1287; [2014] SGCA 52 (“*Lim Ghim Peow*”) at [25].

<sup>43</sup> *Public Prosecutor v Goh Lee Yin* [2008] 1 SLR(R) 824; [2007] SGHC 205 (“*Goh Lee Yin*”) at [1].

<sup>44</sup> *Lim Ghim Peow* (n 42) at [26] and [28].

<sup>45</sup> [2019] 5 SLR 769; [2019] SGHC 174.

<sup>46</sup> *ibid* at [44(a)].

<sup>47</sup> *ibid* at [44(b)].

<sup>48</sup> *ibid* at [44(c)].

notwithstanding the existence of a disability on the part of the accused person, specific deterrence may remain relevant in instances where the offence is premeditated or where there is a conscious choice to commit the offence.<sup>49</sup>

Third, if the disability renders deterrence less relevant, where for instance the offender has a significantly impaired ability to appreciate the nature and quality of his actions, then rehabilitation may take precedence.<sup>50</sup> Nevertheless, even though rehabilitation may be a relevant consideration, it does not necessarily dictate a sentence that excludes incarceration since the accused person could potentially be rehabilitated in prison too.<sup>51</sup>

Finally, in cases involving heinous or serious offences, even when the accused person is labouring under a serious mental disorder, the retributive and protective principles of sentencing may prevail over the principle of rehabilitation.<sup>52</sup>

The foregoing principles highlights three principal considerations that influence which sentencing principle should take precedence and how an offender's disability is accounted for in the sentencing process: first, the nature of the offender's disability; second, the causal connection between the disability and the commission of the offence; and third, the impact of the disability on the offender's ability to appreciate the gravity and wrongfulness of the offence they had committed.

#### (1) Nature of the offender's disability and the seriousness of the offence in question

In *Goh Lee Yin*,<sup>53</sup> the High Court held that the starting point in determining any sentence is the four classical principles of sentencing stated in *R v James Henry Sargeant*:<sup>54</sup>

*What ought the proper penalty to be? ... [The] classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.*

*Goh Lee Yin* is a case involving an adult offender who was diagnosed with kleptomania which had purportedly prompted her to commit the thefts for which she was being sentenced. In such a case, the High Court held that "the principles of rehabilitation and deterrence must form the prime focus of [the court's] attention."<sup>55</sup> This is because the nature of offences committed by kleptomaniacs, shoplifting, is not particularly serious as to engage the principles of retribution and prevention. However, if an offender's disability caused them to commit a particularly heinous offence, then those principles would be more salient.

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<sup>49</sup> *ibid* at [44(d)].

<sup>50</sup> *ibid* at [44(e)].

<sup>51</sup> *ibid* at [44(f)].

<sup>52</sup> *ibid* at [44(g)].

<sup>53</sup> *Goh Lee Yin* (n 43) [58].

<sup>54</sup> (1974) 60 Cr App R 74, 77.

<sup>55</sup> *Goh Lee Yin* (n 43) at [60].

In the same vein, the court held that the “low-key nature of the offence”, which does not “seriously affect or inconvenience [the] public... [and] the items stolen are of little value”,<sup>56</sup> leads to the conclusion that rehabilitation should form the primary focus in cases involving kleptomaniacs to help keep kleptomaniacs from reoffending.<sup>57</sup> In contrast, deterrence plays a less significant role in cases involving kleptomaniac offenders for two reasons. First, general deterrence is less important because of the “very low incidence of kleptomania among apprehended shoplifters.”<sup>58</sup> Second, specific deterrence is of limited relevance given that kleptomania is an impulse control disorder where the offender “may not be fully able to control his or her actions prior to and while committing the offence.”<sup>59</sup>

However, both general and specific deterrence may come into play in the exceptional circumstance where the offender in question has skipped their treatment plan persistently. In such a case, general deterrence is relevant to signal to kleptomaniacs that they could not expect to skip their treatment programs and then steal, with the courts forgiving them everything.<sup>60</sup> Similarly, specific deterrence is engaged in a secondary manner to discourage the offender from violating the treatment program.<sup>61</sup> At the same time, because the causal link between the omission to adhere to treatment and the actual commission of future offences cannot be conclusively proved, the court held that this secondary manifestation of specific deterrence (to discourage the offender from violating the treatment plan) should not be applied with equal force as the primary manifestation of deterring the offender from re-offending.<sup>62</sup>

