A review of the 'discretionary' death penalty for drug trafficking in Malaysia

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Joint report by Anti-Death Penalty Asia Network and Eleos Justice (Monash University)

Introduction

On 10 June 2022, Wan Junaidi Tuanku Jaafar, the Minister in the Prime Minister's Department, announced the government's decision to give the judiciary discretion in the sentencing of 11 offences which currently carry the mandatory death penalty.[1] In November 2017, the *Dangerous Drugs Act 1952* was amended to introduce section 39B(2A), allowing judicial discretion in the sentencing of drug trafficking offences which previously mandated a death sentence. The government appears not to have included drug trafficking under s39B(2A) as one of the 11 offences currently under review. However, this discretion is so limited that in practice, the death penalty drug trafficking remains mandatory in the vast majority cases, resulting in the continued use of the death penalty for drug trafficking.

This briefing note prepared by the Anti-Death Penalty Asia Network (ADPAN) and Eleos Justice at Monash University outlines the current judicial practice concerning s39B(2A), highlights reasons behind the lack of discretion afforded to judges and other problems with the provisions, and proposes amendments to remedy these shortcomings, including the removal of the death penalty for drug trafficking.

[1] Amnesty International, 'Malaysia: Move to abolish mandatory death penalty is 'welcome step' in right direction' (online: 10 June 2022).
<https://www.amnesty.org/en/latest/news/2022/06/malaysia-mandatory-death-penalty-abolition/>.

Judicial practice under s39B(2A)

In 2017, former Minister in the Prime Minister's Department Datuk Seri Azalina Othman Said stated that the introduction of s39B(2A) was intended to "add an element of mercy in a certain situation which the judge sees fit",[2] and that under the new provision, judges would not have their hands "tied by the government".[3]

We searched the Lexis Advance database for cases containing the terms "Dangerous Drugs Act" and "39B" and "trafficking". After limiting the jurisdiction to "Malaysia" and the Court to "Malaysia High Court", our search yielded 206 cases between 15 March 2018 (when s39B(2A) was introduced) and 1 June 2022. After excluding irrelevant cases (such as appeals, retrials, and trials where the trafficking charge was removed due to a plea bargain), duplicate judgments, and judgments written in Malay, we identified 143 cases involving a total of 215 defendants[4] Of the 215 people charged with drug trafficking between 15 March 2018 and 1 June 2022, 105 were convicted of this offence. Of these, 104 were adults, meaning the death penalty was an available punishment. Judges "elected" to impose the death penalty on 98 people (94%), while six (6%) received a life sentence, five of whom were afforded this option in accordance with s39B(2A).

Section 39B(2A) is applicable in *all* instances where a person has been convicted of an offence under s39(B)(1) of the Dangerous Drugs Act 1952, trafficking in dangerous drugs. Should the

[2] NST Team, 'No more mandatory death sentence soon as amendments to Dangerous Drugs Act Passed in Parliament', *New Straight Times* (online: 1 December 2017) <https://www.nst.com.my/news/government-public-policy/2017/11/309354/no-more-mandatory-death-sentence-soon-amendments>.
[3] Daily Express, 'Passed – Bill to do away with mandatory death sentence', (online 1 December 2017) <http://www.dailyexpress.com.my/news.cfm?NewsID=121421>.
[4] We report the number of defendants rather than cases to account for divergent outcomes in single cases. Accordingly, the figures cited in this report refer to individual defendants, rather than case numbers.

convicted individual satisfy the requirements of s39B(2A), judges can use their discretion to sentence them to either the death penalty or a lesser sentence of life imprisonment and 15 strokes

of the cane. However, of the 98 people who were sentenced to death, s39B(2A) was only considered in relation to 73 (75%). In relation to the remaining 25 people (26%), the court did not make any reference to s39B(2A)—that is, the court sentenced the defendants to death without considering whether a lesser sentence was available to them by operation of the s39B(2A) discretionary sentencing regime.

