



MahWengKwai & Associates

ADVOCATES AND SOLICITORS



Parliamentarians for Global Action (PGA)

Roundtable on the Abolition of the Mandatory
Death Penalty in Malaysia

DATO MAH WENG KWAI

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Situation of the Mandatory Death Penalty in Malaysia

- National Framework
- Impact of the Mandatory Death Penalty
- Challenge to Abolition
- Role and Contribution of Parliamentarians

Aims of punishment are retribution, justice, deterrence, reformation and protection, not vengeance. Courts are to protect society by enforcing justice – Hari Ram Seghal v PP [1981] 1 MLJ 165 per Wan Yahya J.

Universal Declaration of Human Rights - “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

A. Situation in Malaysia

- 1) Mandatory death penalty for
 - a) Murder - S302 Penal Code
 - b) Offences against the person of the King, Rulers or Yang di-Pertua Negeri - S121A Penal Code
 - c) Trafficking in dangerous drugs - S39B (1) Dangerous Drugs Act 1952
 - d) Discharging a firearm in the commission of a scheduled offence eg. robbery - S3 Firearms (Increased Penalties) Act 1971
 - e) Accomplices in case of discharge of firearm - S3A Firearms (Increased Penalties) Act 1971

2) Discretionary death penalty for

a) Abduction, wrongful restraint or wrongful confinement for ransom - S3 Kidnapping Act 1961

b) Waging or attempting to wage or abetting the waging of war against the Yang di-Pertuan Agong, Ruler or Yang di-Pertua Negeri - S121 Penal Code

3) S3 of the Kidnapping Act 1961 provides for death or imprisonment for life upon conviction. If not sentenced to death, accused is liable to whipping (Maximum 24 strokes).

S121 Penal Code provides for death or imprisonment for life. If not sentenced to death, accused is liable to be fined.

4) In July 2012, former Attorney General Tan Sri Gani Patail announced that the AG's Chambers were working towards proposing an amendment to the Dangerous Drugs Act 1952 to give judges the discretion of not imposing the death sentence on couriers.

On 13th November 2015, the present Attorney General Tan Sri Mohamed Apandi Ali said that while he is not against capital punishment judicial discretion should be given to judges in sentencing in capital offences and that the mandatory death penalty for drug 'mules' ought to be removed.

B. Situation Internationally

- 1) The European Convention on Human Rights
1953
 - the death penalty was abolished under Protocol No 6 Article 1 - signed by 18 countries in Strasbourg
 - but Article 2 excludes the death penalty for offences committed in time of war or of imminent threat of war
 - India acceded to the Convention on 27 March 1979

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- Convention recognises that every human being has the inherent right to life, which right shall be protected by law
 - no man shall be arbitrarily deprived of his life
 - in countries that have not abolished the death penalty, the death sentence may be imposed only for the most serious / heinous crimes in accordance with the laws in force at the time of the commission of the crime

2) The International Convention on Civil and Political Rights

- Resolution No 2000/65 dated 27 April 2000 of the UN Commission on Human Rights titled “The Question of Death Penalty” urges all states that still maintain the death penalty to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child

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- urges States not to impose the death penalty for any but the most serious crimes and only pursuant to a final judgment rendered by an independent and impartial competent court
 - urges States not to impose death penalty for crimes committed by persons below 18 years of age and to exclude pregnant women
 - urges States to ensure right to a fair trial and the right to seek pardon or commutation

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- urges States that notion of ‘most serious crimes’ does not go beyond intentional crimes with lethal or extremely grave consequences
 - urges States not to impose death sentence for non violent financial crimes or for non violent religious practices or expressions of conscience
 - urges States to progressively restrict the number of offences for which death penalty may be imposed

3) The Law Commission of India Report No. 262 on the Death Penalty evaluated the celebrated case of Bachan Singh v State of Punjab (1980) 2 SCC 684 where the Supreme Court of India held that Indian penal laws, which prescribe the death penalty as an alternative punishment, only for a handful of heinous crimes, is in keeping with the spirit of international covenants

- Introduced a formula what has come to be known as the 'rarest-of-rare cases' formula ie. Should be reserved for the gravest of cases with extreme culpability

In Bachan Singh, the Supreme Court laid down the following principles to guide judicial discretion in determining the appropriate sentence for murder:

- I. life imprisonment is the rule and death sentence an exception.
- II. this exceptional penalty can be imposed “only in gravest cases of extreme culpability” taking into account the aggravating and mitigating circumstances in a case, paying due regard to the “circumstances of the offence” as well as the “circumstances of the offender”.