## (2) Causal connection between disability and the offender’s commission of the offence

The fact that an offender is mentally disabled however does not always or necessarily lead a court to find that rehabilitation should be the dominant sentencing principle. Instead, the disability must also be causally connected to the offence in question. Hence, in *Public Prosecutor v Chong Hou En* (“*Chong Hou Er*”),<sup>63</sup> the High Court held:

*[J]ust because a disorder is included within the pages of the DSM-5 and ICD-10 does not automatically mean a court of law will attribute weight to the disorder as a substantial mitigating factor... The diagnosis must be supported by a clinical expert’s opinion on the nature of the disorder and how it affects an individual.*<sup>64</sup>

(emphasis in original)

In this case, though the offender was diagnosed with voyeurism, the court held that the diagnosis is not determinative to override the principle of deterrence in favour of rehabilitation. Instead, the court must go on to “establish whether or not the voyeur is able to control himself when he plans, takes preparatory steps and eventually

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<sup>56</sup> *ibid* at [107].

<sup>57</sup> *ibid* at [98].

<sup>58</sup> *ibid* at [93].

<sup>59</sup> *ibid* at [80].

<sup>60</sup> *ibid* at [95].

<sup>61</sup> *ibid* at [83].

<sup>62</sup> *ibid* at [85].

<sup>63</sup> [2015] 3 SLR 222; [2015] SGHC 69.

<sup>64</sup> *ibid* at [58].

commits the acts of voyeurism.”<sup>65</sup> Hence, the court will consider the offender’s disability only insofar as it impairs his ability to control their own behaviour prior to and during the commission of the offence. Where the connection between the disability is more attenuated, the court is unlikely to give any weight to the fact of the accused’s disability as a mitigating factor since it is not considered *directly* relevant to the commission of the offence.

### (3) Offender’s ability to appreciate the gravity and wrongfulness of the offence

Even if the offender’s disability has some causal relation to the offense in question, the nature of the offence may lead the court to consider that the retributive and preventive principles should take precedence over rehabilitation. In *Lim Ghim Peow*, the accused had set his ex-lover on fire which resulted in her death as a result of her burn injuries. Because of the heinous nature of the offence, the fact that the accused was diagnosed with major depressive disorder was secondary and did not convince the court to prioritize his rehabilitation over the principles of retribution, prevention and deterrence. Specifically, though the court acknowledged that the accused’s major depressive disorder impaired his degree of self-control and decision-making capacity, it nonetheless considered that the disability did not mean that he lacked the “capacity to comprehend the events or the capacity to appreciate the wrongfulness of his actions.”<sup>66</sup>

As this above quote suggests, the court is concerned not simply with the gravity of the offence itself but whether the offender is capable of appreciating what he has done. It was on this basis that the Court of Appeal rejected Nagaenthran’s appeal to reduce his sentence to life imprisonment. In finding that he could not rely on the statutory defence of diminished responsibility, the Court of Appeal held that even assuming that he was suffering from an “abnormality of mind”, Nagaenthran “clearly understood the nature of his acts and did not lose his sense of judgment of the rightness or wrongness of what he was doing”.<sup>67</sup>

In contrast, in *PP v ASR*, the Court of Appeal held that though the offender had raped the victim after threatening to pull a knife on her, rehabilitation remained the dominant sentencing consideration. This is because whether rehabilitation was displaced as the dominant sentencing consideration turned principally on the offender’s state of mind at the time of the offence.<sup>68</sup> In this case, the court held that the offender – who was 14 years old at the time of the offence and intellectually disabled – did not understand the gravity and consequence of what he had done because of his low cognitive ability.<sup>69</sup> Accordingly, these factors substantially reduced his culpability and the nature of the offence by itself would not displace rehabilitation as the dominant sentencing objective.

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<sup>65</sup> *ibid.*

<sup>66</sup> *Lim Ghim Peow* (n 42) at [50].

<sup>67</sup> *Nagaenthran (CA)* (n 4) at [34] and [40].

<sup>68</sup> *PP v ASR* (n 14) at [103].

<sup>69</sup> *ibid* at [110] – [113].

