

Session 18

**Evaluating the Mandatory Death Penalty
under Section 39B of the Dangerous Drug Act
1952**

By

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1.0 Introduction

The mandatory death penalty under section 39B of the Dangerous Drugs Act 1952¹ is now 23 years old. This paper seeks to evaluate this penalty from two main perspectives: the nature of the death penalty itself, and the mandatory nature of the punishment under section 39B of the DDA. The first section traces the legislative history of section 39B and other provisions related to the offence of drug trafficking. The second section will examine, first, whether the mandatory death penalty has achieved the aims for which it was promulgated, and secondly, whether these aims are in fact desirable, bearing in mind that the ultimate goal of any legal system is to achieve justice. The third section is an exposition on the international view of the death penalty. This paper will conclude with a summary of our findings.

2.0 Legislative history

Trafficking in drugs was not initially an offence under the Dangerous Drugs Act 1952. It only became an offence pursuant to an amendment made in 1975,² which introduced a new section, section 39B. Section 39B created the offence of drug trafficking, which was punishable either by death or life imprisonment. As a corollary, the amendment also inserted into section 2 of the Act the definition of the term 'trafficking', which included the manufacturing, selling, giving, administering, transporting, sending, delivering, procuring, supplying or distributing of a dangerous drug without lawful authority.

The definition of 'trafficking' was broadened in 1977³ to include the possession of drugs. The amendment also introduced section 37(da), which provides that any person found in possession of certain types of drugs beyond a prescribed weight limit shall be presumed to be trafficking in those drugs until the contrary is proved.

¹ hereinafter 'DDA'

² the Dangerous Drugs (Amendment) Act 1975 (Act A293)

³ the Dangerous Drugs (Amendment) (No 2) Act 1977 (Act A390)

In 1983,⁴ two amendments were made to the provisions dealing with drug trafficking. First, section 37(da) was amended to reduce the amount of drugs a person has to be in possession of before the presumption of trafficking applies. From 100 grammes of heroin or morphine, the amount was reduced to 15 grammes; and from 5 kilogrammes of raw opium, the amount was reduced to 1,000 grammes. The amendment also provided for the presumption of trafficking to apply to cases of possession of a total of 15 grammes or more in weight of heroin and morphine. This addresses the situation where a person is in possession of both heroin and morphine but less than 15 grammes each.

The second and more significant amendment made in 1983 was the introduction of the mandatory death penalty: the offence of drug trafficking became punishable only by death. The reason for this, as explained by the then-Deputy Prime Minister, was threefold. First, to stem the increasing activities of drug traffickers. Second, because the existing law, which provided for alternatives to the death penalty, had failed to act as an effective deterrent. And finally, to avoid inconsistency in the sentencing of drug traffickers.⁵

A further amendment was made in 1984⁶ to add more categories of drugs or combinations of drugs, possession of which would attract the presumption of trafficking under section 37(da).

It can be seen clearly that the law governing drug trafficking has become more and more stringent over the years. It is no coincidence that drug trafficking first became an offence at what the Anti-Narcotics Task Force has identified as the first 'peak period' of drug dependency in Malaysia (1976 to 1978), while the death penalty for trafficking became mandatory during the second 'peak period' (1981 to 1983).⁷ The legislative intent for this entire series of amendments is clear – to deter drug traffickers.

3.0 Has the mandatory death penalty achieved its objectives?

The aim of the legislature in determining that the mandatory death penalty is the most appropriate punishment for the offence of drug trafficking under section 39B of the

⁴ the Dangerous Drugs (Amendment) Act 1983 (Act A553/83)

⁵ Parliamentary Debates, Representative, Sixth Parliament, First Session, 24 March 1983, 7408

⁶ the Dangerous Drugs (Amendment) Act 1984 (Act A596)

⁷ Mimi Kamariah, *Dangerous Drugs Laws*, (Kuala Lumpur: Malayan Law Journal, 1995), at 5

DDA has been explained in the previous section: to provide for an effective deterrent against drug traffickers and to avoid inconsistency in sentencing.

