



# Malaysian Court Practice

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### SHOULD THE DEATH PENALTY BE ABOLISHED?

Ashgar Ali Ali Mohamed  
Ahmad Ibrahim Kulliyah of Laws (AIKOL)  
International Islamic University Malaysia (IIUM)

#### Introduction

A crime is a deliberate act that results in harm, physical or otherwise, towards another in a manner prohibited by law, and the punishment to be imposed must befit the crime to reflect the public abhorrence. Serious offences punishable with the death sentence would be tried in the High Court<sup>1</sup> and to convict the offender, the case must be proven against him beyond all reasonable doubt.<sup>2</sup> The legal burden is on the prosecution to prove its case beyond reasonable doubt and the evidential burden is on the accused to raise a reasonable doubt. The duty of a judge at the end of the trial is to carefully evaluate the whole of the evidence of the prosecution and the defence to determine whether reasonable doubt has been raised as to the guilt of the accused.<sup>3</sup>

Where the court finds that the accused is guilty of the offence for which he was charged, the court will assess the appropriate punishment to reflect the seriousness of the offence. In determining the sentence, public interest must supersede other considerations. Public interest demands that law and order must be maintained at all times. A sentence that is too lenient may well have the effect of sending a message to the public that it is worth committing an offence because if caught, a lenient sentence will be imposed on the offender.<sup>4</sup> In other words, the public would lose confidence

in the courts if a lenient sentence is meted out for a serious offence.<sup>5</sup>

For the commission of most hideous and dreadful offences such as murder, trafficking in dangerous drugs, possession or control of firearms, ammunition or explosions, the punishment is the death penalty. This sentence may only be imposed by the High Court when acting under its original criminal jurisdiction. In determining whether the death sentence ought to be passed, the court will strike a balance with regard to the proportion between the offence, the punishment provided by law, the mitigating and aggravating factors and any extenuating circumstances which might exist and which are in favour of the accused.

In Malaysia, the death sentence is carried out by way of hanging and the procedure for the execution of the sentence is contained in the Criminal Procedure Code and the Prisons Regulations 2000. In other countries, it is by way of lethal injection, electrocution, gas chamber, firing squad or beheading. In two situations however, the death sentence cannot be imposed, notwithstanding the fact that a person is convicted of an offence punishable with death namely, a woman who is pregnant and a child offender. In the case of a pregnant woman, she will be sentenced instead to life imprisonment. For a child offender, in lieu of a sentence of death, the court will order the child convicted of the offence to be detained in prison during the pleasure of the Yang di-Pertuan Agong if the offence was committed in the Federal Territories, or the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.

Currently, out of the 195 countries around the globe only 53 countries including Malaysia have retained the death penalty in their domestic laws. Some view the death penalty as cruel, inhuman and degrading punishment, while others contend

1 See section 22 of the Courts of Judicature Act 1964 (Act 91) (Revised 1972).  
2 See *Balachandran v Public Prosecutor* [2005] 2 MLJ 301, FC.  
3 See *Public Prosecutor v Ibrahim Mahmud* [2001] 3 CLJ 284; *Public Prosecutor v Mohd Amin Mohd Razali* [2002] 5 MLJ 406.  
4 See *Public Prosecutor v Pe Hong Yong* [2009] 7 CLJ 97.

5 For the guiding principle in ascertaining appropriate sentence for the commission of a crime, see *Public Prosecutor v Toha bin M Yusuf & Ors* [2006] 4 MLJ 63; *Mohd Zandere bin Arifin v Public Prosecutor* [2006] 5 MLJ 685.

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that such a severe punishment breaches the 1948 Universal Declaration of Human Rights. Some even argue that the imposition of the death penalty does not deter criminals or reduce violent crimes. Many have supported the move to abolish the death penalty in Malaysia, although some have argued otherwise mainly because the punishment serves as a deterrent from the commission of heinous offences. In view of the above, this article discusses the issue of abolishment of the death penalty and whether there is any valid basis for this move.

