

The Death Penalty in Malaysia

Public opinion on the mandatory
death penalty for drug trafficking,
murder and firearms offences

Roger Hood



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A report for The Death Penalty Project

Contents

Foreword	iii
Acknowledgements	v
Summary and conclusions	vii
PART ONE: Introduction: The purpose of the study	1
1. The context	2
2. The issues	4
3. The survey	5
PART TWO: The findings	7
1. Interest, concern and knowledge of Malaysian citizens about the death penalty and its mandatory nature	8
2. Level of support in general for the mandatory death penalty	9
3. Who supported the mandatory death penalty?	11
4. Judging cases of drug trafficking	12
5. Judging cases of murder	16
6. Joint enterprise in murder	21
7. Judging Firearms Act offences	22
8. Support for the mandatory death penalty: conclusions drawn from 12 scenario cases ...	24
9. Reasons for supporting the mandatory or discretionary death penalty	27
10. Reasons given when choosing whether or not to sentence to death in scenario cases...	28
11. Level of support for the death penalty: impact of deterrence and innocence	30
12. More executions compared with other policies	31
13. Malaysia and world trends	32
PART THREE: Conclusions and policy implications	35
Conclusions: Policy implications	36
Appendix – a note on methods	37

The questionnaire is available at www.deathpenaltyproject.org

Foreword

Notwithstanding the global trend towards restriction and final abolition of capital punishment, the mandatory, automatic, imposition of the death penalty for drug trafficking, murder, certain firearms offences and treason, remains the law in Malaysia. The automatic nature of this sentence is considered in many parts of the world to be arbitrary and disproportionate by reason of its failure to take into account the different circumstances in which offences may be committed and the different characteristics of offenders, especially considering mitigating factors.

The right to life provision in Article 5(1) of the Malaysian Constitution exists to provide Malaysian citizens with the necessary constitutional protection from the arbitrary deprivation of life – anything less would be contrary to due process. The constitutionality of the mandatory death penalty in Malaysia was considered 30 years ago in the case of *Public Prosecutor v Lau Kee Hoo* [1983] 1 MLJ 157. This case related to the imposition of a mandatory death sentence for the offence of having a hand grenade under the 1960 Internal Security Act. The court upheld this law as consistent with Article 5(1) and in doing so followed the seminal case from Singapore of *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 – which had declared that automatic death sentences were not unconstitutional. There have been a number of subsequent challenges to the application of the mandatory death penalty in Malaysia, but in essence, the reasoning in *Ong Ah Chuan* and *Lau Kee Hoo* has endured.

There exists a large body of Commonwealth jurisprudence and case law from international courts or tribunals that recognises the death penalty as a special form of sentence that cannot be imposed justly without affording some discretion to sentencing judges – so they may take into account the individual circumstances of the offence and of the offender. These bodies have found, without exception, that mandatory death sentences amount to cruel or inhuman punishment, being an arbitrary deprivation of life. The prohibition on cruel and unusual punishment is now a rule of customary international law and, thus, the continued application of a mandatory death penalty is no longer considered to be in accordance with international human rights norms.

As a result, the protection of the right to life in the constitutions of other countries, which is similar to Article 5(1) of the Malaysian Constitution, has consistently been interpreted to prohibit the mandatory imposition of the death penalty. As such, criminal laws providing for the mandatory imposition of the death penalty have been declared unconstitutional in a number of Commonwealth countries like India, and they do not exist in many countries in Asia – China among them. Singapore, where the laws on the death penalty were similar to those of Malaysia, amended its criminal code in 2012 so as to introduce judicial discretion in respect of some capital crimes.

Clearly, the changes in Singapore can be linked to the high-profile case of the young Malaysian citizen Yong Vui Kong who, upon conviction, was automatically sentenced to death for drug trafficking. A combination of the legal challenge to the mandatory death penalty in this case and the widespread public support Vui Kong received in Singapore in favour of clemency, led to the amendments to Singaporean law. Public support for Vui Kong was further bolstered by pronouncements made in support of clemency by the executive in Malaysia. This served to highlight the double standard that exists, while individuals in Malaysia are being sentenced to death for similar offences, and has helped

to generate a media debate on the legal position in Malaysia, such that the matter is now under review by the Attorney General.

In spite of the reaction of a large number of Malaysians in the Vui Kong case, it is often stated that the public strongly supports the use of the mandatory death penalty and this would be a barrier to any reform of the laws governing the use of capital punishment in Malaysia. But, as far as we are aware, no reliable empirical data exists on the attitudes and opinions of citizens towards the use of the death penalty and its mandatory imposition. Without such information, there is clearly a risk that it will be assumed that support for the current law by Malaysians is stronger and more entrenched than it may be.

Against this background, we commissioned Professor Roger Hood to conduct a public opinion survey on the mandatory death penalty in Malaysia for drug trafficking, firearms offences and murder. It is, as far as we are aware, the first large-scale survey providing unique and compelling data from a large and detailed survey of public opinion. By using a series of scenarios, it reveals the extent to which members of the public support the mandatory death penalty when faced with the reality of having to judge whether a crime merits the death sentence. The findings show that, in these circumstances, the majority of the public surveyed did not support the mandatory death penalty, whether for drug trafficking, murder, or firearms offences. It is our hope that this report will make a considerable contribution to the current debate and remove the assumption that public opinion is a barrier to reform. On the contrary, public opinion actually provides support for the abolition of the mandatory death penalty and this evidence should prove helpful in bringing about changes to the law - in line with both public sentiment and international human rights standards.

We would like to express our sincere thanks to Professor Roger Hood for this important work. Professor Hood is one of the foremost experts on the death penalty worldwide and has produced and advised on a number of reports examining the issue of public opinion and the death penalty. An enormous amount of time and effort has gone into the analysis of the data generated by the survey. We would also like to thank SUHAKAM, the Bar Council of Malaysia, HAKAM and the University of Malaya for their support and to Ipsos Malaysia, whose advice and expertise in carrying out the survey designed and analysed by Professor Hood is greatly appreciated.

This survey was made possible by a grant to The Death Penalty Project from the Human Rights and Democracy Programme of the UK Foreign and Commonwealth Office. We are especially grateful to Simon Featherstone, the British High Commissioner to Malaysia, for his support and for the assistance of his dedicated staff.

Saul Lehrfreund MBE and Parvais Jabbar MBE
Executive Directors, The Death Penalty Project
May 2013

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In designing the questionnaire, my thanks go to Professor Julian Roberts for most helpful suggestions and to Budiman Lutfi Mohamed, a Malaysian prosecutor at the Attorney General's Chambers, Malaysia, who is currently on leave in the United Kingdom undertaking a study of the death penalty. In particular, he made sure that I made no egregious mistakes about the law relating to the mandatory death penalty in Malaysia and that the scenario cases chosen for this study were representative of the kinds that are prosecuted and convicted in Malaysia.

We were fortunate in securing the gold prize-winning market research company Ipsos Malaysia to administer the survey. It made valuable suggestions about the structure and wording of the questionnaire. The author is especially grateful to Phoebe Chow, of Ipsos, for her efficiency and thoroughness in taking charge of the survey and to Katharine Davis for her oversight.

In Malaysia, I am grateful for the support of the British High Commission in making arrangements to meet organisations who might wish to be associated with this project. I was also delighted to receive such support from the Bar Council of Malaysia and especially its president at that time, Lim Chee Wee; from the Human Rights Commission of Malaysia (SUHAKAM) and its chairman, Tan Sri Hasmy Agam; the Law Faculty of the University of Malaya, with the support of Datuk Dr Khaw Lake Tee and from The National Human Rights Society of Malaysia (HAKAM), especially its president, Abdul Rashid Ismail. Needless to say, none of these organisations is responsible for the findings of this public opinion survey or the conclusions I have drawn from it.

I would like to thank Julian Roberts, Budiman Lutfi, Florence Seemungal, David Johnson, Khaw Lake Tee, Abdul Rashid Ismail, Phoebe Chow and Michael Radelet for reading the text so carefully and for pointing out where changes were necessary.

The author is very grateful to Dr Mai Sato for her help in preparing this report for publication. He gladly acknowledges the considerable contribution she has made to the analysis and presentation of the findings.

Roger Hood
Oxford
May 2013

Summary and conclusions

The background

The number of executions carried out in Malaysia has declined markedly in the last decade despite there being no changes in the scope of capital punishment in law or any reform of the system which mandates the death penalty as the only punishment for murder; for trafficking in narcotics in various amounts according to the drug concerned; and for discharging a firearm with intent to cause death or hurt while committing various crimes, whether or not any hurt is caused.