Sentence	**Number of persons sentenced**	**Court engagement with s 39B(2A)**	
		Section 39B(2A) considered	**Section 39B(2A) not considered**
Death penalty	98	73	25
Life sentence + 15 strokes of cane	6	5	1
Total	104	78	26

These findings demonstrate that in practice the intention of s39B(2A) to introduce judicial discretion in sentencing has not been achieved in the overwhelming majority of cases, either due to the narrowness of the s39B(2A) criteria (majority of cases) or the non-application of s39B(2A) by courts (minority of cases).

Interpretation of s39B(2A)

Numerous judgments highlight ambiguity in the interpretation of s39B(2A), which currently reads:

(2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:

> *(a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;*
> *(b) there was no involvement of agent provocateur; or*
> *(c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and*
> *(d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.*

There has been confusion as to the interpretation of this provision.[5] Specifically, there is ambiguity as to whether the subsections under s39B(2A) should be read conjunctively or disjunctively—that is, whether some or all of the provisions must be met to enliven judicial discretion.[6] This uncertainty largely stems from the drafting of the provision, where the words 'and' and 'or' are used at the end of paragraphs (b) and (c), respectively. Our research shows that, where judges have considered s39B(2A), they overwhelmingly interpret the provision as requiring paragraphs (a), (b) and (c) to be read disjunctively, and conjunctively with (d). In other words, they interpret discretion to be enlivened where (a) and (d), or (b) and (d), or (c) and d) are satisfied. However,

[5] Sara Kowal, Dobby Chew, and Mai Sato 'Discretion in law but not in practice: Malaysia's Dangerous Drugs Act' (online 19 July 2021) <https://www.monash.edu/law/research/eleos/blog/eleos-justice-blog-posts/discretion-in-law-but-not-in-practice-malaysias-dangerous-drugs-act>.
[6] Ibid.

in a handful of cases, alternate interpretations have been given (and even used to invoke discretion).

It should also be noted that the s39B(2A) provides that the Court "*may* have regard only" [emphasis added] to the conditions in paragraphs (a) to (d), suggesting it is neither binding nor mandatory. We hope this ambiguity will be dealt with in the impending legislative amendments. We suggest a method to do so in Recommendation 1.

Assisting an enforcement agency

S39B(2A)(d) requires the convicted person to have "assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia". Enforcement agencies have adopted varying approaches to investigating information provided by an accused. For example, in *Qui Jieru v PP*,[7] the customs officer did not investigate information provided by the accused, thereby denying the defendant the opportunity to satisfy paragraph (d). Likewise, in *PP v Brits Shaun*,[8] an officer provided the court with an incomplete and unclear account of the assistance given by the accused, in doing so skewing the court's assessment of the defendant's compliance with paragraph (d). As these cases demonstrate, judges' ability to exercise their discretion—and, by extension, a defendant's ability to access a lesser sentence—turns on law enforcement agencies conducting proper investigations and rendering accurate information to courts.

Our assessment of the small number of cases in which s39B(2A)(d) was deemed to have been satisfied indicates that the current threshold demands an unrealistically high level of assistance. We suggest this may be lowered in the following ways:

Lowering the threshold: As most persons arrested for drug trafficking hold low-level positions in a drug syndicate, they are often not appraised with an operational knowledge of the transactions that they are engaged to perform. This is precisely why vulnerable persons are targeted by criminal organisations. We recommend that the threshold for assistance be lowered to reflect this hierarchy. The emphasis should be on the willingness of the defendant to assist, rather than the outcomes.

[7] *Qui Jieru v Public Prosecutor and another appeal* [2020] MLJU 821.
[8] *Public Prosecutor v Brits Shaun* [2019] MLJU 916.

Amending the definition of 'assistance': In *PP v Brits Shaun*, the Court noted that the term 'assistance' is undefined, and that this was a deliberate choice on behalf of the legislature such that the 'form, manner or method of assistance…is unlimited', subject to the condition that it facilitates the 'disruption of drug trafficking activities'.[9] The Court also held that despite the legislature's intention for courts to determine whether assistance has been given, 'such determination must primarily be guided by the confirmation of the enforcement agency'.[10] Concerningly, this charges the prosecution—responsible for pursuing a conviction—with the responsibility to provide the court with exculpatory information that undermines its own pursuit of the death penalty.