### Offences punishable with death penalty

The death sentence is constitutional, as Article 5(1) of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law. In *Public Prosecutor v Yee Kim Seng*,<sup>6</sup> it was argued that the mandatory death sentence under the repealed Internal Security Act 1960 was unconstitutional as it infringed inter alia, the above article of the Federal Constitution. In dismissing this argument, the High Court held that Article 5(1) of the Federal Constitution was not infringed because the accused was not deprived of his life or personal liberty except in accordance with law, ie the Internal Security Act 1960, a valid law passed by Parliament. This decision was cited with approval by the Federal Court in *Public Prosecutor v Lau Kee Hoo*.<sup>7</sup> In *Lau Kee Hoo's* case the Court stated: 'capital punishment is not unconstitutional *per se*. In their judicial capacities judges are in no way concerned with arguments for or against capital punishment. Capital punishment is a matter for Parliament. It is not for judges to adjudicate upon its wisdom, appropriateness or necessity if the law prescribing it is validly made.'

Again, in *Christin Nirmal v Public Prosecutor*,<sup>8</sup> Yeoh Wee Siam JCA responding to the appellant's argument that the imposition of the mandatory death penalty for trafficking of dangerous drugs is cruel and/or inhuman and amounted to an arbitrary deprivation of life, stated: 'the function of the Courts is to interpret the law, and not to declare the mandatory death penalty under the impugned provisions of the DDA as unconstitutional. It is the legislature, being the policy-maker, which has to amend the DDA and abolish the mandatory death sentence if it thinks that it is cruel and harsh, and a draconian law

which is not in keeping with international trends, and "is inconsistent with the Federal Constitution for being arbitrary and disproportionate and for failing to take into account individual mitigating circumstances".'

In *Letitia Bosman v Public Prosecutor*,<sup>9</sup> Tengku Maimun JCA in dismissing the argument by the appellant's counsel that the courts should follow the current international trend and hold that the mandatory death sentence is degrading and unconstitutional, stated that such arguments 'would result in us departing from the decisions in *Ong Ah Chuan* and *PP v Lau Kee Hoo* .... it is trite that the function of the court is to apply the law and if at all the present law is disproportionate, cruel, inhuman, or degrading the initiative to change should come from the legislature.'

The death penalty punishment is reserved for the commission of the most hideous or dreadful crimes such as murder, violent extremist incidents resulting in death, trafficking in dangerous drugs, possession or control of any firearm, ammunition or explosives without lawful authority. The table below provides the lists of offences which carry the death sentence.

No.	Offence	Statute
1	Waging war or attempting to wage war or abetting the waging of war against the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri.	Section 121 Penal Code
2	Offences against the person of the Yang di-Pertuan Agong, Ruler or Yang di-Pertua Negeri	Section 121A Penal Code
3	Committing terrorist acts which results in death	Section 130C(1)(a) Penal Code
4	Directing activities of terrorist groups which results in death	Section 130I(a) Penal Code
5	Providing or collecting property for terrorist acts which results in death	Section 130N(a) Penal Code
6	Providing services for terrorist purposes which results in death	Section 130O(1)(aa) Penal Code
7	Accepting gratification to facilitate or enable terrorist acts which results in death	Section 130QA(a) Penal Code
8	Accepting gratification to facilitate or enable organized criminal activity which results in death	Section 130ZB(a) Penal Code
9	Abetment of mutiny within Malaysian Armed Forces, if mutiny is committed in consequence thereof	Section 132 Penal Code
10	Murder	Section 302 Penal Code
11	Abetment of suicide of child or insane person	Section 305 Penal Code
12	Attempt to murder while under a life sentence	Section 307(2) Penal Code

6 [1983] 1 MLJ 252.

7 [1983] 1 MLJ 157, FC.

8 [2018] MLJU 879, [2018] 1 LNS 930.

