

Reviewing Life Imprisonment in Malaysia: Prospects for Law Reform?

Farah Nini Dusuki¹ & Melati Abdul Hamid²
Malaysia

Abstract

Life imprisonment in Malaysia has two divergent connotations and is used in different forms as punishments for serious offences. As death penalty exists both in mandatory and discretionary modes, life imprisonment caters for the comparatively less serious offences to those which are punishable with death. Though efforts are currently underway to abolish mandatory death penalty, it will only be manifested in practice much later. This paper examines these issues, both the different connotations and forms of life imprisonment and discusses their existence against the backdrop of the international legal framework on the issue.

Keywords: life imprisonment – imprisonment for natural life – death penalty.

Introduction

In Malaysia, there are two important implications involved when life imprisonment is stated. Firstly, in the two different connotations the phrase implies: one, being life imprisonment for natural life, as the phrase is commonly understood worldwide; and, two, to indicate the period of thirty years, as provided by the Criminal Justice Act 1954.³ Unlike the life imprisonment for specified period being the penalty stipulated for quite a wide array of offences, imprisonment for natural life is rather limited to being expressly provided in three specific statutes namely, the Penal Code,⁴ the Arms Act 1960⁵ and the Firearms (Increased Penalties) Act 1976 (FIPA).⁶ Secondly, life imprisonment is provided in various different approaches as punishment for different categories of offences: first, as an alternative penalty to death sentence; second, as a sole penalty in the form of imprisonment for natural life; third, as a sole penalty in the form of 30 years; and fourth, as a maximum penalty of imprisonment where the minimum years of imprisonment may, or may not, be provided; and lastly, as a form of an alternative penalty when the offender receives a royal pardon for the death penalty.

¹ Senior Lecturer, Faculty of Law, University of Malaya.

² General Counsel, Asia School of Business.

³ Act 345.

⁴ Act 574.

⁵ Act 206.

⁶ Act 37.

Imprisonment for Natural Life

Imprisonment for natural life exists in only three statutes in Malaysia. In the Penal Code imprisonment for life means “(subject to the provisions of any written law conferring power to grant pardons, reprieves or respites or suspension or remissions of punishment) **imprisonment until the death of the person** on whom the sentence is imposed.”⁷(emphasis added). It is provided for two different categories of offences.

The first category is listed under Chapter VI of the Penal Code with the heading ‘*Offences Against the State,*’ namely the offences of waging or attempting to wage war or abetting the waging of war against the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri;⁸ offences against the authority of the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri;⁹ collecting arms, etc., with the intention of waging war against the Yang di-Pertuan Agong, a Ruler or Yang di-Pertua Negeri;¹⁰ sabotage;¹¹ espionage;¹² waging war against any power in alliance with the Yang di-Pertuan Agong;¹³ harbouring or attempting to harbour any person in Malaysia or person residing in a foreign state at war or in hostility against the Yang di-Pertuan Agong;¹⁴ public servant voluntarily allowing prisoner of State or war in his custody to escape;¹⁵ and aiding escape or, rescuing, or harbouring such prisoner.¹⁶

The second category is listed under Chapter VIA of the Penal Code with the heading ‘*Offences relating to Terrorism,*’ namely the offence of providing devices to terrorist group;¹⁷ soliciting or

⁷ Sections 130A(f) and 130B(1).

⁸ Section 121.

⁹ Section 121B.

¹⁰ Section 122.

¹¹ Section 124K. “Sabotage” means ‘(a) an act or omission intending to cause harm – (i) for the interests of foreign powers or foreign organisations; (ii) to premises or utilities used for national defence or for war; or (iii) to the maintenance of essential services; or (b) knowingly producing defective materials, premises or utilities used for national defence or for war,’ section 130A(c).

¹² Section 124M. “Espionage” means ‘an activity to obtain sensitive information by ulterior or illegal means for the purpose that is prejudicial to the security or interest of Malaysia,’ section 130A(c)

¹³ Section 125.