In 2011 it was reported that 441 people had been hanged since 1960, but since 2002, when four were hanged, executions have become increasingly rare. There were no more executions until 2006, when four people were executed for waging war against the King. In 2008 there was one execution for murder, two for drug-trafficking in 2009, and again one for murder in 2010. There have been no executions since then, despite everyone convicted of the three types of offence mentioned above being mandatorily sentenced to death: 108 people were sentenced to death in 2011, about two-thirds for drug-related offences. By September 2012, it appeared that there were 924 people under sentence of death on 'death row' in Malaysia, 648 of them having been sentenced for drug-trafficking.

The decline in executions has been accompanied by a growing public debate on whether or not the death penalty should be abolished completely, either for all crimes or at least for drugs trafficking and firearms offences not leading to injury, or whether, as a first step, the mandatory element should be replaced by a discretionary system to be used in exceptional circumstances. There is now an active anti-death penalty campaign in Malaysia led by the Bar Council of Malaysia and the Human Rights Commission of Malaysia (SUHAKAM), with support from Lawyers for Liberty, Amnesty International Malaysia, the Civil Rights Committee of the Kuala Lumpur and Selangor Chinese Assembly Hall, Malaysians against the Death Penalty and Torture (MADPET), as well as The National Human Rights Society of Malaysia (HAKAM). In 2009 Malaysia's representative in Geneva told the UN Human Rights Council that his country was considering replacing the death penalty with life imprisonment.

These initiatives were welcomed by Nazri Aziz, then the Minister in the Prime Minister's office in charge of legal and parliamentary affairs who was sometimes referred to as the 'Law Minister'. He had spoken out against the death penalty but, in 2011, made it clear that in his view this cannot be achieved without support from the public. The policy of abolishing the mandatory death penalty, at least as far as drug mules are concerned, has also been championed by the press, notably by the *New Straits Times*. Thus, the time is ripe to find out what the attitudes and opinions of Malaysian citizens are towards the law and practices governing the use of the death penalty in that country, in particular the mandatory death penalty. Such information will be crucial to the debate on whether the mandatory death penalty can be abolished without unacceptable resistance from the population at large.

This publication reports the findings from a public opinion survey, designed by the author, of the views of a representative quota sample of Malaysian citizens from every part of that country on the topical

subject of the death penalty. Its aim was to assess the extent to which Malaysian citizens support the laws which make the death penalty the *mandatory* punishment for three types of crime: trafficking in prohibited drugs above certain specified amounts depending on the drug concerned (section 39B, Dangerous Drugs Act 1952); murder (section 302, Malaysian Penal Code); and the discharge of a firearm with intent to kill or harm, whether or not any harm was caused, while involved in certain specified crimes, such as housebreaking (section 3, Firearms (Increased Penalties) Act 1971). Worded in another way, its focus is on whether public opinion in favour of the mandatory death penalty is so strong that it would be a barrier to reform of these laws.

The survey

The data were collected through face-to-face interviews with 1,535, Malaysians, carried out between 8 November and 28 December 2012 by the prize-winning company Ipsos Malaysia and analysed by the author, with assistance from Dr Mai Sato. The research was funded by a grant made to the Death Penalty Project by the United Kingdom Foreign and Commonwealth Office. As mentioned in the acknowledgements, it had the support of the Bar Council of Malaysia, the Malaysian Human Rights Commission (SUHAKAM) and several other organisations.

Interest and knowledge

Respondents were first asked how concerned about or interested they were in the issue of the death penalty. This revealed that fewer than one in 10 was *very* concerned about the issue; over half said they were not well informed at all and no more than 41% had known that the death penalty *is* mandatory for the three types of crime mentioned above.

Support for the mandatory death penalty

When informed what the law is in Malaysia, respondents were asked whether they agreed with this law in respect of:

- Drug trafficking, if the amount found in someone's possession was above certain specific amounts; namely 15 grams or more of heroin, 40 grams or more of cocaine, 50 grams or more of amphetamines; 200 grams or more of cannabis or 1,000 grams or more of opium
- Murder; or
- Discharging a firearm with intent to kill or harm, whether or not any harm was caused, while involved in certain specified crimes,

or whether they thought the judge should be allowed the discretion to decide whether or not to choose the death penalty according to the circumstances of the case; *or* whether they were against the death penalty and would like to see it abolished and replaced by life or long-term imprisonment; *or* whether they didn't know what to think.

Murder was the only one of these crimes for which a majority (56%) favoured the mandatory death penalty (50% strongly in favour). The proportion for drug trafficking was between 25% for heroin (20% strongly in favour) and 44% for opium (35% strongly) and 45% for a Firearms Act offence (35% strongly). Only 12% said they were in favour of the mandatory death penalty for *all* of these crimes, 70% for *at least one* of them, and 30% for *none* of them at all.

A higher proportion (62%) of those who identified their ethnicity as Malay, who comprised 54% of the sample, stated that they were in favour of the mandatory death penalty for murder than those who identified themselves as Chinese (54%), Indian (52%) or from a non-Malay Bumiputera (38%). Those who said that they were of the Islamic faith (60% of the sample) were more likely (60%) to favour the mandatory death penalty for murder than those of other faiths – Buddhists and Hindus (53%) and Christians (46%). But in respect of age, gender, urban or rural living, and work status there were negligible differences in the level of support for the mandatory death penalty for murder; for trafficking in heroin of 15 grams or more; or for firearms offences.

Support in general for the death penalty

A large majority of respondents supported *either* a mandatory *or* a discretionary death penalty: for murder (91%), for one of the five drugs trafficking offences (between 74% and 80%), and for the firearms offences (83%).

However, a much *lower* support for the death penalty was found when respondents were faced with scenarios of cases, some with an aggravating feature and some with mitigating features, all of which they were told had been mandatorily sentenced to death. The sample was divided roughly in half and each half was presented with six scenarios (12 in all). There were four cases of drug trafficking (two of heroin, one cocaine and one cannabis); six cases of murder (two being robbery murders, two being domestic murders and two being drug-related murders); and two cases of discharging a firearm with intent to kill or injure.

Support when judging drug trafficking scenarios

Of the four drug trafficking scenarios, the highest proportion of respondents who chose the death sentence was only 29% – and this for an attempt to smuggle 25 kilograms of heroin hidden in a boat. And in this case almost half (48%) of the 25% who had said they were in favour of the mandatory death sentence did not choose death as the appropriate penalty. For a woman aged 21, caught in possession of 100 grams of heroin secreted in a suitcase, only nine per cent of all respondents who ‘judged’ the case thought that the death penalty was the appropriate sentence and 80% of those who had said they were in favour of the mandatory death penalty, did not impose it in these circumstances. Only eight per cent chose death for both cases they sentenced. Thus, there appears to be a low level of support for inflicting a mandatory death sentence on such common types of drug trafficking cases, or even for applying the death penalty at all.

Support when judging murder scenarios

Faced with the six scenario cases of murder (three judged by half the sample and three by the other half), the 1,535 respondents sentenced 43% to death. They sentenced more than half of the perpetrators to death in only three of the cases: a man with no previous convictions who shot a shop owner to death during robbery of a local shop (57%); a man who did a similar thing but who had previously been in prison twice for robbery (65%); and a man with previous convictions for violence and drug possession who killed a rival drug dealer (57%). The death sentence was thought to be correct by only 14% of respondents who judged the case of a woman, abused by her husband for many years, who deliberately poisoned his food to kill him.

Thus, in respect of the types of murder represented by these scenarios, no more than two-thirds were in favour of the death penalty even for the most serious of the cases they judged and no more than 73% sentenced *any* of the murder scenario cases they judged to death and 27% sentenced *none* – a considerably lower endorsement of capital punishment than the figure of 91% in favour of the death penalty for murder found in response to the general question of whether they favoured a mandatory or a discretionary death penalty or no death penalty at all.

Of the decisions made in all three cases judged by one half the sample and all three judged by the other half, only 14% (117/866) of those *who had said that they favoured the mandatory death penalty for all murder cases*, actually imposed it *for all three* scenarios. In other words, these respondents stuck to their principle. But these 117 made up only *eight per cent* of the total 1,535 people interviewed: far fewer than the 56% who had said in response to the general question, that they favoured the mandatory death penalty for murder. Thus, when faced with reality, the majority of respondents found that they would want to use their discretion in deciding whether to sentence a person convicted of murder to death and not follow the law that required them to do so in *all* cases.