9 [2017] MLJU 263.

Senior Legal Editor  
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Editorial Operations Associate  
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Managing Editor,  
Southeast Asia  
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Seksyen 13  
46200 Petaling Jaya  
Selangor Darul Ehsan  
Tel: 03 7882 3500  
Fax: 03 7882 3506  
Website: www.lexisnexis.com.my

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13	Kidnapping or abducting in order to murder	Section 364 Penal Code
14	Hostage-taking resulting in death	Section 374A Penal Code
15	Rape resulting in death	Section 376(4) Penal Code
16	Gang-robbery with murder	Section 396 Penal Code
17	Trafficking in dangerous drugs	Section 39B Dangerous Drugs Act 1952
18	Discharging a firearm in the commission of a scheduled offence	Section 3 Firearms (Increased Penalties) Act 1971
19	Being an accomplice in case of discharge of firearm	Section 3A Firearms (Increased Penalties) Act 1971
20	Abduction, wrongful restraint or wrongful confinement for ransom	Section 3(1) Kidnapping Act 1961

As noted earlier, the death sentence may be imposed by the High Court when acting under its original criminal jurisdiction and by the Court of Appeal or the Federal Court when exercising their appellate powers.<sup>10</sup> In most cases, a person sentenced to death will appeal against the sentence. In such cases, the execution of the death penalty is automatically stayed until the appeal is finally determined.<sup>11</sup>

A Sessions Court cannot try offences punishable with death nor impose the sentence of death.<sup>12</sup> Further, the Court for Children which is constituted in accordance with Child Act 2001 (Act 611) for the purpose of hearing, determining or disposing of any charge against a child, has jurisdiction to try all offences except offences punishable with death.<sup>13</sup>

As noted earlier, the death sentence cannot be imposed in two situations notwithstanding the fact that a person is convicted of an offence punishable with death. Section 275 of the Criminal Procedure Code ('CPC') provides that where the accused is pregnant, the death sentence cannot be imposed. Instead, the sentence of imprisonment for life will be imposed which generally is imprisonment for 30 years.<sup>14</sup> Further, section 97(1) of the Child Act 2001 provides that a death sentence should

not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child. In lieu of a sentence of death, the Court will order the person convicted of the offence to be detained in a prison during the pleasure of the Yang di-Pertuan Agong, if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.

In *Public Prosecutor v Kok Wah Kuan*,<sup>15</sup> the Federal Court held that on a plain reading of section 97, it clearly empowered the court, after convicting a person who was a child at the time of the commission of an offence punishable with death, to make an alternative order instead of imposing a sentence of death. There is nothing unconstitutional about this scheme. The Court of Appeal's decision in *Kok Wah Kuan v Public Prosecutor*,<sup>16</sup> which held otherwise was reversed by the Federal Court.

In *Vania Osman v Public Prosecutor*,<sup>17</sup> the appellant, a Malawi national, was charged and tried in the High Court with an offence of trafficking in dangerous drugs under section 39B(1) of the Dangerous Drugs Act 1952 and punishable under section 39B(2) of the same Act. The appellant was 17 years and 11 months old at the time of the commission of the offence and was a 'child' under the Child Act 2001. Although the appellant was found guilty of the offence under section 39B which carries a mandatory death sentence, the Child Act 2001 prohibits the death sentence from being carried out on the appellant who was a child at the time of commission of the offence. The appellant was ordered to be detained in a prison during the pleasure of the Yang di-Pertua Negeri (Governor) of the state of Penang.

It is also noteworthy that offences punishable by death are non-bailable under section 388(1) of the CPC unless there exists 'exceptional and special circumstances' to order otherwise for example, when the accused was below the age of 16 years, a woman, a sick or infirm person i.e.