It is also possible to detect the undercurrents of a desire to exact retribution from drug traffickers. When tabling the 1983 amendment bill for the second reading, the then-Deputy Prime Minister described drug traffickers as cruel, mercenary killers, 'traders in death, destruction and traffickers in suffering', and added that such persons were completely undeserving of forgiveness and compassion.⁸

The aims of deterrence and retribution were highlighted by the present Prime Minister in February last year, when he spoke with the Australian media at a press conference in Perth.⁹ He was quoted as saying: 'The only way to fight the drug scourge is take preventive and punitive measures, including imposing the death penalty on traffickers.' and 'You know the kind of suffering they [drug traffickers] have inflicted upon the people who have to take their product... I have seen enough suffering. I have seen enough. I have seen what happens to these people.'

Another ground frequently cited for the retention of the mandatory death penalty is that public opinion demands it. If this is the case, then the legislature, being the representatives of the people, are duty-bound to bring the will of the people into effect.

The crucial questions here are: first, whether the mandatory death penalty has achieved its legislative aims; and secondly, whether these aims are, in themselves, desirable. If both questions are answered in the affirmative, it will strengthen the case in support of retaining the death penalty. If, however, it is found that the mandatory death penalty has failed to achieve its legislative aims, or it is found that the desirability of these aims is questionable, our retention of the mandatory death penalty will also need to be called into question.

3.1 The deterrent aim

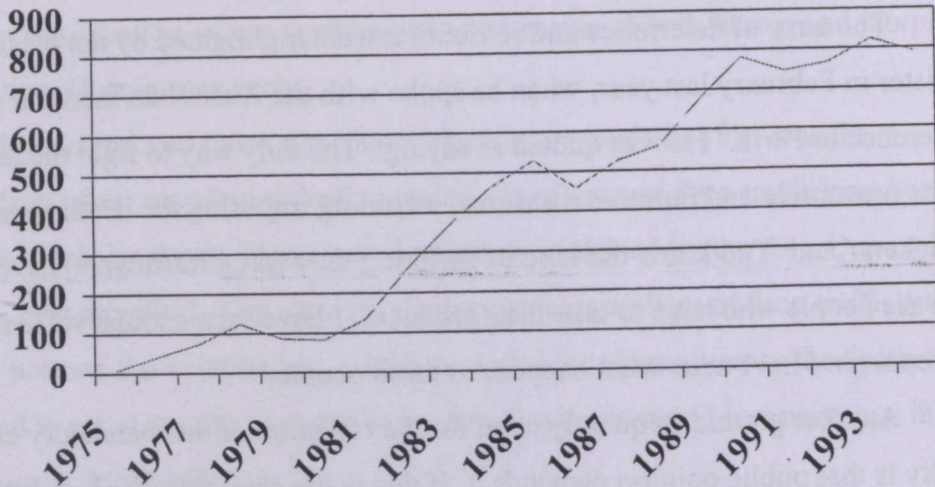
In order to determine whether the mandatory death penalty has achieved its deterrent aim, we have decided to compare the number of arrests made under section 39B before 1983 to the number of arrests made under the same section after 1983. The correlation is straightforward: if the mandatory death penalty has achieved its aim of deterrence,

⁸ Parliamentary Debates, Representative, Sixth Parliament, First Session, 24 March 1983, 7410

⁹ "PM: Punitive steps needed to fight drug scourge", *The Star Online*, 23 February 2006
<<http://www.thestar.com.my/news/story.asp?file=/2006/2/23/nation/13475864&sec=nation>>

the number of drug trafficking cases should be drastically reduced. Correspondingly, the number of arrests under section 39B should also be reduced.