We suggest that the 'assistance' be evaluated following consideration of a non-exhaustive list of mitigating factors (see below) to ensure consistency of and proportionality in sentencing. In drafting such a list, the legislature should be mindful of case law and invite submissions from relevant stakeholders. When assessing whether sufficient assistance has been provided, courts should be mindful of what contributions can realistically be expected of the defendant in question.

[9] Ibid [35].
[10] Ibid [36].

Mitigating Factors

At present, the law does not mandate (or indeed allow) any assessment of the vulnerability of the defendant beyond the requirement s39B(2A) that:

(a) The offender was not buying and selling dangerous drugs;

(b) The offender was not an agent provocateur; and

(c) The involvement of the offender was only in transporting.

However, there are additional factors a judge may consider relevant. For example, Justice Lee Swee Seng in *Berimang v PP* stated in dissent**:**

> *Carriers and mules are at the lowest end of the nefarious hierarchy of the drug trafficking business and yet they stand to receive the maximum irrevocable and final sentence in law, that of the death penalty whilst the real culprit and mastermind may not be known, much less successfully arrested and prosecuted. Surely a case has been made out that there must be some room given to the application of the proportionality principle on sentencing when considering the involvement of carrier or mule in the drug trafficking activities.*[11]

Recent reports examining the profile of the death row population in Malaysia have highlighted vulnerabilities amongst the population. One report found that a "significant population of those sentenced to death in Malaysia is comprised of individuals convicted of drug offending, many of whom face socioeconomic, nationality and language barriers that prohibit their access to the requisite level of legal assistance needed to properly test the prosecution case". [12] Another study

[11] *Junaidi Berimang v Public Prosecutor and another appeal* [2022] MLJU 453.

[12] Natalia Antolak-Saper Sara Kowal Samira Lindsey Ngeow Chow Ying Thaatchaayini Kananatu, *Drug Offences and the Death Penalty in Malaysia: Fair Trial Rights and Ramifications* (Online: <https://www.hri.global/files/2020/05/29/Malaysia_Death_Penalty_-_Fair_Trial_-_Monash_ADPAN.pdf>, 41; Carole

found that "many of the women facing the death penalty in Malaysia were either unemployed or employed in low-level, low-paid, precarious work".[13] This reinforces the importance of considering vulnerabilities during sentencing.

We propose the judiciary be directed to consider a range of mitigating factors in sentencing. These mitigating factors are listed by Hamid Sultan JCA in *Brits Shaun*[14] and *Public Prosecutor v Morah Chekwube Chukwudi.*[15] These mitigating factors are already recognised in Malaysian jurisprudence, yet they are not applied by judges as a result of s39B(2A)**.** A non-exhaustive list of mitigating factors include: addiction and willingness to get treatment for addiction; economic necessity behind the offending; vulnerability; demographic factors including age, education, and minority status; willingness to assist law enforcement (independent of the outcome achieved); the manner in which evidence was obtained; and perceived risk of recidivism.

Legislators can refer to comparative legal frameworks such as s164 of the *New Drug Act* established in Thailand,[16] which provides for an array of factors that can be considered by judges in sentencing. This includes suggestions mentioned in the above list of mitigating factors. Similar to this suggested approach is one taken by the Supreme Court of India, earlier this year in *Manoj & Ors v State of Madhya Pradesh*.[17] This judgement reiterated that the death penalty in India applies only in the severest of circumstances**.** Additionally, mitigating circumstances are to be assessed in each individual case. Mitigating factors are broad and may encompass any aspect

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Berrih & Ngeow Chow Ying, 'Isolation and Desolation: Conditions of Detention of People Sentenced to Death Malaysia' *ADPAN* <https://www.ecpm.org/wp-content/uploads/mission-enquete-Malaisie-GB-2019-280420-WEB.pdf>; Amnesty International, 'Fatelly Flawed: Why Malaysia must Abolish the Death Penalty' *Amnesty International* 2019. Online: <https://www.amnesty.org/en/documents/act50/1078/2019/en/>.

[13] Lucy Harry, 'Rethinking the relationship between women, crime, and economic factors: the case study of women sentenced to death for drug trafficking in Malaysia' Centre for Criminology, University of Oxford (2021) 10, 2.