Support in cases of joint enterprise murder

Respondents were also presented with two cases of murder in which two persons had been convicted. In the first case – a fight – one man had delivered the fatal blow while the other was adjudged to have encouraged him. In the second case – a bank robbery – one of the convicted people had fired the fatal shot while the other had driven him to the bank, knowing that his partner had a gun, waited outside and driven him away. Under Malaysian law, all of them were held to be guilty of murder as part of a joint enterprise and, therefore, subject to the mandatory death penalty. Respondents were asked in both cases whether they thought that the person who had *not* actually killed the victim, but assisted in the crime, should have been found guilty of murder and sentenced to death. Only 24% in the first case, and 30% in the second, thought that they should have been convicted of murder.

Support when judging Firearms Act scenarios

Respondents were presented with two cases (half judging one and half the other) where a man was convicted under the Firearms (Increased Penalties) Act. In one, where a night-time burglar with no previous convictions shot at and missed the householder, 87% did not consider the death

penalty to be appropriate. In the other, where the burglar had previously served a prison sentence for housebreaking and had shot and wounded the householder, but not fatally, only 20% chose the death penalty. Under a third of those who had said they were in favour of the mandatory death penalty for *all* persons convicted of such firearms offences chose to sentence the people convicted in these two firearms cases to death.

Support for the mandatory death penalty ‘in theory’ and ‘in reality’

When confronted with 12 scenarios of real cases (each half of the sample dealing with six different cases of drug trafficking, murder and firearms offences) for which the penalty is mandatory death, only a small minority of Malaysians responded in a way that showed that they favoured this policy for *all* such cases. Just 1.2 in 100 considered that *all* the cases they judged were worthy of death. In other words, they did not support a *practice* of mandatory death sentencing where the circumstances of the case should be ignored whatever they may be. A fifth (22%) of respondents did not impose the death penalty for *any* of the cases they were asked to judge.

Sentences chosen other than death in scenario cases

It has been suggested that the death penalty might be replaced by a sentence of 30 years imprisonment or by life imprisonment without the possibility of being released on parole. The findings from the scenario cases show that when a death penalty was not chosen, respondents did not simply choose life without parole. In all cases of drug trafficking, life imprisonment with the possibility of parole, or a determinate sentence well below 30 years, were chosen more frequently than life without parole. In the murder scenarios, life imprisonment without parole was more often chosen than other alternatives only in two cases with aggravating features. Where imprisonment was chosen, the average length was 12.5 years. For the Firearms Act scenarios, a sentence other than life without parole was chosen more frequently for both scenarios – mostly life imprisonment with the possibility of parole or, less frequently, a determinate sentence of imprisonment averaging 12 years.

These findings give no support to a policy of replacing the death penalty by a *mandatory* sentence of 30 years or life imprisonment without the possibility of parole. When judging these cases, Malaysians showed that they valued the discretion to adjust the penalty to the circumstances of the offence and characteristics of the offender.

Reasons for favouring the mandatory death penalty

Those respondents who said that they supported the mandatory death penalty were asked what the *main* reason was for doing so. Retribution was the most frequently chosen – ‘There can be no excuses for committing [this crime]. Everyone found guilty ... deserves to die’ – by 47% for those who favoured the mandatory death penalty for murder, 40% who favoured it for drug trafficking and 45% of those who favoured it for Firearms Act offences.

Deterrence – ‘Unless the punishment is certain, with no exceptions, it will not be a powerful deterrent to these crimes’ – was the *main* reason given by only 32% of those who favoured the mandatory death penalty for murder, 25% for drug trafficking and 11% for Firearms Act offences. Thus, one of the main justifications often given for the mandatory death penalty received relatively little public support.

Those who said they favoured a discretionary death penalty for at least one of the three crimes for which it is mandatory at present, gave as their *main* reasons that circumstances differed, so not everyone convicted of one of these crimes would deserve to die (31%), that some people can be rehabilitated (39%), or that the death penalty should be reserved for only the most heinous forms of these crimes (30%).

These findings show that the majority of Malaysians base their reasons for supporting or rejecting the mandatory death penalty on the principles of desert and proportionality.

Reasons given when judging scenario cases

Respondents were asked, after considering each scenario, what the *main* reason was why they had chosen the death penalty or why they had not chosen it. The findings show clearly that the main reason for selecting the death sentence was retribution: that the offender deserved to be put to death. The deterrence of others was given as the main reason for the penalty they chose by never more than 15% of respondents. This suggests that general deterrence, a major theoretical reason for supporting the mandatory death penalty by making the punishment certain in every case, was not supported by most Malaysians.

Those respondents – the majority in all but three murder scenarios – who did not choose death mostly did so because they considered that, in the circumstances, death would be an excessive, disproportionate punishment and/or that mitigation suggested that the offender might be reformed. Yet again, this reinforces the findings from the scenario cases that a large majority of Malaysians were in favour of a restricted use of a discretionary death sentence.

Deterrence and support for the death penalty

Nevertheless, the level of support for the death penalty in Malaysia was, to some degree, contingent on it being believed that it was an effective deterrent. When asked what their opinion would be ‘if new scientific evidence showed that it was *not* a better deterrent for murder or drug trafficking or firearms offences than life or long-term imprisonment’ the proportion in favour of the death penalty fell from 91% to 57% for murder; from about 75% to 43% for drug trafficking; and from 83% to 40% for firearms offences.

Innocence and support for the death penalty

The impact was even greater when they were asked: ‘If it was proved to your satisfaction that innocent people have sometimes been executed ... would you still favour the use of the death penalty?’ The

proportion supporting the death penalty for murder fell from 91% to 33%, for drug trafficking from about 75% to 26% and for firearms offences from 83% to 23%.

Executions v other policies for reducing very violent crime or drug trafficking

Respondents were asked to rank a number of policies in respect of how effective they might be in reducing very violent crimes leading to death and reducing the amount of trafficking in illegal drugs. In respect of both very violent crime and drug trafficking, they placed first 'better moral education of young people' then 'more effective policing', followed by other policies to prevent these crimes. Both in relation to reducing very violent crimes and drug trafficking, 'greater number of executions' was ranked last. It was the first choice of only 12% and the last choice by 48% for reducing very violent crime, and the first choice of 15% and the last of 42% for reducing the amount of drug trafficking.

The impact of world trends

Finally, respondents were told about the world trend towards abolishing the mandatory death penalty and the trend towards abolishing it completely. They were then asked whether they thought that Malaysia should follow these trends.

When those already opposed to the mandatory death penalty (30%) were added to those who now, after receiving this information, thought that Malaysia should follow these other countries (11%) or were not sure (13%), it became clear that over half the respondents (54%) were *not opposed* to Malaysia following the path towards abolition of the mandatory death penalty. Thus, given the information about the world trend, the proportion who *definitely* wanted to retain the mandatory death penalty for any of the three types of crime covered by this survey, fell to 46%: much lower than the 70% who, in response to the general question, had supported the mandatory death penalty for at least one of the three types of offence included in this survey.

In respect of total abolition, 59% said definitely 'No': 16% said definitely 'Yes' and 25% were unsure. Thus, the proportion *definitely against* following the world trend towards complete abolition of capital punishment, is far lower than the proportions (for example, 91% for murder) that appeared to support the death penalty when asked the initial general question in the survey.

Conclusions: Policy implications

Do the findings of this survey support the view that public opinion stands in the way of abolishing the mandatory death penalty for drug trafficking, offences under the Firearms (Increased Penalty) Act, or murder?

The conclusion, as far as drug trafficking and firearms offences are concerned is clearly 'No'. Indeed the findings would give strong support to those who believe that the death penalty could be abolished for both these offences without a public outcry. Fewer than half the respondents favoured the mandatory

death penalty and, for none of the six scenario cases which they were asked to judge, did more than 30% say that they would have favoured the death penalty. Furthermore, when asked which of four crime prevention policies would be most effective in reducing drug trafficking, 'increasing the number of executions' was ranked last, being ranked first by only 15% and last by 42%. Although a majority of Malaysians had said they favoured the death penalty for drug trafficking and firearms offences, the evidence of this survey, which tested what proportion would in fact enforce it, suggests that there would be relatively few who would oppose its complete abolition.

This conclusion also applies to the mandatory death penalty for murder. Although a higher proportion of respondents (56%) said they favoured the death penalty being the mandatory punishment in all cases of murder, when they were asked to say what sentence they themselves would pass when shown a mixture of 'scenarios', some with aggravating and some with mitigating features, only a minority of them (a mere 14%) actually chose death as the appropriate penalty for *all* the cases they were asked to judge. This is only eight per cent of all 1,535 respondents. Furthermore, at least 70% did not think that persons convicted of murder in a 'joint enterprise' who had not actually killed the victim, should be found guilty of murder and, thus, liable to be punished by death. It was clear that, when faced with the reality of punishment, the majority of Malaysians favoured being able to exercise discretion whether or not to sentence persons convicted of murder to death.