Number of drug offenders arrested under section 39B 1975 - 1994



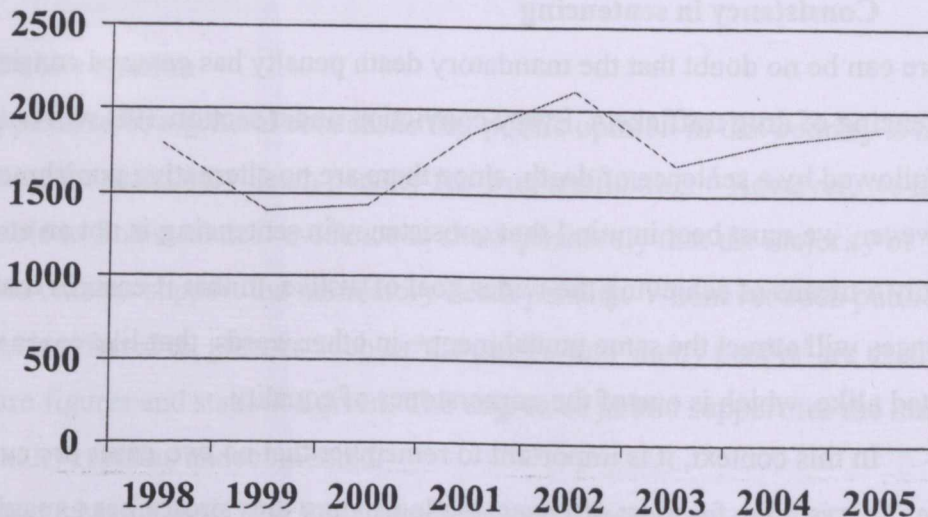
Graph 1¹⁰

Graph 1 traces the number of drug offenders arrested under section 39B since it was introduced in 1975 to 1994. 1983 is the midpoint of this time period, which allows us to compare more effectively the number of arrests before and after the implementation of the mandatory death penalty. It is obvious that, despite several fluctuations over the years, the general trend in the number of arrests has been upwards.

This upward trend is reflected in Graph 2, which charts the number of arrests made under section 39B in more recent years. Although the numbers fluctuate, what is significant is that they either hover around or exceed the 1,500 mark.

¹⁰ Source: Royal Malaysia Police, Bukit Aman, Kuala Lumpur. Quoted in Mimi Kamariah Abdul Majid, *op. cit.*, 7

Number of drug offenders arrested under section 39B 1998 - 2005



Graph 2¹¹

On the face of it, the mandatory death penalty does not seem to have achieved its deterrent aim. Of course, statistics do not tell the whole story, and there could be other explanations for the increase in the number of drug trafficking cases, as the drug problem cannot be resolved entirely through legal measures, and involves interlinked socio-economic factors. Nevertheless, the numbers being what they are, we cannot say conclusively that the mandatory drug penalty has achieved resounding success in deterring drug traffickers.

3.2 The retributive aim

Unlike the deterrent aim, the success or otherwise of the mandatory death penalty in achieving its retributive aim cannot be measured statistically. The use of the mandatory death penalty as a means of retribution supposedly allows society to express its abhorrence towards drug traffickers, and to give redress to those who have suffered as a result of drug abuse. However, it is doubtful whether the death penalty truly allows for closure on the part of the victims of drug abuse and their families.¹²

¹¹ Source: Jabatan Siasatan Jenayah Narkotik, Polis Diraja Malaysia, Bukit Aman, Kuala Lumpur

¹² Devaraj, Prema, "Malaysia: Is Capital Punishment Justified?", 28 August 2003, *ThinkCentre*, 9 January 2005 <<http://www.thinkcentre.org>>

Furthermore, it is questionable whether demanding a human life in retribution is consonant with our national values of peace, harmony and unity.

3.3 Consistency in sentencing

There can be no doubt that the mandatory death penalty has ensured consistency in the sentencing of drug traffickers. Every conviction under section 39B will automatically be followed by a sentence of death, since there are no alternative punishments.

