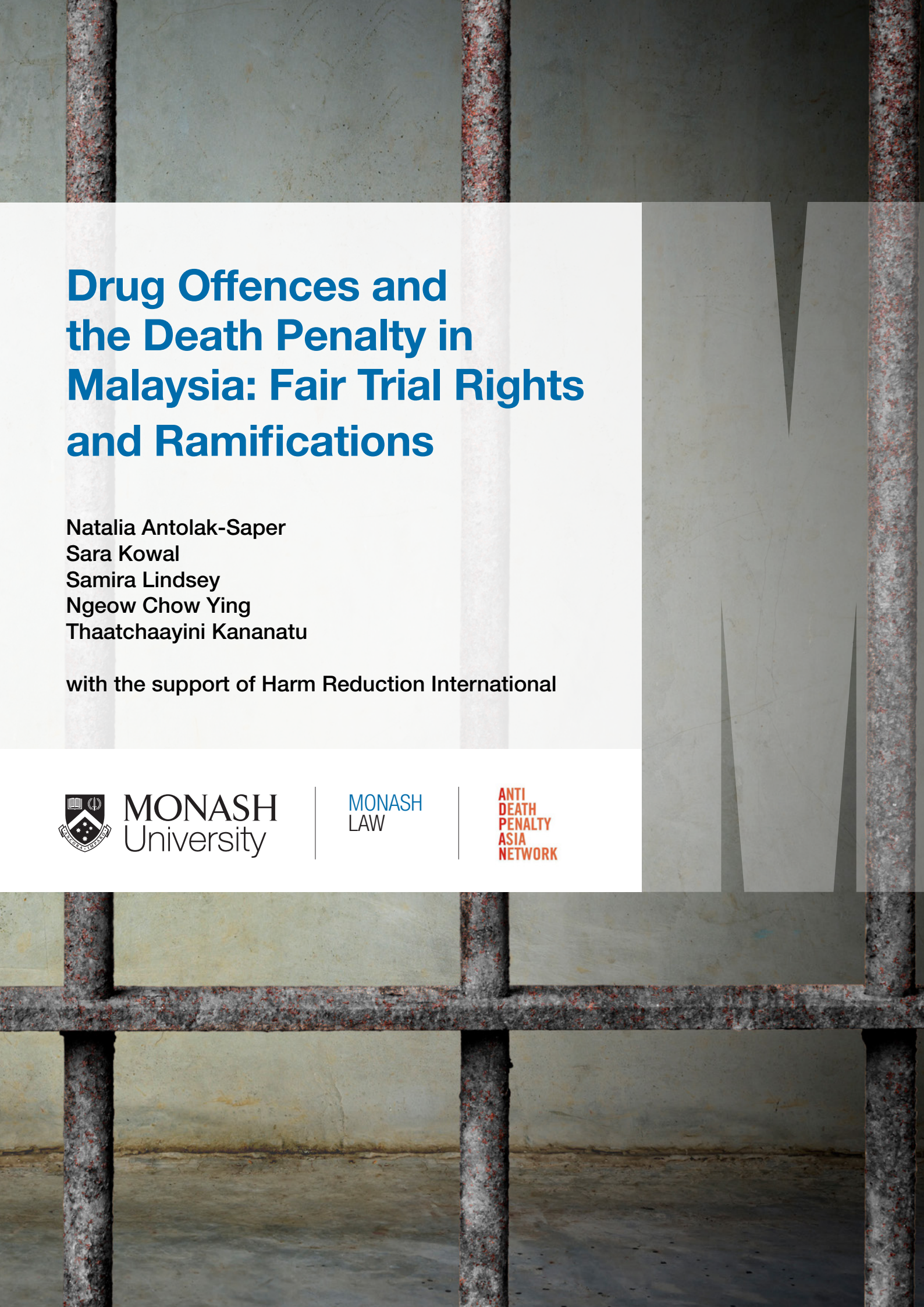


Drug Offences and the Death Penalty in Malaysia: Fair Trial Rights and Ramifications

Natalia Antolak-Saper
Sara Kowal
Samira Lindsey
Ngeow Chow Ying
Thaatchaayini Kananatu

with the support of Harm Reduction International

MONASH University | MONASH LAW | ANTI DEATH PENALTY ASIA NETWORK

Faculty of Law,
Monash University,
Building 12,
15 Ancora Imparo Way
Clayton, Victoria, 3800
Australia

Telephone: +61 3 9902 6000
Website: https://www.monash.edu/law

CRICOS provider: Monash University 00008C

Contents

Introduction 5
Current Composition of Death Row in Malaysia 5
Drug Offending and the Death Penalty 6

Part 1. Death Penalty Legal Frameworks 7
1.1 Malaysian criminal justice system 7
1.2 International death penalty frameworks 8
1.3 Exclusions in the Application of the Death Penalty 9

Part 2. Fair Trial Legal Frameworks and the death penalty 10
2.1 Malaysian Legal Framework 10
2.2 International Legal Framework 11
2.3 Mandatory Death Penalty 12

Part 3. Fair Trial standards in practice in Malaysia 14
3.1 Right to be Presumed Innocent Until Proven Guilty 15
3.2 Right to be Informed Promptly and in Detail, in a Language which the Accused Understands, of the Nature and Cause of the Charge Against Him or Her 15
(a) Transparency 15
(b) Discovery 17
3.3 Right to have Adequate Time and Facility to Prepare a Defence and Communicate with Counsel of the Accused's Own Choosing 18
3.4 Right to Choose Legal Assistance, and if Unable to Select Legal Assistance, the Right to State-provided Legal Assistance 19
(a) Effective Counsel 19
(b) Counsel of Choice 20
(c) Appeal Representation 20
3.5 Right to be Tried Without Undue Delay 21
3.6 Right to Have an Interpreter 22
Case Study 22
3.7 Privilege Against Self-incrimination 23
3.8 Right to Appeal Conviction and Sentence 24
(a) Appeal 24
(b) Revision 25
(c) Clemency 26
Case Study 27

Part 4. Drug Offences and the Death Penalty in Malaysia 28
4.1 Malaysian Legislative Framework: Dangerous Drugs Act 1952 ('DDA') 28
4.1.1 Unclear Wording 29
4.1.2 Enforcement Agencies Inadvertently Gaining a Judicial Power 29
4.1.3 'Double Presumption' Burden 30
Case Study 31
4.1.4 Reforms are not Retrospective 31
4.2 Defence of Innocent Carrier 32
Case Studies: Innocent Couriers: The over-representation of Foreign Nationals & Women on death row 33
4.3 Additional Defences 36
(a) Defence of Mental Impairment or 'Insanity' 36
(b) Defence of Duress 37

Part 5. Key Findings and Recommendations 39

Appendix I: Methodology and Approach 43

Appendix II: Illustrative Cases Involving Capital Charges for Drug Trafficking Under s 39B DDA for the period 1978 to 2019 44

References 46

Acknowledgments

The authors wish to thank Harm Reduction International for their generous support. In particular we would like to thank Human Rights Analyst Giada Girelli for her patience, and insightful comments on earlier drafts of this report.

Any errors are the authors' own.

We would also like to thank the criminal law practitioners who gave generously of their time in the form of interviews and provided valuable insights that contributed so greatly to this report.

We are grateful to our research assistants Samira Lindsey and Janice Ananthan for their diligence and comprehensive research.

Natalia and Sara would also like to thank the students in the Monash University Anti-Death Penalty Clinic – Nathan Haynes, Sowmyaa Sangu & Juljana Todorovic – for their initial research for this report. Additionally, they thank their colleagues at the Faculty of Law, Monash University and in particular the Dean, Professor Bryan Horrigan for his leadership in relation to the Capital Punishment Impact Initiative.

This publication has been produced with the financial support of the European Union. The contents of this publication are the sole responsibility of Monash University and can under no circumstances be regarded as reflecting the position of the European Union.

Introduction

The May 2018 election of the Pakatan Harapan Government marked a significant turning point in Malaysian politics; it was the first time that the Barisan Nasional party had lost power since Malaysia established its independence in 1957. Having successfully campaigned on a platform promising to revoke the 'mandatory death by hanging in all Acts',[1] the newly elected Government was quick to impose a full moratorium on executions in July 2018.[2] On 10 October 2018, World Day Against the Death Penalty, the Hon. Liew Vui Keong, Minister of Law in the Prime Minister's Department announced that the Government would go further than its campaign commitment, stating that '[a]ll death penalty will be abolished … full stop'.[3] This position was confirmed on the world stage on 13 November 2018, when Malaysia was one of the 123 United Nations ('UN') Member States that voted in support of a universal moratorium for the death penalty at the Third UN Commission; a notable occasion as it was the first time the Malaysia had voted in favour of this resolution.[4]

By 13 March 2019, there was a clear shift in the Government's position. In response to vehement public opinion opposing the proposed death penalty reforms, the Government announced that it would now only be enacting amendments to repeal the mandatory death penalty for 11 specific offences found in the *Penal Code 1999* (Malaysia) (*'Penal Code'*) and the *Firearms (Increased Penalties) Act 1971* (Malaysia).[5] These offences included murder, terrorism related offences and treason. Notably, drug trafficking offences remained subject to mandatory sentencing except in very limited circumstances.[6] In August 2019, the Minister announced the formation of a Special Committee to Review Alternative Sentences to the Mandatory Death Penalty led by the former Chief Justice Tan Sri Richard Malanjum.[7] The Special Committee was due to report in December 2019 with a view to tabling the Bill, repealing mandatory sentencing for those 11 specific offences (as identified above) by March 2020.[8] The Special Committee submitted its 128-page Report on 11 February 2020, however as of 28 May 2020, it has not been released.[9]

On 24 February 2020, Prime Minister Mahathir Mohamad announced his resignation due to the collapse of his coalition of support.[10] At the time of writing, the new Government's position in relation to supporting the draft Bill is unknown.

Current Composition of Death Row in Malaysia

Under domestic law, '[w]hen any person is sentenced to death, the sentence shall direct that he be hanged till he is dead'.[11] The sentence is carried out by a warrant issued by the sentencing court, directed to the prison where the execution is to take place.[12] The Medical Officer of that prison and at least two prison officials must attend.[13] Other persons who may attend the execution include any Minister of Religion and such relatives of the prisoner or other person as admitted by the prison.[14] A Magistrate must report the death of the inmate within 24 hours.[15]

As at December 2019, 1,280 people were on death row in Malaysia.[16] Eighty-nine per cent of these people are male, and more than two-thirds of all persons on death row have been convicted of drug trafficking offences, according to figures by Amnesty International.[17] Forty-three percent of all sentenced to the death penalty are foreign nationals.[18] According to Amnesty International it appears that the most represented foreign national group was Nigeria (21%) followed by Indonesia (16%) and Iran (15%).[19] Amnesty International also revealed that although only 11% of inmates on death row are women, 86% of these are foreign nationals.[20] Ninety-five percent of all women on death row were convicted for drug trafficking offences.[21] Of the 1,280 people on death row, 453 have an appeal pending to either the Court of Appeal or to the Federal Court. The remaining 827 people appear to have Pardon Board applications pending, and execution warrants had not been received as at December 2019.[22]

1. Pakatan Harapan, *Rebuilding Our Nation, Fulfilling Our Hopes* (Manifesto of the Harapan Coalition, 8 March 2018) 61 <https://kempen.s3.amazonaws.com/manifesto/Manifesto_text/Manifesto_PH_EN.pdf>.
2. Richard C Paddock, 'Malaysia to Repeal Death Penalty and Sedition Law', *New York Times* (online, 11 October 2018) <https://www.nytimes.com/2018/10/11/world/asia/malaysia-death-penalty-repeal.html>.
3. Ida Nadirah Ibrahim, 'Minister: Putrajaya to Abolish Death Penalty', *Malay Mail* (online, 10 October 2018) <https://www.malaymail.com/news/malaysia/2018/10/10/minister-putrajaya-to-abolish-death-penalty/1681448>.
4. '8 More Countries Vote For a Universal Moratorium', *Together Against the Death Penalty (ECPM)* (online, 16 November 2018) < http://www.ecpm.org/en/8-more-countries-vote-for-a-universal-moratorium/>.
5. AFP, 'Malaysia accused of U-Turn on Death Penalty Abolition', *News Straits Times* (online, 13 March 2019) <https://www.nst.com.my/news/nation/2019/03/468937/malaysia-accused-u-turn-death-penalty-abolition>.
6. Hemananthani Sivanandam, Martin Carvalho & Rahimy Rahim, 'Govt Wants to Abolish Mandatory Death Sentence for 11 Offences, says Hanipa', *The Star* (online, 13 March 2019) <https://www.thestar.com.my/news/nation/2019/03/13/govt-wants-to-abolish-mandatory-death-sentence-for-11-offences-says-hanipa>.
7. 'Liew: Govt to Set Up Taskforce to Study Alternatives to Mandatory Death Penalty', *The Star* (online, 6 September 2019) <https://www.thestar.com.my/news/nation/2019/09/06/liew-govt-to-set-up-taskforce-to-study-alternatives-to-mandatory-death-penalty>; 'Minister: Special Committee Submits Report on Death Penalty Alternative Sentences' *Malay Mail* (online, 11 February 2020) <https://www.malaymail.com/news/malaysia/2020/02/11/minister-special-committee-submits-report-on-death-penalty-alternative-sent/1836640>.
8. 'Bill to Abolish Mandatory Death Penalty Will be Tabled in March 2020', *FMT News* (online, 10 October 2019) <https://www.freemalaysiatoday.com/category/nation/2019/10/10/bill-to-abolish-mandatory-death-penalty-will-be-tabled-in-march-2020/>.
9. 'Minister: Special Committee Submits Report on Death Penalty Alternative Sentences' *Malay Mail* (online, 11 February 2020) <https://www.malaymail.com/news/malaysia/2020/02/11/minister-special-committee-submits-report-on-death-penalty-alternative-sent/1836640>.
10. 'Malaysia's Premier, Mahatir Mohamad, Is Ousted in a Surprising Turn', *New York Times*, (online, 29 February 2020) <https://www.nytimes.com/2020/02/29/world/asia/malaysia-mahathir-mohamad.html?auth=login-email&login=email>.
11. *Criminal Procedure Code 1999* (Malaysia) s 277 ('CPC').
12. CPC s 281(d)(i).
13. Ibid
14. CPC s 281(e)(ii).
15. CPC s 281(e)(iii).
16. Question and Answer, 2 December 2019 (English Translation) (document on file with authors).
17. Amnesty International, 'Fatally Flawed: Why Malaysia Must Abolish the Death Penalty' (2019) 19 ('Fatally Flawed').
18. Question and Answer, 2 December 2019 (English Translation) (document on file with authors).
19. Amnesty International, 'Fatally Flawed' (n 17) 19.
20. Ibid.
21. Ibid.
22. Question and Answer, 2 December 2019 (English Translation) (document on file with authors).

From the limited data available on the death penalty in Malaysia we know that 'a large proportion of those on death row have less advantaged socio-economic backgrounds, which becomes particularly relevant in a criminal justice system where safeguards in death penalty cases are especially lacking, both in law and in practice, for foreign nationals and people convicted under the *Dangerous Drugs Act 1952*'.[23]

Drug Offending and the Death Penalty

Government sources have reported that since the Independence of Malaysia in 1957, half of the 469 executions that have taken place were in relation to drug trafficking.[24]

In 2018, Amnesty International reported that of 136 of the 195 death penalty sentences imposed, related to offending under the *Dangerous Drugs Act 1952 ('DDA').*[25] This is of particular concern considering that the offence of drug trafficking is not considered to be in the category of a 'most serious offence' for which the death penalty may be imposed under Article 6 of the *International Covenant on Civil and Political Rights ('ICCPR')*, the cornerstone international treaty addressing the death penalty, albeit Malaysia has not ratified this.[26] In this context, it should be noted that Malaysia is one of 35 countries in the world that imposes the death penalty for drug offences and in 2019, was one of 13 countries to actually sentence accused to death for drug trafficking.[27]

As Malaysia's most extreme punitive response to its so called 'war on drugs', the imposition of the death penalty is the most acute form of human rights violations associated with drug suppresssion.[28]

This report considers whether Malaysian death penalty trials for drug-related offences comply with fair trial guarantees, and whether accused persons are provided with the high level of procedural fairness and access to justice required. **Part 1** of this report sets out the legal framework and standards which apply in capital cases involving drug charges under both international law and Malaysian law. In **Part 2**, we examine whether Malaysia's domestic legislation adheres to fair trial benchmarks in cognate common law countries and international human rights standards. **Part 3** builds upon this analysis with a discussion of relevant decisions and interviews with Malaysian lawyers who have experience in criminal law, and specifically death penalty cases. A comprehensive methodology is attached in Appendix 1. **Part 4** of this report provides an analysis of how the peculiarities of Malaysia's *DDA* undermine the fair trial rights of accused persons charged with drug offences. Finally, **Part 5** of this report makes key recommendations. Crucially, our research finds that death penalty sentences for drug related offences in Malaysia have been imposed following proceedings that do not meet either the international fair trial standards or similar benchmarks found in the common law.

The purpose of this report is to:

- inform policy debate in Malaysia, and regionally, in relation to the abolition of the death penalty, with a particular emphasis on the death penalty for drug offences;
- help ensure that the trial and sentencing process comply with national and international standards of human rights and due process protections;
- inform discussions about potential reforms of death penalty legislation and judicial discretion; and
- inform discussions about strengthening fair trial guarantees through the introduction of, for example, additional legislative protective measures.

23. Ibid.
24. 'Amnesty International Urges Malaysia to End Death Penalty', *AP News* (online, 10 October 2019) <https://apnews.com/af112cfb6a9c4bd68c6bdd6092d7942c>.
25. Amnesty International, 'Fatally Flawed' (n 17) 15-16.
26. See Table 2 below at page 12.
27. Giada Girelli & Adrià Cots Fernández, 'The Death Penalty for Drug Offences: Global Overview 2019' (Harm Reduction International, 2020) 11.
28. Richard Lines & Wiliam Schabas (2017) Drug Control and Human Rights in International Law (Cambridge: Cambridge University Press) ix.

Death Penalty Legal Frameworks

PART 1

1.1 Malaysian Criminal Justice System

The death penalty has been an integral part of the Malaysian legal system, long before the country obtained independence. At the time of writing, the death penalty is retained for 33 offences covered in eight pieces of legislaton,[29] including 12 offences which attract a mandatory death penalty sentence. Most commonly, the death penalty is imposed in cases of drug trafficking or murder.[30] This is reflected in Table 1: Domestic Legislation Retaining the Death Penalty.

Table 1. Domestic Legislation Retaining the Death Penalty[31]

Statute	Provision	Offence	Mandatory or Discretionary?
Penal Code	ss 302, 309A-B	Murder	Mandatory
Penal Code	s 194	Bearing false witness resulting in an innocent victim's conviction and execution	Discretionary
Penal Code	s 305	Assisted Suicide of child or insane person	Discretionary
Penal Code	s 2	Rape or attempted rape resulting in death	Discretionary
Penal Code	s 396	Gang robbery involving at least five offenders where one participant commits murder during the robbery	Discretionary
International Security Act 1960 (Malaysia), revised 1972	ss 57(1), 59(1)-(2)	Terrorism-related offences not resulting in death	Mandatory
Firearms (Increased Penalties) Act 1971 (Malaysia)	s 3A	Robbery not resulting in death	Mandatory
Firearms (Increased Penalties) Act 1971 (Malaysia)	s 3A	Kidnapping not resulting in death	Mandatory
Firearms (Increased Penalties) Act 1971 (Malaysia)	s 3A	Burglary not resulting in death	Mandatory
DDA	s 39B	Trafficking in dangerous drugs	Mandatory
	s 39B(2A)	Trafficking in dangerous drugs where prosecutorial assistance is provided	Discretionary
Penal Code	s 121	Treason	Mandatory
Penal Code	s 132	Military offense of abetting mutiny that is carried out	Discretionary
Firearms (Increased Penalties) Act 1971 (Malaysia)	s 7	Weapons trafficking	Discretionary
Penal Code	s 307(2)	Repeat offender (attempted murder where harm actually results and offender was serving sentence of 20 years or more)	Discretionary
Firearms (Increased Penalties) Act 1971 (Malaysia)	s 3A	Discharging firearm to murder or cause harm while resisting arrest or escaping lawful custody	Discretionary

29. Hemananthani Sivanandam, Martin Carvalho & Rahimy Rahim, 'Govt Wants to Abolish Mandatory Death Sentence for 11 Offences, says Hanipa', *The Star* (online, 13 March 2019) <https://www.thestar.com.my/news/nation/2019/03/13/govt-wants-to-abolish-mandatory-death-sentence-for-11-offences-says-hanipa>.
30. Cornell Centre on the Death Penalty Worldwide, 'Death Penalty Database: Malaysia' (Web Page, 12 February 2020) <https://dpw.pointjupiter.co/country-search-post.cfm?country=Malaysia#f33-3> citing Anil Netto, 'Death to Malaysian Water Contaminators?', *Inter Press News* (online, 8 May 2006) <http://ipsnews.net/news.asp?idnews=33160>; Malaysians Against the Death Penalty and Torture (MADPET), *Malaysia: Death Penalty Data & News* (Report, 16 February 2006) <http://www.reocities.com/easytocall/deathpenaltyreports2005.html>.
31. Ibid.