As regards support for the death penalty for murder *in general*, the evidence from the judgments made on the types of murder represented by the scenario cases shows that it was considerably lower than the 91% first elicited by a general question, even for aggravated cases of murder. In only three of six cases did more than half of all respondents, who judged them, choose death (the highest proportion being 65%) and 27% did not choose the death penalty for any of the murder scenarios they judged. When asked to rank five preventive policies in terms of their likely effectiveness in 'reducing very violent crimes leading to death', 'greater number of executions' was placed last, being ranked first by only 12% and last by 48%. Furthermore, if evidence were to be forthcoming that an innocent person had been executed, support for capital punishment would drop dramatically. Taken together, this evidence shows that the level and strength of support among the Malaysian public for the death penalty for murder is lower than is perhaps commonly supposed. This suggests that public opinion ought not to be regarded as a definite barrier to abolition of the death penalty for murder.

A hand holding a pen over a document, with a blurred background of a person's face.

PART ONE:

Introduction: The purpose of the study

1. The context

In Malaysia, it has been recognised that the time is ripe for consideration of the attitudes and opinions of Malaysian citizens towards the law and practices governing the use of the death penalty in that country, in particular the mandatory death penalty.¹

The number of executions carried out in Malaysia has declined markedly in the last decade, despite there being no changes in the scope of capital punishment in law or any reform of the system which mandates the death penalty as the only punishment for murder (section 302 of the Penal Code)²; for trafficking narcotics in various amounts according to the drug concerned (section 39B of the Dangerous Drugs Act 1952)³; and for discharging a firearm with intent to cause death or hurt while committing various crimes, whether or not any hurt is caused (section 3 of the Firearms (Increased Penalties) Act 1971).⁴

In 2011, it was reported that 441 people had been hanged since 1960, the majority, it appears, for drug offences.⁵ Yet only four persons were hanged in 2002 (two for murder and two for drug trafficking), four in 2006 (for waging war against the King), one in 2008 (for murder), two in 2009 (for drug trafficking), one in 2010 (for murder) and none since then, despite at least 108 persons being sentenced to death in 2011, about two-thirds for drug-related offences. By September 2012 it appears that there were 924 people under sentence of death on 'death row' in Malaysia, 648 of whom had been sentenced for drug trafficking.⁶

This decline in recourse to executions, even in the absence of any law reform, has been influenced by a growing public debate on whether or not the death penalty should be abolished completely, either for all crimes or, at least, for drugs trafficking and firearms offences not leading to injury, or whether, as a first step, the mandatory element should be replaced by a discretionary system to be used in exceptional circumstances for the offences for which is at present the mandatory penalty.

There is now an active anti-death penalty campaign in Malaysia led by the Malaysian Bar Council and the Human Rights Commission of Malaysia (SUHAKAM), with support from Lawyers for Liberty, Amnesty International Malaysia, the Civil Rights Committee of the Kuala Lumpur and Selangor Chinese Assembly Hall, Malaysians Against the Death Penalty and Torture (MADPET), as well as The National Human Rights Society of Malaysia (HAKAM).⁷

¹ The death penalty is also mandatory for treason (section 121A of the Penal Code), for 'Planning or intending the death of or hurt to or imprisonment or restraint of the King or a State Ruler (Sultan) or a State Governor.' Time constraints on the interview did not make it possible to study this aspect of the law.

² Murder means **either**: Deliberately killing with intent **or** intending to do grievous bodily injury which the offender knows to be likely to cause death to a person who then dies **or** Intending to cause bodily injury which is sufficient in the ordinary course of nature to cause death **or** the person knows that the act is so imminently dangerous that in all probability it will cause death, or that such bodily injury is likely to cause death, and then commits such an act without any excuse. See section 300 of the Penal Code.

³ Under the Act: "trafficking" includes the doing of any of the following acts, that it to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

⁴ Section 3 Firearms (Increased Penalties) Act 1971: The discharge of a firearm 'with intent to cause death or hurt to any person, shall notwithstanding that no hurt is caused thereby, be punished by death', while committing any of the following offences listed in Schedule [Section 2]: '1) Extortion, 2) Robbery, 3) Preventing or resisting by any person, of his own arrest or the arrest of another by a police officer or any other person lawfully empowered to make the arrest; 4) Escaping from lawful custody, 5) Abduction or Kidnapping under sections 363 to 367 of the Penal Code and section 3 of the Kidnapping Act 1961, or 6) House-breaking or house-trespass under sections 454 to 460 of the Penal Code'.

⁵ Home Minister Hishammuddin Hussein, reply to Bukit Bendera MP Liew Chin Tong's question in parliament (31/3/2011), 'Time to abolish the death sentence', *Free Malaysia Today*, 3/4/2011. Quoted in Amnesty International *Death Sentences and Executions 2011*, 2012, p. 23.

⁶ See *The Death Penalty for Drug Offences. Global Overview 2012*, London, Harm Reduction International, 2012, p. 30. Numbers updated to 21 September 2012.

⁷ Kua Kia Soong, 'Hudud and the Death Penalty', *Malaysia Today*, 16 October 2011. Cited in Roseann Rife *Campaigning for Abolition in Asia and New Opportunities in Malaysia*, Paper presented to the International Conference on Reform of the Death Penalty in Asia, City University of Hong Kong, 4-5 November 2011.

Complete abolition of the death penalty in Malaysia was called for by the Malaysian Bar in 2006 by a majority of 105 to two with 21 abstentions and again in March 2012, this time unanimously. The Human Rights Commission of Malaysia (SUHAKAM) in its annual report for 2010 also supported abolition. A year earlier, Malaysia's representative in Geneva told the UN Human Rights Council that his country was considering replacing the death penalty with life imprisonment⁸. In addition, in 2011 the Malaysian government set up an International Centre for Law and Legal Studies (I-CeLLs) on whose executive council are distinguished European experts in international law. It appears that the project will address the continued use of capital punishment in Malaysia, as a matter of priority.

All these initiatives have been welcomed by Nazri Aziz, then the Minister in the Prime Minister's Office in charge of legal and parliamentary affairs, who is sometimes referred to as the 'Law Minister'. In August 2010 he was reported to have said: 'If it is wrong to take someone's life, then the government should not do it either'⁹. But, in his view, abolition cannot be achieved without support from the public¹⁰. In June 2011, an inter-parliamentarian round table brought together by Nazri Aziz, agreed to push for a resolution to abolish the mandatory death penalty and to institute an immediate moratorium on executions.

Indications that the Malaysian public are concerned about the mandatory death penalty is evident in the appeals to the government of Singapore to grant clemency to Yong Vui Kong, a young Malaysian. He was facing execution after being mandatorily sentenced to death for acting as a courier of 47grams of heroin he brought into Singapore, where the death penalty is the mandatory punishment for trafficking 15 grams or more, as it is in Malaysia¹¹. Although the Singapore Court of Appeal upheld the mandatory death penalty for this crime, such was the concern surrounding the Vui Kong case that the Singapore government, after examining the issue further, decided to amend the law. The amendment, put into effect in 2012, restricted the imposition of a mandatory death penalty for murder only to those cases where there is an intention to kill (rather than to cause injury). As regards trafficking in drugs, it has abolished the mandatory death penalty where the person charged can show that he or she had played no part other than being a courier and where, in addition, the prosecutor has issued a certificate to say that the convicted person has 'substantively assisted' the state in disrupting trafficking activities, and/or that he or she was acting under a mental illness sufficient to diminish responsibility.

This development in Singapore acted as a catalyst to press for a similar reform in Malaysia. In July 2012, the Attorney-General of Malaysia, Abdul Gani Patail, announced that his chambers were 'getting advice from law experts throughout the world regarding drug laws and how they are applied in their country' and working towards proposing an amendment to the Dangerous Drugs Act 1952 to give judges the discretion of not imposing death sentences on couriers. He added that this would mean that 'those on death row would be referred back to the courts, with legal representation to be

⁸ Othman Hashim, Permanent Representative of Malaysia to the United Nations Office at Geneva, stated: 'On the issue of the death penalty, such a penalty was only imposed on the most heinous crimes, such as drug trafficking, murder, treason and kidnapping, and the Government was considering proposals to replace the penalty with a maximum sentence of life imprisonment'. Human Rights Council adopts outcomes of Universal Periodic Review on Malaysia, 16 June 2009, Portal HREA - www.hrea.org

⁹ 'Nazri says 'wrong' to use the death penalty' 29 August 2010, <http://www.malaysiakini.com/news/141410>

¹⁰ 'Public opinion will be taken into account before abolishing death penalty', *Malaysian Mirror*, 14 October 2011.