However, we must bear in mind that consistency in sentencing is not an end in itself. It is only a means of achieving the wider goal of justice, in that it ensures that the same offences will attract the same punishment – in other words, that like cases will be treated alike, which is one of the cornerstones of equality.

In this context, it is important to remember that no two cases are ever entirely alike. This is why, for most offences, the legislature only prescribes a maximum punishment, leaving it up to the court to determine the most appropriate sentence to be passed on the offender. The court will exercise this discretion in accordance with established guidelines and principles, taking into account all mitigating and aggravating factors.

While on the face of it, it seems only fair that all persons convicted of drug trafficking should suffer the same punishment, we must remember that the circumstances of each case and each offender will vary, sometimes greatly. It may be tempting to think of all such persons as cold-hearted, mercenary vultures who feed off human suffering and deserve not the slightest bit of mercy, but this is an overgeneralisation. This is especially the case considering that the offence of trafficking includes possession, and the burden lies on the accused to disprove the presumption of trafficking.

For instance, it is obvious what a vast difference there is between a drug lord and an unfortunate drug dependent who happens to have in his possession a quantity of a dangerous drug just a little in excess of the weight limit sufficient to attract the presumption of possession, which he fails to disprove. As the law now stands, both of these persons can be convicted section 39B, and sentenced to death. Yet while the death penalty might seem to be justified in the former, it would be regarded as unduly harsh in the latter. A rehabilitative sentence would be more appropriate in the latter case, unless one wishes to regard our hypothetical unfortunate drug dependent as a regrettable but needful casualty in our country's war against drugs.

The example given above illustrates why, far from furthering the cause of justice, the mandatory death penalty would actually retard it. Its constitutionality is also questionable.

3.4 Public opinion

There appears to be a general consensus that public opinion in this country is in favour of retaining the mandatory death penalty for drug trafficking.¹³ However, we have been unable to find statistical evidence to show positively that the majority of Malaysian citizens support the mandatory death penalty. Whenever such public sentiment is referred to, phrases such as 'the public' and 'many people' are used – but seldom are figures and statistics given. The degree of public support for the mandatory death penalty remains undocumented.

On 18 March 2006, the Bar Council passed a resolution calling for the death penalty to be abolished and for a moratorium on all executions.¹⁴ The members of the Bar Council are undoubtedly members of the public as well, and this shows that not all members of the public are in favour of retaining the death penalty.

Even if the general perception is correct, it still gives rise to an intriguing chicken and egg conundrum. Did the public demand the amendment, or did the amendment itself breed public support in favour of it? It was noted earlier that the legislature cited public support as a factor for retaining the mandatory death penalty for drug trafficking. However, it is submitted that legislative will is not necessarily reflective of public opinion, particularly in an Asian context. For most Asians, the acceptance of authority is not inherently bad, but rather is an acceptable key to finding personal security.¹⁵ Therefore, we will have a tendency to approve of laws and policies implemented by the government, including laws which we might not have approved of so wholeheartedly had the government not been in favour of them.

In any event, it is unclear how aware the general public is of the ramifications and controversies surrounding the mandatory death penalty. The knee-jerk responses demanding the death penalty for all offences given extensive coverage by the media,

¹³ *The Malay Mail* conducted a 'street poll' following Minister in the Prime Minister's Department Nazri bin Abdul Aziz's comments against the death penalty in March 2006. The newspaper stated that its poll 'showed a consensus' on support for the death penalty for major crimes. Quoted in <<http://asiadeathpenalty.blogspot.com/renewed-debate-on-death-penalty-in.htm>>

¹⁴ the resolution was passed by a 105-2 majority, with 21 abstentions.

¹⁵ Pye, Lucian W., *Asian Power and Politics: The Cultural Dimensions of Authority*, (Harvard: Belknap Press, 1985), at x

which are as diverse as snatch-thefts, rape and water pollution suggest that these are motivated by outrage and impulse rather than after mature consideration.