*B. Ascertaining the offender's state of mind at the time of the offence*

What is significant about *PP v ASR*, compared to previous cases, is the meticulous manner by which the court went about ascertaining the offender's state of mind to determine whether he was capable of appreciating the gravity and wrongfulness of what he had done. This contrasts with earlier cases, like *Lim Ghim Peow* where the court found that "there was nothing to indicate that the [offender] lacked the capacity to comprehend his actions or appreciate the wrongfulness of his conduct."<sup>70</sup> In *Lim Ghim Peow*, the court did not directly assess the offender's state of mind at the time that he committed the offences. Instead, it mainly relied on the conclusion of the expert psychiatric witness and its own inference that the offender must have had the capacity to appreciate what he had done based on the fact that he had "carefully planned his moves."<sup>71</sup>

In this case, the accused was a student at a special education school and had been assessed by the Institute of Mental Health a few months after the commission of the offences to have an IQ of 61. His mental age was assessed by one expert to be eight years old, and by another to be between eight and ten years old. On the day of the offence, he had spotted the victim who went to the same special education school though they did not know each other. He followed her to her apartment building and forced himself on her when they exited the elevator. When she resisted and tried to flee, the accused told her that he would take out a knife if she did not lie down. He then penetrated her without her consent and ejaculated on her underwear. After he found a comb about 15cm long that belonged to the victim, he inserted it into her vagina and placed it into her mouth after taking it out. He then said, "Bye bye", and left the scene.

In its judgment, the Court of Appeal carefully considered the evidence set out in an expert report that demonstrated the accused had "a limited understanding of the nature and consequence of his actions."<sup>72</sup> Specifically, the court noted that while the offender "knew that what he had done to the victim was wrong; [t]he question was the extent of this awareness."<sup>73</sup> Based on the offender's responses to the psychiatrist's questions about the incident during which he committed the offences, the court found that the offender was:

*a person with a distorted, confused but ultimately simplistic view of sexuality, and of the significance and heinousness of the sexual abuse that he committed... Critically, he appeared not to have even begun to understand the depravity of his conduct, the degradation and trauma suffered by the victim, and the consequences for the both of them.*<sup>74</sup>

Though the court's finding was consistent with the expert's conclusion that the offender "knew that his actions were wrong, but `... did not appreciate the legal wrongfulness of his act[s]'",<sup>75</sup> what is striking is that the court did not simply accept

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<sup>70</sup> *Lim Ghim Peow* (n 42) at [52].

<sup>71</sup> *ibid* at [51].

<sup>72</sup> *PP v ASR* (n 14) at [113].

<sup>73</sup> *ibid* at [110].

<sup>74</sup> *ibid* at [111].

<sup>75</sup> *ibid*.

the expert's words at face value. Instead, the court looked to the relevant evidence to ascertain the offender's state of mind at the time of the offence. This offender-specific inquiry is important because it ensures that the court attends to the particular manner by which an offender's disability impacts their mental responsibility for and appreciation of the wrongfulness of what they had done. This prevents the court from engaging in sanist reasoning that the offender's intellectual or psychosocial disability must necessarily reduce their culpability or not, as was arguably the case in *Lim Ghim Peow*.

#### IV. CRIMINAL SENTENCING IN THE CRPD ERA

This section analyses Singapore's sentencing jurisprudence through the lens of the CRPD. As discussed above in Section II, the CRPD demands both formal and substantive equality in respect of the equal enjoyment of legal capacity. In addition, the CRPD represents a shift away from the medical model of disability which raises questions as to how much reliance courts should place on expert medical evidence in the sentencing process.

Yet, ultimately, criminal legal system that recognises the equality of disabled and non-disabled persons before the law could still fail to respect the inherent dignity of disabled persons – and non-disabled persons as well. Singapore's experience demonstrate that even when criminal sentencing is conducted in compliance with the CRPD, our contemporary imagination of criminal punishment – be it incarceration, or the death penalty or caning – may ultimately be contrary to the CRPD's purpose of promoting respect for the inherent dignity of disabled persons. Looking beyond the CRPD, this section ends by considering the limits of a *disability rights* approach to criminal justice and how we should instead turn to a broader engagement with criminal justice reform through the lens of penal and prison abolition.