10 See the Courts of Judicature Act 1964 ss 22(2), 60(2) and 92(2), respectively.

11 See the Courts of Judicature Act 1964 ss 57(3) and 89(3).

12 See Subordinate Courts Act 1948 ss 63 and 64.

13 Section 11(5) of the Child Act 2001.

14 See the Criminal Justice Act 1953 (Act 345) (Revised 1988) s 3.

15 [2008] 1 MLJ 1, FC.

16 [2007] 5 MLJ 174, CA.

17 [2018] 1 LNS 1082.



an elderly or very old person.<sup>18</sup> In *Loy Chin Hei v Public Prosecutor*,<sup>19</sup> Wan Yahya J stated: 'A non-bailable offence is no doubt an offence in respect of which the accused may be refused bail, but it is not an absolutely unbailable offence because the court has been given the discretionary power to grant bail in certain circumstances and, in the case of offences punishable with life imprisonment or death, for special reasons.' It may be added that a male offender sentenced to death shall be spared from whipping as provided by section 289 of the CPC. Further, section 292(2) of the CPC provides that a sentence of death shall be executed notwithstanding the pendency of any sentence of imprisonment.

In relation to clemency, section 301 of the CPC provides that the Yang di-Pertuan Agong, the Ruler or Yang di-Pertua Negeri of a State, acting in accordance with Article 42 of the Constitution in which the offence was committed may commute the sentence of death to a lighter sentence of a different kind. Article 42 of the Federal Constitution empowers the Yang di-Pertuan Agong to grant pardons, reprieves and respites in respect of all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya. Likewise, the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.

In *Public Prosecutor v Lim Hiang Seah*,<sup>20</sup> Suffian LP stated: 'When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which courts bound by the law of evidence cannot take into account and decides each case on grounds of public policy; such decisions are a matter solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as is recognized by its inclusion in Chapter 3 of Part IV of the Constitution, is an executive power.' The power of pardon under Article 42 is a prerogative of mercy, its exercise is not susceptible or amenable to judicial review.<sup>21</sup>

18 See *Re KS Menon* [1946] MLJ 49; *R v Ooi Ah Kow* [1952] MLJ 95; *Shanmugam v Public Prosecutor* [1971] 1 MLJ 283.

19 [1982] 1 MLJ 31 at 32.

20 [1979] 2 MLJ 170, FC.

21 See *Juraimi bin Husin v Pardons Board of State of Pahang & Ors* [2002] 4 MLJ 529, FC.

## Execution of sentences of death: The Procedure

The procedure to be taken against the accused who has been convicted and sentenced to death is contained in section 281 of the CPC. The above section provides:

- (a) after sentence has been pronounced a warrant, under the seal of the Court, shall be made out for the commitment of the person sentenced to the custody of the officer in charge of the district prison, and the warrant shall be full authority to the said officer, or any officer appointed by him for that purpose, for receiving into his custody and detaining the person so sentenced until the further warrant or order of the Court;
- (b)
  - (i) in cases in which notice of appeal is not given within the prescribed period, the Judge passing sentence of death shall, as soon as conveniently may be after such period has elapsed, forward to the Menteri Besar of the State in which the crime was committed, a copy of the notes of evidence taken on the trial, together with a report in writing signed by him, setting out his opinion whether there are any reasons, and, if any, what reasons there are, why the sentence of death should or should not be carried out;
  - (ii) in cases in which notice of appeal is given the Judge who passed sentence of death shall, as soon as conveniently may be after the appeal has been determined by the Court of Appeal, forward to the Federal Court the report in writing referred to in subparagraph (i); and, if the Federal Court dismisses the appeal made to it, the Judge presiding in that Court shall as soon as conveniently may be after the dismissal forward to the aforesaid Menteri Besar, the said report in writing together with a copy of the notes of evidence taken at the original trial, a copy of the record of the proceedings before the Federal Court and also such report, if any, on the case as the Federal Court may think fit to make signed by the Judge presiding in the Federal Court;
- (c) the Menteri Besar shall, upon receipt of the proceedings, submit the same to the Ruler of the State and shall communicate to the Court of the Judge passing sentence a copy under his hand and seal of any order the Ruler of the State may, acting in accordance with Article 42 of the Constitution, make thereon, which order, if the sentence is to be carried out,