¹¹ A 'Save Vui Kong' campaign garnered almost 100,000 signatures on a petition urging clemency online. See Save Vui Kong blog at <<http://savevuihong.blogspot.com/2010/08/malaysian-campaigners-gather-nearly.html>>. As Minister Abdul Nazri has put it: 'Malaysia must get rid of the mandatory death penalty before we can appeal to these (other) countries not to impose capital punishment on our citizens who are detained there. How can we justify our appeal if we still implement the mandatory death penalty death sentence for similar offences?' See 'Cabinet to decide' Proposal to defer mandatory death sentence' *New Straits Times*, 25 October 2012, p. 22.

re-sentenced'.¹² Nazri Aziz declared that 'until the status of the mandatory death penalty is finalised' it would be 'only fair that the implementation of the death sentence be deferred'.¹³ He has the support of Malaysian Human Rights Commissioner James Nayagam, who believes that drug mules, 'some of whom come from difficult backgrounds', should be given 'a second chance'.¹⁴ The policy of abolishing the mandatory death penalty, at least as far as drug mules are concerned, has also been championed by the press. In a leading article in October 2012, the *New Straits Times* declared:

'... ideally the death penalty should be abolished altogether, and not just in cases that involve low-level mules ... the taking of human lives by the state in such offences should thus be carried out as sparingly as possible'¹⁵.

In reviewing the law, the Attorney-General cannot help but note that courts and international human rights bodies, including the UN Human Rights Committee, have held that the mandatory death penalty is a breach of human rights, mainly on the ground that each convicted person has the right to have mitigating circumstances taken into account before the decision is taken as to whether the death penalty is an appropriate and proportionate punishment. Thus, the mandatory death penalty has been held to be an arbitrary punishment in that it deals with unlike cases as if they were all alike.¹⁶ Opposition to the mandatory death penalty is now a worldwide movement.

There are bound to be those who will oppose these proposed changes in the law. As in many other countries that retain the death penalty, opponents of abolition will no doubt cite public opinion as being on their side. It is often said that support for capital punishment is embedded in the local culture and that to abolish it would be undemocratic and likely to undermine respect for government and the law. This is why the study reported here may help to clarify what the opinions and attitudes are of Malaysian citizens in relation to support for the death penalty in general and the mandatory death penalty in particular. We trust that the findings will be seen as a valuable contribution to consideration of law reform.

2. The issues

This survey of the opinions of Malaysian citizens examines and measures:

- Their level of interest in and knowledge about the death penalty, and in particular the mandatory death penalty in Malaysia;
- Their level of support for both the mandatory and discretionary death penalty in general;
- The extent to which they actually endorse the use of the death penalty or choose an alternative punishment when presented with case scenarios of four drug trafficking convictions, six murder convictions and two firearms offence convictions, for all of which the punishment of a court would mandatorily be death;

¹² Reported in 'M'sia mulls scrapping death penalty for drug couriers', *The Malay Mail*, 11 July 2012.

¹³ Reported in *New Sunday Times*, 21 October 2012, pp. 1 and 9.

¹⁴ Reported in *New Straits Times*, 22 October 2012, p. 6.

¹⁵ Leading Article: 'Amendments are afoot to spare the death sentences on some drug offences', *New Straits Times*, 23 October 2012, p. 14.

¹⁶ See the discussion in Roger Hood and Carolyn Hoyle, *The Death Penalty: A World-wide Perspective*, Oxford: Oxford University Press, 4th. Edition, 2008, pp. 278-284.

- The main reasons why they supported the mandatory death penalty in general and what the main reasons were for choosing or not choosing the death penalty in the scenario cases they judged;
- The extent to which their support for the death penalty was contingent on it being an effective general deterrent or not, and administered without error and any innocent persons being executed;
- The importance attached to carrying out more executions for murder and firearms offences when compared with other policies for reducing very violent crimes leading to death;
- The importance attached to carrying out more executions or drug trafficking when compared with other policies for reducing the amount of trafficking in illegal drugs; and
- The level of support for the mandatory death penalty or the death penalty in general when informed of world trends in the abolition of capital punishment in other countries.

3. The survey

The questionnaire was devised by the author in consultation with Mr Budiman Lutfi Mohamed – a Malaysian prosecutor at the Attorney General’s chambers, Malaysia, currently in the United Kingdom undertaking a study of the death penalty – who was particularly helpful in confirming that the scenario cases used in this research (see below) were appropriate and quite typical of cases normally appearing before the Malaysian courts. The survey company chosen to carry out the interviews – Ipsos Malaysia, winner of the Gold Medal in 2011 and 2012 for Market Research Agency of the Year – was also very helpful in ensuring that the schedule of questions were appropriate and understandable by non-expert citizens of Malaysia.

Face-to-face interviews with 1,535 Malaysian citizens were conducted with a quota sample representative of the Malaysian population by Ipsos’ experienced staff between 8 November 2012 and 28 December 2012. The interviews were undertaken nationwide (covering the 13 states in Peninsular and East Malaysia, plus the Federal Territory of Kuala Lumpur) in Malay or Chinese or English. The average length of the interview was 34 minutes, with the shortest taking 25 minutes and the longest 71 minutes. They were carried out using a random door-to-door household method. The match between the distribution of the total Malaysian population by gender, age, race, monthly household income, whether living in a market centre, other urban or rural area, and resident state and the proportion chosen for sampling was so close that no weighting of the data was required (see the Appendix).

Respondents were first asked what they knew about the death penalty in Malaysia and in particular whether they knew that it was the only (ie mandatory) sentence that a judge can impose on persons convicted of drug trafficking (above certain specified amounts); on persons convicted of various named crimes who discharge a firearm with intent to kill or injure, whether the person aimed at is injured or not; or on persons convicted of murder. The law was then carefully explained to them by the interviewer who read it out:

‘In fact, in Malaysia everyone without exception convicted of the following crimes must be sentenced to death. The judge has no discretion/choice to take into account the circumstances in which the crime took place or the personal circumstances of character of the person convicted. This is called the mandatory death sentence’.

Respondents were then asked, in relation to each type of crime:

- Whether they agreed with the death penalty being mandatory for everyone; or
- Whether they thought that the judge should be able to pass a different sentence depending on the circumstances in which the crime took place or the personal circumstances or character of the person convicted; or
- Whether they were against the death penalty and would like to see it abolished altogether and replaced by life or long-term imprisonment; or
- Didn't know or had no opinion either way.

The survey also had an experimental element – one which had been successfully employed in surveys of public opinion in China and Trinidad¹⁷. This method aimed to capture what Malaysian citizens believed to be the appropriate sentence when presented with a number of 'scenario' cases, each of which described briefly the facts of the offence and information about the offender who had been convicted and mandatorily sentenced to death. This made it possible to compare the level of support given by respondents to the 'general' question regarding their support for the death penalty (whether mandatory or discretionary) and what in reality was the level of support for the death penalty, among all who 'judged' the scenario cases, as well as among those who had said they favoured the mandatory death penalty. In other words, it provided a test of support 'in theory' or 'in abstract' compared with support 'in reality'.

Scenario cases were chosen so that some had an aggravating factor and some had one or more mitigating features. Each interviewee was presented with six scenarios – two cases of drug trafficking, three cases of murder and one of discharging a firearm with intent to kill or injure. To ensure that there was a different ordering between the presentation of aggravating and mitigating scenarios, because the decision on one might affect the decision on the next one, the respondents were divided into two sub-samples, named A and B in this report. This means that those in Group A would receive first an 'aggravating' scenario, then a 'mitigating' scenario of a different case, while those in Group B would receive first a 'mitigating' scenario, followed by an 'aggravating' scenario of a different case etc. Thus 12 scenarios were judged altogether: six by 761 respondents in Group A and six by 774 respondents in Group B (the pattern can be seen in table A2 in the Appendix). The details of the scenarios cases are set out and the decisions made about them are discussed in the text below. The A and B cases were allocated by the survey administrators so as to ensure a fair split of the quota sampling frame in each area. This was successful. An analysis of the demographic characteristics of groups A and B showed that the proportions that were male or female were precisely the same and that there were close similarities in terms of age and other variables, as well as in the responses to all the questions asked in this survey that were the same for both sub-samples. Thus, with respect to all questions, other than responses to the scenario cases, the two sub-samples have been combined and the findings related to the total sample of all 1,535 respondents.