¹⁴ Section 125A.

¹⁵ Section 128.

¹⁶ Section 130.

¹⁷ Section 130D.

giving support to terrorist groups or for the commission of terrorist acts;¹⁸ harbouring persons committing terrorist acts;¹⁹ and of being a member of a terrorist group.²⁰

The Firearms (Increased Penalties) Act 1971 which caters for aggravated forms of offences in relation to firearms defines “imprisonment for life” to mean imprisonment for the duration of the natural life of the person sentenced, notwithstanding section 3 of the Criminal Justice Act 1953²¹ and any other written law to the contrary. The offences that prescribes for imprisonment for life as a potential sentence are as follows:

Penalty for exhibiting a firearm in the commission of a scheduled offence

4. Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence or robbery exhibits a firearm in a manner likely to put any person in fear of death or hurt shall be punished with imprisonment for life and with whipping with not less than six strokes.

Penalty for having firearm in the commission of a scheduled offence

5. Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence has on his person a firearm shall be punished with imprisonment for life and with whipping with not less than six strokes.

Penalty for trafficking in firearms

7. (1) Any person trafficking in firearms shall be punished with— (a) death; or (b) imprisonment for life and with whipping with not less than six strokes. (2) Any person proved to be in unlawful possession of more than two firearms shall be presumed to be trafficking in firearms.

The Arms Act 1960 too defines “imprisonment for life” similarly to the definition adopted by Firearms (Increased Penalties) Act 1971.

Is Imprisonment for Natural Life Unconstitutional?

The legal status of the sentence of life imprisonment for the duration of natural life was deliberated by the Federal Court (the highest court in Malaysia) in the case of ***Che Ani bin Itam v PP***.²² In this case, the appellant was convicted in the Sessions Court under section 4 of the Firearms (Increased Penalties) Act 1971 and sentenced to imprisonment for life with six strokes of whipping. He appealed to the High Court and on the application of the appellant, the High Court stayed proceedings and certified the following constitutional question for the

¹⁸ Section 130J.

¹⁹ Section 130K.

²⁰ Section 130KA.

²¹ Act 345.

²² [1984] 1 MLJ 113.

determination of the Federal Court. The question was whether or not the sentence of life imprisonment for the duration of natural life as provided under section 4 of the Firearms (Increased Penalties) Act 1971, read together with section 2, is **unconstitutional and violates Article 5(1) on Right against Deprivation of Liberty and Article 8(1) on Equality before the Law of the Federal Constitution.**

The Federal Court decided that the sentence prescribed in the Firearms (Increased Penalties) Act 1971 is constitutional and valid based on the reasoning that in matters relating to equal protection, the basis of approach is the identification of legislative purpose and a reasonable classification, which includes all persons who are similarly placed with respect to the purpose of the law. To augment the decision, the learned Lord President Raja Azlan Shah said:

*"The sentence prescribed in the 1971 Act is constitutional and valid, and we might perhaps just add that the **existence of executive powers of clemency could well militate against the rigours of the sentence** sought to be impugned by consideration on a case to case basis."* (emphasis added)

Imprisonment for Thirty Years

Unless it is clearly stated otherwise, imprisonment for life shall be deemed for all purposes to be a sentence of imprisonment for thirty years.²³ Accordingly, any penalty in any penal law providing for life imprisonment is to be understood to mean imprisonment for thirty years. This provision commensurates with section 57 of the Penal Code which states: "*in calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for thirty years.*"²⁴ Previously the period for the same purpose was twenty years and it was amended in 2007, to bring it in line with the corresponding increase in several of offences in the Penal Code. The increase in the life imprisonment period was made corresponding to amendments to the penalties for sexual offences, which were increased from twenty years to thirty years, to indicate public abhorrence of such crimes, particularly those committed against children.

The Death Penalty in Malaysia

Currently, the death penalty in Malaysia is retained for a total of 33 offences, of which eleven offences are prescribed with mandatory death sentence, and an additional offence in the

²³ Section 3, Criminal Justice Act 1953.