Statute	Provision	Offence	Mandatory or Discretionary?
Firearms (Increased Penalties) Act 1971 (Malaysia)	s 3A	Being a participant or accomplice in the discharge of a firearm who cannot prove they took all reasonable measures to prevent the discharge of a firearm in an attempt to murder or cause harm while resisting arrest or escaping lawful custody	Mandatory
Penal Code	s 121A	Offences against the person of the Rule of the State	Mandatory
Penal Code	s 130C	Committing terrorist act	Mandatory
Penal Code	s 374A	Hostage-taking resulting in death	Mandatory
Firearms (Increased Penalties) Act 1971 (Malaysia)	s 3	Discharging a firearm in the commission of a scheduled offence	Mandatory
Kidnapping Act 1961 (Malaysia)	s 3(1)	Abduction, wrongful restraint or wrongful confinement for ransom	Discretionary
Internal Security Act 1960 (Malaysia)	s 58(1)	Consorting with a person carrying or having possession of arms or explosives in security areas	Discretionary
Internal Security Act 1960 (Malaysia)	s 58(1)	Offences in security areas for possession of firearm, ammunition and explosives	Discretionary

1.2 International Death Penalty Frameworks

International bodies, such as the UN, have established significant safeguards and restrictions on the use of the death penalty with the objective of worldwide abolition. Whilst Malaysia is not a signatory to the key treaties limiting the practice of the death penalty (see Table 2 on page 12), international jurisprudence contextualises how drug related offending is considered to be outside the realm of 'most serious offending'.

In 1966, the right to life was enshrined in Article 6 of the *ICCPR*, which restricted the imposition of the death penalty to only the 'most serious crimes in accordance with the law in force at the time of the commission of the crime'.[32] The phrase 'most serious crimes' has been interpreted by the UN Human Rights Committee to mean 'that the death penalty should be a quite exceptional measure' and that 'crimes not result directly and intentionally in death …such as drug…offences, although serious in nature, can never serve as the basis, within the framework of Article 6, for the imposition of the death penalty'.[33]

In 1989, the Second Optional Protocol to the *ICCPR* was drafted, committing its members to take 'all necessary measures to abolish the death penalty within its jurisdiction'.[34] In 2007, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions compiled a list of crimes which *should* be excluded from the definition of 'most serious crimes', notably including drug-related offences.[35]

Both the UN Office of Drugs and Crime ('the UNODC') and the International Narcotics Control Board ('the INCB') have criticised the use of death penalty for drug-related offences, stating that the 'use of the death penalty cannot provide durable solutions or protect people'.[36] Further, in March 2019, the UN Chief Executive Board for Coordination – the main body for supporting the UN intergovernmental bodies on social, economic and related

32. *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Art. 6.3 ('ICCPR'); *Safeguards Guaranteeing Protection of the Rights Facing the Death Penalty*, ESC Res 1984/50 UN Doc E/1984/84 (25 May 1984) [1] ('Death Penalty Safeguards').
33. Human Rights Committee, *General Comment No 36: Art. 6 of the ICCPR On the Right to Life,* UN Doc CCPR/C/GC/36 (2018), [35].
34. *Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty,* UN Doc A/RES/44/128, Art. 1.
35. Including abduction not resulting in death, abetting suicide, apostasy, corruption, economic crimes, financial crimes, embezzlement by officials, evasion of military service, homosexual acts, illicit sex, sexual relations between consenting adults, theft or robbery by force, the expression of conscience, religious practice, and political offences.
36. United Nations Office on Drugs and Crime (UNODC), 'Statement Attributable to the UNODC Spokesperson on the Use of the Death Penalty' (Press Release, 27 June 2019) <https://www.unodc.org/unodc/en/press/releases/2019/June/statement-attributable-to-the-unodc-spokesperson-on-the-use-of-the-death-penalty.html>.

matters – emphasised that the imposition of the death penalty in drug related offences is not justified in any of the international drug-control conventions, and can undermine potential effective cross-border and international cooperation against drug trafficking.[37]

1.3 Exclusions in the Application of the Death Penalty

Pursuant to international law and standards, there are four categories of persons who may not be sentenced to death or executed:

- First, children under the age of 18.[38] This is included under Malaysian law provided the accused was below the age of 18 at the time of the offence, in accordance with Malaysia's obligation as a signatory to the *Convention on the Rights of the Child.*[39]
- Second, people with mental or intellectual disabilities or disorders (including people who have developed disorders after being sentenced to death).[40] While Malaysian law prohibits the prosecution of those who offended whilst mentally incapacitated,[41] it does not prohibit the imposition or execution of the death sentence for people suffering from general mental health issues.
- Third, pregnant women,[42] and mothers of young children (generally up to two years old).[43] This is reflected by s 282 of the *Criminal Procedure Code 1999* (Malaysia) (*'CPC'*).
- Fourth, elderly persons.[44] This is because the right to life for the elderly is considered to be 'particularly vulnerable', as their 'old age makes them more susceptible to … cruel or inhuman treatment'.[45] For example, the *American Convention on Human Rights* prohibits the execution of people over the age of 70.[46] Increased protections for the elderly exist in a number of other jurisdictions including Vietnam, Indonesia, Belarus, Kazakhstan, Russia, Sudan, Guatemala, Qatar and Zimbabwe.[47] The UN Economic and Social Council has also recommended that States should establish 'a maximum age beyond which a person may not be sentenced to death or executed',[48] which should be influential upon Malaysia's implementation of the death penalty. It should be noted, however, that Malaysian law does not prohibit the imposition nor the execution of the death sentence for elderly persons.

37. UN System Coordination Task Team on the Implementation of the UN System Common Position on Drug-Related Matters, *What We Have Learned Over the Last Ten Years: A Summary of Knowledge Acquired and Produced by the UN System of Drug-Related Matters,* UN Doc E/CN.7/2019/CRP.10

38. United Nations General Assembly, *Resolution on the Rights of the Child,* GA Res 19/37, UN Doc A/HRC/19/L.31 (20 March 2012), para 49.

39. *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 U.N.T.S 3 (entered into force 2 September 1990) Art 37(a).

40. *Human Rights Resolution 2005/59: The Question of the Death Penalty,* UN Doc E/CN.4/RES/2005/59.

41. *Penal Code 1936* (Malaysia) s 84 (*'Penal Code'*).

42. *ICCPR* Art. 6(5).

43. *Death Penalty Safeguards* [3].

44. Ban Ki-moon, 'Moving Away from the Death Penalty: Lessons in South-East Asia' (PDF Document), <https://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf>.

45. Frederic Megret, 'Human Rights of Older Persons' (2011) 11 *Human Rights Law Review* 37, 53-5.

46. *American Convention on Human Rights,* Organization of American States, opened for signature 22 November 1969, UNTS 1144 123 (entered into force 18 July 1978), Art 4(5).

47. See Pip Nicholson & Tim Lindsey, *Drugs and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (Hart Publishing, 2016) 264; Cornell Law Centre on the Death Penalty Worldwide, 'Elderly' (Web Page), 20 December 2011 <http://www.deathpenaltyworldwide.org/elderly.cfm>.

48. *Death Penalty Safeguards* [1c].

Fair Trial Legal Frameworks and the Death Penalty

PART 2

2.1 Malaysian Legal Framework

Malaysia's domestic legal framework contains principles governing fair trials. These principles are embodied either within legislative instruments or the common law (see Table 3: Fair Trial Rights Overview below at page 14). As Malaysia's legal system developed from common law traditions jurisprudence from other common law countries can form part of the domestic law.[49]

The Malaysian criminal justice system is adversarial in nature. In broad terms, the criminal process comprises of the following six procedures:

(a) Arrest

- Arrests can be performed by police officers, private persons, Magistrates and a Justice of Peace in compliance with s 15 of the *CPC*.

(b) Trial

- Malaysia's adversarial system means that accused persons standing trial are presumed innocent until proven guilty and the prosecution must prove the charge against the accused beyond a reasonable doubt.[50]
- The court hierarchy begins with the Subordinate Courts (comprising the Session Court and Magistrate Court) followed by the Superior Courts, comprising the High Court, Court of Appeal and the Federal Court as invested with increasing judicial power.
- Offences punishable by death (as detailed in Table 1: Domestic Legislation Retaining the Death Penalty, above at page 7) proceed first before the High Court, as it has unlimited jurisdiction (save for matters governed by Islamic family law).

(c) Sentencing & Mitigating Factors

- Once an accused is found guilty, or pleads guilty, they must be sentenced per s 173(m)(ii) of the *CPC*, in accordance with sentencing principles such as deterrence, rehabilitation, prevention and retribution.[51]
- Prior to sentencing, courts will consider 'mitigating' factors including: age, past criminal record, conditions surrounding the prisoner's guilty plea, circumstances prior to the commission of the offence, the effects of the conviction on the prisoner's family, employment, conduct of the prisoner, his or her health, and/or prior offences.[52] For mandatory death penalty matters, this stage in the sentencing process is irrelevant as the discretion is removed.

(d) Imprisonment

- Where the accused is sentenced to life imprisonment, the term is effectively for 30 years with remission of one third for good behaviour.[53]
- Where the accused is sentenced to imprisonment for a fixed period, the sentence begins from the date that the sentence was passed, unless ordered otherwise by the courts.[54]

49. *Krishnan v Public Prosecutor* (1987) 1 MLJ 292, 295.
50. Ibrahim Danjuma & Rohaida Nordin, 'The Imposition of Fines by the Law Enforcement Agencies in Malaysia: A Violation of the Rule of Law' (2015) 8(4) *International Journal of Business, Economics & Law* 88, 90 citing Peter Halstead, *Unlocking Human Rights* (Hodder Education, 2009) 196.
51. Gan Chee Keong, 'Conceptualizing the Principles of Sentencing in Criminal Offences in Malaysia: Bridging Theory and Reality' (2017) V(5) *European Academic Research* 2474, 2474.
52. Datuk Baljit Singh Sidhu, *Criminal Litigation Process* (Sweet & Maxwell, 3rd edn, 2015).
53. *Courts of Judicature Act 1964* (Malaysia) s 3 ('CJA').
54. *CPC* s 282.

(e) Appeals in Court of Appeal

- Appeals are commonly heard before the Court of Appeal and the Federal Court.
- The Court of Appeal can hear appeals from the High Court.[55] These appeals can only be made on questions of law or fact, or mixed law or fact for cases that are first tried in the High Court or the Sessions Court.[56] For cases first tried in the Magistrates Court, appeals shall only be confined to questions of law.
- The Federal Court can hear and decide on appeals from the Court of Appeal.[57] For capital drug offences, trials are typically held before the High Court but this is followed by a two-stage appeal process. First, an appeal is heard before the Court of Appeal. Second, if the convicted prisoner is dissatisfied with that outcome, an appeal may be made to the Federal Court. Both questions of fact and of law can be considered by the Federal Court.

(f) Clemency

- For Malaysia, clemency is granted by the Head of State, on the advice of the Pardons Board.[58]

2.2 International Legal Framework

Notions of 'judicial fairness' have been built into the public consciousness for centuries, evidenced, for example, by the 1791 amendments to the Bill of Rights of the United States Constitution, where the right to remain silent and the right to due process of law prior to sentencing was clearly articulated.[59] A tribunal at the post-Second World War Nuremberg Trials upheld the 'right to fair trial' in international criminal law, finding that 'prosecutors and judges involved in a trial lacking the fundamental guarantees of fairness could be held responsible for crimes against humanity.'[60] Today, the right to a fair trial is one of the most universally applicable guarantees, enshrined in the *Universal Declaration of Human Rights ('UDHR')*,[61] and constitutes an important feature of international human rights.

Since the enactment of the *UDHR* in 1948, the right to a fair trial has been upheld in a number of other documents including legally binding treaties such as the *ICCPR*, in regional treaties such as the ASEAN Human Rights Declaration *('ADHR')*,[62] domestic legislation and common law.

At its most basic, the right to a fair trial is the right to a public hearing, within a reasonable time, by an independent and impartial court. It should be recognised that this right is supported by a number of other rights.[63] Article 14 of the *ICCPR* for example sets out a detailed list of ancillary rights under the broad 'right to a fair trial' headings (see Table 3: Fair Trial Rights Overview below).

According to the UN Human Rights Committee General Comment 6(16), a violation of Article 14 fair trial procedures in a capital trial amounts to a breach of the right to life set out in Article 6; 'the procedural guarantees therein prescribed must be observed, including the right to a fair hearing by an independent tribunal, the presumption of innocence, the minimum guarantees for the defence, and the right to review by a higher tribunal'.[64]

55. *Federal Constitution 1957* (Malaysia) Art. 21(1B) ('Federal Constitution').
56. *CJA* s 50(4).
57. Ibid s 87(1).
58. Federal Constitution Art. 42(1). For detailed discussion, see below at page 24–27.
59. Pascal Chenivesse & Christopher J Piranio, 'What price justice? On the evolving notion of 'right to fair trial' from Nuremberg to The Hague' (2011) 24(3) *Cambridge Review of International Affairs* 403,403-423.
60. William A Schabas (2006) The UN International Criminal Tribunals – the former Yugoslavia, Rwanda and Sierra Leone (Cambridge: Cambridge University Press) 404.
61. *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Art. 10 ('UDHR').
62. Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration,* Art 20 ('*ADHR*').
63. See, e.g., UDHR Art. 10, expressly referring to various associated rights.
64. William A Schabas (2002) The Abolition of the Death Penalty in International Law (Cambridge: Cambridge University Press) 160-161.

Historically, initial concern regarding the legitimacy of the death penalty was inherently linked to capital cases involving a denial of due process.[65] Because of the irreversible nature of the death penalty, death penalty proceedings require strict observance of fair trial rights, and the *Safeguards Guaranteeing Protection of the Rights Facing the Death Penalty* ('Death Penalty Safeguards').[66] Further, capital offence trials must be heard by 'a competent, independent and impartial tribunal established by law'.[67]

The abolition of the death penalty is generally considered to be an important element in democratic development.[68] Although Malaysia has not historically supported the abolition of the death penalty, it has become party to at least five of the 'core human rights' treaties protecting fair trial rights, as detailed in Table 2: Ratification Status of International Instruments for Malaysia Pertaining to the Death Penalty, below:

Table 2: Ratification Status of International Instruments for Malaysia Pertaining to the Death Penalty[69]

Instrument	Date of Accession?	Date of Signature?
International Covenant on Civil & Political Rights ('ICCPR')	–	–
First Optional Protocol to ICCPR	–	–
Second Optional Protocol to ICCPR	–	–
Convention Against Torture & Other Cruel Inhuman or Degrading Treatment or Punishment ('CAT')	–	–
Optional Protocol of the CAT	–	–
Convention on the Elimination of All Forms of Discrimination Against Women	5 July 1995	–
Convention on the Rights of the Child ('CRC')	17 February 1995	–
Optional Protocol on the CRC on the Involvement of Children in Armed Conflict	12 April 2012	–
Optional Protocol on the CRC on the Sale of Children, Child Prostitution & Child Pornography	12 April 2012	–
Convention on the Rights of Persons with Disabilities	19 July 2010	8 April 2008

Table 2 reflects Malaysia's commitment to observing international legal norms, which has led to a marked increase in Malaysia's adherence to the rule of law.[70] It is worth noting here that although Malaysia has not signed the UDHR, the Office of the Attorney-General of Malaysia maintains that Malaysia 'has subscribed to the philosophy, concepts and norms provided by the Universal Declaration of Human Rights, which sets out the minimum and common standard of human rights for all peoples and all nations', by virtue of its membership to the UN.[71]

2.3 Mandatory Death Penalty

In 2004, the Special Rapporteur to the UN reported that mandatory death sentences should be prohibited, as they prevent courts from considering mitigating factors in sentencing.[72] International tribunals have condemned the use of the mandatory death penalty for its failure to consider the 'particular circumstances of the crime' and any relevant mitigating factors.[73] Further, the UN Secretary-General has noted that mandatory sentencing makes it 'difficult if not impossible' for courts to evaluate individual circumstances that may otherwise remove the offending conduct from being considered as 'the most serious crime'.[74]

65. William A Schabas 'International Law and Abolition of the Death Penalty' (1998) 55(3) *Washington and Lee* Law Review 797, 800.
66. *Death Penalty Safeguards* [5]; HRC: General Comment No 6 §7; General Comment No 32 § 59.
67. William A Schabas (2002) The Abolition of the Death Penalty in International Law (Cambridge: Cambridge University Press) 167.
68. William A Schabas 'International Law and Abolition of the Death Penalty' (1998) 55(3) *Washington and Lee* Law Review 797, 798-9 citing Human Rights Committee, *Question of the Death Penalty: Report of the Secretary-General*, 54th sess, 82d mtg, UN Doc E/CN.4/1998/82 (1998).
69. Cornell Center on the Death Penalty Worldwide 'Death Penalty Database: Malaysia' (Web Page, 12 February 2020) <https://dpw.pointjupiter.co/country-search-post.cfm?country=Malaysia#f7-2>; UN Human Rights Office of the High Commissioner, 'UN Treaty Body Database' (Web Page) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN>; UN Human Rights Office of the High Commissioner, 'Status of Ratification: Interactive Dashboard' (Web Page, 2014) <https://indicators.ohchr.org/>; Attorney General's Chambers of Malaysia, 'Human Rights' (Web Page, 2016) <http://www.agc.gov.my/agcportal/index.php?r=portal2/left&menu_id=L2YvK3oycE5FSlg1NGNmTGFJdlNIdz0>.
70. World Justice Project, *Rule of Law Index Report* (Report, 2019) 16 <https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf>.
71. Attorney General's Chambers of Malaysia, 'Human Rights' (Web Page, 2016) <http://www.agc.gov.my/agcportal/index.php?r=portal2/left&menu_id=L2YvK3oycE5FSlg1 NGNmTGFJdlNIdz09>.
72. Philip Alston, Special Rapporteur, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN DOC E/CN.4/2005/7 (22 December 2004) 19; *Together Against the Death Penalty (ECPM)*, Harm Reduction International (HRI), Anti-Death Penalty Asia Network (ADPAN), The Advocates for Human Rights & World Coalition Against the Death Penalty (WCADP), *Death Penalty in Malaysia: Joint Stakeholder Report for the 31st session of the Working Group on the Universal Periodic Review* (Report, March 2018) 6 ('*Joint Stakeholder Report*').
73. *Boyce v Barbados (Judgment)* (Inter-American Court of Human Rights, Series C No 169, 20 November 2007) [57]-[63].
74. William A Schabas (2002) The Abolition of the Death Penalty in International Law (Cambridge: Cambridge University Press) 111.

Yet beyond these few examples, international standards do not outline broad sentencing guidelines or mitigating factors to which States must adhere when implementing death sentences (i.e. carrying out executions).

Separate sentencing hearings are not required under Malaysian law and the *CPC* stipulates that a court must only pass sentences 'according to law'.[75] This is undefined, and there is no express legislative requirement for courts to consider specific mitigating factors in sentencing.

The retention of the mandatory death penalty removes the ability of Malaysian courts to consider individual circumstances and mitigating factors when sentencing people who have been found guilty of capital crimes. However, the Court of Appeal has upheld the constitutional validity of the mandatory death sentence in the *DDA* in *Christin Nirmal v Public Prosecutor.*[76] The constitutionality of the sentence was challenged on numerous grounds, including that it fails to permit consideration of mitigating factors. Ultimately, it was held that it is the role of the legislature to amend the DDA if it seeks to allow courts to consider mitigating factors.

75. *CPC* s 183.
76. *Christin Nirmal v PP* [2018] MYCA 219.

Fair Trial Standards in Practice in Malaysia

PART 3

Our research shows that the death penalty in Malaysia has been imposed following proceedings that did not meet fair trial standards either in accordance with international, domestic or cognate common law standards. This section considers specific fair trial guarantees or safeguards by first briefly outlining the relevant benchmark before turning to an analysis of the Malaysian experience. Here in particular, interview quotes and case studies are utilised to provide context for the analysis.

Table 3: Fair Trial Rights Overview provides a fair trial rights overview with each fair trial right traced to the relevant Malaysian domestic authority:

Table 3: Fair Trial Rights Overview

Right/Guarantee	International Human Rights Frameworks	Domestic Law
Right to be presumed innocent until proven guilty	• *ICCPR* Art. 14(2) • *UDHR* Art. 11(1) • *ADHR* Art. 20(1) • *CRC* Art. 40(2)(i)	• *Federal Constitution* Art. 5 • Common Law: *PP v Saimin* [1971] 2 MLJ 16 • Islamic Criminal Law: Quran al-Isra': 15
Right to be informed promptly and in detail, in a language which the accused understands, of the nature and cause of the charge against him or her	• *ICCPR* Art. 14(3)(a) • *CRC* Art. 40(2)(ii)	• *CPC* s 51A
Right to have adequate time and facility to prepare a defence and communicate with counsel of the accused's own choosing	• *ICCPR* Art. 14(3)(b) • *ADHR* Art. 20(1)	• *CPC* s 28
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	• *ICCPR* Art. 14(3)(d) • *CRC* Art. 40(2)(ii)	• *Federal Constitution* Art. 5(3) • *CPC* s 28A • *Legal Aid Act 1971* [Malaysia] s 29, Sch. 2 • *Legal Aid (Amendment) Act 2017* [Malaysia]
Right to be tried without undue delay	• *ICCPR* Art. 14(3)(c) • *UDHR* Art. 9 • *CRC* Art. 40(2)(iii)	• *Federal Constitution* Art. 5(1) • *CPC* ss 42, 117
Right to Examine and cross-examine witnesses	• *ICCPR* Art. 14(3)(e) • *CRC* Art. 40(2)(iv)	• *Federal Constitution* Art. 5(1) • Common Law: *Kamalan Shaik Mohd v PP* [2013] 4 CLJ 396
Right to have an interpreter and translation	• *ICCPR* Art. 14(3)(f) • *CRC* Art. 4)(2)(vi)	• *CPC* ss 256(8), 265B, 270
Privilege against self-incrimination	• *ICCPR* Art. 14(3)(g)	• *CPC* ss 112(2)-(3), 173(ha) • *DDA* s 37A • Common Law: *Mohd Jamail Bin Abdul Ghani v PP* Criminal Appeal No. A-05-42-2010 (Court of Appeals Putrajaya) citing *Alcontra a/l Ambross Anthony v PP* [1996] 1 MLJ 209
Right to appeal conviction and sentence	• *ICCPR* Art. 14(5) • *UDHR* Art. 8	• *CPC* s 281

3.1 Right to be Presumed Innocent Until Proven Guilty

The presumption of innocence is central to fair trial rights and allows the defence to put the prosecution to proof. This means that it is not for the defendant to prove their innocence, but rather, it is for the prosecution to establish their case beyond reasonable doubt. This is reflected by Art. 14(2) of the *ICCPR*, which provides that '[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law', as echoed by the UDHR.[77]

The presumption of innocence also exists at the domestic level in Malaysia and is implied into Art. 5(1) of the *Federal Constitution*, though not expressly incorporated.[78] However, in practice, Malaysia deviates from the international standards by shifting the evidential burden from the prosecution to the defendant in two significant ways.