¹⁷ This approach was used in a survey by the Max Planck Institute of Foreign and International Criminal Law, Freiburg, of public opinion on the death penalty in China, for which Roger Hood acted as consultant, and for the study which he undertook on public opinion on the mandatory death penalty in Trinidad. See: Dietrich Oberwittler and Qi Shenghui, *Public Opinion on the Death Penalty in China, Results from a General Population Survey Conducted in Three Provinces in 2007-08*, Great Britain-China Centre 2009, www.gbcc.org.uk/death-penalty-reform.aspx; and Roger Hood and Florence Seemungal, *Public Opinion on the Mandatory Death Penalty in Trinidad*, London: *The Death Penalty Project*, 2011. http://www.deathpenaltyproject.org/content_pages/5

A hand holding a pen over a document, with a blurred background of a desk and chair.

PART TWO:

The findings

1. Interest, concern and knowledge of Malaysian citizens about the death penalty and its mandatory nature

Before examining views on the mandatory death penalty, it is important to gain a perspective on how salient this issue is in the minds of the respondents to this survey and how well informed they were in general about it.

When asked how interested or concerned they were about the death penalty in general, only eight per cent said they were *very* concerned and 36% said they were not very interested or not concerned at all.

Few Malaysians (a mere six per cent) felt that they were *very* well informed or knew a great deal about the death penalty in their country and around a half (53%) said they were not well informed at all. As a topic of general conversational interest it was rarely raised by the majority of citizens. More than half (58%) said they spoke about it less than once a year and fewer than one in five (18%) spoke about it several times in a year.

This is, perhaps, because most Malaysians were not able to say how many executions had been carried out in their country. Only seven per cent knew that the last execution occurred in 2010: two-thirds (66%) simply said that they did not know when it took place and about a quarter (27%) said that an execution had taken place in 2011 or 2012, which was incorrect. When asked specifically about the number of executions carried out over the past 10 years since 2002 (Table 1) for the three categories of crime for which the death penalty is the mandatory penalty, between 70 and 75% answered ‘don’t know’.

Table 1: Percentage unable to estimate the number of people executed for the last 10 years since 2002 for drug trafficking, murder and Firearms Act offences

Offence	%
Drug trafficking	70
Murder	71
Firearms Act offences	75

Indeed, the majority of respondents (Table 2) did not know that the death penalty *was* mandatory: the *only* punishment that a judge could impose on conviction for these crimes:

Table 2: Is death the only penalty that can be imposed by the judge?

	Yes %	No %	Don't Know %
Drug trafficking	40	53	7
Murder	41	51	7
Firearms Act offences	31	61	8

Note: Percentages in rows, in this and other tables, may not always add to 100% due to rounding of numbers up or down to the nearest round number.

In spite of the prominent warnings given at Malaysian airports and border controls about the mandatory penalty of death for *drug trafficking*, only 4 in 10 of the citizens questioned in this survey were aware of this fact; a similar proportion knew that it was mandatory for murder and 31% that it was the mandatory penalty for an offence under the Firearms Act. Only a fifth (22%) of Malaysians knew that the death sentence was mandatory for *all* three of these crimes.

This was another indicator of the relatively low lack of interest, concern and knowledge of the subject. More importantly, it shows that the presumed deterrent message that a mandatory death penalty is *presumed* to impart had not been taken note of by more than half the representative sample of Malaysians interviewed for this survey.

2. Level of support in general for the mandatory death penalty

The concepts of mandatory and discretionary death penalty were, therefore, carefully explained to respondents: namely that the judge had no discretion at all, the death penalty being the mandatory punishment when sentencing a person convicted of:

- Drug trafficking if the amount found in their possession was above certain specific amounts; namely 15 grams or more of heroin, 40 grams or more of cocaine, 50 grams or more of amphetamines; 200 grams or more of cannabis or 1,000 grams or more of opium
- Murder
- Discharging a firearm with intent to kill or harm whether or not any harm was caused, while involved in certain specified crimes¹⁸

The 1,535 respondents were then asked, in relation to each of these categories of offence, whether they were in favour of the death penalty being mandatory for everyone; *or* whether the judge should be allowed to decide whether or not to choose the death penalty according to the circumstances; *or* whether they were against the death penalty for this crime and would like to see it abolished and replaced by life or long-term imprisonment; *or* they didn't know or had no opinion either way. Those who were in favour of the mandatory death penalty were asked whether they agreed 'very strongly' or didn't feel very strongly but still preferred it, 'rather than giving the judge discretion'.

As regards drug trafficking, respondents had been told clearly, before this question was asked, that: 'the more harmful the drug is considered to be, the smaller amount of it possessed will lead to the death penalty. Hence, someone found in possession of 15 grams or more of heroin faces the mandatory death penalty, but someone will need to possess 1,000 or more grams of opium before becoming liable to the mandatory death penalty.'

¹⁸ For more precise definitions of the three types of crimes concerned see fn. 2, 3 and 4 above.

The findings, set out in Figure 1 (which does not distinguish between being strongly, or less strongly, in favour of the mandatory death penalty) reveal that, when asked this general question:

- Between 25% and 44% said they were in favour of the *mandatory* death penalty for drug trafficking depending upon the drug (whether heroin, cocaine, amphetamines, cannabis or opium) and the amount which it would be necessary to possess. Eighty per cent of those in favour said they were strongly in favour (without being asked to differentiate between the five types of drug). Thus, 20% were *strongly* in favour of the penalty being mandatory for trafficking in heroin with an amount of 15 grams or more.
- Fifty-six per cent of respondents said they were in favour of the *mandatory* death penalty for murder, 88% of them being strongly in favour. Thus almost 50% of all respondents were *strongly* in favour of the mandatory death penalty for murder
- Forty-five per cent were in favour of the *mandatory* death penalty for Firearms Act offences, even when nobody had been killed – 78% of them being strongly in favour. Thus, 35% of Malaysians were *strongly* in favour of the mandatory death penalty for firearms offences.

Thus, murder was the only one of these three types of crime for which at least half the respondents supported the mandatory death penalty.

Overall:

- Only 12% said that they supported the *mandatory* death penalty for *all* these types of crime (including separately all five drug offences) for which it is laid down in Malaysian law
- Seventy per cent said they were in favour of the *mandatory* death penalty for *at least one* of these of crimes
- Seventy-six per cent were in favour of a *discretionary* death penalty for *at least one* of these crimes; and
- Thirty per cent did not favour the *mandatory* death penalty for *any* of these crimes

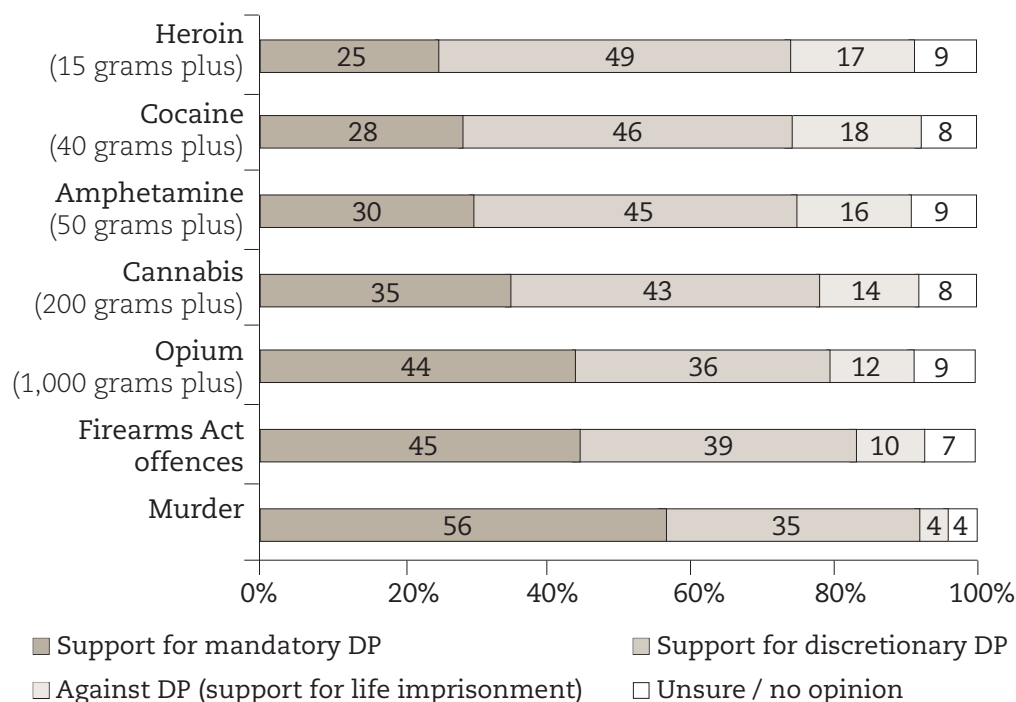
In response to the explanation given about drug trafficking, it appears that respondents gave more weight to the *amount* of the drug possessed than to the *presumed harm* that can be caused by the drug: for example, trafficking 1 kilogram of opium was perceived as more worthy of the mandatory death penalty than trafficking 15 grams or more of heroin or 40 grams or more of cocaine. This indicates either:

- That respondents failed to appreciate the reasons behind the law, or
- That respondents did not agree that possession of small amounts of heroin and cocaine were as serious as possessing larger amounts of cannabis and opium in particular

Overall, the responses to this general question on the level of support for the death penalty (whether mandatory or discretionary), shows that it appears to be very high in Malaysia: at least nine out of ten were clearly in favour of death being the maximum punishment for murder; between 74% and 80% for drug trafficking (depending on the drug) and 83% for discharging a firearm with intent to injure or kill, even when no death ensued.