²⁴ Section 57, Penal Code, as amended by the Penal Code (Amendment) Act, A1210.

Dangerous Drugs Act 1952,²⁵ which, although stated as discretionary, yet in effect it becomes mandatory due to the stringency of the conditions it needs to be satisfied. The twelve offences comprise of nine offences under the Penal Code, two offences under the Firearms (Increased Penalties) Act 1971 and one offence under the Dangerous Drugs Act 1952. The offences under the Penal Code mostly are offences bearing the nature of those against the person of the Yang di-Pertuan Agong, Ruler or Yang di-Pertua Negeri, committing terrorist acts, if the act results in death; directing activities of terrorist groups, if the act results in death; providing or collecting property for terrorist acts, if the act results in death; providing services for terrorist purposes, if the act results in death; accepting gratification to facilitate or enable terrorist acts, if the act results in death; accepting gratification to facilitate or enable organized criminal activities, if the act results in death; punishment for murder and taking hostage. As for the Firearms (Increased Penalties) Act 1971, the death sentence is the penalty for discharging a firearm in the commission of a scheduled offence or for accomplices in case of discharge of firearm. The twelfth offence, drug trafficking under section 39B provides for discretionary death penalty upon satisfying four stringent requirements, which in effect renders the death sentence to be mandatory.

It is reported by Amnesty International that Malaysia is among only 15 countries in the world where death penalty is known to have been imposed or carried out for drug-related offences in 2018. In fact, 73% of death row prisoners are convicted of drug-trafficking under section 39B of the Dangerous Drugs Act 1952.

Move Towards the Abolition of The Mandatory Death Penalty

The authorities of Malaysia continued to observe an official moratorium on executions for the third consecutive year and supported the biennial UN General Assembly resolution calling for a suspension of the use of the death penalty for the second time.²⁶ In September 2019, a Special

²⁵ Act 234.

²⁶ *Amnesty International Global Report: Death Sentences and Executions 2020*, Amnesty International 2021. Available at file:///C:/Users/Admin/Downloads/DEATH-SENTENCES-AND-EXECUTIONS-2020_ACT5037602021ENGLISH.pdf

Committee was established by the late Liew Vui Keong, former minister in the Prime Minister's Department for Legal Affairs to undertake a Study on the Abolition of the Death Penalty.²⁷ The Study was to review the 11 offences which provided for mandatory death penalty and to suggest for alternative penalty and to seek public opinion on such abolition. The Report was submitted to the Minister on 11 February 2020.²⁸ Following a change in government in early March, Minister Takiyuddin Hassan confirmed in a response to parliament that the new government had received the final version of the report on 17 July. The findings of the study were not made public before the year ended, but the minister informed parliament in August that the report recommended the substitution of the mandatory death penalty for 11 offences under the Dangerous Drugs Act, 1952 and 21 offences carrying the death penalty but with discretion of the Court.²⁹ The findings of the Study are currently under embargo pending the final decision of the Cabinet. In August 2020, the Federal Court declared the imposition of the mandatory death penalty constitutional, clarifying that it is a prerogative of the parliament to enact legislation on offences and punishments.³⁰

International Treaties and Life Imprisonment in Malaysia

Civil and political rights are reflected in a range of international instruments with clear implications on criminal sentences, to which they refer directly as punishment. More generally, the Universal Declaration of Human Rights in 1946 recognised the importance of human dignity in Article 1 and a range of other basic rights including the prohibition of torture and cruel, inhuman, or degrading treatment or punishment in Article 5.

²⁷ Nine members were appointed consisting of the former Chief Judge; a former Chief Judge of Malaya; a former Court of Appeal Judge; a former Solicitor General; a former Senior Prison Officer; two members of the Bar Council and two academics.

²⁸ Malaysiakini, "Death sentence – committee submits report on alternatives", 11 February 2020, [malaysiakini.com/news/510445](https://www.malaysiakini.com/news/510445)

²⁹ Parliament of Malaysia, Second Meeting, Third Term of the 14th Parliament, Written responses to question no. 1 to 556, 13 July to 27 August 2020, Response to question no. 1.