4.0 Other perspectives

4.1 International perspective

As of now, there is a marked trend towards the abolition of the death penalty worldwide. Article 6 of the International Covenant on Civil and Political Rights prohibits the death penalty except for the punishment of serious crime, while a number of regional conventions prohibit it, notably Optional Protocols 6 and 13 of the European Convention on Human Rights. The European Union and the Council of Europe have made the abolition of the death penalty a requirement of membership, although they are willing to accept a moratorium as an interim measure.

In addition, abolition is a global trend. In 1977, 16 countries were abolitionist, while the figure was 122 for the end of 2005. In more detail, 88 countries have abolished capital punishment for all offences, 11 for all offences except under special circumstances, and 30 others have not used it for at least 10 years. Only a total of 68 countries worldwide retain it.

4.2 Religious perspectives

The religion of Islam expressly provides for the mandatory death penalty in the form of 'hudud' which are confined to a small number of offences expressly stated in the Quran, while 'qisas', which is based on the principle of retaliation allows the death penalty in murder cases. Nevertheless, there is an alternative punishment which allows the victim's family to obtain compensation from the murderer and this is encouraged. As to the concept of 'ta'zir', this punishment is entirely discretionary. Thus it can be concluded that except in a limited category of 'hudud' cases, the death penalty is not mandatory.

In Buddhism and Hinduism, there is not much mention of the death penalty. However, taking into account the teachings of Buddha which prohibit violence against all living beings and the belief in 'karma' or retribution, it is clear that the Buddhist stance is very much against the death penalty.

The Christian view of the death penalty is divided, with the Roman Catholic Church taking an abolitionist stand as seen in the late Pope John Paul II's encyclical "Evangelium Vitae" which denounced capital punishment, euthanasia and abortion as

murder and the Protestant Church taking a retentionist stand, except for a few splinter groups.

4.3 The constitutionality of the mandatory death penalty

In discussing the mandatory death penalty, a crucial issue is the constitutionality or otherwise of this sentence. It is acknowledged that the doctrine of separation of powers, particularly between the legislature-executive and the judiciary, is an important component of constitutionalism. Among other things, the function of the judiciary is to pass an appropriate sentence on each offender before it. However, as has been highlighted earlier, this discretion was removed with the imposition of the mandatory death penalty for drug trafficking. It is tantamount to the legislature passing the death sentence on each and every person found guilty of drug trafficking which could amount to an usurpation of the judicial function by the legislature.

4.4 The economic cost of the death penalty

A recurring argument in support of the death penalty is that it saves costs. These costs include the cost of rehabilitation and housing for the offender which will no longer be needed once he has been executed. Conversely, however, there are also costs involved in carrying out an execution which are seldom acknowledged. Unfortunately, we were unable to ascertain the exact comparative costs of each approach. However, undeniably, there are costs involved in both approaches to sentencing. It is submitted that the more important question which needs to be answered here is whether it is possible to put a price on human life i.e. how much a human life is worth when conducting the cost-benefit analysis on the death penalty.

5.0 Conclusion

The purpose of this paper is not to highlight the deficiencies of the mandatory death penalty under section 39B of the DDA but to allow the reader of this paper to understand more fully the issues and controversies surrounding it. The death penalty debate has been characterised as an irrational debate, capable of rousing strong passions and emotions in its proponents and opponents. Therefore it is our intention to clarify these issues and to enable the reader to approach the debate in a more informed manner. Further, the time is ripe for a review of the effectiveness of this sentence and a

evaluation of how it fits into the framework of a cohesive and comprehensive national criminal justice policy.

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Session 19

POLICE POWERS

Exercise of Police Power and its Effect on the
Process of Criminal Prosecution

THE POLICE, THE PROSECUTOR AND
THE JUDGE: A CRIMINAL PROCEDURE
AND EVIDENCE COURSE