However, as the next sections – which report on how the respondents ‘judged’ scenario cases which would have attracted a mandatory death sentence – show, support for the mandatory death penalty and for the death penalty ‘in theory’ was considerably lower when citizens were faced with the ‘reality’ of sentencing a convicted person to death.

Figure 1: Percentage in favour of the mandatory death penalty for drug trafficking (by drug concerned), firearms offences and murder



3. Who supported the mandatory death penalty?

When related to ethnicity, age group, gender, urban or rural living and work status, there were negligible differences in the level of support for the mandatory death penalty for murder; for trafficking in heroin of 15 grams or more; or for firearms offences.

As far as *ethnic origin* is concerned, the 54% of the sample, who classified themselves as Malays, were more in favour of the mandatory death penalty for *murder* (62%) than were the 27% who were Chinese, 54% of whom were in favour, and the eight per cent of the sample who said they were Indian, 52% of whom favoured the mandatory death penalty for murder. However, among the respondents who said they belonged to one of the other ethnic groups (the non-Malay *Bumiputera*), who comprised 11% of the sample, only 38% were in favour.

For *trafficking in heroin*, Malays (26%) and Indians (27%) were slightly more likely to support the mandatory death penalty than were citizens of Chinese origin (23%) and non-Malay *Bumiputera* (19%). The same pattern was observed for firearms offences.

In relation to *religious belief*, those who said they were of Islamic faith (60% of the sample) were more likely (60%) to say they were in favour of the mandatory death penalty for murder than were the 22% who were Buddhists and seven per cent of Hindus – 53% of both groups being in favour – and the nine per cent who were Christians (46% in favour). For smuggling heroin, Hindus (28%) were slightly more likely to favour the mandatory death penalty than were Muslims (25%) and Buddhists (22%), although Christians were the most likely (31%). This pattern was also found in relation to firearms offences.

4. Judging cases of drug trafficking

Half the sample, A, were asked to say which penalty (a determinate sentence of imprisonment, life imprisonment with the possibility of parole, life imprisonment without the possibility of parole, death, or another penalty) they would 'prefer/think the person deserves' for two cases: one of heroin trafficking with aggravating circumstances and one of cocaine trafficking with mitigating circumstances. The other half, B, were asked to choose the sentence they thought appropriate for two cases, one of trafficking in heroin with mitigating circumstances and one of trafficking in cannabis with an aggravating circumstance. The proportions selecting the death penalty are shown below, distinguishing between those who had said, in response to the general question, that they favoured a mandatory death penalty for this offence and those who did not.

Case 1 (Aggravating) Group A:

'A Malaysian man, aged 30, was arrested when he sailed into a Malaysian port. Following a tip-off to the police, 25kg of *heroin* was found hidden inside panels in the cabin of the boat. *He had a previous conviction for possessing a small amount of heroin*, below 15g, but claimed that he knew nothing about the hidden heroin. He was convicted of trafficking and sentenced to death.'

Table 4.1

Sentence chosen	Favoured mandatory death penalty for heroin (25%)	Did not favour mandatory death penalty (75%)	Total number (N)	Percentage
Death %	52	22	223	29
Not death %	48	78	538	71
Total number (N)	189	572	761	100

Seven out of 10 respondents did *not* consider that death was the appropriate sentence for the attempted shipment of this large amount of heroin by a known former heroin user. This is the inverse of the 74% who had said they favoured the death penalty for trafficking 15grams of more of heroin.

Of the minority (25%) who had said that they had favoured a *mandatory* death penalty for trading in 15 grams or more of heroin, only just over half (52%) actually sentenced this person to death. This meant that 48%, who said they favoured a mandatory death penalty, did not impose, it even for this very serious case of importing heroin.

Case 2 (Mitigating) Group B:

'A Malaysian woman, *aged 21*, was stopped by immigration at KL airport and when searched was found to have 100 grams of *heroin* hidden in a false bottom of her suitcase. She claimed that a foreign man she had met on holiday had asked her to carry the suitcase as a special favour. *She had no previous criminal record*. She was convicted of trafficking and sentenced to death.'

Table 4.2

Sentence chosen	Favoured mandatory death penalty for heroin (25%)	Did not favour mandatory death penalty (75%)	Total number (N)	Percentage
Death %	20	6	71	9
Not death %	80	94	703	91
Total number (N)	192	582	774	100

For this typical case of smuggling by a so-called 'mule', only nine per cent thought that death was the appropriate penalty: whereas when asked generally whether they were in favour of it for this type of offence, which was well above the 'trigger' weight of 15 grams for assuming trafficking in heroin, 74% had said they were definitely in favour.

Of the 25% who had stated that they were in favour of the mandatory death penalty for this type of offence, only a fifth (20%) actually sentenced this person to death.

Case 3 (Mitigating) Group A:

'An Indonesian man, *aged 20*, was arrested when he arrived at KL International Airport after a flight from Indonesia because his behaviour aroused suspicion. He was found to be carrying a package containing 100 grams of *cocaine*. He said he was asked to deliver the package by his boss and had no idea what was in it. *He had no previous convictions*. He was found guilty of trafficking and was sentenced to death.'

Table 4.3

Sentence chosen	Favoured mandatory death penalty for cocaine (28%)	Did not favour mandatory death penalty for cocaine (72%)	Total number (N)	Percentage
Death %	33	10	127	17
Not death %	67	90	634	83
Total number (N)	214	547	761	100

In this case of a foreign drug courier, only 17% thought that the death penalty was the appropriate sentence, compared with 74%, who in response to the general question, had said they favoured the death penalty for trafficking 40 grams or more of cocaine.

Of the 28% who had stated that they were in favour of the mandatory death penalty for this type of offence, only a third actually applied it when confronted with this example of a courier carrying cocaine. Only one in 10, who preferred a discretionary system, would have sentenced this courier to death.

Case 4 (Aggravating) Group B:

‘A Malaysian man, aged 25, was arrested in Kuala Lumpur on suspicion that he was dealing drugs. His property was searched and 400 grams *cannabis* was seized. *He had a previous conviction for selling cannabis in small amounts on the street.* He claimed that someone else had left the 400 grams of cannabis at his house without telling him. He was convicted of trafficking and sentenced to death.’

Table 4.4

Sentence chosen	Favoured mandatory death penalty for cannabis (34%)	Did not favour mandatory death penalty (66%)	Total number (N)	Percentage
Death %	36	13	159	21
Not death %	64	87	615	79
Total number (N)	264	510	774	100

Only a fifth of the respondents considered death to be the appropriate penalty for a drug trader who was found in possession of twice the amount prescribed as requiring a mandatory death sentence, despite that fact that he was a convicted drug peddler. This compares with 78% who said they were in favour of the death penalty for such a crime.

Of the 34%, who had stated that they were in favour of the mandatory death penalty for this type of offence, only 36% sentenced this person to death. Among respondents who did not favour a mandatory system, only 13% considered this case ‘death worthy’.