³⁰ *Letitia Bosman v. Public Prosecutor and other appeals* [2020] 8 CLJ 147 (FC).

International Covenant on Civil and Political Rights (ICCPR)

The International Covenant on Civil and Political Rights (ICCPR) is commonly cited as one of main treaties governing the human rights standards in relation to life imprisonment. While the ICCPR does not explicitly prohibit life imprisonment (Article 6 the ICCPR even permits the use of the death penalty in limited circumstances), the legality of life imprisonment could be evaluated or argued based on the ICCPR's Article 7 that prohibits cruel, inhuman and degrading punishment and treatment and Article 10(3) that further provides for the duty of prison authorities to orient prison regimes towards 'social rehabilitation.' Life imprisonment is essentially punitive in nature; in reality, it negates the possibility or prospect of social rehabilitation or reformation of the prisoner.

Malaysia, however, is not a party to ICCPR. Although the Government of Malaysia had made periodical statements on the likelihood of it ratifying the ICCPR, it is unlikely to happen in the near future. In 2018, the ratification of several international human rights treaties, including the ICCPR and the Rome Statute, was suggested by the then Government and such suggestion was faced with a strong political backlash as some provisions of the treaties are seen as politically sensitive and/or unconstitutional. The governing party in Malaysia had changed twice since then due to changed political coalitions. Regardless whether such views were warranted, the ratification of the ICCPR (and other human rights treaties) is seen as a political hot potato and is unlikely to be a priority, especially in light of the COVID-19 pandemic which brings the focus of the public discourse/policy to health and economic issues.

Convention on the Rights of the Child (CRC)

Article 37 of the CRC provides that capital punishment or life imprisonment without possibility of release shall not be imposed for offences committed by persons below 18 years of age.

Malaysia had acceded to the CRC on 17 Feb 1995 with reservations made to five Articles, including Article 37. The reason expressed for the reservation to Article 37 is mainly due to the

existence of statutory allowance for children to be caned in schools. However, there is another cause of concern in respect to the adherence to Article 37.

According to section 97 of the Child Act 2001, in lieu of the death penalty (which is prohibited for persons below 18 years of age), the child is to be detained "during the pleasure of" the Yang di-Pertuan Agong / Ruler / Yang di-Pertua Negeri, depending on where the offence was committed. Such case is to be reviewed annually by the Board of Visiting Justice and recommendations can be made for release or further detention. In practice, the term can extend beyond 10 years or more.

To cite actual ongoing cases, there are at least two men currently detained in prison under this provision and both were found guilty when they were 17 years old. Now they are 33 and 34 years old respectively. They have been in prison as long as they were out of it, and there is no sign of them being released anytime soon. In *PP v KWK*,³¹ the appellant was sent to prison at the age of 14 years old upon being found guilty for the murder of his tuition teacher's daughter. He was eventually released when he was 27 years old. Like the other two persons mentioned above, he had spent 14 years behind bars, the same age when he entered prison the first time.

The only other existing protection for children who come into conflict with the law is that no child can be sent to prison before he attains 14 years of age. However, there is no prohibition for imprisonment of children between the ages of 14 and 18. Also relevant is the definition of 'young prisoners' under section 2 of the Prison Act 1995,³² which refers to prisoners below the age of 21 years old, effectively including children between the ages of 14 and 18.

³¹ [2007] 6 CLJ 341.

³² Act 537.

Human Rights Issues: Non-justiciability of the power and process to grant pardon

Article 42 of the Federal Constitution of Malaysia provides the Yang di-Pertuan Agong / Ruler / Yang di-Pertua Negeri with the power to grant pardons, reprieves and respites for offences committed in their respective territorial jurisdictions (colloquially referred to as the 'royal pardon'). This includes the power to remove or all legal punishment, postpone punishment, remove disqualifications, or provide a lighter punishment. This power is to be exercised by the Yang di-Pertuan Agong / Ruler / Yang di-Pertua Negeri on the advice of a Pardons Board (established for each territorial jurisdiction).