##### *A. Equal enjoyment of legal capacity*

In relation to formal equality, the conscientious approach adopted in *PP v ASR* demonstrates how sentencing courts should approach an offender's intellectual or psychosocial disability in a manner that is consistent with the CRPD's demand that disabled persons enjoy equal recognition before the law. Rather than draw any inference based on the fact of the offender's disability, a court should look specifically at the particular offender before it to determine those questions. Whether an offender has a disability or not should not be conclusive as to what the dominant sentencing principle or appropriate sentence should be.

While the imposition of rehabilitative sentences may ostensibly appear to violate the formal equality principle since it is available only to offenders whom the court has found to be "suffering" from a mental disorder, this may be justified as a form of reasonable accommodation. Such sentencing orders would thus still remain consistent with the CRPD, since Article 5(3) of the CRPD requires that state parties take all appropriate steps to ensure that reasonable accommodation is provided to promote equality and eliminate discrimination. Hence, where the court has determined that rehabilitation should be the dominant sentencing objective, it should apply its mind as

to the most appropriate sentence to achieve rehabilitation – be it probation, a mandatory treatment order (notwithstanding that such orders violate Article 25(d) of the CRPD),<sup>76</sup> or even rehabilitation in a structured environment through imprisonment – in light of the specific offender’s needs and circumstances. In fact, what would fly in the face of the CRPD is a *de jure* or *de facto* diversion of *all* offenders with intellectual or psychosocial disabilities to a specific type of rehabilitative sentence.

### *B. Reliance on expert medical evidence*

As a facet of substantive equality, the court should not simply rely on the evidence of medical experts but look at the totality of the evidence adduced at trial, including especially the testimony of the offender should they choose to testify in the proceedings. The court must also ensure that diversity in the decision-making process is accommodated. This means that judges should be circumspect about making assumptions or drawing adverse inferences about how an offender with intellectual or psychosocial disability should conduct or express themselves. They should also approach the question with an attentiveness to the danger that sanism might seep into their reasoning or colour their perception of the offender.

Making these considerations explicit invites judges to challenge their personal biases and appreciate the complexities of how intellectual and psychosocial disability may manifest differently in each individual. In this regard, and as emphasised by the CRPD Committee, judges should receive the necessary training about the rights of persons with disabilities, in particular “the fact that persons should not be identified purely on the basis of impairment” and “the diversity among persons with disabilities and their individual requirements in order to gain effective access to all aspects of the justice system on an equal basis with others”.<sup>77</sup>

In this regard, it is questionable whether the court’s finding that there was a high degree of planning, preparation and premeditation necessarily means that the offenders in *Lim Ghim Peow* and *Chong Hou En* are equally culpable as a non-disabled comparator. Unfortunately, this did not seem to have crossed the court’s mind in either case. In accordance with the CRPD’s requirements, the court should have considered the offender’s conduct in planning and preparing to commit the relevant offences in the *context of their disability*. These actions, by themselves, should not lead the court to assume that the offender’s disability had no bearing or causal relation to the commission of the offences, and therefore that the offender should have been conscious of the wrongfulness of what they were doing.

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<sup>76</sup> Lisa Brophy and others, ‘The Urgent Need to Review the Use of CTOs and Compliance with the UNCRPD Across Australian Jurisdictions’ [2022] International Journal of Mental Health and Capacity Law 3; George Szmukler, Rowena Daw and Felicity Callard, ‘Mental Health Law and the UN Convention on the Rights of Persons with Disabilities’ (2014) 37 International Journal of Law and Psychiatry 245.

<sup>77</sup> Committee on the Rights of Persons with Disabilities General comment No. 6 (2018) on equality and non-discrimination (n 23) para 55.

*C. Limits of the CRPD in the pursuit of dignity for disabled persons in criminal justice reform*

This Article's discussion on how criminal sentencing should be conducted in light of the CRPD should make clear that the CRPD may be of limited utility in the context of criminal justice insofar as its purpose is the promotion of respect for the inherent dignity of disabled people. Beyond the two requirements of formal and substantive equality discussed above, the CRPD seems incapable of offering any substantive critique of the forms of punishment imposed by the penal state. As Steele observed, the CRPD "does not provide the tools to grapple with the full complexities and contradictions of disability-specific coercive interventions in a criminal legal context and in relation to criminalised disabled people."<sup>78</sup> In Singapore's context, putting aside the issue as to whether he was afforded accommodations in the investigation process, this unsatisfactory state of affairs is perhaps best demonstrated by the sentencing of Nagaenthran to the gallows, which arguably was conducted in compliance with the CRPD in finding that he was not disabled for purposes of the statutory exemption from the death penalty.