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shall state the place where the execution is to be held, and if the sentence is commuted into any other punishment shall so state; and if the person sentenced is pardoned shall so state;

- (d) (i) on receiving the copy of the said order the Court shall cause the effect of the same to be entered in the records of the Court, and when the said order directs the sentence to be carried out shall appoint the time when it is to be carried out and shall endorse the time so appointed on the said order, and shall in all cases cause the order to be carried into effect by issuing a warrant or taking such other steps as may be necessary;
- (ii) the Ruler of the State acting in accordance with Article 42 of the Constitution may order a respite of the execution of the warrant and afterwards appoint some other time or other place for its execution;
- (iii) the warrant shall be directed to the officer in charge of the prison for the district where the sentence is to be carried into effect, who shall carry the sentence into effect, in accordance with law;
- (e) (i) there shall be present at the execution of the sentence the Medical Officer in charge of the prison, the Superintendent of Prisons, the Officer-in-Charge of the prison and such other officers of the prison as the latter may require, and there may also be present any Minister of Religion in attendance at the prison and such relations of the prisoner or other persons as the Superintendent thinks proper to admit;
- (ii) as soon as may be after judgment of death has been executed the Medical Officer shall examine the body of the person executed and shall ascertain the fact of death and shall sign a certificate thereof and deliver the same to the Officer-in-Charge;
- (iii) a Magistrate of the district shall, within twenty-four hours after the execution, hold an inquiry and satisfy himself of the identity of the body and whether judgment of death was duly executed thereon, and he shall make a report of it to the Menteri Besar of the State;
- (f) when a sentence of death is avoided by the escape of the person sentenced to death execution of the sentence shall be carried into

effect at such other time after his recapture as the Court shall order;

- (g) no omission or error as to time and place and no defect in form in any order or warrant given under this and no omission to comply with the provisions of paragraph (e) shall be held to render illegal any execution carried into effect under the order or warrant, or intended so to have been carried into effect, or shall render any execution illegal which would otherwise have been legal.

Regulation 176(2) of the Prisons Regulations 2000 provides that a prisoner condemned to death shall be confined in a separate cell and be kept apart from all other prisoners, under the constant supervision of a prison officer both by day and by night. The prisoner will be asked if he wishes to see a religious personnel, and, if he so desires, a religious personnel to which denomination he belongs shall, if practicable, be asked to visit the prisoner on a duration approved by the Officer-in-Charge.<sup>22</sup> He is also provided with facilities to correspond with his legal adviser, relatives or in the case of a foreign prisoner, his consular's representative. He is also entitled to write one letter to his relatives a week.<sup>23</sup>

In relation to the execution, regulation 182 provides that the Officer-in-Charge shall be responsible for carrying out executions and he and the prison officer involved shall make themselves familiar with the instructions for carrying out the executions. The Officer-in-Charge and the prison officers involved will satisfy themselves that every precaution is taken to ensure that executions are carried out with efficiency and dispatched in accordance with proper instruction and that the gallows and all appliances connected with executions are maintained in good condition and order. The execution shall be carried out in accordance with the instructions issued from time to time by the Director General, and due decorum shall be observed by all concerned. No person shall attend any execution other than the Officer-in-Charge, the Medical Officer and such other prison officers and staff as the Officer-in-Charge may direct.

### Retain death penalty for heinous crime

It is indisputable that murder cases, the use of firearms in the commission of offences such as armed robbery, and drug trafficking

<sup>22</sup> Regulation 177 of the Prisons Regulations 2000

<sup>23</sup> Ibid. reg 178.



cases are rampant and frequently flooding our daily news. Recently, the nation was reeling in shock when a 9-month-old baby girl died after being allegedly raped and sodomized by her caretaker's husband.<sup>24</sup> Such a despicable and horrifying crime deserves the most stringent of punishments. Likewise, the taking of innocent lives is a crime so heinous that the severe punishment is necessary in reflecting a society's abhorrence and intolerance towards such crimes, where public interest should be greatly considered. Such dreadful and abhorrent offences committed by the accused are reflected in some of the following cases.

