

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

Report Briefing

Challenges Inherent to the Dangerous Drugs Act 1952

Pursuant to s 39B(1) of the *Dangerous Drugs Act 1952* (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. In 2017 following significant campaigning from the Malaysian Bar, non-Government organisations and civil society groups over a number of years, Malaysian Parliament introduced discretionary sentencing for drug trafficking offences; 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.

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 report identifies four key problematic implications arising from the drafting of this section and sections 37-37A of the DDA more broadly. These are

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 because of an inconsistent use of the word 'and' and 'or'. 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.

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'. 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.

Case Study

Issues with double presumptions are perhaps most clearly demonstrated in the 2016 decision of *PP v Duangchit Khonthokhonburi*¹ 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.

1. [2016] MLJU 1097.

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

Report Briefing

3. Presumption of Innocence Undermined:

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.² 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.'³ Despite the fact that the decision of *Atenza* was handed down in April 2019,⁴ 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. Further, in the Federal Court decision of *Atenza* prohibited the use of double presumption but did not make any findings on the constitutionality of a single presumption.

4. Reforms are not Retrospective

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.⁵

These concerns are significant, and the report suggests that a result of these drafting limitations is that mandatory sentencing for drug offending largely remains in place.

2. DDA s 37(da).

3. Giada Girelli, 'The Death Penalty for Drug Offences: Global Overview 2018' (Harm Reduction International, 2019) 13.

4. '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/>>.

5. 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.

Further information about this report

Contact Sara Kowal: sara.kowal@monash.edu

Dr Natalia Antolak-Saper: natalia.antolak-saper@monash.edu

Faculty of Law, Monash University, Australia

Full report available: <https://www.monash.edu/law/research/drug-offences-and-the-death-penalty-in-malaysia/>

Telephone: +61 3 9902 6000

Website: <https://www.monash.edu/law>



MONASH
University

MONASH
LAW



**ANTI
DEATH
PENALTY
ASIA
NETWORK**