III. to prevent sentencing from becoming arbitrary, the Court endorsed the view that the determination of aggravating and mitigating circumstances should be based on “well recognised principles... crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases.”

The Court thus prescribed a process of **principled sentencing**, and held that the determination of aggravating and mitigating factors would be based on a determinate set of standards created through the evolutionary process of judicial precedents.

IV. only if the analysis of aggravating and mitigating circumstances, as indicated above, provided **“exceptional reasons”** for death, would capital punishment be justified, because “[a] real and abiding concern for the dignity of human life postulates resistance to taking a life through law’s instrumentality. That ought not to be done save in the **rarest of rare cases when the alternative option is unquestionably foreclosed.”**

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- V. therefore, the Bachan Singh formulation requires judges to impose the death penalty only when the offender is not capable of reform/rehabilitation and the onus is on the prosecution to prove that the offender cannot be reformed.
- See cases of
Surja Ram v State of Rajasthan AIR [1997] SC 18
cf State of Rajasthan v Baisakha [1997] Cri. LJ 1399 and
Om Prakash v State of Haryana AIR [1999] Sc 1332

C. Impact of the Mandatory Death Penalty on Malaysian Courts

- where there is an alternative sentence of life imprisonment, judges may be inclined to exercise their discretionary powers in sentencing to impose the alternative sentence ie. judges are slow to impose the death penalty

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- further where the death penalty is mandatory, judges may be inclined to stretch the concept of ‘benefit of the doubt’ to the fullest and may be slow to convict the accused as per the charge and proceed to reduce the charge to a lesser offence which does not carry the death penalty
 - mandatory sentences kill judicial discretion in sentencing

D. Challenges to Abolition

- ultimate goal of UN Resolutions and International Conventions is to eventually abolish death penalty altogether - the universal trend
- courts should welcome repeated efforts to question the constitutional validity of the death penalty

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- to determine when society has evolved and progressed enough to abolish the death penalty completely
 - in meantime it will be a major challenge to Malaysian society to determine which are the most serious / heinous crimes that warrant the retention of the death penalty (eg. murder, drug trafficking, terrorism?)

E. Role and Contributions of

Parliamentarians

- those who propagate the abolition of the death penalty completely should continue to strive to achieve that goal
- to call on the government to progressively restrict the number of offences which carry the death penalty (eg. drug couriers) instead of enlarging the number of offences
- if mandatory capital punishment cannot be abolished altogether, then judicial discretion should be returned to judges to pass an alternative sentence of life imprisonment

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- to establish a moratorium on executions pending a complete review on whether the death penalty should be abolished altogether and if not, the restriction of the number of the most serious / heinous crimes that warrant the death penalty to be imposed
 - Chairman YB Dato Sri Mohamed Nazri Aziz himself has said that ‘until the status of the mandatory death sentence is finalised, it would only be fair that the implementation of the death sentence be deferred’

F. Conclusion

- to endeavour to abolish the death penalty altogether for all types of offences
- if the death penalty is to be retained it should not be made mandatory but left to the discretion of the judge
- if the death penalty is to be imposed, it should be 'reserved' for the rarest-of-rare cases as per the formula laid down by the Indian Supreme Court
- in any event to progressively restrict the number of offences which carry the death penalty

Note: See article on 'Should the Death Penalty be Abolished' [1981] 1 CLJ 25 by Dato' Mah Weng Kwai

<http://www.mahwengkwai.com/should-the-death-penalty-be-abolished/>

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Thank you.

Dato' Mah Weng Kwai