In *Public Prosecutor v Aloywisius Andreas Belia Dafid*,<sup>25</sup> the accused attacked the victim on the head with a hammer until she collapsed on the floor. The graphic portrayal of the victim's head depicted that the death of the victim was nothing less than brutal. Again, in *Public Prosecutor v Ravindran & Ors*,<sup>26</sup> the six accused and two others who were still at large had abducted the deceased and stabbed and punched him several times. The body of the deceased was then thrown into a stream at Sentul. The deceased died of his injuries. In *Public Prosecutor v Nazarudin bin Ahmad & Ors*,<sup>27</sup> the police investigation revealed that the accused persons had hijacked a taxi driven by the deceased. While on the kampung road, the 1<sup>st</sup> accused took out a revolver from his waist and demanded money from the deceased. As the deceased had no money, the 1<sup>st</sup> accused shot the deceased in the head. The deceased's body was removed from the taxi and left on the ground.

In *Public Prosecutor v Tai You Choy*,<sup>28</sup> the accused and deceased were known to each other. The deceased had threatened to dismiss the accused from employment. The accused who felt humiliated and shamed, retaliated. He chased the deceased who ran up to the first floor. When the accused came face to face with the deceased, the accused stabbed the deceased with a sharp bearing scrapper on the chest which ruptured the deceased's heart.

Again, in *Public Prosecutor v Soo Tai Leng*,<sup>29</sup> a quarrel between an estranged husband and wife erupted. The accused wife poured petrol on the deceased husband and set him on fire. The deceased husband suffered severe burns and subsequently died.

Again, in *Public Prosecutor v Safian bin Abdullah & Anor*,<sup>30</sup> the 1<sup>st</sup> and 2<sup>nd</sup> accused mercilessly attacked the deceased with the 'kerambit', crushed the deceased's head with empty bottles and used a rope to strangle him. The attack was ferocious. The deceased suffered multiple deep wounds on his body, neck and face. Several of his ribs were broken. The deceased died from thoracic, intra cranial and intra abdominal injuries with asphyxia due to strangulation.

The above are mere examples of heinous crimes tried in the courts. The accused may apologise to the family of the victim but no amount of apologies can bring back the victim and nothing can alleviate the anguish and sorrow experienced by the victim's family and friends. They will have to come to terms with the trauma, shock and loss caused by the horrifying death of a loved one. Hence, to restrain people from killing innocent souls, the death sentence ought to be assigned for the commission of such heinous crimes. 'The survival of an orderly society demands the extinction of the life of a person who is proved to be a menace to social order and security.'<sup>31</sup> In *Public Prosecutor v Kanadasan a/l Sankaran & Anor*,<sup>32</sup> the Court of Appeal stated: 'No one who has killed an innocent person can expect upon conviction to be dealt with other than with utmost severity. Unless there are mitigating circumstances, they can expect to be sentenced or punished with the severest allowed by law.' In *Kanadasan's* case, the deceased was attacked while he was sleeping. The attack was nothing less than premeditated with no element of provocation on the night of the incident.

In relation to drug trafficking or drug abuse cases, such offences have been described as the country's number one public enemy. The evil of drug offences on the society is also obvious and

24 'Nine-month-old baby dies after alleged rape by caretaker's husband', 11 Nov 2018 at <https://www.malaysiakini.com/news/451346>

25 [2006] MLJU 308, [2006] 7 CLJ 120.

26 [1993] 1 MLJ 45.

27 [1993] 2 MLJ 9.

28 [1982] CLJ 78.