First, the prosecution in Malaysia need only establish its case on a prima facie basis. The onus is on the prosecution to prove elements of an offence beyond reasonable doubt,[79] which is the same as under English common law.[80] It follows that in order to be acquitted an accused only needs to raise a doubt as to the existence of a fact on which the prosecution is relying on, or simply that contrary facts exist.[81] Failure to do so however, has been found by the Malaysian judiciary to mean that the prosecution had established its case on a prima facie basis.[82] Our research indicates that it is rare that a court will be persuaded that such a doubt exists.

Second, the prosecution can rely on multiple presumptions under Malaysian statute to effectively reverse the burden of proof in criminal proceedings. This is particularly pronounced in death penalty cases involving drug trafficking charges because s 37 of the DDA – discussed in detail below in Part 3 – sets up a series of 'deeming' presumptions which allow the prosecution to automatically establish knowledge of the nature of the drug and knowledge of possession of the drug. These are in practice difficult or impossible to rebut, as detailed below in Part 3.

3.2 Right to be Informed Promptly and in Detail, in a Language which the Accused Understands, of the Nature and Cause of the Charge Against Him or Her

(a) Transparency

A central requirement imposed on retentionist States is that their governments make available information on the imposition and use of the death penalty.[83] This is because a lack of transparency makes it difficult to monitor execution rates and more broadly, to understand the effect of the death penalty on prisoners over time. Further, the availability and provision of this information enables accurate consideration of key fair trial issues. It also informs dialogue regarding the reform of death penalty practices.

The Malaysian Government has increased efforts to make relevant information publicly available. For example, Question and Answer sessions in Parliament indicate that there are 1,280 people convicted to death by the High Court as at 2 December 2019. Previous Question and Answer sessions stated that between the years of 1970 and 1996, 349 people were executed,[84] and that between the years of 1998 and 2015, 33 people were executed.[85] Figures released by the Government in March and May 2016 indicated that 12 people were executed and 829 persons were sentenced to death since 2010.[86]

77. *UDHR* Art. 26.
78. *Alma Nudo Atienza v Public Prosecutor* [2019] 5 CLJ 780 ('Atienza').
79. *Lin Tong v PP* (1938) 7 MLJ 41 ('*Lin Tong*').
80. In the decision of *Lin Tong*, Horne J found that the onus on the prosecution is the same as that in England and that the burden of proof is 'beyond reasonable doubt'. The English authority discussed in the Malaysian cases and endorsed by the Malaysian Court of Appeal is that of the House of Lords in *Woolmington v DPP* [1935] AC 462.
81. Bron McKillop 'Burden of Proof on an Accused in Malaysia' (1964) 6(2) *Malaya Law Review* 250, 265-6.
82. See, e.g., *Gopi Kumar Subramaniam v PP* [2019] 1 LNS 807; *PP v Denish a/l Madhavan* [2009] MLJ 194.
83. *ICCPR* Art. 14; *Moratorium on the Use of the Death Penalty*, GA Res 65/206, UN Doc A/RES/65/206, [3(b)].
84. Rita J Simon & Dagny A Blaskovich, *A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies & Public Attitudes the World Over* (Lexington Books, 2002) 29; David T Johnson & Franklin E Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty* (Oxford University Press, 2009) 306 citing Roger Hood, *The Death Penalty – A Worldwide Perspective* (Oxford University Press, 3rd edn, 2002) 48.
85. *Daniel Pascoe Last Chance for Life: Clemency in Southeast Asian Death Penalty Cases* (Oxford University Press, 2019) 135, 263 ('*Last Chance*'); Daniel Pascoe, 'Towards a Global Theory of Capital Clemency Incidence' in Carol S Steiker & Jordan M Steiker (eds) *Comparative Capital Punishment* (Edward Elgar, 2019) 124; 'Bill to Abolish Death Penalty for Drug Offences on the Cards, Says Law Minister', *Malaysian Insider* (online, 17 November 2015) <www.themalaysianinsider.com/malaysia/article/bill-to-abolish-deathpenalty-for-drug-offences-on-the-cards-says-law-minis>; 'Lawyers: Freeze all executions while mandatory death sentences under review', *Malay Mail* (Online, 24 November 2015) <https://www.malaymail.com/news/malaysia/2015/11/24/lawyers-freeze-all-executions-while-mandatory-death-sentence-under-review/1011023>.
86. Ram Anand, 'Death Penalty: Home Ministry Says 12 Executed in Last Six Years', *Malay Mail* (online, 30 March 2016) <https://www.malaymail.com/news/malaysia/2016/03/30/death-penalty-home-ministry-says-12-executed-in-last-six-years/1089863>.

However, this information is inconsistent and limited.[87] Comprehensive figures on death penalty are not provided and there are no internal systematic monitoring and reporting mechanisms in place, unlike in other countries.

In order to satisfy the duty to be transparent, the Malaysian Government would need to reveal accurate and up to date information on the use of the death penalty. For example, the UN Human Rights Council suggested in 2015 that states 'make available relevant information disaggregated by sex, age and other applicable criteria, with regard to their use of the death penalty, inter alia, the number of persons sentenced to death, the number of persons on death row, the number of executions carried out and the number of death sentences reversed, commuted on appeal or in which amnesty or pardon has been granted, which can contribute to possible informed and transparent national and international debates, including on the obligations of States with regard to the use of the death penalty'.[88]

Transparency is also an issue in the context of judgments; any judgment made in a death penalty case ought to be made public.[89] A lack of transparency may also undermine the right to a fair and public trial, as well as the right to appeal and the ability to submit applications for pardon or commutation. Further, public judgments are necessary to ensure that trials are fair and consistent with past precedent. This is particularly concerning in Malaysian death penalty cases given that there is an inconsistency not only in the available law reports, but also in the provision of written judgments; an issue relevant not only to the High Court but also the Court of Appeal and the Federal Court.[90]

Lawyer Interviewee 1 stated in an interview for this report, that an accused typically knows the reasoning of the court's decision because the court will:

> read it out, and that's it. Sometimes they do the reporting then you have the reports online, on the journals. But if you decide to appeal then you need the ground. And for review cases, they won't give them. It's unfair right? In public interest especially for death row inmates, this is very important. How do we know what's the basis of the decision? The public and the lawyers are in the dark, but for public it's even more so.[91]

There are currently no procedural requirements in place within the Malaysian legal framework that facilitate transparency. Malaysian law does not, for example, expressly require courts to produce reasons for their dissenting decisions, or to write a formal dissenting judgment, where such judgments exist. For this reason, there is 'a dearth of dissenting decisions' according to Fahri Azzat, a lawyer with 20 years' experience in death penalty cases.[92] Another lawyer interviewed for the purpose of this report, Datuk Baljit Singh echoes these sentiments, 'it's all always unanimous'.[93]

It should be noted that the perception that there is a lack of dissenting judgments is not a view shared by all lawyers. For example, according to lawyer Mohd Haijan Omar, judges are encouraged to dissent and to ensure that their judgments are in written form:

> If the judge doesn't agree with the majority they can write judgement. That's how the dynamism of law, that's how they develop the law you see? And we have had a situation where one of the court appointed judge …writes extensive dissenting judgement.[94]

Further, there are those who do not view the lack of available dissenting judgments as an obstacle in the preparation of a client's defence. This is because, 'Malaysian lawyers ...

87. Ibid.
88. *The Question of the Death Penalty,* HRC Res 30/5, UN Doc A/HRC/RES/30/5. See also Philip Alston, *Report of the Special Rapporteur on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions,* UN Doc E/CN.4/2006/53.Add 3 (24 March 2006).
89. *ICCPR* Art. 14(2).
90. Lim Chee Han, Ngeow Chow Ying & Harchanadevi Arivananthan 'High Incidence of Judicial Errors in Capital Punishment Cases in Malaysia' (2018) *Penang Institute: Issues* 1, 3.
91. Interview with Interviewee 1 (Dr Thaatchaayini Kananatu & Janice Ananthan, 25 February 2020).
92. Interview with Mr Fahri Azzat (Dr Thaatchaayini Kananatu & Janice Ananthan, Fahri & Co, Selangor, Malaysia, 27 December 2019).
93. Interview with Datuk Baljit Singh Sidhu (Dr Thaatchaayini Kananatu & Janice Ananthan, Wisma Shukorbaljit, Kuala Lumpur, Malaysia, 2 January 2020).
94. Interview with Mr Haijan Omar (Dr Thaatchaayini Kananatu & Janice Ananthan, Haijan Omar & Co, Kuala Lumpur, Malaysia, 17 January 2020).

they don't stop at the legal journals…[they] look towards judgments, judicial judgments from India, from the UK, from Commonwealth countries as well…I don't stop short at our legal positions in Malaysia'.[95]

(b) Discovery

Pursuant to s 51A of the *CPC* the prosecution is required to share the following documents with the defence:[96]

- a copy of the information made under s 107 relating to the commission of the offence to which the accused is charged, if any;[97]
- a copy of any document which would be tendered as part of the evidence for the prosecution;[98] and
- a written statement of facts favourable to the defence of the accused signed under the hand of the Public Prosecutor or any person conducting the prosecution.[99]

Notwithstanding the above, there are some notable deficiencies in s 51A. First, there is no time prescribed as to when the documents must be given to the defence, simply that it must be before the commencement of the trial. This creates the possibility for documents to be handed to the defence on the day of their trial, which in practice results in the prosecution case not being effectively tested due to insufficient time to consider the evidence as a whole and seek expertise opinion where required.

Second, is s 51A(2), which states that the prosecution may not supply any fact favourable to the accused if its supply would be contrary to the public interest.[100] The vague wording of the phrase 'public interest' means that evidence that is favourable to the defence can be withheld under almost any circumstance, which is profoundly incompatible with the concept of a fair trial.

A discovery process that does comply with a fair trial process is one that requires the prosecution to provide evidence to the accused that it will be using in presenting its case, as well as providing the accused with exculpatory evidence, that is, evidence that is supportive of a defence. This is largely linked back to the prosecution's duty to obtain justice rather than obtain a conviction.

In practice, it appears that the provision of relevant prosecutorial evidence is complied with 'most of the time'.[101] However, even if the documents are not provided, lawyers do not appear to necessarily see the value in making an application under s 51A of the *CPC* due to the low threshold required for compliance by the prosecution. Datuk Baljit Singh explains that the main justification for this is 'because their evidence is nothing much, investigating officer with the arresting officer… the photographer, the chemist, nothing'.[102]

Chan Yen Hui, in her interview, also supports the view that the prosecution makes insufficient discovery:

> …documents given to us are very limited like the photographs, the accused's statements…the post-mortem report … Like for example witnesses' statements we don't get it. So, I would say that it is not sufficient. Because you have eyewitnesses, all these statements are not given to us. How many eyewitnesses, we also do not know. And even what happened in ... the process of discovery. We do not have all this information.[103]

95. Ibid.
96. *CPC* s 51A.
97. Ibid s 51A(1)(a).
98. Ibid s 51A(1)(b).
99. Ibid s 51A(1)(c).
100. Ibid s 51A(2).
101. Interview with Datuk Baljit Singh Sidhu (Dr Thaatchaayini Kananatu & Janice Ananthan, Wisma Shukorbaljit, Kuala Lumpur, Malaysia, 2 January 2020).
102. Ibid.
103. Interview with Miss Chan Yen Hui (Dr Thaatchaayini Kananatu & Janice Ananthan, Monash University, Malaysia, 30 December 2020).

Fahri Azzat also comments on the limitations of the documents provided by prosecution:

> …in theory under s51A of the Criminal Procedure Code, [the prosecution] are supposed to give us a set of documents. Alright. ... So, they do give you a set, but usually it's not complete. Yeah? So, I don't think I've ever gotten a nice 100 percent pack where they didn't have to supplement it after that. You know? Maybe you get between anything between 60–90 percent of the documents that they will tender in court. But not all of it, of course. I would say, our sense of equality of arms we call it right, that means the prosecution/ defence should have more or less the same material, they should have theoretically the same resources and all that kind of nonsense, but doesn't happen here. So, for example, we can't ask for witness statements from or statements taken by prosecution during investigation or police during investigation for, for us to read. This is unlike UK, Australia, South Africa, where they have to give. They have to disclose whatever preparation they did for bringing the prosecution – it's available for the defence as well.[104]

Thus, it appears that in respect of the disclosure of prosecutorial evidence, and the discovery process more broadly, further change is needed. According to Fahri Azzat, such change may be cultural:

> …even though we adopted the Commonwealth system, we didn't quite adapt their mentality. In a sense, that didn't follow. So, we got the rules, we didn't quite all get the principle … we just went down the course of [non-disclosure].[105]

Notwithstanding, Fahri Azzat heralds the introduction of s 51A of the *CPC* as a significant step:

> … I would say it's a huge step from where we used to be. Before that, you don't get anything. You get your charge sheet, your client's s 113 statement, and [that's it].[106]

3.3 Right to have Adequate Time and Facility to Prepare a Defence and Communicate with Counsel of the Accused's Own Choosing

Under Art. 5(3) of the *Federal Constitution*, a detained person has the right to be 'informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice'.

Additionally, the right to communicate with counsel arises upon arrest and police officers are under restrictions to facilitate and not deny that right pursuant to s 28A of the *CPC*. For example, detained persons are entitled to request to consult with a legal practitioner, and that legal practitioner is similarly entitled to be present to meet with their client; police must ensure reasonable time is allowed to do so, in circumstances where the communication will not be overhead.[107] The police must also provide reasonable facilities for the communication to take place without cost to the detained person.[108] The police must not question or record the making of a statement from a detained person.[109]

There is, however, a significant limitation on the right to communicate in s 28A of the *CPC*, which is that there is no need for compliance if the police officer reasonably believes that:

- compliance will result in the detained person taking steps to avoid apprehension, the concealment or involvement with evidence or a witness; or

104. Interview with Mr Fahri Azzat (Dr Thaatchaayini Kananatu & Janice Ananthan, Fahri & Co, Selangor, Malaysia, 27 December 2019).
105. Ibid.
106. Ibid.
107. *CPC* s 28A(4).
108. Ibid s 28A(5), (7).
109. Ibid s 28A(6).

- 'having regard to the safety of other persons, the questioning or recording of any statement is so urgent that it should not be delayed'.[110]

These rights or guarantees also appear to be enshrined in international instruments, including those other than Art. 14 of the *ICCPR*. For example, the right to counsel is included under the *UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment,* particularly principle 17 generally and principle 18 (which provides for confidential communication and adequate facilities for consultation to take place).[111] While this seems to be in tandem with Malaysian procedural requirements, the reality is that 'Malaysian authorities have paid little heed to the requirements of international law' or domestic guarantees.[112]

A lack of access to, or communication with, counsel will severely limit the fair trial rights of accused persons. This right 'is an element in the larger jurisprudence of natural justice, encapsulated in the larger right to a fair hearing' including the 'chance to be heard and the opportunity to present the best case'.[113]

3.4 Right to Choose Legal Assistance, and if Unable to Select Legal Assistance, the Right to State-provided Legal Assistance

a) Effective Counsel

The right to effective counsel is set out in the *ICCPR*, the *Death Penalty Safeguards* and the United Nations Principles and Guidelines on Access to Legal Aid ('Principles on Legal Aid').[114] The expectation is that the adequate assistance of counsel will be adhered to 'above and beyond the protection afforded in non-capital cases',[115] and if a capital defendant cannot afford a lawyer this must be provided by the state.[116] These standards should be adhered to during: detention, preliminary stages of proceedings, at trial, during appeal, upon constitutional court review and throughout the clemency process.[117]

The *ICCPR* suggests that the accused should have the right to be represented by counsel of their choice. This right applies even if it means that a hearing has to be adjourned. The *Principles on Legal Aid*,[118] and the *Basic Principles on the Role of Lawyers*,[119] establish that where an accused does not have counsel of choice or cannot bear the costs themselves, they should still have the right to be assisted by legal counsel. In these circumstances, the Standards suggest that the State should bear the cost and have sufficient resources to provide effective counsel for the accused.[120]

In the decision of *Robinson v Jamaica,*[121] the Human Rights Committee ('HRC') found that death penalty cases should not continue until the right to effective counsel has been satisfied. Effective counsel refers to a legal representative that is 'competent, [and] has the requisite skills and experience commensurate with the gravity of the offence'.[122] Where counsel is found not to be effective and state authorities become aware of this, the HRC case of *Pinot v Trinidad & Tobago* suggested that where Counsel are unable to perform their duties effectively, the Court should replace Counsel or ensure their effectiveness.[123]

110. Ibid s 28A(8).
111. Human Rights Watch, *In the Name of Security: Counterterrorism and Human Rights Abuses Under Malaysia's Internal Security Act* (Human Rights Watch, 2004) 33-4.
112. Ibid 34. See also Sahr Muhammed Ally 'Convicted Before Trial: Indefinite Detention Under Malaysia's Emergency Ordinance' (Human Rights Watch, 2006) 16.
113. Syahredzan Johan, 'Legal Representation, A Sacred Right', *The Star* (online, 21 August 2017) <https://www.thestar.com.my/opinion/online-exclusive/a-humble-submission/2017/08/21/legal-representation-a-sacred-right>.
114. *ICCPR* Art. 14(3)(d); *Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,* GA Res 67/187, UN Doc A/67/458, ('*Principles on Legal Aid*'), Principle 3; *Death Penalty Safeguards* [5].
115. *Death Penalty Safeguards* [1(a)]. See also *General Comment No 32*, [11] citing Death Penalty Safeguards[1(a)]; Human Rights Committee, *Concluding Observations Trinidad & Tobago,* UN DOC CCPR/CO/70/TTO (10 November 2000) [7.25].
116. *Death Penalty Safeguards* [1(a)].
117. *Death Penalty Safeguards* [5]; *ICCPR* Art. 14(3)(d).
118. *Principles Legal Aid*, Principle 3.
119. Ibid.
120. Ibid.
121. Human Rights Committee, *Communication No 223/1987*, 35th sess, UN Doc CCPR/C/35/D/223/1987 (4 April 1989) [10.2]-[10.3] ('*Robinson v Jamaica*').
122. *Principles on Legal Aid*, Principle 13.
123. Human Rights Committee, *Communication No 232/1987*, 39th sess, UN Doc CCPR/C/39/D/232/1987 (21 August 1990) [12.5] ('*Pinto v Trinidad and Tobago*').

b) Counsel of Choice

Pursuant to Art. 5(3) of the *Federal Constitution*, a person who is arrested shall be informed of their grounds of arrest and 'shall be allowed to consult and be defended by a *legal practitioner of his choice*'.[124] Similarly, s 28A of *CPC* (as referred to above) entitles arrested persons to *choose* their legal practitioner. For those facing the death penalty, Chan Yen Hui, a lawyer interviewed for this report, states that 'all … cases are entitled to free legal aid', in the sense of court assigned pro bono legal representation.[125]

A practical challenge, however, is that the funding of legal aid lawyers is insufficient, which can impact on the way in which the rights of prisoners are protected and how accused can prepare an effective case. The resources assigned to a legal aid lawyer are approximately RM 6000, an amount described by a lawyer as 'pittance'[126] for the entirety of the case from the first trial to the final appeal. Shashi Devan Thalmalingam, a lawyer with 9 years' experience on death penalty matters, states that the:

> … fees are reviewed and increased. But it's still not enough, it covers disbursements. But no way is it even at the minimum level of legal fees for a lawyer, private lawyer handling a death-penalty case…Whether it's sufficient, there is some money. It is sufficient to cover cost but definitely I wouldn't call it legal fees.[127]

As it is not possible to obtain sufficient legal aid funding for all of the requisite stages required to adequately defend an accused (the preliminary stages of proceedings, detention, pre-trial preparation, trial, and appeal) the provision of legal aid does not conform either to the requisite international standards, or Art. 5 of the *Federal Constitution*.[128]

One example of an issue that flows from the limited funding available for legal aid is the inability for defence counsel to obtain adequate independent expert witnesses. The prosecution, funded by the State, is well resourced and has access to a range of expert witnesses if need be. For the defence, challenging such expert witnesses may be difficult, if not impossible, if independent expert witnesses are not obtained.

For example, in an interview conducted for this report, lawyer Fahri Azzat states that:

> When you say defending them to the best of my abilities, I can't do that simply because we don't have a budget for it. It's really down to how much I am willing to put on my own money and feeling like this is worthwhile. But it's difficult because for example we don't get specialist evidence, we can't hire an expert. Expert[s] cost at least a grand a day to come and give evidence, never mind their report. Never mind the time they spent preparing that report. So, you know we're looking to at least easily 5 to 10 thousand to come up with a specialist report.

This discrepancy of resourcing undermines the principle of 'equality in arms', a principle that requires parties to have a reasonable opportunity of presenting their case in conditions that do not disadvantage one of them against the other.[129]

c) Appeal Representation

The right to representation is also significant when an incarcerated person seeks to exercise his or her appeal rights. The Human Rights Committee has stated that the denial of legal aid to an accused facing the death sentence would constitute a violation of the right to appeal.[130]

124. *Federal Constitution* Art. 5(3).
125. Interview with Miss Chan Yen Hui (Dr Thaatchaayini Kananatu & Janice Ananthan, Monash University, Malaysia, 30 December 2020).
126. Interview with Mr Fahri Azzat (Dr Thaatchaayini Kananatu & Janice Ananthan, Fahri & Co, Selangor, Malaysia, 27 December 2019).
127. Interview with Mr Shashi Devan Thalmalingam (Janice Ananthan, Monash University, Malaysia, 18 January 2020).
128. See, e.g., *Death Penalty Safeguards* [5]; *ICCPR* Art. 14(3)(d); *Federal Constitution*, Art. 5.
129. See for example, Attorney-General, 'Fair Trial and Fair Hearing Rights', (Web Page, 2020) <https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Fairtrialandfairhearingrights.aspx>.
130. *General Comment No 32* [51].