This can be attributed to the fact that the CRPD was not intended to create *new* substantive rights but to address the problem that "existing human rights instruments have fallen far short in their protection of the human rights and fundamental freedoms guaranteed to persons with disabilities".<sup>79</sup> Insofar as the international human rights regime has "accepted and normalised the existence of prisons through the production of an extensive range of norms and standards pertaining to the treatment of prisoners",<sup>80</sup> it is unsurprising then that the CRPD does not offer any guidance as to whether existing penal sentences would be consistent with the dignity and rights of persons with disabilities.

Yet, even if the two requirements of formal and substantive equality are satisfied, it is clear that the criminal legal system is in urgent need of reform and reimagination. Bringing into dialogue the two fields of penal abolitionism and critical disability studies, Rowe and Dowse argue that both strands of scholarship call attention to the "depth of violence inherent in carcerality and the social, physical, psychic, political and economic harms synonymous with carceral practices and incarceration".<sup>81</sup> In particular, the implementation of disability-specific rights in prison may "justify even greater funnelling of the already extraordinary resources into penal institutions" and "leave unexamined an arguably primary root cause of the penalisation of people with and without disability: social-structural injustice".<sup>82</sup>

In this regard, Isobel Renzulli has argued that a human rights based approach to imprisonment "cannot be limited to improving the conditions inside the prison or

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<sup>78</sup> *Id.* at 59.

<sup>79</sup> Arlene S Kanter, *The Development of Disability Rights Under International Law: From Charity to Human Rights* (Routledge 2014) 51.

<sup>80</sup> Isobel Renzulli, 'Prison Abolition: International Human Rights Law Perspectives' (2022) 26 *The International Journal of Human Rights* 100, 109.

<sup>81</sup> Rowe and Dowse (n 16) 210.

<sup>82</sup> *ibid* 211.



limiting its use"; instead, it must also implement "transformative interventions outside the narrow and punitive confines of the criminal justice system... for a more equitable and inclusive social justice agenda, where human flourishing matters more than punishment".<sup>83</sup> Specifically, Renzulli points to the role that economic, social and cultural rights play in challenging structural inequalities and "tackling exclusion and social disadvantage, as factors heightening the risk of imprisonment".<sup>84</sup> Considering that the CRPD comprises both first-generation civil and political rights as well as second-generation economic, social and cultural rights,<sup>85</sup> it remains to be seen how these two components of the treaty can be creatively interpreted and applied to the criminal legal system to address the harms of the carceral state and its penal practices.

## V. CONCLUSION

Drawing on recent jurisprudence in Singapore, this Article has presented a critical disability perspective on whether and how courts should weigh an offender's intellectual or psychosocial disability in the criminal sentencing process. It adds to the scholarship on the implementation of the CRPD in the criminal context, which has hitherto focused on other components of the criminal process such as the role of mental health courts, disability-specific defences and court-ordered mandatory treatment. Heeding the CRPD's demand for a paradigm shift in how disability and legal capacity are understood, this Article demonstrates what the treatment of offenders with disabilities on an equal basis in the criminal legal system can and should look like within the context of criminal sentencing by focusing on how an offender's disability should be taken into account in determining the appropriate sentence.

Yet, the equality of disabled persons in the criminal sentencing process may be insufficient to realise the more ambitious objective of the CRPD to promote respect for the inherent dignity of disabled persons in light of its inability to interrogate the carceral state. Future research should look beyond the CRPD and engage with the related fields of critical disability studies and penal abolitionism to imagine how the criminal sentencing of offenders with intellectual and psychosocial disabilities can and should be carried out in a way that is consistent with respect for their inherent dignity.

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<sup>83</sup> Renzulli (n 80) 114.

<sup>84</sup> *ibid* 112.

<sup>85</sup> Degener (n 20) 44–47.