29 [2005] 7 CLJ 218.

30 [1983] 1 CLJ 324.

31 'Punishment must reflect public abhorrence of crime, says apex court' at <https://www.deccanherald.com/content/274722/punishment-must-reflect-public-abhorrence.html>

32 [2010] 1 MLJ 297.



therefore, drug traffickers and peddlers should rightfully be severely punished. The media often reports on law enforcement agencies seizing large quantities of dangerous drugs. The profits from the sale of illicit drugs is very lucrative and drug addiction has been known to lead to other offences such as robberies and snatch thefts. Some have gone to the extent of harming their own families in order to attain money to support their addictive habits. In *Tia Ah Leng v Public Prosecutor*,<sup>33</sup> Mokhtar Sidin JCA speaking for the Court, stated:

‘The Government and the legislature have taken very serious views in the abuse of usage of dangerous drugs. Drug addictions are rampant and the Government as well as the legislature have tried to curb these addictions especially amongst youths but met with little success. Death sentences and heavy penalties have been introduced but we find drug addicts everywhere. The addiction to drugs have led to other offences such as thefts, burglary and snatch thefts. Some of these offences lead to serious consequences. We have read in the newspapers that some drug addicts have gone to the extent of hurting their own families such as their mothers, sisters and grandmothers in order to get some money to purchase the drugs to support their addictions. Recently, a woman died when a snatcher snatched her handbag and she was dragged together with the handbag some distance away and as a result of that she died. In our view, the source of all these evils are the drug traffickers and the drug peddlers. They are the ones who have been trafficking, selling and peddling the drugs to those drug addicts. It is public knowledge that the return in this type of business is very lucrative. The seriousness of the offences on drugs have been made known since the seventies. Eminent judges have expressed this in so many cases.’

Again, in *Obiego Emmanuel Chukwunanu v Public Prosecutor*,<sup>34</sup> Tun Abd Majid Haji Tun Hamzah JC stated: ‘[U]ntil today such offence has not reduced in number, in fact, increasing and threatening. The introduction of various types of drugs in particular what they called the designer drugs which are penetrating into all levels of the society have caused grave concerns to the Government. Methamphetamine or ‘syabu’ was unheard of in Malaysia in the eighties. It is one

of the pioneers of designer drugs. Almost every other day the local newspapers would carry news of raid over drug processing laboratory or arrest of drug cases. To my mind, for this reason the element of public interest should be considered in favour of imposing a deterrent sentence.’

In *Mogan Maruthamuthu v Public Prosecutor*,<sup>35</sup> VT Singham JC stated: ‘It cannot be gainsaid that dangerous drugs related offences are very serious and becoming rampant and that the court must show its abhorrence of it and this could only be done by imposing a deterrence sentence against an accused person so as to deter other would be offenders. Also, sentences passed by the court no doubt must commensurate with the seriousness of the criminal conduct and persistent criminality should result in more severe punishment than would otherwise have been imposed’.

In *Adam Atan v Public Prosecutor*,<sup>36</sup> Gopal Sri Ram JCA stated: ‘There is no gainsay that drug offenders are a menace to society. They are nothing less than serpents on the front lawn of justice and should be dealt with accordingly. Everyday we read in the newspapers about the efforts of the law enforcement agencies in seizing large quantities of dangerous drugs and of the deleterious nature of these drugs which is visited upon members of our society, in particular our youth. The courts will be failing in their duty if they do not take a serious view towards the offences of this nature. The sentence imposed must not only be commensurate with the offence in this case but must also stop would be offenders dead in their tracks from committing it’.

In *Public Prosecutor v Oo Leng Swee & Ors*,<sup>37</sup> the accused persons had pleaded guilty to a charge of trafficking in 3,441 grammes of morphine and 2,880.3 grammes of heroin, contrary to section 39B(1)(a) of the then Dangerous Drugs Ordinance 1952 and were convicted and sentenced to life imprisonment by the High Court. In allowing the appeal and substituting the sentence of life imprisonment with the death sentence, Suffian LP, delivering the judgment of the Federal Court stated:

‘In our view these accused should have been sentenced to death, notwithstanding that they were first offenders and had pleaded guilty –

35 [2003] 5 CLJ 118.