If an appellant is unable to fund their own counsel, the *Principles on Legal Aid* provide the accused with the right to legal aid when applying for pardon or commutation.[131] In Malaysia, there is limited legal aid available at the clemency stage, due in part to sparse funding schemes and inadequate communication by prison officials of legal aid access to inmates.[132]

3.5 Right to be Tried Without Undue Delay

The right to be tried without delay is an entrenched right in many jurisdictions. For example, in England and Wales, the right is established at common law, most notably in the decision of *Attorney General's Reference (No 1 of 1990).*[133] At the international level, Art. 14(3)(c)of the *ICCPR* is often cited as establishing the right for an accused to be tried without delay.[134]

The length of time that constitutes delay is not defined, and reasonable time is determined by evaluating the circumstances of each case. The complexity of the case, conduct of the accused, severity of the charges and potential penalties are all relevant factors in establishing what would constitute an 'undue delay'.[135]

The UN Human Rights Committee has provided examples of scenarios where the right to be tried without delay had been breached. This includes cases where:

- there was one week between arrest and bringing the accused before a judge;
- the accused was held in detention for 16 months prior to trial; and
- there were 31 months between the trial and the dismissal of the appeal.[136]

It should be noted here that the need for a speedy trial does not justify a breach of fair trial standards that would be inconsistent with the rights of the accused.[137]

In Malaysia, Art. 5(1) of the *Federal Constitution* provides that no one 'shall be deprived of his life or personal liberty save in accordance with law'. In *Public Prosecutor v Choo Chuan Wang,* Edgar Joseph Jr J (as he then was) cited several Indian Supreme Court decisions in holding that Art. 5(1) of the *Federal Constitution* be interpreted in favour of an accused person being accorded the right to a fair hearing within a reasonable time, by an impartial Court established by law.[138]

The right to a trial without undue delay is not entrenched in Malaysian statute, however, there are a number of *ad hoc* pieces of legislation that refer to unreasonable delay. For example, s 42 of the *CPC* requires persons arrested ought to be brought before courts without delay. Additionally, s 117 of the *CPC* stipulates that an accused is not to be held in custody for an excessive period of time without charge.[139] An arrested person may not be held for a period of over twenty-four hours, if it is believed that the investigation could not be completed during that period of time. However, this period may be extended on application to a magistrate under s 117(2) of the *CPC*[140] for a period which is reasonable in the circumstances, with consideration being given to the complexity and serious nature of offences punishable by death.

Delay can occur through a number of stages throughout the criminal justice process. First, pre-trial; trial itself; appeal process; and finally the clemency process. Lengthy delays can have a significant effect on the accused from a mental health perspective, due to the stress placed upon them and from a social and economic standpoint.[141]

131. *Principles on Legal Aid*, Principle 47(c).
132. Ida Lim, 'Legal Aid Shrinking Due to Delayed Payments, Malaysia Bar Report Says', *Malay Mail* (online, 18 March 2017) <https://www.malaymail.com/news/malaysia/2017/03/18/legal-aid-shrinking-due-to-delayed-payments-malaysian-bar-report-says/1337793>; Neville Spykerman, 'Helping Hand for Death Row Prisoners', *The Star* (online, 12 January 2014) <https://www.thestar.com.my/news/nation/2014/01/12/helping-hand-for-death-row-prisoners>.
133. [1992] Q.B 630.
134. *ICCPR* Arts. 9(3), 14(3)(c).
135. *General Comment No 32* [35].
136. Human Rights Committee, *Communication No 702/1996* UN Doc CCPR/C/60/D/702/1996 (18 July 1997) [5.6], [5.11] ('*McLawrence v Jamaica*').
137. *Prosecutor v Jean-Pierre Bemba Gombo* (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08-1386, 3 May 2011) 55. See, e.g., *Legal Aid Act 1971* (Malaysia) s 26.
138. *PP v Choo Chuan Wang* [1992] 2 CLJ 1242.
139. *CPC* s 117(1).
140. Ibid.
141. William A Schabas, *The Death Penalty as Cruel Treatment & Torture: Capital Punishment Challenged in the World's Courts* (Northeastern University Press, 1996) 139-40. In the context of the death row phenomenon, delay is particularly problematic: L Vogelman "The Living Dead: Living on Death Row" (1989) 5(2) *South African Journal on Human Rights* 183, 195; Patrick Hudson (2000) 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?' 11(4) *European Journal of International Law* 833, 835-6.

3.6 Right to Have an Interpreter and Translation

The right to an interpreter is particularly significant for those accused persons who belong to ethnic minorities, are foreign nationals or otherwise do not speak Bahasa Melayu (the national language of Malaysia, and formal language used in the courts). Foreign nationals, or non-citizens, are overrepresented in the Malaysian death row population. Amnesty International reports that as of February 2019, 44% of persons sentenced to death are foreign nationals and, of those foreign nationals 49% are convicted of drug-trafficking.[142]

In 1991, the *Vienna Convention on Consular Relations* ('Vienna Convention') was acceded by Malaysia. Pursuant to the Vienna Convention member states are required to, without delay, inform the consular post of a State whose citizen has been 'arrested or committed to prison or to custody pending trial or is detained in any other matter'.[143] In reality, 'there is considerable variation in state practices as regards the assistance given' and limited information available regarding the protections in place for foreign nationals outside the jurisdiction of their country of nationality.[144] Thus, foreign nationals are denied critical support from their consulate, often in the vital and early stages in the criminal proceedings, in their own language.[145]

The *Principles on Legal Aid* also suggest that an interpreter should be provided for defendants who do not speak or understand the language used by authorities.[146] That interpreter should be independent from the authorities. The *European Court of Human Rights* found that translations should be provided for any key written document that the accused needs to understand to ensure a fair trial.[147]

In Malaysia, the *CPC* requires courts to ensure trial proceedings are understood by the accused. For example, s 270(1) establishes the right of an accused to an interpreter's translation of evidence presented in a language they do not understand;[148] and under s 256(8), questions put to the accused must be in a language the accused understands.[149] However, during court proceedings, it is at the court's discretion as to whether documentary material must be translated to the accused.[150] Importantly, the right to an interpreter is only entrenched during the trial procedure, and not during preliminary police investigation.

Our research confirms that the Malaysian framework and process may not be providing the minimal protections offered to foreign nationals. For example, the fact that interpreters are provided to accused persons only in the courtroom means that foreign nationals are not adequately supported outside the courtroom. In fact, '[m]any foreign nationals are

142. Amnesty International, Fatally Flawed (n 17) 19-20.
143. *Vienna Convention on Consular Relations*, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967).
144. Carolyn Hoyle, 'The Plight of Foreign Nationals on Death Row in Malaysia and Indonesia' *Oxford* (Web Page) <https://www.law.ox.ac.uk/sites/files/oxlaw/carolyn_hoyle_-_formatted.pdf>.
145. Ibid.
146. *Principles on Legal Aid*, Guideline 3 [43(f)].
147. *Luedicke, Belkacem & Koç v Germany* (1978) 29 Eur Court HR (ser A) 9, [48]. See also ICCPR Arts. 14(3)(f); CRC Art. 40(2)(b)(vi); *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, opened for signature 18 December 1990, 2220 UNTS 39481 (entered into force 1 July 2003) Arts. 16(8), 18(3)(f).
148. *CPC* s 270(1).
149. Ibid s 256(8).
150. Ibid s 18.
151. 'Special Report: 80 Iranian Death Row Prisoners in Malaysia', *Iran Human Rights* (online, 12 October 2017) <https://iranhr.net/en/articles/3089/>.

Case Study

Between 2009-2010, a number of Iranian nationals were arrested in Malaysia for drug trafficking in contravention of the *DDA*. The defendants indicated that they had been duped into carrying drugs by smugglers who had promised significant financial rewards or a funded trip to Malaysia. They were sentenced to the death penalty and as of October 2017 were being held in the Kajang prison in confinement. One of the prisoners, stated that:

> …we were arrested at Malaysia's airport and the next day a Pakistani translator came and we realised that we were carrying meth. The translator they sent us was Pakistani and didn't know Persian very well. The [Iranian] embassy didn't do anything about it either. At the time, we had to pay 20 to 30 million Tomans…to get a lawyer which we didn't have. Therefore, we got a public defender and were sentenced to death. The third council of the embassy got one lawyer for 20-30 of us and he handled the case carelessly which didn't have a different result.[151]

arrested for drug-related crimes and…are not necessarily provided with immediate and professional interpretation during the crucial hour of police investigation and interrogation, rendering confession based on misrepresentation and/or induced by the investigating officer'.[152]

Even if an accused person is provided with an interpreter in the courtroom, there is a concern that he or she may be unable to understand the legal process (e.g. the charge, consequences or penalty, the evidence presented and the court process), particularly in a jurisdiction foreign to them. For example, Interviewee 1, a lawyer interviewed for this report, notes that in the case of foreign nationals you 'don't know whether they are given interpreters, or if they understand the law ... How are the accused to know what's happening exactly'.[153]

3.7 Privilege Against Self-incrimination

Accused persons have the right to remain silent at trial, which is recognised at both the pre-trial and trial stage under international standards,[154] including the *UDHR* by implication.[155] As noted above, Malaysia observes the rights enshrined by the *UDHR* by reason of its membership as a member of the UN.[156] While there is no express provision under Malaysian domestic legislation such as the *CPC*, the right to remain silent is implied from Art. 5 of the *Federal Constitution* and s 173(ha) of the *CPC*.[157]

The privilege against self-incrimination exists in the common law jurisdictions,[158] and is critical in 'minimis[ing] the risk of convicting the innocent, but it has taken a different turn in Malaysia'.[159] Rather, the privilege (or silence) is arguably exploited by the prosecution to establish its case on a prima facie basis, which the Malaysian judiciary seems to allow. This is most clearly demonstrated by the ruling of the Federal Court in 2006, which explained that:

> ... if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of a reasonable doubt in the case for the prosecution. If there is any such doubt, there can be no prima facie case.[160]

So, while an accused person does have the right to remain silent to avoid self-incrimination under common law, in practice, exercising this right can result in an automatic conviction. This is because in remaining silent, the accused fails to establish a reasonable doubt in the prosecution's case. However, this arguably undermines the principle of judicial independence in that where an accused wishes to remain silent, trial judges will immediately conclude that their silence warrants a conviction. This seems to be the effect of s 173(h)(iii) of the *CPC*. In reality, however, an accused person's 'silence should be treated individually and not to represent the absence of evidence in the defence case as a whole'.[161]

This is exacerbated in drug trafficking cases because of the operation of the *DDA* 'double presumptions', where the accused is required to rebut a presumption which is in stark contradiction to the right to remain silent. This is discussed in detail in **Part 4** below.

More importantly, the Malaysian legislature should consider inserting a mechanism to guarantee accused persons facing criminal charges are a statutory entitlement to the privilege against self-incrimination.

152. *Joint Stakeholder Report* (above n 72) 4.
153. Interview with Interviewee 1 (Dr Thaatchaayini Kananatu & Janice Ananthan, 25 February 2020).
154. *General Comment No 32; Death Penalty Safeguards* [4].
155. *UDHR* Arts. 3, 5, 9, 10-1; Jerald Gomez 'Rights of Accused Persons: Are Safeguards being Reduced?'(2004) 1 *Malaysian Law Journal* 20, 22.
156. Attorney General's Chambers of Malaysia, 'Human Rights' (Web Page, 2016) <http://www.agc.gov.my/agcportal/index.php?r=portal2/left&menu_id=L2YvK3oycE5FSlg1NGNmTGFJdlNId z09>.
157. Naziah Mohd, Alias 'Protections for Vulnerable Accused in Malaysian Criminal Trials: Are they sufficient? Proposal for Reform' (LLM Thesis, Victoria University of Wellington, 2013) 53 <https://core.ac.uk/download/pdf/41338407.pdf>; Mohn Munzil bin Muhamad, 'Is It Wrong to be Silent?: Comparative Legal Positions in Malaysia and New Zealand on the Right to Silence' (2013) 1 *Malayan Law Journal* ix, lxii. See also *Khoo Hi Chiang v Public Prosecutor and Another Appeal* [1994] 1 MLJ 265, 265 (Edgar Joseph Jr SCJ); *Balachandran v PP* [2005] MLJ 301, [25].
158. See, e.g., *Criminal Justice & Public Order Act 1994* [England & Wales] s 35; *Evidence Act 1995* (Cth) [Australia] s 20(2); *Evidence Act 2006* [New Zealand] s 33; *Criminal Procedure Code 2010* [Singapore] s 230(1)(m).
159. Naziah Mohd, 'Protections for Vulnerable Accused' 53.
160. *Balachandran v PP* [2005] 2 MLJ 301, [25].
161. Naziah Mohd, 'Protections for Vulnerable Accused' 53.

3.8 Right to Appeal Conviction and Sentence

The *Death Penalty Safeguards* state that the death penalty may only be carried out after a final judgment by a competent court.[162] To satisfy this requirement, every person convicted and sentenced to death must be entitled to exercise the right to a review of both their conviction and sentence,[163] to be heard by a higher, independent, impartial and competent tribunal.[164] This is an integral part of the judicial system and is instrumental in ensuring justice and fairness for the accused. In Malaysia, legislative mechanisms exist for convicted persons to seek a revision of the imposed sentence and/or an appeal of the decision.

(a) Appeal

The description of the appellate process for convicted criminals is limited in Malaysian statute. A prisoner may appeal their sentence from the High Court to the Court of Appeal.[165] After the Court of Appeal determines whether the appeal may be made, the judge who passed the sentence of death forwards a report on the case with the Federal Court, which determines the ultimate outcome.[166] It should be noted as per s 287(1) of the *CPC*, a sentence of death may not be carried out if an appeal is made and until such time as the sentence of death is confirmed by the appellate court. This is consistent with provisions of the *Courts of Judicature Act 1964* (Malaysia) ('*CJA*') which expressly prohibits the execution of a sentence of death or corporal punishment until notice of appeal is given and after the determination of the appeal, in the case of criminal appeals.[167] During the period 2007 to 2017, there were 128 cases pending in the Federal Court (appeal applications) compared to 442 before the Board of Pardons (clemency applications).[168]

Additionally, the right to appeal to the High Court to the Court of Appeal is considered to be an 'automatic' right.[169] In practice, however, this may not be the case. For example, in an interview for this report, lawyer, Mohd Haijan Omar stated that 'the law says right of appeal you need 14 days from the date of decision. This is a criminal appeal…If you don't file your appeal within the specified time, the next course of actions is to get a breach … get it extended'.[170]

Mohd Haijan Omar went on to give an example of a matter he had been working on reflecting the consequences of failing to appeal within the specified time:

> …a boy who was charged for an offence that happened in 2002 (I think). He was 14 years old. He was alleged to have killed his employer, and in the process also killed, a 2 year old boy I think. Then…a court assigned lawyer was appointed to him…not much was done for the trial. There's no Record of Appeal. There are no notes of proceedings taken by the judge … He was too young, 14 years old, did not know what happened to him all knew he was guilty. So, the lawyer did not file an appeal for him. When he was brought to prison, the prison officers they all talk to him against it. They all said you know you did it, might as well don't appeal. So, he was guilt-ridden and he did not file an appeal. Ended in the High Court. He's been there for 18 years now. He's not been pardoned, not been reviewed, although he's a child. So, what I'm saying…is that it is not automatic.[171]

It should be noted that while judicial appeals have to be prepared rapidly, both the outcome and the process of the appeal can be lengthy and arduous. Chan Yen Hui, a lawyer who was interviewed for the purpose of this report, states that:

162. *Death Penalty Safeguards* [5]; *ICCPR* Art. 6(2).
163. *ICCPR* Art.14(5).
164. Ibid.
165. *CPC* s 307(1). See also, *CJA* ss 67-9.
166. Ibid s 281.
167. *CJA* ss 57, 89.
168. Ibid.
169. *CJA* ss 67-9; *CPC* s 307.
170. Interview Mr Haijan Omar (Dr Thaatchaayini Kananatu & Janice Ananthan, Haijan Omar & Co, Kuala Lumpur, Malaysia, 17 January 2020).
171. Ibid.

> … we have like one month to appeal. Once we filed the appeal, the Court of Appeal may take a few months, maybe 7–8 months so they would be like seven, eight months waiting. At that point of time, most of these convicted accused they are still happy to wait. Because they are waiting for this Court of Appeal decision. After the Court of Appeal decides the case, then we have another one month to appeal to the Federal Court. So again, it will take like 6–7 months so, then the matter proceeds to the Federal Court…[then] awaiting clemency, 6 –7 years now…usually execution will only take years later.[172]

When interviewed, Datuk Baljit Singh stated that 'from the date he's charged the court of first instance you … give yourself one year. One to one and a half years, maximum…Then to the Court of Appeal you give another year. Maximum…Then Federal Court another one year. So total, three and a half years.'[173]

Further, Seira Sacha Abu Bakar noted that the appeal process 'can go up until 5 years I think…review from the day you're convicted, probably take about five years.'[174]

Another complication is the fact that the appeals are conducted in paper form. For example, Seira Sacha Abu Bakar explains that:

> … you don't get sight of the accused's body language…When you do the trial case one of the challenges is you don't get to see the demeanour of the witnesses. You can only read but you don't know whether what he's stating is correct or not…the other is when you don't get the grounds of judgment…which makes you unable to proceed.[175]

Therefore, although Malaysia has a right to appeal that theoretically conforms with international standards, the issues discussed above indicate that there is a potential for injustice in a way that undermines the objectives of the international standards.

(b) Revision

The superior courts of Malaysia are conferred specific revisionary powers. Pursuant to s 31 of the *CJA*, the High Court has discretionary revisionary power over criminal proceedings including questions of criminal procedure arising from the subordinate courts. Similarly, both the Court of Appeal and the Federal Court have express powers of revision to quash, substitute or vary sentences.[176]

However, it is very rare for an appeal court to overturn a death penalty sentence as the threshold to do so is very high. During the period 2007 to 2017, only 165 of the 1,267 of death row inmates in Malaysia were successful in their application for a sentence reduction.[177] For example, in the matter of Mainthan Arumugam, the Federal Court refused to entertain the application for review due to new evidence, demonstrating its preference *not* to reopen a death penalty case despite the reappearance of the alleged victim. This case pertains to a death penalty imposed for an alleged murder and demonstrates an extreme example of the failings of the process. The alleged victim, Devadass, was located 13 years after Arumugam was sentenced to death for his murder and the victim signed a statement confirming that he was not in fact murdered. Arumugam's lawyer, Amer Hamzah, reflected in an interview with the media on the failed appeal stating that he was 'struck by the many unanswered questions' and the reappearance of the victim, which constituted a gap in the evidence which led to his client's conviction. The effect is that this high threshold for review leaves 'Malaysia's death row inmates ... in limbo'.[178]

172. Interview with Miss Chan Yen Hui (Dr Thaatchaayini Kananatu & Janice Ananthan, Monash University, Malaysia, 30 December 2020).
173. Interview with Datuk Baljit Singh Sidhu (Dr Thaatchaayini Kananatu & Janice Ananthan, Wisma Shukorbaljit, Kuala Lumpur, Malaysia, 2 January 2020).
174. Interview with Miss Seira Sacha Abu Bakar (Dr Thaatchaayini Kananatu & Janice Ananthan, Seira & Sharizad, Kuala Lumpur, Malaysia, 25 February 2020).
175. Ibid.
176. *CJA* ss 62(2), 92(2).
177. Rashvinjeed S Bedi, '165 on Death Row Escaped the Gallows from 2007 to 2017', *The Star* (online, 28 June 2018) <https://www.thestar.com.my/news/nation/2018/06/28/165-on-death-row-escaped-the-gallows-from-2007-to-2017/>.
178. Preeti Jha, 'A Country With a Growing Death Row Reconsiders its Future with Capital Punishment', *Washington Post* (online, 31 December 2019) <https://www.washingtonpost.com/world/asia_pacific/a-country-with-a-growing-death-row-reconsiders-its-future-with-capital-punishment/2019/12/30/6037ecd0-0c26-11ea-8054-289aef6e38a3_story.html>.

(c) Clemency

Persons who receive a sentence of death have the right to seek pardon or commutation of their sentence under Article 6(4) of the *ICCPR* and paragraph 7 of the *Death Penalty Safeguards.* In Malaysia, a person sentenced to death has the right to petition for pardon (which constitutes a form of clemency).[179] This right to seek clemency is automatic,[180] and the power to grant clemency rests with the Board of Pardons which consists of the Attorney-General, the Federal Territories Minister and three other lay members appointed by the Yang di-Pertuan Agong (Head of State).[181] After consideration of the opinion of the Federal Attorney-General, the Board must then advise the Yang di-Pertuan Agong about the appropriateness of a pardon.[182]

Unfortunately, the Malaysian process does not appear to be transparent and at times, it can in fact be described as arbitrary.[183] This is because the clemency process has no clear legal framework, as it falls within the ambit of the Executive rather than the Judiciary.[184] This is problematic in the three ways.