The Pardons Board comprises of the Attorney General, the Chief Minister of the State or the Federal Territories Minister, and no more than 3 members appointed by the Yang di-Pertuan Agong / Ruler / Yang di-Pertua Negeri. Members of the House of Representatives / State Legislative Assembly are not allowed to be appointed as members of a Pardons Board. The Yang di-Pertuan Agong / Ruler / Yang di-Pertua Negeri presides over the Board. A Pardons Board must consider any written opinion by the Attorney General before tendering the Board's advice.

The justiciability of the power to grant pardons has been raised before the courts several times. In *Sim Kie Chon v Superintendent of Pudu Prison & Ors*,³³ the Yang di-Pertuan Agong's exercise of his powers of clemency under Article 42 was challenged. The (then) Supreme Court held that the power of pardon provided under Article 42 of the Federal Constitution is a prerogative of mercy, exclusively vested in the Yang di-Pertuan Agong or ruler of any states in Malaysia, which was by its very nature not an act that is susceptible or amenable to judicial review. It also held that the role of the Pardons Board was only to tender advice to the Yang di-Pertuan Agong.

In *Juraimi bin Husin v Pardons Board, State of Pahang & Ors*,³⁴ the decision-making process of the Sultan of Pahang in rejecting the clemency petition was challenged due to inordinate delay

³³ [1985] 2 MLJ 385.

³⁴ [2002] 4 MLJ 529.

of approximately two years between the presentation of the clemency petition and the rejection. The Federal Court held that the prerogative of mercy, which includes the power to grant a royal pardon, was not susceptible to judicial review because its nature and subject matter was not amenable to the judicial process. The Federal Court further held that this would include challenges made against the decision-making process as the attempt to make the process justiciable would indirectly make the decision itself justiciable.

More recently in September 2021, the Court of Appeal struck out a lawsuit challenging the pardon granted to Datuk Seri Anwar Ibrahim over his sodomy conviction. The Court of Appeal set aside the earlier High Court decision which had held that the Yang di-Pertuan Agong had carried out his executive function when he granted the pardon to Anwar and therefore it involved procedures and laws where the exercise of executive powers could be questioned. The Court of Appeal held that a decision made in pursuant to the exercise of royal pardon prerogative cannot be varied or confirmed by the court and hence it is not justiciable. The court also added that the power of pardon is under Article 42 of the Federal Constitution was not limited on just the sentence but also on the conviction.

The non-justiciability of the power to grant pardons is not unique to Malaysia. The breadth of the power, as interpreted by the Malaysian courts to also cover the pardon process and the conviction, may raise concerns on the extent and scope of the absolute discretion. For example, the case of Mokhtar Hashim raised the question as to whether political influence plays a role in easing the process of obtaining a royal pardon. Mokhtar, who was a Cabinet minister, was convicted of murder of the then-Speaker of a State Legislative Assembly. He was sentenced to death in 1983. However, his death sentence was commuted to life imprisonment by way of a royal pardon. Subsequently, he was granted a full pardon in 1991 and released from prison.

WAY FORWARD?

An in-depth empirical study is way overdue on life imprisonment and its ramifications. While there have been a few studies conducted on death penalty and with the most recent one

commissioned by the Government enabled ‘sensitive insights’ to be obtained,³⁵ the same cannot be said of life imprisonment. There is a need to fully examine at least these three issues: the proportionality of the sentences to offences; the current plight of prisoners undergoing life imprisonment in both its connotations (natural life or thirty years) and prospects of social reformation and reintegration. Only then, with cogent and meaningful findings, advocacy and engagement efforts towards reforms may be effectively done.

³⁵ The Special Committee had conducted extensive consultations nationwide with different segments of society and was able to meet families of both victims and prisoners and prisoners waiting death row.