36 [2009] 1 CLJ 33, CA.

37 [1981] 1 MLJ 247, FC.

33 [2004] 4 MLJ 249.

34 [2018] 1 LNS 1089.



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because they were engaged in manufacturing and manufacturing in a systematic and a big way (they admitted they were paid \$1,200 a day); and without manufacturers, there would not have been traffickers and pushers; and without any of these people engaged in this deadly business there would have been no or fewer consumers – to save whom, parents and relatives suffer mental anguish and Government spend time and money which could very well be expended in developing the economy and increasing the prosperity of the country.’

The above are examples of serious offences which deserve to be sentenced with no less than the death penalty. The public interest is served by balancing the interest of the accused with the interest of the public to show that the commission of serious offences are punished appropriately, with a view of deterrence not only of the guilty person from repeating the offence but also others from committing a similar offence. The primary object of the death penalty for drug trafficking offences is that society regards the offence with particular abhorrence and the death penalty should act as a formidable deterrent, particularly where the offence is one that is committed for profit and the offender is prepared to take such a dreadful risk.

In light of the foregoing discussion, it is submitted that a thorough study has to be carried out before finally deciding on the abolishment of the death penalty. While it is true that the substitution of the death penalty with 30 years’ maximum imprisonment or life imprisonment would remove the offender from the society and thus, no longer posing a risk to the society, the wishes of the deceased’s family members grieving the loss of their loved one as a result of brutal or *uncivilized criminal* acts must also be given merit and viewed with serious consideration. It is also noteworthy that a longer term of imprisonment would not only involve a huge cost to the government to sustain the prisoners but would also involve the need to build more prisons with the ever-increasing number of convicted persons. In

Sabah for example it was reported that the Prisons Department spends approximately RM114 million annually to feed inmates with more than 7,000 prisoners statewide<sup>38</sup> whose daily expenditure costs between RM35 and RM41 per person. Further, the six prisons in the state of Sabah with the capacity of 5,000 were overpopulated by 2,000 people which potentially posed security threats.

## Conclusion

The commission of most heinous and dreadful offences such as murder, trafficking in dangerous drugs, possession or control of firearms, ammunition or explosives deserves the most severe of punishments. Some view the death penalty as a cruel, inhuman, or degrading punishment that amounts to an arbitrary deprivation of life. Many countries have abolished such punishment while Malaysia is still contemplating the abolishment of the death penalty, substituting the punishment with a longer term of imprisonment or life imprisonment. It is submitted that the death penalty should be maintained to reflect the gravity of the offence and that the public interest demands a deterrent sentence on serious offenders. Nowadays, the commission of serious offences such as murder is not only rampant but brutal and vicious and the imposition of the death penalty will assist in deterring others from committing similar crimes and thus may save countless innocent lives. Undoubtedly it would be ludicrous to contend that the imposition of the death penalty for serious offences has not deterred or reduced the commission of such offences to a certain extent over time. The punishment is to be imposed on the convicted offender with due process, and the imposition of such punishment would more often than not produce a strong deterrent effect on potential criminals.

38 ‘Sabah Prisons spend RM114m to feed prisoners annually’ New Straits Times November 17, 2018. <https://www.nst.com.my/news/nation/2018/11/432211/sabah-prisons-spend-rm114m-feed-prisoners-annually>

## F E E D b a c k

If you have any feedback or comments about the newsletter, please send an email to: [j.halili@lexisnexis.com](mailto:j.halili@lexisnexis.com); [katherine.leong@lexisnexis.com](mailto:katherine.leong@lexisnexis.com)

Please let us know of other information that should be included in future issues.