First, there are political representatives serving on the Board of Pardons which enables the federal government to indirectly participate in the decision-making of the Board of Pardons, which should be an independent constitutional advisory body. For example, the applicant for clemency is entitled to provide written but not oral submissions, whereas the report of the Attorney-General must be considered by the Board of Pardons,[185] and can participate both through written and oral means. This has been criticised by the Malaysian Bar for undermining the doctrine of separation powers.[186] This is particularly concerning since the Attorney-General acts as both prosecutor and advisor. According to lawyer Datuk N Sivananthan who was interviewed for this report:

> The problem is lawyers are not allowed to appear at those hearing and I think that's very unsatisfactory. Because you are going to have a bunch of people from the prosecution there, then you have some other members of the board. So to me, the moment you have a prosecutor there without defence that is grossly unfair. So I think the Pardon's Board itself should not include the prosecutor. They can have the board and if they want to hear the representation the both prosecution and defence should be allowed to make representation.[187]

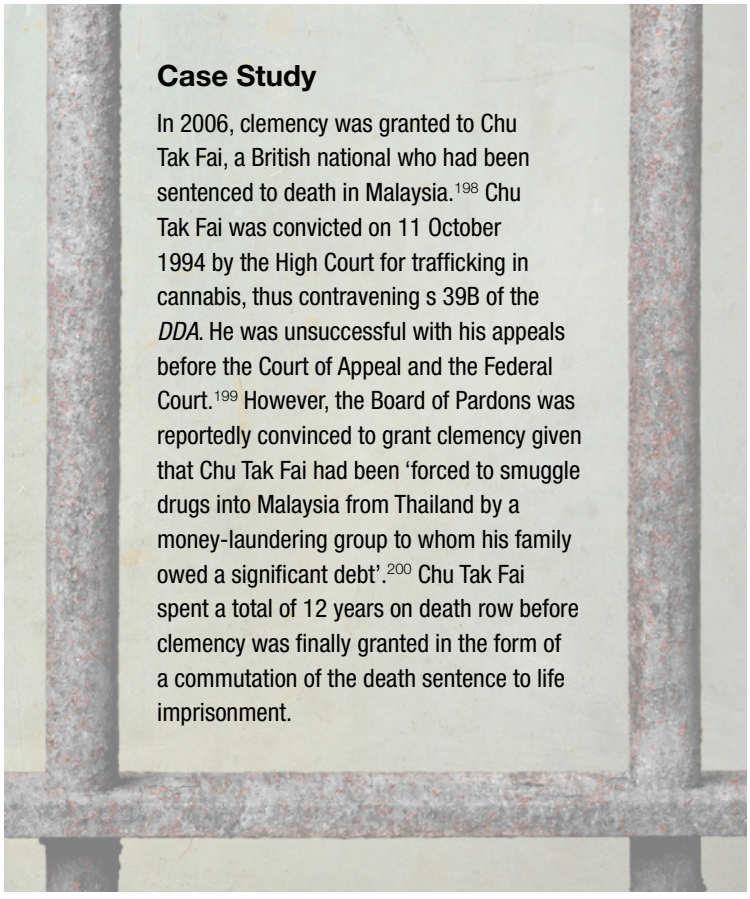
Second, the Board of Pardons rarely meets,[188] which means that petitioners do not have the opportunity to present their case before the Board, and the Board is not required to disclose the explanation for its decision. This is compounded by the fact there is no time limit prescribed by Malaysian statute by which the Board of Pardons must render its decision on the clemency application.[189] It is common for clemency applicants to wait on death row for at least 10 years but there are also cases where persons convicted of drug-trafficking waited for 22 years.[190] Delay is of particular concern for death row prisoners, who have experienced lengthy delays over a number of years post trial. They are subject to a 'unique psychological impact on prisoners of long periods under the harsh conditions of death row, with the ever-present shadow of execution hanging over them'[191] known as the 'death row phenomenon'. Isolation and years of uncertainty can have a detrimental effect on a prisoner's mental and physical state. In and of itself, death row phenomenon has been recognised as a form of cruel, inhuman or degrading treatment. For example, the European Court of Human Rights held that prolonged detention of prisoners on death row is considered as cruel, inhuman or degrading treatment.[192]

179. *Federal Constitution* Art. 42.
180. Pascoe, *Last Chance* (n 86) 133.
181. *Federal Constitution* Art. 42(5)-(6).
182. Ibid Art. 42(9).
183. Salleh Buang, 'The Prerogative of Mercy', *New Straits Times* (online 20 May 2019) <https://www.nst.com.my/opinion/columnists/2018/05/369929/prerogative-mercy>.
184. Daniel Pascoe, 'Clemency in Southeast Asian Death Penalty Cases' 4 Asian Law Centre Briefing Paper 3, 12.
185. *Prisons Regulations 2000* (Malaysia) rr 113-4; *Federal Constitution* Art. 42(9).
186. Malaysian Bar, 'The Attorney General - The Most Powerful Person in Malaysia?' (1983) *Journal of the Malaysian Bar* <http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=16136>.
187. Interview with Datuk N Sivananthan (Dr Thaatchaayini Kananatu & Janice Ananthan, Sivananthan Associates & Solicitors, Selangor, Malaysia, 10 January 2020).
188. Pascoe, *Last Chance for Life* (n 86) 153.
189. *Husin v Lembaga Pengampunan negeri Pahang* [2001] 3 MLJ 458, 466-7. See also Pascoe, *Last Chance for Life* (n 97) 135.
190. Pascoe, *Last Chance for Life* (n 86) 154.
191. 'Death Row Phenomenon: The Psychological Impact of Living in the Shadow of Execution', *Reprieve* (Web Page) <https://reprieve.org.uk/death-row-phenomenon-psychological-impact-shadow-execution/>.
192. *Soering v United Kingdom and Germany* (1989) 11 EHRR 439. This decision has been reaffirmed in *Earl Pratt & Ivan Morgan v Jamaica* [1994] 2 AC 1. See also *Abbott v Attorney-General of Trinidad and Tobago* [1979] 1 WLR 1342; *Sher Singh & Ors v State of Punjab* [1983] 2 SCR 583; *Ediga Anamma v State of Andhra Pradesh* [1974] 3 SCR 329; *Re Kemmler* 1 3 6 US 436 (1980); *Khaki v The State* [2010] PLD 1; *Dhlamini v Carter* 1968 (1) RLR 136; *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Ors* 1993 4 SA 239 ZSC.

Third, the outcome of the clemency process cannot be reviewed. In *Karpal Sing v Sultan of Selangor*, it was held that the Yang di-Pertuan Agong is not bound to act on the advice of the Pardons Board and is permitted to exercise their discretion in the prerogative of mercy, and the decision of the Yang di-Pertuan Agong is not reviewable in court.[193]

However, beyond this process, there is no legal framework in place that outlines the process in detail, nor are there criteria set out as to how pardon decisions should be considered or communicated.

It should also be noted that, in the case of a clemency request, there is no legislative scheme which prescribes the minimum time requirements between sentence and execution.[194] While s 281(c) of the *CPC* provides that persons granted a pardon cannot be executed, there is no specific safeguard resulting in a stay of execution caused by the making of a clemency application, pending before the Board of Pardons. In theory, executions will not take place until clemency is considered.[195] However, in practice, pardon applications rarely have an effect on the stay of an execution. For example, of the four known executions in 2017, two were carried out while the petitioners' clemency requests were pending.[196] This conflicts with international standards for fair trial rights which calls for States to allow sufficient time between the imposition of a death sentence and the execution.[197] Adequate time should be provided to enable the prisoner to prepare their appeals and petitions for clemency, and to address any personal matters.



Case Study

In 2006, clemency was granted to Chu Tak Fai, a British national who had been sentenced to death in Malaysia.[198] Chu Tak Fai was convicted on 11 October 1994 by the High Court for trafficking in cannabis, thus contravening s 39B of the *DDA*. He was unsuccessful with his appeals before the Court of Appeal and the Federal Court.[199] However, the Board of Pardons was reportedly convinced to grant clemency given that Chu Tak Fai had been 'forced to smuggle drugs into Malaysia from Thailand by a money-laundering group to whom his family owed a significant debt'.[200] Chu Tak Fai spent a total of 12 years on death row before clemency was finally granted in the form of a commutation of the death sentence to life imprisonment.

193. *Karpal Singh v Sultan of Selangor* (1985) 1 MLJ 64.
194. Pascoe, *Last Chance for Life* (n 86) 135.
195. 'Filing an Appeal', *Pejabat Ketua Pendaftar Mahkamah Persekutuan Malaysia* [Office of the Registrar General of the Federal Court of Malaysia] (Web Page) <http://www.kehakiman.gov.my/ms/filing-appeal>; Pascoe, *Last Chance for Life* (n 86) 127.
196. Oliver Holmes, 'Malaysia Hangs Three Men for Murder in "Secretive" Execution', *The Guardian* (online at 20 May 2019) <https://www.theguardian.com/world/2016/mar/25/malaysia-hangs-three-men-for-in-secretive-execution>.
197. *Death Penalty Safeguards* [5].
198. *Chu Tak Fai v PP* [2007] 1 MLJ 201; *Chu Tak Fai v PP* [2006] 4 CLJ 931; *Chu Tak Fai v PP* [1998] 4 MLJ 246.
199. Goh Yihan, 'The Jurisdiction to Reopen Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal' (2008) *Singapore Journal of Legal Studies* 395, 411-4.
200. Daniel Pascoe 'What the Rejection of Anwar Ibrahim's Petition for Pardon Tells Us About Malaysia's Royal Pardon System' (2016) 18(1) *Asian-Pacific Law & Policy Journal* 63, 78; Daniel Pascoe, *Last Chance for Life* 139.

Drug Offences and the Death Penalty in Malaysia

PART 4

Drug use and drug trafficking are global phenomena that transcend jurisdictional borders. Malaysia is no exception and notwithstanding a punitive approach to drug related offences, drug use and drug trafficking appears to persist unabated. The issue is perhaps more challenging largely because of Malaysia's close proximity to the Golden Triangle; it is treated as a 'transit country for drug traffickers from the Golden Triangle to other destinations'.[201]

In response to the difficulties posed by increased drug trafficking and drug dependence, 'Malaysia began its drug war in 1975 when it first prescribed the death penalty for drug trafficking'.[202] This punitive 'war on drugs' approach to criminalising drug related activities is reflected in Malaysia's criminal law framework today, in particular by the DDA, which is of most concern to this report.

In Malaysia, drug-trafficking remains the primary offence that attracts the death penalty.[203] As at December 2019, of the 1280 persons on death row; 899 were convicted pursuant to s 39B of the *DDA* (70%) and 546 were foreign nationals (43%).[204] Amnesty International reports that over two thirds of foreign nationals were convicted for contravening s 39B of the *DDA*[205] and although no executions have been carried out since 2017, the death penalty for drug trafficking continues to be routinely imposed.[206] The following Table 4 indicates the executions and imposition of death sentences in Malaysia from 2013–2019:

Table 4: Executions & Death Sentences in Malaysia for the period 2013 to 2019[207]

Year	No. Executions of Persons Convicted for Capital Offences	No. of Executions of Persons Convicted under s 39B DDA	No. of Convictions of Persons Charged with Capital Offences	No. of Convictions of Persons Charged Under s 39B DDA
2019	0	0[208]	26[209]	12[210]
2018	0	0[211]	190	136
2017	4+	0[212]	38+	21
2016	4	+[213]	14+	5
2015	+	0[214]	39+	24
2014	2+	+[215]	38+	16
2013	2+	0[216]	76+	47

Whilst the rate of executions has slowed down in the last 7 years, the substantial increase in the reporting of death penalty sentences being imposed in 2018 can be attributed to official data being made available to Amnesty International, whereas previous figures came through Amnesty International's monitoring of the Courts and media.[217]

4.1 Malaysian Legislative Framework: Dangerous Drugs Act 1952 ('DDA')

Pursuant to s 39B(1) of the *DDA*, it is an offence punishable by death for an accused to traffic in a dangerous drug, offer to traffic a dangerous drug, or do or offer to do a peremptory act for the purpose of trafficking in a dangerous drug. Prior to November 2017, convictions under s 39B attracted the mandatory death penalty. However, the November 2017 amendments allowed a discretionary element to sentencing judges; an accused who now contravenes s 39B(1) shall be punished with death or imprisonment for life and shall, if not sentenced to death, be punished with whipping of not less than fifteen strokes.[218]

201. Yingyos Leechaianan & Dennis R Longmire, 'The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis' (2013) 2 *Laws* 115, 132.
202. Sidney Harring 'Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs' (1991) 29 *Columbia Journal of Transnational Law* 365, 366.
203. *Joint Stakeholder Report* (above n 72) 1.
204. Question and Answer, 2 December 2019 (English Translation) (document on file with authors). See also Giada Girelli, 'The Death Penalty for Drug Offences: Global Overview 2018' (Harm Reduction International, 2019) 26.
205. Giada Giarelli, 'Report to the UN Office on Drugs and Crime on the Tenth survey on capital punishment and on the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, covering the period 2014-2018', *Harm Reduction International* (Report, 13 September 2019) 8.
206. Amnesty International, 'Fatally Flawed' (n 17) 15-6.
207. These figures have been reported by Amnesty International: Amnesty International, 'Fatally Flawed' (n 17) 15-6. These are minimum figures. The symbol '+' represents the fact that there is no data available to determine exactly how many executions took place for that year or how many sentences are imposed (i.e. 'unknown' data).
208. Giada Girelli, 'The Death Penalty for Drug Offences: Global Overview 2018' (Harm Reduction International, 2019) 24.
209. Amnesty International, 'Death Sentences and Executions 2019: Global Report' (2020) 21.
210. Giada Girelli & Adrià Cots Fernández, 'The Death Penalty for Drug Offences: Global Overview 2019' (Harm Reduction International, 2020) 9.
211. Giada Girelli, 'The Death Penalty for Drug Offences: Global Overview 2018' (Harm Reduction International, 2019) 24.
212. Ibid.
213. Gen Sander, 'The Death Penalty for Drug Offences: Global Overview 2017' (Harm Reduction International, 2018) 27.
214. Ibid.
215. Patrick Gallahue & Rick Lines, 'The Death Penalty for Drug Offences: Global Overview 2015' (Harm Reduction International, 2016) 15.
216. Ibid.
217. Amnesty International, 'Death Sentences and Executions 2018: Global Report' (Amnesty International, 2019) 20.
218. *DDA* s 39B(2).

The introduction of discretionary sentencing for drug trafficking offences was the culmination of significant campaigning from the Malaysian Bar, non-Government organisations and civil society groups over a number of years. Datuk Seri Azalina Othman, Minister in the Prime Minister's Department at the time, who moved the legislation stated that '[t]he government had taken into consideration the views and suggestions of 30 million Malaysians in drafting the amendment which will add an element of mercy in a certain situation where the judge sees fit'.[219]

Although this provision appears to permit sentencing judges a discretion as to whether or not to impose the death penalty, the discretion is limited by s 39B(2A) of the *DDA* which states that when imposing a sentence of imprisonment for life and whipping of not less than fifteen strokes, the Court 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.

The problematic implications arising from the drafting of this section and sections 37-37A are significant and will be discussed below. A result of these drafting limitations is that mandatory sentencing for drug offending largely remains in place.

4.1.1 Unclear Wording

Subsections 39B(2A)(a)-(d) of the *DDA* set out four circumstances in which a court may exercise discretion *not* to impose the death sentence. It is clear that subsection (d), being the requirement to provide prosecutorial assistance, is required in every circumstance as it is prefaced with the word 'and'. However, the application of the other subsections is more ambiguous. For example, subsection (a) is not followed by any direction of 'and' or 'or' whereas subsection (b) is followed by the direction 'or'. It is unclear as to whether an accused must satisfy subsection (a), (b) together with (d), or (a) together with (d), or (b) together with (d) or (a) and (c) together with (d) or (c) and (d).

The Explanatory Statement does not clarify this point as it states merely that 'the Court may have regard only to any of the circumstances specified in the proposed new paragraph 39B(2A)(a), (b) or (c)',[220] and the subsection that became (d). Given that this subsection is the only avenue for discretionary sentencing in the entire DDA, the lack of clarity may result in a mandatory sentence being imposed due to misinterpretation of the legislative options rather than the non existence of a factual circumstance.

4.1.2 Enforcement Agencies Inadvertently Gaining a Judicial Power

Subsection 39B(2A)(d) requires that 'the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia'.

219. NST Team, 'No More Mandatory Death Sentence Soon As Amendments to Dangerous Drugs Act Passed in Parliament', *New Straits Times* (online, 30 November 2017) <https://www.nst.com.my/news/government-public-policy/2017/11/309354/no-more-mandatory-death-sentence-soon-amendments>.
220. Explanatory Statement, *Dangerous Drugs (Amendment) Bill 2017* (Malaysia) 3-4.

Whilst the determination of whether this section has been satisfied is a judicial decision, it requires Malaysian enforcement agencies to give evidence in support of the level assistance provided by the accused. However, it is unclear exactly which elements have to be established in order to demonstrate the drug trafficking activities have been disrupted. Due to the confidential and covert nature of prosecutorial investigations, this information is not likely to be available to an individual accused. In practice, the burden of proof is reversed as it falls on the accused to establish their level of assistance which undermines their right to the presumption of innocence.

Importantly, whilst the option of discretionary sentencing was aimed at allowing those on the lower level of drug offending a reprieve from the death penalty, the mandatory requirement to satisfy the Court of (d) means that those offenders who have less involvement with criminal activity (for example, those who have been forced or tricked into participating) may not be able to offer information that can assist 'disrupting drug trafficking activities'. This is because they simply do not have the level of information required to discharge this reverse-burden.

4.1.3 'Double Presumption' Burden

Section 37 of the *DDA* contains a presumption that an accused who is found in *possession* of a *traffickable amount* of a drug of dependence is in fact *trafficking* in the said drug.[221] This means that potentially an accused may be sentenced to death for drug trafficking on what is commonly referred to as a 'double presumption'. The effect of these presumptions is that an accused is effectively 'guilty until proven innocent, in violation of one of the most fundamental tenets of the right to fair trial.'[222]

Under s 37 of the *DDA*, the prosecution is entitled to rely on statutory presumptions that either deem the accused to be in possession of a drug of dependence or be to trafficking in a drug of dependence. For example, s 37(b) allows the prosecution to rely on the deeming provision to prove that the drug was on land or premises occupied by the accused; that is to prove that the accused had custody and control of the drug. Section 37(d) allows the prosecution to presume that an accused had knowledge of the nature of the drug and as such, was in possession of the drug. Such deeming provisions typically shift the burden on to the accused to disprove the requisite elements on a balance of probabilities.

The 'double presumptions' enshrined in s 37 of the *DDA* have been described as a 'complex system … has the effect of shifting a part of the burden of proof in a trafficking case to the accused'.[223] Their application has been the subject of contention in a number of Malaysian decisions, as discussed in **Part 4.6** and **Appendix II** below.

In the context of drug trafficking, the presumption of innocence is undermined because as a result of the double presumptions accused are presumed to be guilty. As discussed above in **Part 3**, the burden of proof generally lies with the prosecution, but that is not the case in practice since the threshold is merely 'on a prima facie basis', rather than 'beyond a reasonable doubt'.[224] According to the former Chief Justice Richard Malanjum in the decision of *Atienza*, s 37A of the *DDA* violates the presumption of innocence as the provision allows for the possibility to convict an accused despite the possibility of reasonable doubt: 'we consider that s 37A constitutes a most substantial departure from the general rule which cannot be justified by and is disproportionate to the legislative objectives it serves'.[225]

221. *DDA* s 37(da).
222. Giada Girelli, 'The Death Penalty for Drug Offences: Global Overview 2018' (Harm Reduction International, 2019) 13.
223. Sidney Harring 'Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs' (1991) 29 *Columbia Journal of Transnational Law* 365, 372.
224. Ibid; *Saminathan & Ors v Public Prosecutor* (1955) 21 MLJ 121.
225. *Atienza* [2019] 5 CLJ 780.

The effect of *Atienza* is that s 37A can offend the requirements of fairness under Arts. 5 and 8 of the *Federal Constitution*. The effect of the provision is to 'revers[e] the burden onto an accused to prove his or her innocence' and, 'where double presumptions are applied… the burden on the appellants to rebut both presumptions on the balance of probabilities is oppressive, unduly harsh and unfair'.[226] The Federal Court concluded that 's 37A is unconstitutional for violating Art. 5(1) read with Art. 8(1) of the [Constitution]' and for this reason, the Court struck s 37A down. This is because 'the application of what may be termed the "double presumptions" … gives rise to a real risk that an accused may be convicted of drug trafficking in circumstances where a significant reasonable doubt remains as to the main elements of the offence'.[227] The convictions of the appellants for trafficking were quashed under s 39B *DDA*, and substituted for possession, punishable under s 39A(2) *DDA*. This is because while there was no reasonable doubt as to possession of drugs, there was a reasonable doubt as to trafficking.

By striking down s 37A, it is clear that the Federal Court, in interpreting the DDA presumptions, is not willing to allow the use of multiple presumptions to support the finding of a conviction of trafficking. Ultimately, these decisions demonstrate judicial support for the fact that each case ought to be determined on a case by case basis and that the application of generic presumptions can lead to erroneous outcomes. Further, as discussed above, the double presumptions may be unconstitutional as they undermine the presumption of innocence.

Despite the fact that the decision of *Atienza* was handed down in April 2019,[228] the Malaysian Parliament has yet to address this ruling by amending the legislation. This means that accused are still being arraigned and convicted under a section of a statute that has been found to be unconstitutional and an unknown number of people convicted under this section remain on death row, deprived of their liberty.

4.1.4 Reforms are not Retroactive

It is concerning that the amendments to subsection 39B(2A) were not enacted to apply retrospectively. International law fair trial principles require that an accused convicted of a death penalty offence ought to be provided with the benefit of a lighter penalty for that crime, where such a penalty becomes available.[230]

Domestically, Art. 7 of the *Federal Constitution* states that accused shall not be punished for an offence, or suffer greater punishment for an offence unless such was prescribed by the law at the time the offence was committed. However, the *Federal Constitution* does not stipulate how laws should be applied if they are to potentially benefit the defendent or prisoner.

226. *Atienza* [2019] 5 CLJ 780, [94].
227. *Atienza* [2019] 5 CLJ 780, [149].
228. 'Double Presumptions for Drug-Trafficking Conviction Struck Down', *The Star* (online, 6 April 2019) <https://www.thestar.com.my/news/nation/2019/04/06/double-presumptions-for-drugtrafficking-conviction-struck-down/>.
229. [2016] MLJU 1097.
230. *Death Penalty Safeguards* [2]; ICCPR Art. 15(1); *Scoppola v Italy (No 2)* (European Court of Human Rights, Grand Chamber, Application No 10249/03, 17 September 2009) § 1009.