[14] *Public Prosecutor v Brits Shaun* [2019] MLJU 916.

[15] [2017] MLJU 958, [5].

[16] *New Drug Act 2021* (Thai) <http://www.thailawforum.com/laws/New%20Drug%20act%20(Eng)%20.pdf>.

[17] *Manoj & Ors. versus State of Madhya Pradesh* [2022] Supreme Court of India [182], [204].

of a defendant's life.[18] The Court issued guidelines to ensure that lower courts considered mitigating circumstances of an offender during sentencing in a capital case. In this instance, where the death penalty would have been awarded, all three defendants were sentenced to life imprisonment based on consideration of their likelihood of rehabilitation. Such factors may include but are not limited to, socio-economic position, age, criminal record, health, mental health, potential for rehabilitation and continuing family ties.

With the above in mind, sentencing guidelines allowing a wide range of mitigating factors to be considered would bring Malaysia in step with global approaches to drug sentencing including those of its partners in Asia, such as Thailand and India.

[18] Gursimmran Kaur Bakshi, 'Individualised and Informed Sentencing Inquiry is Necessary, Says Team From NLUD's Project 39', *NewsClick* (online: 09 July 2022) <https://www.newsclick.in/individualised-informed-sentencing-inquiry-necessary-team-NLUD-projecct-39A>.

Recommendations

We make the following recommendations:

1. Remove the death penalty as a sentencing option for drug trafficking.
    - Under international law, for States that have not abolished the death penalty, it must not be applied except for the 'most serious crimes'[19] Drug trafficking does *not* meet the threshold of 'most serious crime'.[20]
    - This approach altogether removes the need to correct the issues identified with s39B(2A) and brings Malaysia more in line with the global trend of countries moving away from the death penalty.
    - Research does not exist, either in Malaysia or in other countries, which shows that the death penalty deterred individuals from trafficking drugs or that the death penalty was more effective in deterring drug trafficking compared to other punishments. The absence of any such deterrent effect contravenes the imposition of the death penalty for drug trafficking.
    - Public support for law is vital; however, a survey carried out in 2022 showed that a minority (19%) supported the death penalty for 'knowingly transporting, carrying or delivering' serious drugs.[21] Support for the death penalty is even lower (6%) for 'unknowingly' transporting, carrying or delivery serious drugs. The findings show that the Malaysian public already supports the removal of the death penalty for drug trafficking.

[19] Article 6, International Covenant on Civil and Political Rights.
[20] UN Human Rights Committee, General comment 36. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf .
[21] The Centre, '*How Do Malaysians Really Feel About the Death Penalty?*' (Death Penalty Survey Report, July 2022). Serious drugs are defined in this study as: heroin, LSD, MDMA/ecstasy, opium, crack cocaine, and crystal meth.

However, if the Malaysian government believes for whatever reason that the country is not yet ready for the complete removal of the death penalty for drug trafficking, and recognises that the current 'discretionary' drug trafficking provision—in practice—operates like a mandatory sentence, we recommend the following revisions to s39B(2A):

2. Allow appropriate judicial discretion by removing the current conditions set out in s39B(2A)(a)-(d). Provisions (a) through to (b) should be treated as a non-exhaustive list of examples that judges can take into consideration.
    - This would remove the confusion in the interpretation of this section as evidenced above. It will also allow the original intention of Parliament to allow "mercy" guided by judges to be fully realised.
    - In particular, broaden the definition of 'assistance of enforcement agencies' under s39B(2A)(d). The emphasis should be on the person's *willingness* to assist law enforcement, rather than the actual outcome achieved through assistance, given the limited knowledge available to many offenders in drug syndicates.

3. Introduce sentencing guidelines to enhance consistency in sentencing which allows judges to consider a range of mitigating and aggravating factors. Those charged with capital offences should be afforded the opportunity to gather and present such evidence in a separate sentencing hearing to ensure individualised sentencing is applied.

4. Those on death row convicted of drug trafficking under s39B(2A) should be afforded a review of their sentence, under this new framework.

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Legislation

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New Drug Act 2021 (Thai)