Case study

Issues with double presumptions are perhaps most clearly demonstrated in the 2016 decision of *PP v Duangchit Khonthokhonburi*[229] whereby the High Court held that the statutory presumption of trafficking under s 37(d) DDA has the effect that the accused is deemed to be in possession of drugs. The case concerned a female foreign national of Thailand arrested at Kuala Lumpur International Airport for trafficking 2809g of methamphetamine. Her defence argued that the accused was not 'in the act' of carrying or importing drugs into Malaysia by reason of being 'in transit'. In ascertaining the definition of 'trafficking' under s 2 *DDA*, the High Court concluded that the prosecution need only prove the accused was *deemed* to be in possession of the drugs on a *prima facie* basis for the purpose of s 37(d). Subsequently, once in possession of the prescribed statutory amount, the accused is deemed in law to be trafficking, regardless of the fact that he or she may not have intended to distribute or consume the drugs.

Notwithstanding, it was open to the Malaysian Parliament to enact reforms that benefit defendants or prisoners retrospectively and this point was raised at the time the Bill was debated in Parliament in November 2017.[231] These amendments did not come into force until 15 March 2018[232] and in July 2018 a full moratorium on all executions was imposed.[233] It is therefore difficult to ascertain the effect that the 2018 legislative change has had on sentencing practices due to the likelihood that most of the cases currently before the Court involve offending that took place prior to 15 March 2018.

Regardless of the lack of retrospectivity, the reality is that there are now a significant number of people sentenced to death mandatorily in circumstances where the Parliament has since recognised that lower level offenders should be spared execution.

4.2 Defence of Innocent Carrier

In the context of drug trafficking and the death penalty, there is a defence commonly raised by accused persons, that is, the defence of innocent carrier. A creature of the Malaysian common law, the defence is defined as 'a state of affairs where an accused person acknowledges carrying for example a bag or a box … containing the dangerous drugs but disputes having knowledge of the drugs'.[234] Whether the defence is successful is dependent upon the facts of each case.[235]

Decisions examined below, and in **Appendix 2**, illustrate the way in which an accused may raise the defence. Typically, the focus is on the fact that their role in the conduct that attracted the drug trafficking charge was that of a 'drug mule/carrier'; conduct that is presented by defence counsel as mitigating. The defence is particularly prevalent amongst those vulnerable members of the death-row population, notably foreign nationals who are female (e.g. female migrant workers). These people are targeted by drug-trafficking syndicates 'because they are typically poor and uneducated, but hold passports'.[236] In fact, it is estimated that at least 30% of persons arrested for suspected drug-trafficking globally are women, 'usually for low-level involvement, including as drug couriers/mules'.[237] It should be noted that the defence is rarely accepted by trial judges in Malaysia in the context of drug trafficking and the death penalty. For example, in **Table 5: Illustrative Cases Involving Capital Charges for Drug Trafficking Under s 39B DDA** for the period 1978 to 2019, it appears that in 24 of the cases, the defence was raised 15 times but was never accepted.

Malaysian courts are often reluctant to accept the defence of innocent carrier suggesting that the defence is a 'mere afterthought', or that the conduct of the accused gives rise to wilful blindness. Wilful blindness arises where 'a person deliberately shuts his eyes to the obvious, because he doesn't want to know'; that person is 'taken to know'.[238] A person is not wilfully blind if and only if 'there is no reason for suspicion and no right and opportunity of examination, and ignorance simpliciter is not enough'.[239] In assessing the defence, the courts will assess the conduct of the accused even at the time of arrest. For example, fleeing the scene or resisting arrest can 'whittle away the presumption of innocence'.[240] For example, in the decision *Kabunda Sakaii Eddy v PP*,[241] the High Court did not accept the defence of innocent courier, finding instead that the accused was guilty of wilful blindness. In so doing, the High Court rejected the accused's plea that he had no knowledge of the substance contained within capsules he had swallowed, being methamphetamine. From his evidence, it became clear that the accused was recruited by a woman in Tanzania who instructed him to travel to Malaysia for a 'work assignment' and to swallow the capsules which he thought resembled African food. The High Court however held that the accused had all the opportunity to refuse to swallow

231. *Interpretation Acts 1948 and 1967* (Malaysia) ss 20, 43(1).
232. *Joint Stakeholder Report* (above n 72) 7.
233. Richard C Paddock, 'Malaysia to Repeal Death Penalty and Sedition Law', *New York Times* (online, 11 October 2018) <https://www.nytimes.com/2018/10/11/world/asia/malaysia-death-penalty-repeal.html>. 1.
234. *Venkatesan Chinnasami v PP* [2011] 1 LNS 1736
235. *Munuswamy Sundar Raj v PP* [1987] 1 MLJ 492, [6].
236. Cornell Centre on the Death Penalty Worldwide, 'Judged for More than Her Crime: Global Overview of Women Facing the Death Penalty' (Report of the Alice Project, September 2018) 12.
237. Jennifer Fleetwood and Lizzie Seal 'Women, Drugs and the Death Penalty: Framing Sandiford' (2017) 56(3) *Howard Journal of Crime and Justice* 358, 358.
238. Mohamed Elewa Badar, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing, 2013) n 178.
239. *Munuswamy Sundar Raj v PP* [1987] 1 MLJ 492, [8]-[9] citing *Ubaka v PP* [1995] 1 SLR 267; *Tan Ah Tee v PP* [1980] 1 MLJ 49; *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356.
240. *Marlan Marpaung v PP* [2012] 8 CLJ 41; *Evidence Act 1950* (Malaysia) s 8.
241. [2017] MLJU 1087.

the capsules. It was of the view that there was opportunity for the accused to inquire as to the substance of the capsules as his life and personal security was not threatened. It found that ultimately the accused 'should have been wary'.

Further, the courts have also held that whether the 'organiser' of the drug scheme is fictitious or not, is often irrelevant in establishing whether the accused is an innocent carrier.[242] Considering *Kabunda Sakaii Eddy v PP*, it is clear that the High Court did not include in its reasons (and thereby did not consider relevant) the existence of the woman who recruited the accused. Ultimately, it was held that the accused's arguments did not rebut the presumption of knowledge required to establish the defence of innocent carrier. The irrelevance of the 'recruiter' seems, however, contrary to the ratio in *Alcontara a/l Ambross Anthony v PP*,[243] which held that persons who wish to raise the defence of innocent carrier should 'reveal the information about the so called real trafficker [at] the soonest possible' time.[244]

It also appears likely that prosecution submissions which rely on the double presumption under the *DDA* are not easily rebutted by the defence of innocent carrier. For example, the Court in *Atienza* found that the defence will not work if the accused has failed to perform their own investigations, even in circumstances where the prosecution has simply relied on the double presumptions to make out the elements of drug trafficking.[245] Doing so may be particularly difficult for accused who do not have the resources and are in custody awaiting trial, or if the prosecution is not willing, or not under an obligation, to provide adequate discovery of the evidence.

242. *PP v Rudolf Tschernezow* [2016] 1 LNS 654, [52].
243. [1966] 1 CLJ 705.
244. *PP v Rudolf Tschernezow* [2016] 1 LNS 654, [55].
245. *Atienza* [2019] 5 CLJ 780.
246. Amnesty International, Fatally Flawed (n 17) 19-20.
247. Ibid.
248. Jennifer Fleetwood and Lizzie Seal 'Women, Drugs and the Death Penalty: Framing Sandiford' (2017) 56(3) *Howard Journal of Crime and Justice* 358, 360.
249. Ibid.

Innocent Couriers: The Over-representation of Foreign Nationals and Women Prisoners on Death Row

As discussed above, foreign nationals are overrepresented in the Malaysian death row population. Amnesty International reports that 44% of persons sentenced to death are foreign nationals and, of those foreign nationals 49% have been convicted of drug-related offences.[246]

Whilst women only comprise 11% of Malaysia's total death row population, Amnesty International reports that 95% of females on death row have been sentenced for a drug-related crime and 86% of women on death row are foreign nationals.[247] Importantly, it must be recognised that '[d]rug war discourse is profoundly gendered' whereby the 'drug war discourses establish the state as paternalistic protector'.[248] In the context of 'the female drug mule', women traffickers are prima facie seen as 'potential villains' despite that 'as women, they are potential victims'.[249]

44%
of persons sentenced to death in Malaysia are foreign nationals

49%
of the foreign nationals sentenced to death have been convicted of drug-related offences

95%
of women sentenced to death have been convicted of drug-related offences

86%
of women sentenced to death in Malaysia are foreign nationals

The cases below are representative of cases that concern foreign nationals and women prisoners, who have been sentenced to the death penalty for drug trafficking.

PP v Huang Ziling [2017] MLJU 1582

The accused, Huang Ziling ('Ziling'), was a female Chinese national charged with trafficking 1.4kg of methamphetamine under s.39B DDA. Ziling elected to give evidence on oath and stated that she was an unmarried girl from the Chinese Guangxi province. She submitted that her presence in Malaysia was her first overseas trip, prior to which she worked as a waitress in Guangzhou. She claimed that one of her customers was a Nigerian male called 'She Be' who, in or about November 2013, offered her a job with a monthly salary of 10,000 yuan to transport children's items and clothing outside of China. In or about January 2014, She Be gave Ziling a luggage bag and instructed her to travel to Malaysia. She Be opened a small hole in the bag revealing a box of stationery but otherwise did not show Ziling what was inside the bag. She Be did not accompany Ziling to the airport.

Ziling's main defence was that she was merely an innocent carrier who, given the nature of her employment and the description of her tasks by She Be, had no reason to suspect that the luggage contained illicit drugs. However, the Court found this to be a bare denial and that Ziling's explanation was not credible. The defence did not raise a reasonable doubt in the prosecution case despite the fact that burden upon which Ziling was to rebut the statutory presumption of trafficking was on the balance of probabilities.

PP v Hares Waeda-Oh [2018] 1 LNS 1383

The accused was a Thai national who worked as a taxi driver and whose arrival in Malaysia was to collect passengers from the Kuala Perlis Pier. The accused gave evidence that the car was owned by a person called Mohd Shukri who instructed him to drive one passenger to the pier in February 2016 and to collect the passenger in March 2016. The accused used Mohd Shukri's car and did not use his own taxi car as it could not withstand long journeys. The accused thus denied knowledge of the drugs hidden behind the passenger seat however the Court concluded that he should have checked before leaving Thailand whereby he would have discovered the illicit substances. The Court arrived at this finding despite the fact that there was no evidence of any odour of cannabis in the car's cabin. Additionally, the Court accepted the prosecution's allegation that Mohd Shukri was a fictional character. The defendant's lawyer did not raise the defence of innocent carrier.

PP v Winfred To Make [2019] 1 LNS 1168

Pursuant to s.39B DDA, the accused who was a Kenyan national was convicted for trafficking 818g of methamphetamine. The accused was arrested at Kuala Lumpur International Airport and argued that he had no knowledge of the drugs contained in the seized luggage. He submitted that his friend, Sharon, had asked him to do her a favour by delivering the luggage to her. He had no reason to be suspicious, particularly since the drugs were concealed and not visible to the naked eye. However, the Court found the defence was without merit and that the concealment of the drugs could not be considered in the defence in drug cases. This would enable those accused of drug trafficking to evade prosecution. The Court held that Sharon was a fictitious character and rejected the accused's argument that he did not know Sharon well and that he did not receive compensation from Sharon. The Court did not accept the defence of innocent carrier finding instead that the accused was guilty of wilful blindness.

Hu Yanyu v PP [2019] 1 LNS 57

The accused was a female convicted of trafficking 1.6kg of methamphetamine under s.39B DDA.

She appealed to the Court of Appeal in 2019 on several grounds. First, the credibility of the drug exhibits given the appellant's defence that she had made a small cut in the packets containing the drugs to examine the contents. The chemist stated that upon receiving the packets, there was no such 'cut'. On appeal, the Court found that this was sufficient to conclude that the accused did not make a cut in the packets. Second, that there was a break in the chain of evidence regarding the exhibits identifying the substance trafficked as drugs. The Court concluded that the exhibits were handed over by the authorities to the investigating officer and the chemist for analysis.

The Appeal Court was satisfied that the date and signatures on the exhibits were correct. Third, the search list tendered was altered and was different to the original search list. The Court simply concluded that this was not true relying on testimony of the police that the lists were identical. Fourth, there were discrepancies in the weight of the drugs measured by the chemist and the customs officer, and this gave rise to a reasonable doubt as to the identity of those drugs. The Court concluded that it would be better for the prosecution to be given the opportunity to offer a reasonable explanation for the discrepancy. After hearing the prosecution's submissions, the Court found that there was no reasonable doubt on the facts.

The appellant also submitted that the trial judge erred in failing to properly consider the case put forward by the defence. The defence argued that the appellant conducted a business in China and that she came to Malaysia on the suggestion of her female friend, Zhang Xijuan, who lived here. The appellant submitted that she met with her friend's boyfriend in China who asked her to carry two packets of Chinese tea and a tea pot to Zhang Xijuan and he advised the appellant to place this in her luggage. She did not suspect anything and did not check the luggage. The appellant, on arriving in Malaysia, was informed that Zhang Xijuan had returned to Hong Kong and her boyfriend instructed the appellant to deliver the tea to Hong Kong. The appellant showed the Malaysian authorities all the communications between herself and Zhang Xijuan, including her contact number and photos. The trial judge rejected this defence. This finding was upheld by the Court of Appeal which concluded that the appellant had failed to rebut the presumption of possession and knowledge under s.37(d) DDA on the balance of probabilities.

Samim Sainsha (India) v PP **[2019] MLJU 243**

The appellant, an Indian national, was convicted of trafficking 746g methamphetamine pursuant to s.39B DDA. The Court rejected the defence of innocent carrier finding that the appellant had failed to rebut the presumption of knowledge under s.37(d) DDA. The appellant had argued that she was recruited by an employment agent named Abdullah who had promised her a job in Malaysia. She did not deny taking the bag containing the drugs from the luggage carousel at Kuala Lumpur International Airport, but did submit that she had done so mistakenly. She also submitted that whilst the bag was being examined by the Customs Officer, a contact of Abdullah's had called her. The trial judge said that this defence was a mere afterthought and fabrication since the appellant never lodged a report of mistaken luggage with the police or Airport Authority.

On appeal, the appellant said that the trial judge erred in finding that the chemist was an expert since the 'expertise' had not been proven. The chemist had failed to adhere to s.45 Evidence Act which required that she give details of her background. However, the Court found this was not fatal to the prosecution case since the required identification of the substance was an opinion of chemists which was merely elementary in nature. The appellant also submitted that she had raised a reasonable doubt as to her knowledge of the drugs. However, the Court simply found that there was no coincidence that the bag collected was similar to the bag the appellant owned and highlighted that the contents of the bag contained traditional female Indian clothes which all fitted the appellant. Ultimately, it was found that even if Abdullah was not fictitious, this makes little difference to the defence of innocent carrier since the appellant had taken the bag containing the drugs.

Nabweteme Hadija v PP **[2015] 1 LNS 1259**

The appellant, a female national of Uganda, was convicted of trafficking 2kg of methamphetamine under s.39B DDA. The accused claimed that she had sent her old luggage bag to be dry cleaned. When she collected the bag, it was still wet. As she needed to board her flight to Malaysia, she borrowed another bag from her friend and neighbour, Vicky. Vicky gave the bag to the appellant's son, Christopher. Vicky informed the appellant that the bag belonged to her husband and the appellant submitted that she had no knowledge that drugs were hidden in the bag. On arrival in Penang on 7 September 2010, the appellant was informed by Thai police that her bag was in Bangkok for an 'unknown reason'.

On 9 September 2010, the appellant collected her bag from the Baggage Service Section in Penang after signing a release form and obtaining customs clearance after which two officers from the Narcotics Division examined the appellant's bag. The defence witness, Hajah Noraihan who was a member of the Ugandan consulate in Malaysia, gave evidence that she had met with the appellant whilst detained and had interviewed the appellant's son, Christopher, discovering that Vicky had left Uganda and closed her shop. However, the trial judge found that the defence had failed to raise a reasonable doubt in the prosecution case. The Court of Appeal upheld this decision and said further that there was no evidence of motive indicating Vicky would plant the drugs in the appellant's bag and further that the appellant's 'suspicious' conduct after collecting the bag indicates knowledge. This conduct is relevant under s.8 Evidence Act.

***PP v Lan Yi Ling* [2017] 7 MLJ 214**

The accused was convicted of trafficking 336g of methamphetamine under s.39B DDA. The accused raised the defence of innocent carrier on the basis that a man of African ethnicity, named Clintin whom she had befriended through an online dating website, had sought her assistance in taking a box containing women's clothing and accessories to his brother living in Kuala Lumpur. The accused had known Clintin for only 3 months and had only met him online. She was offered payment of RM 5,000 to help Clintin and his brother. The accused denied knowledge of the presence of the drugs in the box and said that she had no reason to be suspicious since the box was to be given to Clintin's brother. The Court, however, rejected the defence stating instead that the accused was liable under the principle of wilful blindness, particularly since the accused did not have sufficient details for Clintin or his brother to corroborate her evidence. The Court said further that even though the character Clintin was not fictitious and did in fact exist, the accused was a volunteer drug mule who had knowingly agreed to deliver the drugs for a sum of money, free flights and accommodation.

4.3 Additional Defences

In the context of this report, two further defences that may be relevant are the defence of mental impairment and the defence of duress. In practice, these defences are not formally raised in death penalty cases, but, can be used by defence lawyers as a form of mitigating circumstances in sentencing. The benefit in doing so is that it exculpates liability rather than form part of the surrounding context.

a) Defence of Mental Impairment or 'Insanity'

In Malaysia, the defence of mental impairment, referred to as the insanity defence, is articulated in s 84 of the *Penal Code* which states that '[n]othing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law'.

In order to make out the defence successfully, the following elements must be satisfied:

- that the accused was of unsound mind/insane (a term not defined by the Code nor by the courts;
- that the insanity mentally impaired the accused;
- that that the accused was not capable knowing the nature of their act; and
- that what they did was wrong, and/or what they did was contrary to the law.

The burden of proof is on the accused to demonstrate that he or she was 'insane' on a balance of probabilities. If successful, an accused will obtain a qualified acquittal.

Malaysian jurisprudence on the defence indicates that courts may find that an accused is of unsound mind without any clinical evidence in support of that fact.[250] For example, according to the Malaysian Federal Court in *Rajagopal v PP*:

> In this connection we were guided by the decision of the Court of Criminal Appeal in England in the case of *James Frank Rivett* [1951] 34 Cr App R 87. It was held in that case that the issue is one to be determined by a jury and not by medical men of whatever eminence; and where a jury has found a prisoner guilty despite strong evidence by medical men of the highest standing that he was insane at the material time, the Court of Criminal Appeal will not interfere with the verdict, unless it is satisfied that no reasonable jury could have found a verdict of guilty in the particular case.[251]

It therefore appears that the success of the defence is dependent on whether the trial judge accepts the factual finding of insanity. Medical evidence may be only one factor upon which the trial judge makes his or her finding.

Some suggest that the operation of the defence has room for improvement.[252] In particular, Azzat suggests that there ought to be greater emphasis placed on the evidence from medical experts when determining when an accused is 'insane'. This may include a process where medical evidence is adduced from more than one expert, or to have a number of court-appointed medical experts whose role is to provide information to trial judges rather than advocate for one party's position. A more progressive approach is 'the creation of a clinical expert tribunal to decide between competing expert opinions, with a third option being to educate trial judges to become as close to being a clinical expert as possible'.[253]

(b) Defence of Duress

The defence of duress is available in Malaysia pursuant to s 94 of the *Penal Code*. The purpose of this defence is to provide a justification for an accused's conduct that would otherwise be criminal. In order to make out this defence, an accused must satisfy the court that he or she was compelled to commit an offence because of 'threats, which, at the time of doing it, reasonably caused the apprehension that instant death to that person will otherwise by the consequence'.[254] This is of course dependent on the fact that the accused did not commit the offensive act of his or her own accord, or from a reasonable apprehension of harm to themselves short of instant death, placed upon themselves in the situation which they became subject to such a constraint.

It should be noted that according to the decision of *Mohamed Yusof Bin Haji Ahmad v PP*,[255] the duress must be 'imminent, extreme and persistent'.[256] In this decision, the accused was charged with trafficking in cannabis in contravention of s 39(B)(1)(a) of the DDA and claimed the defence of duress. The accused's submission was that 'he had carried the drug under threat from a Thai man… [who] had threatened him with a pistol and told him to carry the cannabis across the border into Malaysia. If he did so he would be paid M$400. If he did not he would be shot'.[257] At first instance, the President of the Sessions Court held that the accused was not able to claim the defence successfully as 'the alleged threat was improbable'.[258] On appeal, the High Court held that 'even if the accused's story was true, the defence would fail'.[259] On appeal, the conviction was affirmed as was the sentence of life imprisonment. The additional punishment of whipping was quashed because of 'extenuating circumstances, which led him to commit the offence'.[260]

250. *PP v Han John Han* [2007] 1 SLR 1180 (Choo Han Teck J).
251. [1976] 1 LNS 122.
252. Interview with Mr Fahri Azzat (Dr Thaatchaayini Kananatu & Janice Ananthan, Fahri & Co, Selangor, Malaysia, 27 December 2019).
253. Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (Lexis Nexis, 3rd edn, 2018).
254. *Mohamed Yusof Bin Haji Ahmad v PP* [1983] 2 MLJ 167, 171.
255. [1983] 2 MLJ 167.
256. Peter English, 'The Defence of Duress Under the Penal Code' (1983) 25(2) *Malaya Law Review* 404, 404 ('*The Defence of Duress*').
257. Ibid.
258. *Mohamed Yusof Bin Haji Ahmad v PP* [1983] 2 MLJ 167, 171.
259. Peter English, 'The Defence of Duress' (n 230) 404.
260. *Mohamed Yusof Bin Haji Ahmad v PP* [1983] 2 MLJ 167, 171.

Perhaps of most concern is that the defence of duress, under the Penal Code is limited in its application. It is not, for example, available for an offence against the State punishable with death, which would include offending under the *DDA*.[261] The second issue that requires addressing is that the defence of duress appears to be only applicable where a threat of death has been made directly to the accused. It does not apply to circumstances where the accused is threatened with violence, or if alternatively someone other than the accused is threatened within the vicinity of the accused.

261. Peter English, 'The Defence of Duress' (n 230) 408.

Key Findings and Recommendations

PART 5

Since 2018, Malaysia has witnessed substantial progress in working towards the abolition of the death penalty. Of most significance in this context, was the introduction of an official moratorium on all executions in 2018, and the introduction of a discretionary death penalty for drug-trafficking offences in a number of limited circumstances, also in 2018.

Notwithstanding, this report has demonstrated how the current Malaysian death penalty framework falls short of current fair trial guarantees and standards that are enshrined either domestically or internationally. Lawyers appearing in criminal trials with experience in death penalty cases who were interviewed for this report, illuminated the ways in which these standards and guarantees are undermined. Common themes that emerged in these interviews were:

- the unique challenges faced by foreign national defendants who may not have adequate access to interpreters at all stages of a criminal matter;
- that legal aid funding is limited which has an impact on the way in which counsel can defend the matter effectively at all stages of the trial;
- that discovery by the prosecution is insufficient;
- that legal representation is not provided for during the petitions and clemency process because the framework does not necessarily allow for it;
- that the petitions and clemency process can be arbitrary; and
- that reasons for decisions, or dissenting judgments are not published in certain cases.

This was supported by our analysis of cases, which demonstrated the challenges that the drug trafficking provisions pursuant to the DDA present. In particular, our analysis illustrated the four concerns arising in connection with the operation of the double presumptions: unclear wording of the legislation; that the provisions inadvertently provide enforcement agencies with judicial power; that the double presumptions shift the evidential burden on to the accused and that the reforms are not retrospective.

Where the state is empowered to impose the death penalty – the ultimate irrevocable sentence – the judicial system must uphold access to justice and fair trial procedures to the highest standards available.

For this reason, the following recommendations arise from the findings of this report:

RATIFICATION OF TREATIES AND ALIGNMENT WITH INTERNATIONAL STANDARDS

- That the Malaysian Government ratify the International Covenant on Civil and Political Rights and the Second Optional Protocol.
- That the Malaysian Government consider the international jurisprudence emerging from the right to life and the right to fair trial and join the global trend to abolish the death penalty for all offences.
- In the interim, the official moratorium on all executions should continue.
- In the interim, in accordance with the March 2019 UN Chief Executive Board for Coordination recommendations, the Malaysian Government should abolish the death penalty in relation to all forms of drug offending involving the possession, trafficking or importation of drugs.

REVIEW THE DANGEROUS DRUGS ACT 1952

- That section 37A under the DDA be abolished removing the availability of the double presumptions.
- That section 39B(2) & (2A) be abolished and section 41B(1)(a) be amended accordingly.
- In the interim, section 39B(2A) ought to be amended to provide sentencing judges unfettered discretion to sentence an accused convicted of drug trafficking.
- Those who have been sentenced under mandatory sentencing practices should be afforded judicial review whereby mitigating factors including 'character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances' are considered by a sentencing judge, and sentencing principles, such as general and specific deterrence are applied.

STRENGTHENING FAIR TRIAL PROCEDURES

- A systematic monitoring and reporting mechanism monitoring capital offence trials ought to be designed and implemented. This focus of this mechanism would be to facilitate the collection and publication of comprehensive figures on the death penalty.
- The right to communicate with a lawyer ought to be made available at the first instance that an accused is arrested.
- Legal aid funding ought be provided to death penalty matters as a priority to ensure that if they wish to, accused can retain the same lawyer for all aspects of the trial. Additionally, adequate funding should be provided to ensure that the defence lawyer has sufficient time and access to evidence.
- For foreign nationals, questioning ought to be conducted with an appropriately qualified interpreter at the first point with which they come into contact with the criminal justice system process, typically at arrest. The accused should also be provided with an opportunity to communicate with their consular office, at the same time that they are provided an opportunity to communicate with a lawyer.
- The prosecution ought to provide all of the evidence to the defence counsel and/or the accused during the pre-trial discovery process, including any evidence that is supportive of a defence. It must be provided at least fourteen days before the evidence is to be adduced in Court.
- That in terms of the process of adducing expert evidence a clinical expert tribunal be established to make a determination on expert opinion. Alternatively, a process is introduced whereby trial judges undertake training to position themselves into the role of a clinical expert as much as possible.
- Reasons for all Court decisions in capital offence cases ought to be made available to the public. Dissenting judgments should also be written and published accordingly.

- Those sentenced under mandatory sentencing practices should be afforded judicial review whereby individual circumstances including 'character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances'[262] are considered by a sentencing judge and a sentence including general and specific deterrence considerations is applied.
- That the delay between trial and appeal not be unreasonable so as to avoid undue strain on the mental health of the prisoner.
- That legal representation for the appeals and clemency stages be fully funded to allow the prisoner ultimate protection of their rights.
- That a transparent process be established that governs the clemency process. This would include permitting the prisoner and their lawyer to attend the hearing and be provided with reasons for the Boards' decision.
- That while a prisoner is petitioning for pardon, their death sentence is automatically suspended pending completion of the process.
- That the Malaysian Parliament make available the defences of duress and mental impairment expressly to those accused of the death penalty.

Evident throughout this report is that a significant population of those sentenced to death in Malaysia is comprised of individuals convicted of drug offending, many of whom face socio-economic, nationality and language barriers that prohibit their access to the requisite level of legal assistance needed to properly test the prosecution case. This is compounded by legal frameworks that fall short of ensuring fair trial guarantees that are paramount. It is hoped that the research and the recommendations identified in this report provide a significant contribution to discussions and reforms aimed at ultimately abolishing the death penalty in Malaysia.

262. *PP v Zulkarnain bin Sani* [2007] 8 MLJ 228.

Appendicies and References

Appendix I: Methodology and Approach

Appendix II: Illustrative Cases Involving Capital Charges for Drug Trafficking Under s 39B DDA for the period 1978 to 2019

References

Methodology and Approach

APPENDIX

This report adopts a mixed-methods approach to provide a detailed analysis of whether the Malaysian criminal justice system delivers fair trial for those facing the death penalty.

There are three components to this methodology. The first is a detailed analysis of the existing literature on issues relating to Malaysian death penalty trials for drug-related offences and fair trial guarantees. Particular emphasis is placed on the mitigating circumstances of offenders and what consideration if any, was accorded to their individual background.

The second component is the consideration of that framework in the context of relevant death penalty cases. Case study research is particularly beneficial in examining questions of "how" and "why", while taking into consideration how a phenomenon is influenced by the context within which it is situated'.[263] For this report, undertaking case study research provided a mechanism to gain significant insight into specific cases, and it allowed for data to be gathered from a variety of sources, triangulated and converged to illuminate the issues.[264] The purpose of this is to demonstrate fair trial guarantee issues that arise in death penalty matters concerning prisoners sentenced for drug-related offences.

The decisions detailed in Table 5: Illustrative Cases Involving Capital Charges for Drug Trafficking Under s 39B DDA for the period 1978 to 2019, were selected because they illustrate common features of a prisoner's experience of fair trial process and death penalty proceedings in Malaysia. The case studies were extracted from an analysis of approximately 200 court judgments found online spanning the years of 1978 to 2019. Decisions selected as case studies are not outlier cases, but rather representative cases. The purpose of this is to be able to extrapolate relevant themes and issues that may affect a typical accused.

The final component consists of structured qualitative interviews with Malaysian lawyers with experience in criminal cases, particularly death penalty cases. These interviews build upon the issues identified in the case studies, incorporating into the report the insights of those closely involved in death penalty proceedings. The approach adopted in this report for conducting the qualitative interviews was standardised open-ended interviews.[265] This form of interviewing allows for structured open-ended questions whereby participants were asked identical questions modified only by their professional context. This ensures consistency in the structure of the interview, which in turn facilitates an accurate comparison between stakeholder responses. At the same time, the open-ended interview allows for maximum flexibility in answering the questions, allowing stakeholders to contribute as much detailed information as they wish to.[266]

Invitations to participate in the interview were sent out via an email letter to the key stakeholders. Thirty-nine invitations were sent out in total. An attempt was made to ensure that a varied representation was obtained when seeking participants. Thirteen interviewees accepted the invitation, and 26 declined. The interviewees were lawyers who had experience in criminal law defending accused in death penalty proceedings.

The interviews were conducted in accordance with an approval granted by the Monash University Human Research Ethics Committee. When inviting stakeholders to conduct the interview, an Explanatory Statement and Consent Form was provided in accordance with the Monash University Human Research Ethics guidelines. Once consent was obtained, the interviews were conducted at a time and place of convenience for the interviewees. The interviews were no longer than an hour and were recorded on a digital recorder and subsequently transcribed.

The approach adopted to integrating the interviews was to identify those narrative responses which most clearly addressed the relevant questions, either positively or negatively. These responses were then included at relevant points in the report to elaborate on specific issues that required direct input from stakeholders, and to further develop the analysis.

263. Pamela Baxter and Susan Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (2008) 13(4) *The Qualitative Report* 544, 556.
264. Ibid.
265. Daniel W Turner, III 'Qualitative Interview Design: A Practical Guide for Novice Investigators' (2010) 15(3) *The Qualitative Report* 754, 755-7. See also John W Creswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches,* (SAGE Publications, 4th edn, 2014).
266. Ibid, 756-8.

Illustrative Cases Involving Capital Charges for Drug Trafficking Under s 39B DDA for the period 1978 to 2019

APPENDIX

Table 5: Illustrative Cases Involving Capital Charges for Drug Trafficking Under s 39B DDA for the period 1978 to 2019 represents a selection of reported Malaysian cases concerning the death penalty and drug trafficking between the years of 1978 and 2019. The cases were selected on the basis that they involve vulnerable accused where fair trial issues are acute. This is of course a small fraction of the 1,280 people sentenced to death. It is important to acknowledge that in many of these cases it is unclear as to whether the cases proceeded to final appeal at the Federal Court, as Federal Court rulings are often not reported.

Table 5: Illustrative Cases Involving Capital Charges for Drug Trafficking Under s 39B DDA for the period 1978 to 2019[267]

Case Name	Court	Gender	Type of Drug Trafficked (Qty)	Age, Nationality or Ethnicity	Issues of concern at trial	Innocent Carrier defence raised?
Phrueksa Taemchim v Public Prosecutor [2013] 6 MLJ 808	Court of Appeal (dismissed)	Male	Cocaine (713.79g)	Foreign national (Thailand)	• X-Ray Evidence* • Expert Evidence* • Lack of Reasoning • Double Presumptions*	No
Alma Nudo Atienza v PP & Another [2019] 5 CLJ 780 ('*Atienza*')	Federal Court	Female	Methamphetamine (2556.4g) Cocaine (693.4g)	Foreign nationals (Philippine, Thailand)	• Double Presumptions	No
PP v Huang Ziling [2020] 1 MLJ 378	Court of Appeal (dismissed)	Female	Methamphetamine (1.4kg)	Foreign national (China)	• Double Presumptions*	Yes*
PP v Duangchit Khonthokhonburi [2016] MLJU 1097	Court of Appeal (dismissed)	Female	Methamphetamine (2809g)	Foreign national (Thailand)	• Definition of 'in transit' • Distribution or Consumption	Yes*
Kabunda Sakaji Eddy v PP [2018] MLJU 1887	Court of Appeal (dismissed)	Male	Methamphetamine (280.7g)	Foreign national (Democratic Republic of Congo)	• Statement to police • Knowledge* • Evidence*	Yes*
Methan Aydroos Mohamed Pillai Naina Mohamed v PP [2013] 1 LNS 968	High Court	Male	Methamphetamine (5759.3g)	Foreign national (India)	• Burden of Proof	Yes*
PP v Hares Waeda-Oh [2018] 1 LNS 1383	High Court	Male	Cannabis (88997.7g)	Foreign national (Thailand)	• Double Presumptions	No
PP v Winfred Mukiri Nkiiri [2019] MLJU 828	High Court	Female	Methamphetamine (818g)	Foreign national (Kenya)	• Double presumptions • Knowledge • Credibility of Witness	Yes
Caniete Robelyn Mastelero v PP [2019] 1 LNS 397	Court of Appeal (dismissed)	Male	Methamphetamine (2268.2g)	Foreign national (Macau)	• Failure to Provide Information Required for Prosecution to Conduct Sufficient Inquiries Regarding the Identity of Witnesses* • Wilful Blindness*	Yes*
Ikenna Emmanuel Chukwudulu v PP [2019] MLJU 165	Court of Appeal (dismissed)	Male	Methamphetamine (1085g)	Foreign national (Nigeria)	• Double Presumptions* • Wilful Blindness*	Yes*
Sutrisno v PP [2017] MLJU 1140	Court of Appeal (dismissed)	Male	Methamphetamine (1586.2g)	Foreign national (India)	• Double Presumptions* • Expert Evidence*	No
Hu Yanyu v PP [2019] 4 MLJ 349	Court of Appeal (dismissed)	Female	Methamphetamine (1674.7g)	Foreign national (China)	• Credibility of Drug Exhibits* • Break in Chain of Evidence* • Alteration of Search Lists* • Wilful Blindness*	Yes*

Case Name	Court	Gender	Type of Drug Trafficked (Qty)	Age, Nationality or Ethnicity	Issues of concern at trial	Innocent Carrier defence raised?
PP v Lan Yi Ling [2017] MLJU 115	Court of Appeal (dismissed)	Female	Methamphetamine (336g)	Foreign national (China)	• Wilful Blindness* • Double Presumptions*	Yes*
PP v Ilag Mary Melanie Cailipan [2018] MLJU 1544	Court of Appeal (dismissed)	Female	Methamphetamine (2285g)	Foreign national (Hong Kong)	• Wilful Blindness* • Presumption of Trafficking* • Burden of Proof*	Yes*
PP v Judith Achieng Odoyo [2012] 10 MLJ 597	High Court	Female	Methamphetamine (3kg)	Foreign national (Kenya)	• Double Presumptions • Burden of Proof	No
Samim Sainsha (India) v PP [2019] MLJU 243	Court of Appeal (dismissed)	Female	Methamphetamine (745.6g)	Foreign national (India)	• Presumption of Trafficking* • Burden of Proof* • Expert Evidence*	Yes*
Nabweteme Hadija v PP [2015] 1 LNS 1259	Court of Appeal (dismissed)	Female	Methamphetamine (2kg)	Foreign national (Uganda)	• Credibility* • Adverse Inference from Conduct Under the *Evidence Act 1950* (Malaysia)*	Yes*
Amala Johnson v PP [2019] MLJU 128	Court of Appeal (dismissed)	Female	Ketamine (4028.4g)	Foreign national (India) aged 48 years old (widowed)	• Wilful Blindness* • Presumption of Trafficking*	Yes*
Liang Youmei v PP [2019] 1 LNS 54	Court of Appeal (dismissed)	Female	Methamphetamine (1529.7g)	Foreign national (Chinese)	• Standard of Investigation* • Accused Evidence	Yes*
Letitia Bosman v PP [2017] MLJU 263	Court of Appeal (dismissed)	Female	Methamphetamine (1920.2g)	Foreign national (South Africa)	• Double Presumptions* • Adverse Inference from Conduct Under the *Evidence Act 1950* (Malaysia)* • Constitutionality of Mandatory Death Sentence*	Yes*
PP v Limneswaran Jegathesan [2019] 1 LNS 494	Court of Appeal	Male	Methamphetamine (736.6g)	Malaysian citizen of Indian ethnicity (did not speak Bahasa Malaysia)	• Double Presumptions* • Presumption of Innocence • Bare Denial	No
PP v Lakshmanan Malaikolandu [2019] 1 LNS 94	Court of Appeal	Male	Heroin (8.4g)	Malaysian citizen of Indian ethnicity	• Confession • Bare Denial • Presumption of Knowledge* • Adverse Inference Under s 8 of the *Evidence Act 1950* (Malaysia)*	No
PP v Denish a/l Madhavan [2009] MLJ 194	Federal Court (allowed, resulting in death sentence)	Male	Cannabis (11.2685g)	Malaysian citizen of Indian ethnicity	• Double Presumptions*	No
Thenagaran Ganapathy v PP & Other Appeal [2019] 1 LNS 1100	Court of Appeal (dismissed)	Males	Cannabis (12418g)	Malaysian citizens of Indian ethnicity	• Credibility of Witness* • Acting in Concert*	No
PP v Vinod Raj Uthayakumar [2019] MLJU	Court of Appeal (dismissed, but death sentence retained)	Male	Cannabis (237g)	Malaysian citizen of Indian ethnicity	• Bare Denial* • Double Presumptions*	No
Gopi Kumar Subramaniam v PP [2019] MLJU 531	Court of Appeal (dismissed)	Male	Cannabis (45290g) Heroin (18.4g) Methamphetamine (16.20g)	Malaysian citizen of Indian ethnicity	• Double Presumptions* • Burden of Proof*	No

References

A Articles, Books, Reports

Ally, Sahr Muhammed, *Convicted Before Trial: Indefinite Detention Under Malaysia's Emergency Ordinance,* (Human Rights Watch, 2006)

Amnesty International 'Fair Trial Manual' (Report No. POL 30/002/2014, 9 April 2014)

Badar, Mohamed Elewa, *The Concept of Mens Rea in International Criminal Law: The Case for a Unified Approach* (Hart Publishing, 2013)

Baxter, Pamela & Susan Jack, 'Qualitative Case Study Methodology: Study Design and Implementation for Novice Researchers' (2008) 13(4) *The Qualitative Report* 544

Chenivesse, Pascal & Christopher J Piranio, 'What price justice? On the evolving notion of 'right to fair trial' from Nuremberg to The Hague' (2011) 24(3) *Cambridge Review of International* 403

Cornell Law Centre on the Death Penalty Worldwide, 'Elderly' (Web Page), 20 December 2011 <http://www.deathpenaltyworldwide.org/elderly.cfm>

Cornell Centre on the Death Penalty Worldwide, 'Judged for More than Her Crime: Global Overview of Women Facing the Death Penalty' (Report of the Alice Project, September 2018)

Creswell, John W, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches,* (SAGE Publications, 4th edn, 2014)

Danjuma, Ibrahim & Rohaida Nordin, 'The Imposition of Fines by the Law Enforcement Agencies in Malaysia: A Violation of the Rule of Law' (2015) 8(4) *International Journal of Business, Economics & Law* 88

Denzin, Norman, & Yvonna Lincoln, *The SAGE Handbook of Qualitative Research*, (SAGE, 3rd edn, 2005)

English, Peter, 'The Defence of Duress Under the Penal Code' (1983) 25(2) *Malaya Law Review* 404

Fleetwood, Jennifer & Lizzie Seal 'Women, Drugs and the Death Penalty: Framing Sandiford' (2017) 56(3) *Howard Journal of Crime and Justice* 358

Giarelli, Giada, 'Report to the UN Office on Drugs and Crime on the Tenth survey on capital punishment and on the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, covering the period 2014–2018', *Harm Reduction International* (Report, 13 September 2019)

Gomez, Jerald, 'Rights of Accused Persons: Are Safeguards being Reduced?'(2004) 1 *Malaysian Law Journal* 20

Han, Lim Chee, Ngeow Chow Ying & Harchanadevi Arivananthan 'High Incidence of Judicial Errors in Capital Punishment Cases in Malaysia' (2018) *Penang Institute: Issues* 1

Harring, Sidney, 'Death, Drugs and Development: Malaysia's Mandatory Death Penalty for Traffickers and the International War on Drugs' (1991) 29 *Columbia Journal of Transnational Law* 365

Hudson, Patrick, (2000) 'Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law?' 11(4) *European Journal of International Law* 833

Human Rights Watch, *In the Name of Security: Counterterrorism and Human Rights Abuses Under Malaysia's Internal Security Act,* (Human Rights Watch, 2004)

Johnson, David T & Franklin E Zimring, *The Next Frontier: National Development, Political Change and the Death Penalty* (Oxford University Press, 2009)

REFERENCES

Keong, Gan Chee, 'Conceptualizing the Principles of Sentencing in Criminal Offences in Malaysia: Bridging Theory and Reality' (2017) V(5) *European Academic Research* 2474

Leechaianan, Yingyos & Dennis R Longmire, 'The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis' (2013) 2 *Laws* 115

Lines, Richard & Schabas, William, *Drug Control and Human Rights in International Law* (Cambridge University Press, 2017)

Munzil bin Muhamad, Mohd 'Is It Wrong to be Silent?: Comparative Legal Positions in Malaysia and New Zealand on the Right to Silence' (2013) 1 *Malayan Law Journal* ix

Naziah Mohd, Alias 'Protections for Vulnerable Accused in Malaysian Criminal Trials: Are they sufficient? Proposal for Reform' (LLM Thesis, Victoria University of Wellington, 2013) 53 <https://core.ac.uk/download/pdf/41338407.pdf>

Nicholson, Pip & Tim Lindsey, *Drugs and Legal Practice in Southeast Asia: Indonesia, Singapore and Vietnam* (Hart Publishing, 2016) 264

Malaysian Bar, 'The Attorney General – The Most Powerful Person in Malaysia?' (1983) *Journal of the Malaysian Bar*

Megret, Frederic, 'Human Rights of Older Persons' (2011) 11 *Human Rights Law Review* 37

McKillop, Bron, 'Burden of Proof on an Accused in Malaysia' (1964) 6(2) *Malaya Law Review* 250

Pascoe, Daniel, 'Clemency in Southeast Asian Death Penalty Cases' 4 Asian Law Centre Briefing Paper 3

Pascoe, Daniel, *Last Chance for Life: Clemency in Southeast Asian Death Penalty Cases* (Oxford University Press, 2019)

Pascoe, D, 'The Functions of the Death Penalty Clemency in South East Asia: Comparative Lessons for Vietnam' (2017) *Asian Law Centre Briefing Paper Series* 1

Pascoe, Daniel, 'What the Rejection of Anwar Ibrahim's Petition for Pardon Tells Us About Malaysia's Royal Pardon System' (2016) 18(1) *Asian-Pacific Law & Policy Journal* 63

Schabas, William A, 'International Law and Abolition of the Death Penalty' (1998) 55(3) *Washington and Lee* Law Review 797

Schabas, William A. (2002). *The Abolition of the Death Penalty in International Law.* Cambridge: Cambridge University Press. doi:10.1017/CBO9780511494109

Schabas, William A, *The Death Penalty as Cruel Treatment & Torture: Capital Punishment Challenged in the World's Courts* (Northeastern University Press, 1996)

Simon, Rita J & Dagny A Blaskovich, *A Comparative Analysis of Capital Punishment: Statutes, Policies, Frequencies & Public Attitudes the World Over* (Lexington Books, 2002)

Singh Sidhu, Datuk Baljit, *Criminal Litigation Process* (Sweet & Maxwell, 3rd edn, 2015)

Stake, Robert E, *Multiple Case Study Analysis* (Guilford Press, 2006)

Steiker, Carol S & Jordan M Steiker (eds) *Comparative Capital Punishment* (Edward Elgar, 2019)

Together Against the Death Penalty (ECPM), Harm Reduction International (HRI), Anti-Death Penalty Asia Network (ADPAN), The Advocates for Human Rights & World Coalition Against the Death Penalty (WCADP), *Death Penalty in Malaysia: Joint Stakeholder Report for the 31st session of the Working Group on the Universal Periodic Review* (Report, March 2018) 6 <https://www.hri.global/files/2018/11/06/Joint_report_UPR31_-_Death_penalty_in_Malaysia.pdf>

Turner III, Daniel W, 'Qualitative Interview Design: A Practical Guide for Novice Investigators' (2010) 15(3) *The Qualitative Report* 754

Vogelman, L, 'The Living Dead: Living on Death Row' (1989) 5(2) *South African Journal on Human Rights* 183

Yeo, Stanley, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore* (Lexis Nexis, 3rd edn, 2018)

Yihan, Goh, 'The Jurisdiction to Reopen Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal' (2008) *Singapore Journal of Legal Studies* 395

B Cases

Abbott v Attorney-General of Trinidad and Tobago [1979] 1 WLR 1342

Alcontara a/l Ambross Anthony v PP [1966] 1 CLJ 705

Alma Nudo Atienza v Public Prosecutor [2019] 5 CLJ 780

Amala Johnson v PP [2019] MLJU 128

Balachandran v PP [2005] MLJ 301

Boyce v Barbados (Judgment) (Inter-American Court of Human Rights, Series C No 169, 20 November 2007)

Caniete Robelyn Mastelero v PP [2019] 1 LNS 397

Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Ors 1993 4 SA 239 ZSC

Christin Nirmal v PP [2018] MYCA 219.

Chu Tak Fai v PP [2007] 1 MLJ 201

Chu Tak Fai v PP [2006] 4 CLJ 931

Chu Tak Fai v PP [1998] 4 MLJ 246

Dhlamini v Carter 1968 (1) RLR 136

Earl Pratt & Ivan Morgan v Jamaica [1994] 2 AC 1

Ediga Anamma v State of Andhra Pradesh [1974] 3 SCR 329

Gopi Kumar Subramaniam v PP [2019] 1 LNS 807

Human Rights Committee, Communication No 223/1987, 35th sess, UN Doc CCPR/C/35/D/223/1987 (4 April 1989) ('Robinson v Jamaica')

Human Rights Committee, Communication No 232/1987, 39th sess, UN Doc CCPR/C/39/D/232/1987 (21 August 1990) ('*Pinto v Trinidad and Tobago*')

Human Rights Committee, Communication No 702/1996 UN Doc CCPR/C/60/D/702/1996 (18 July 1997) ('*McLawrence v Jamaica*')

Husin v Lembaga Pengampunan negeri Pahang [2001] 3 MLJ 458

Hu Yanyu v PP [2019] 4 MLJ 349

Ikenna Emmanuel Chukwudulu v PP [2019] MLJU 165

Kabunda Sakaji Eddy v PP [2018] MLJU 1887

Kabunda Sakaji Eddy v PP [2017] MLJU 1087

Kamalan Shaik Mohd v PP [2013] 4 CLJ 396

Karpal Singh v Sultan of Selangor (1985) 1 MLJ 64

Khoo Hi Chiang v Public Prosecutor and Another Appeal [1994] 1 MLJ 265

Krishnan v Public Prosecutor (1987) 1 MLJ 292

Letitia Bosman v PP [2017] MLJU 263

Liang Youmei v PP [2019] 1 LNS 54

Lin Tong v PP (1938) 7 MLJ 41

Luedicke, Belkacem & Koç v Germany (1978) 29 Eur Court HR (ser A) 9

Marlan Marpaung v PP [2012] 8 CLJ 41

Methan Aydroos Mohamed Pillai Naina Mohamed v PP [2013] 1 LNS 968

Mohamed Yusof Bin Haji Ahmad v PP [1983] 2 MLJ 167

Mohd Jamail Bin Abdul Ghani v PP Criminal Appeal No. A-05-42-2010 (Court of Appeals Putrajaya)

Munuswamy Sundar Raj v PP [1987] 1 MLJ 492

Nabweteme Hadija v PP [2015] 1 LNS 1259

Ocalan v Turkey (Eur Court of Human Rights, Grand Chamber, Application No 46221/99, 2005)

Phrueksa Taemchim v Public Prosecutor [2013] 6 MLJ 808

PP v Atik Hussin bin Abu Bakar & Ors [2016] MLJU 968

PP v Choo Chuan Wang [1992] 2 CLJ 1242

PP v Denish a/l Madhavan [2009] MLJ 194

PP v Duangchit Khonthokhonburi [2016] MLJU 1097

PP v Han John Han [2007] 1 SLR 1180

PP v Hares Waeda-Oh [2018] 1 LNS 1383

PP v Huang Ziling [2020] 1 MLJ 378

PP v Ilag Mary Melanie Cailipan [2018] MLJU 1544

PP v Judith Achieng Odoyo [2012] 10 MLJ 597

PP v Lakshmanan Malaikolandu [2019] 1 LNS 94

PP v Lan Yi Ling [2017] MLJU 115

PP v Limneswaran Jegathesan [2019] 1 LNS 494

PP v Rudolf Tschernezow [2016] 1 LNS 654

PP v Saimin [1971] 2 MLJ 16

PP v Sinniah a/l Letchumanan & Ors [2008] 8 MLJ 582

PP v Vinod Raj Uthayakumar [2019] MLJU

PP v Winfred Mukiri Nkiiri [2019] MLJU 828

PP v Zulkarnain bin Sani [2007] 8 MLJ 228

Prosecutor v Jean-Pierre Bemba Gombo (International Criminal Court, Appeals Chamber, Case No ICC-01/05-01/08-1386, 3 May 2011)

Rajagopal v PP [1976] 1 LNS 122

Re Kemmler 1 3 6 US 436 (1980); *Khaki v The State* [2010] PLD 1

Samim Sainsha (India) v PP [2019] MLJU 243

Saminathan & Ors v Public Prosecutor (1955) 21 MLJ 121

Scoppola v Italy (No 2) (European Court of Human Rights, Grand Chamber, Application No 10249/03, 17 September 2009)

Sher Singh & Ors v State of Punjab [1983] 2 SCR 583

Soering v United Kingdom and Germany (1989) 11 EHRR 439

Soosainathan v Public Prosecutor [2001] 2 MLJ 377

Sutrisno v PP [2017] MLJU 1140

Thenagaran Ganapathy v PP & Other Appeal [2019] 1 LNS 1100

Venkatesan Chinnasami v PP [2011] 1 LNS 1736

Woolmington v DPP [1935] AC 462

C Legislation

Courts of Judicature Act 1964 [Malaysia]

Criminal Justice & Public Order Act 1994 [England & Wales]

Criminal Procedure Code 2010 [Singapore]

Criminal Procedure Code 1999 [Malaysia]

Dangerous Drugs Act 1952 [Malaysia]

Drugs Dependent (Treatment and Rehabilitation) Act 1983 [Malaysia]

Evidence Act 1950 [Malaysia]

Evidence Act 1995 (Cth) [Australia]

Evidence Act 2006 [New Zealand]

Federal Constitution 1957 [Malaysia]

Interpretation Acts 1948 and 1967 [Malaysia]

Legal Aid Act 1971 [Malaysia]

Legal Aid (Amendment) Act 2017 [Malaysia]

Penal Code 1936 [Malaysia]

Prisons Regulations 2000 [Malaysia]

D Treaties

American Convention on Human Rights, Organization of American States, opened for signature 22 November 1969, UNTS 1144 123 (entered into force 18 July 1978)

Association of Southeast Asian Nations (ASEAN), *ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration*

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 U.N.T.S 3 (entered into force 2 September 1990)

International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, opened for signature 18 December 1990, 2220 UNTS 39481 (entered into force 1 July 2003)

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948)

Vienna Convention on Consular Relations, opened for signature 24 April 1963, 596 UNTS 261 (entered into force 19 March 1967)

E Other

'8 More Countries Vote For a Universal Moratorium', *Together Against the Death Penalty (ECPM)* (online, 16 November 2018) <http://www.ecpm.org/en/8-more-countries-vote-for-a-universal-moratorium/>

AFP, 'Malaysia accused of U-Turn on Death Penalty Abolition', *News Straits Times* (online, 13 March 2019) <https://www.nst.com.my/news/nation/2019/03/468937/malaysia-accused-u-turn-death-penalty-abolition>

Alston, Philip, *Report of the Special Rapporteur on Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, UN Doc E/CN.4/2006/53.Add 3 (24 March 2006)

Alston, Philip, Special Rapporteur, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN DOC E/CN.4/2005/7 (22 December 2004)

'Amnesty International Urges Malaysia to End Death Penalty', *AP News* (online, 10 October 2019) <https://apnews.com/af112cfb6a9c4bd68c6bdd6092d7942c>

Amnesty International, 'Death Sentences and Executions 2019: Global Report' (2020)

Amnesty International, 'Fatally Flawed: Why Malaysia Must Abolish the Death Penalty' (2019)

Amnesty International, 'Malaysia: Repeal of Mandatory Death Penalty Should be a First Step Towards Full Abolition' (Public Statement Index No. ACT 50/0040/2019, 14 March 2019)

Anand, Ram, 'Death Penalty: Home Ministry Says 12 Executed in Last Six Years', *Malay Mail* (online, 30 March 2016) <https://www.malaymail.com/news/malaysia/2016/03/30/death-penalty-home-ministry-says-12-executed-in-last-six-years/1089863>

Attorney General's Chambers of Malaysia, 'Human Rights' (Web Page, 2016) <http://www.agc.gov.my/agcportal/index.php?r=portal2/left&menu_id=L2YvK3oycE5FSlg1NGNmTGFJdlNIdz09>

Ban Ki-moon, 'Moving Away from the Death Penalty: Lessons in South-East Asia' (PDF Document), <https://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20f or%20Website.pdf>

REFERENCES

Bedi, Rashvinjeed S, '165 on Death Row Escaped the Gallows from 2007 to 2017', *The Star* (online, 28 June 2018) <https://www.thestar.com.my/news/nation/2018/06/28/165-on-death-row-escaped-the-gallows-from-2007-to-2017/>

'Bill to Abolish Death Penalty for Drug Offences on the Cards, Says Law Minister', *Malaysian Insider* (online, 17 November 2015) <www.themalaysianinsider.com/malaysia/article/bill-to-abolish-deathpenalty-for-drug-offences-on-the-cards-says-law-minis>

'Bill to Abolish Mandatory Death Penalty Will be Tabled in March 2020', *FMT News* (online, 10 October 2019) <https://www.freemalaysiatoday.com/category/nation/2019/10/10/bill-to-abolish-mandatory-death-penalty-will-be-tabled-in-march-2020/>

Buang, Salleh, 'The Prerogative of Mercy', *New Straits Times* (online 20 May 2019) <https://www.nst.com.my/opinion/columnists/2018/05/369929/prerogative-mercy>

Carolyn Hoyle, 'The Plight of Foreign Nationals on Death Row in Malaysia and Indonesia' Oxford (Web Page) <https://www.law.ox.ac.uk/sites/files/oxlaw/carolyn_hoyle_-_formatted.pdf>

Carter McNamara, 'General Guidelines for Conducting Interviews', *Free Management Library* (Web Page, 2009) <http://managementhelp.org/businessresearch/interviews.htm>

Cornell Center on the Death Penalty Worldwide 'Death Penalty Database: Malaysia' (Web Page, 12 February 2020) <https://dpw.pointjupiter.co/country-search-post.cfm?country=Malaysia#f7-2>

'Death Row Phenomenon: The Psychological Impact of Living in the Shadow of Execution', *Reprieve* (Web Page) <https://reprieve.org.uk/death-row-phenomenon-psychological-impact-shadow-execution/>

'Double Presumptions for Drug-Trafficking Conviction Struck Down', *The Star* (online, 6 April 2019) <https://www.thestar.com.my/news/nation/2019/04/06/double-presumptions-for-drugtrafficking-conviction-struck-down/>

Explanatory Statement, *Dangerous Drugs (Amendment) Bill 2017* (Malaysia)

'Filing an Appeal', *Pejabat Ketua Pendaftar Mahkamah Persekutuan Malaysia* [Office of the Registrar General of the Federal Court of Malaysia] (Web Page) <http://www.kehakiman.gov.my/ms/filing-appeal>

Holmes, Oliver, 'Malaysia Hangs Three Men for Murder in "Secretive" Execution', *The Guardian* (online at 20 May 2019) <https://www.theguardian.com/world/2016/mar/25/malaysia-hangs-three-men-for-in-secretive-execution>

Gallahue, Patrick & Rick Lines, 'The Death Penalty for Drug Offences: Global Overview 2015' (Harm Reduction International, 2016)

Giada Girelli, 'The Death Penalty for Drug Offences: Global Overview 2018' (Harm Reduction International, 2019)

Giarelli, Giada & Adrià Cots Fernández, 'The Death Penalty for Drug Offences: Global Overview 2019' (Harm Reduction International, 2020)

Human Rights Committee, *Concluding Observations Trinidad & Tobago*, UN DOC CCPR/CO/70/TTO (10 November 2000)

Human Rights Resolution 2005/59: The Question of the Death Penalty, UN Doc E/CN.4/RES/2005/59

Ibrahim, Ida Nadirah, 'Minister: Putrajaya to Abolish Death Penalty', *Malay Mail* (online, 10 October 2018) <https://www.malaymail.com/news/malaysia/2018/10/10/minister-putrajaya-to-abolish-death-penalty/1681448>

Interview with Datuk Baljit Singh Sidhu (Dr Thaatchaayini Kananatu & Janice Ananthan, Wisma Shukorbaljit, Kuala Lumpur, Malaysia, 2 January 2020).

Interview with Datuk N Sivananthan (Dr Thaatchaayini Kananatu & Janice Ananthan, Sivananthan Associates & Solicitors, Selangor, Malaysia, 10 January 2020).

REFERENCES

Interview with Miss Chan Yen Hui (Dr Thaatchaayini Kananatu & Janice Ananthan, Monash University, Malaysia, 30 December 2020).

Interview with Miss Seira Sacha Abu Bakar (Dr Thaatchaayini Kananatu & Janice Ananthan, Seira & Sharizad, Kuala Lumpur, Malaysia, 25 February 2020).

Interview with Mr Fahri Azzat (Dr Thaatchaayini Kananatu & Janice Ananthan, Fahri & Co, Selangor, Malaysia, 27 December 2019).

Interview Mr Haijan Omar (Dr Thaatchaayini Kananatu & Janice Ananthan, Haijan Omar & Co, Kuala Lumpur, Malaysia, 17 January 2020).

Interview with Mr Shashi Devan Thalmalingam (Janice Ananthan, Monash University, Malaysia, 18 January 2020).

Jha, Preeti, 'A Country With a Growing Death Row Reconsiders its Future with Capital Punishment', *Washington Post* (online, 31 December 2019) <https://www.washingtonpost.com/world/asia_pacific/a-country-with-a-growing-death-row-reconsiders-its-future-with-capital-punishment/2019/12/30/6037ecd0-0c26-11ea-8054-289aef6e38a3_story.html>

Johan, Syahredzan, 'Legal Representation, A Sacred Right', The Star (online, 21 August 2017) <https://www.thestar.com.my/opinion/online-exclusive/a-humble-submission/2017/08/21/legal-representation-a-sacred-right>

'Lawyers: Freeze all executions while mandatory death sentences under review', *Malay Mail* (Online, 24 November 2015) <https://www.malaymail.com/news/malaysia/2015/11/24/lawyers-freeze-all-executions-while-mandatory-death-sentence-under-review/1011023>

'Liew: Govt to Set Up Taskforce to Study Alternatives to Mandatory Death Penalty', *The Star* (online, 6 September 2019) <https://www.thestar.com.my/news/nation/2019/09/06/liew-govt-to-set-up-taskforce-to-study-alternatives-to-mandatory-death-penalty>

Lim, Ida, 'Legal Aid Shrinking Due to Delayed Payments, Malaysia Bar Report Says', *Malay Mail* (online, 18 March 2017) <https://www.malaymail.com/news/malaysia/2017/03/18/legal-aid-shrinking-due-to-delayed-payments-malaysian-bar-report-says/1337793>

'Malaysia Grants Reprieve to Australian "Love Scam" Drug Mule', *BBC News* (online, 26 November 2019) <https://www.bbc.com/news/world-australia-50555286>

'Malaysia's Premier, Mahatir Mohamad, Is Ousted in a Surprising Turn', *New York Times*, (online, 29 February 2020) <https://www.nytimes.com/2020/02/29/world/asia/malaysia-mahathir-mohamad.html?auth=login-email&login=email>

'Minister: Special Committee Submits Report on Death Penalty Alternative Sentences' *Malay Mail* (online, 11 February 2020) <https://www.malaymail.com/news/malaysia/2020/02/11/minister-special-committee-submits-report-on-death-penalty-alternative-sent/1836640>

Moratorium on the Use of the Death Penalty, GA Res 65/206, UN Doc A/RES/65/206

NST Team, 'No More Mandatory Death Sentence Soon As Amendments to Dangerous Drugs Act Passed in Parliament', *New Straits Times* (online, 30 November 2017) <https://www.nst.com.my/news/government-public-policy/2017/11/309354/no-more-mandatory-death-sentence-soon-amendments>

Paddock, Richard C, 'Malaysia to Repeal Death Penalty and Sedition Law', *New York Times* (online, 11 October 2018) <https://www.nytimes.com/2018/10/11/world/asia/malaysia-death-penalty-repeal.html>

Pakatan Harapan, *Rebuilding Our Nation, Fulfilling Our Hopes* (Manifesto of the Harapan Coalition, 8 March 2018) 61 <https://kempen.s3.amazonaws.com/manifesto/Manifesto_text/Manifesto_PH_EN.pdf>

REFERENCES

Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, GA Res 67/187, UN Doc A/67/458

Question and Answer, 2 December 2019 (English Translation) (document on file with authors)

Safeguards Guaranteeing Protection of the Rights Facing the Death Penalty, ESC Res 1984/50 UN Doc E/1984/84 (25 May 1984)

Sander, Gen, 'The Death Penalty for Drug Offences: Global Overview 2017' (Harm Reduction International, 2018)

Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, UN Doc A/RES/44/128

Sivanandam, Hemananthani, Martin Carvalho & Rahimy Rahim, 'Govt Wants to Abolish Mandatory Death Sentence for 11 Offences, says Hanipa', *The Star* (online, 13 March 2019) <https://www.thestar.com.my/news/nation/2019/03/13/govt-wants-to-abolish-mandatory-death-sentence-for-11-offences-says-hanipa>

'Special Report: 80 Iranian Death Row Prisoners in Malaysia', *Iran Human Rights* (online, 12 October 2017) <https://iranhr.net/en/articles/3089/>

Spykerman, Neville, 'Helping Hand for Death Row Prisoners', *The Star* (online, 12 January 2014) <https://www.thestar.com.my/news/nation/2014/01/12/helping-hand-for-death-row-prisoners>

The Question of the Death Penalty, HRC Res 30/5, UN Doc A/HRC/RES/30/5.

UN Human Rights Committee, *General Comment No 32: Article 14, Right to Equality Before Courts and Tribunals and to Fair Trial,* UN Doc CCPR/C/GC/32 (23 August 2007)

UN Human Rights Committee, *General Comment No 36: Art. 6 of the ICCPR On the Right to Life*, UN Doc CCPR/C/GC/36 (2018)

UN Human Rights Office of the High Commissioner, 'Status of Ratification: Interactive Dashboard' (Web Page, 2014) <https://indicators.ohchr.org/>

UN Human Rights Office of the High Commissioner, 'UN Treaty Body Database' (Web Page) <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN>

United Nations Office on Drugs and Crime (UNODC), 'Statement Attributable to the UNODC Spokesperson on the Use of the Death Penalty' (Press Release, 27 June 2019) <https://www.unodc.org/unodc/en/press/releases/2019/June/statement-attributable-to-the-unodc-spokesperson-on-the-use-of-the-death-penalty.html>

United Nations General Assembly, *Resolution on the Rights of the Child*, GA Res 19/37, UN Doc A/HRC/19/L.31 (20 March 2012)

UN System Coordination Task Team on the Implementation of the UN System Common Position on Drug-Related Matters, *What We Have Learned Over the Last Ten Years: A Summary of Knowledge Acquired and Produced by the UN System of Drug-Related Matters*, UN Doc E/CN.7/2019/CRP.10

World Justice Project, *Rule of Law Index Report* (Report, 2019) 16 <https://worldjusticeproject.org/sites/default/files/documents/ROLI-2019-Reduced.pdf>