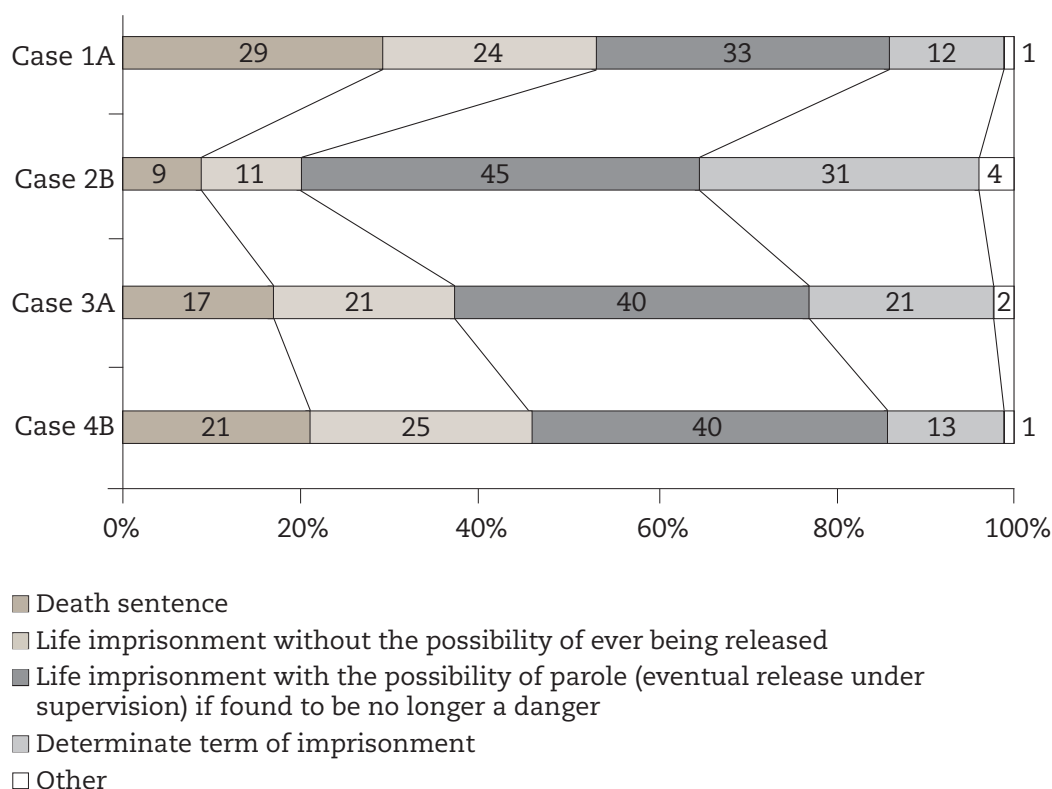
Figure 2: Drug trafficking: Sentence preference using scenarios

Figure 2 shows that imprisonment, either life imprisonment without parole, an indeterminate sentence of life with consideration of parole, or a determinate period of years, was chosen for all scenarios, with only a minority, even in the aggravated cases, selecting life without the possibility of parole.

Given that it has been suggested that if the death penalty for drug mules is abolished it should be replaced by a sentence of 30 years imprisonment, it is interesting to note that, for the two mitigating scenarios (cases 2 and 3 above) where 31% and 21% of respondents chose a determinate sentence of imprisonment, the lengths chosen were well below 30 years:

- For case 2B (a woman importing 100 grams of heroin), 84% chose a sentence of 10 years or less and 99% 20 years or less, the average (mean) length being 8.3 years
- For case 3A (a man importing 100 grams of cocaine), 68% chose 10 years or less and 94% 20 years or less, the average being 10.8 years

Even for the much smaller proportions (12% and 13%) choosing a determinate sentence for the two cases of drug trafficking with an aggravation feature (cases 1A and 4B), 94% chose 20 years or less, with mean lengths of 12.1 and 10.3 years respectively.

Summary

Three findings stand out from consideration of the judgments made on the four drug trafficking scenario cases presented to members of the public, all of which, under Malaysian law, would be sentenced to death, which the respondents were made aware of in each case.

First: There was a wide difference in the proportion of respondents who chose the death penalty depending on the different circumstances of these offences. This indicates that a discretionary system was preferred by a large majority of them, so that the circumstances of each offence could be taken into account.

Second: Even among the minority that had responded to the general question by saying that they supported the *mandatory* death penalty for these drugs trafficking offences, the majority of them did *not* impose it in three of these four cases, and in the most serious case only a slight majority chose death. Further analysis showed that only 10% of respondents, who received the two cases in Group A, and five per cent of those who received the two cases in Group B, chose the death sentence for *both* scenarios they judged. Thus, of the total sample of 1,535 Malaysians who judged these cases, only eight per cent (one in 12) could be said to have acted in line with the law, which makes the death penalty mandatory for *all* these drug trafficking cases.

Third: Although at least 74% of respondents said that they supported the death penalty (either mandatory or discretionary) for these drug trafficking cases, in no instance did as many as 30% endorse the death penalty, even when a very serious case of attempting to import a large amount of heroin was presented to them. In fact, 70% of the respondents did not endorse death as an appropriate punishment for *any* of the drug scenarios they were asked to judge.

5. Judging cases of murder

Respondents in Groups A and B were each given three murder scenarios to judge: murder in the course of robbery with a firearm; domestic murder of a husband by a wife; and a drug-related murder. Three of the six scenarios had an aggravating feature and three had a mitigating feature. These were distributed between Groups A and B, so that each had a mixture of aggravating and mitigating cases to judge. The findings were:

Case 5 (Mitigating) Group A:

‘A man robbed a local shop with a gun and killed the owner by shooting him in the head. He took away with him RM800 cash. *He had not previously been convicted of any crime.* He was convicted of murder and sentenced to death.’

Table 5.1

Sentence chosen	Favoured mandatory death penalty (56%)	Did not favour mandatory death penalty (44%)	Total number (N)	Percentage
Death %	73	37	436	57
Not death %	27	63	214	43
Total number (N)	426	335	761	100

Given the mitigating circumstance of having no previous convictions 57% considered death the appropriate sentence for this deliberate killing during a robbery, 43% did not. Among those who favoured the mandatory death penalty for *all* cases of murder, around a quarter (27%) did not impose it in this case.

Case 6 (Aggravating) Group B:

'A man robbed a local shop with a gun and killed the owner by shooting him in the head. He took away with him RM800 cash. *He had previously been in prison twice for robbery.* He was convicted of murder and sentenced to death.'

Table 5.2

Sentence chosen	Favoured mandatory death penalty (57%)	Did not favour mandatory death penalty (43%)	Total number (N)	Percentage
Death %	78	48	502	65
Not death %	22	52	272	35
Total number (N)	440	334	774	100

Just over a third of those who judged this serious case did not think that death was the appropriate sentence, compared with 91% ,who said that they favoured the death penalty for murder. Even among those who said that death must always be the mandatory sentence for murder, about a fifth (22%) did not chose the death penalty. When compared with case five, it can be seen that having a bad criminal record did not greatly increase the percentage sentenced to death.

Case 7 (Aggravating) Group A:

'A woman deliberately poisoned her husband, who died, *so that she could be free to live with her lover.* She was convicted of murder and sentenced to death.'

Table 5.3

Sentence chosen	Favoured mandatory death penalty (56%)	Did not favour mandatory death penalty (44%)	Total number (N)	Percentage
Death %	53	29	325	43
Not death %	47	71	436	57
Total number (N)	426	335	761	100

Fewer than half of all who judged this case of deliberate murder with no mitigating circumstances chose death. Even among those who were in favour of the mandatory death penalty, only 53% actually chose (endorsed) the death penalty as the appropriate sentence: 47% did not.

Case 8 (Mitigating) Group B:

'A woman, who had been *abused by her husband for many years*, decided to kill him by *deliberately* poisoning his food. A neighbour discovered the death of the husband and reported it to the police. She was convicted of murder and sentenced to death.'

Table 5.4

Sentence chosen	Favoured mandatory death penalty (57%)	Did not favour mandatory death penalty (43%)	Total number (N)	Percentage
Death %	18	8	109	14
Not death %	82	20	665	86
Total number (N)	440	334	774	100

Only one in seven respondents (14%) thought that death was the appropriate sentence. Furthermore, less than a fifth (18%) of those who said that *all* persons convicted of murder *must* be sentenced to death, chose the death penalty in this case with mitigating circumstances.

Case 9 (Mitigating) Group A:

'A young man, *aged 19*, deliberately shot dead a drug dealer who had failed to pay a debt. *He had no previous convictions for violence* and had said that he killed the victim on the orders of an older man. He was convicted of murder and sentenced to death.'

Table 5.5

Sentence chosen	Favoured mandatory death penalty (56%)	Did not favour mandatory death penalty (44%)	Total number (N)	Percentage
Death %	28	13	165	22
Not death %	72	87	596	78
Total number (N)	426	335	761	100

Just over one in five (22%) of those who judged this case considered death to be the appropriate punishment. Furthermore, only just over a quarter (28%) of those in favour of the *mandatory* death penalty chose it for this case of drug/gang murder: 72% did not.

Case 10 (Aggravating) Group B:

‘A man, *aged 35, with previous convictions for violence and drug possession* shot dead a rival drug dealer who had failed to pay back a debt. He was convicted of murder and sentenced to death’

Table 5.6

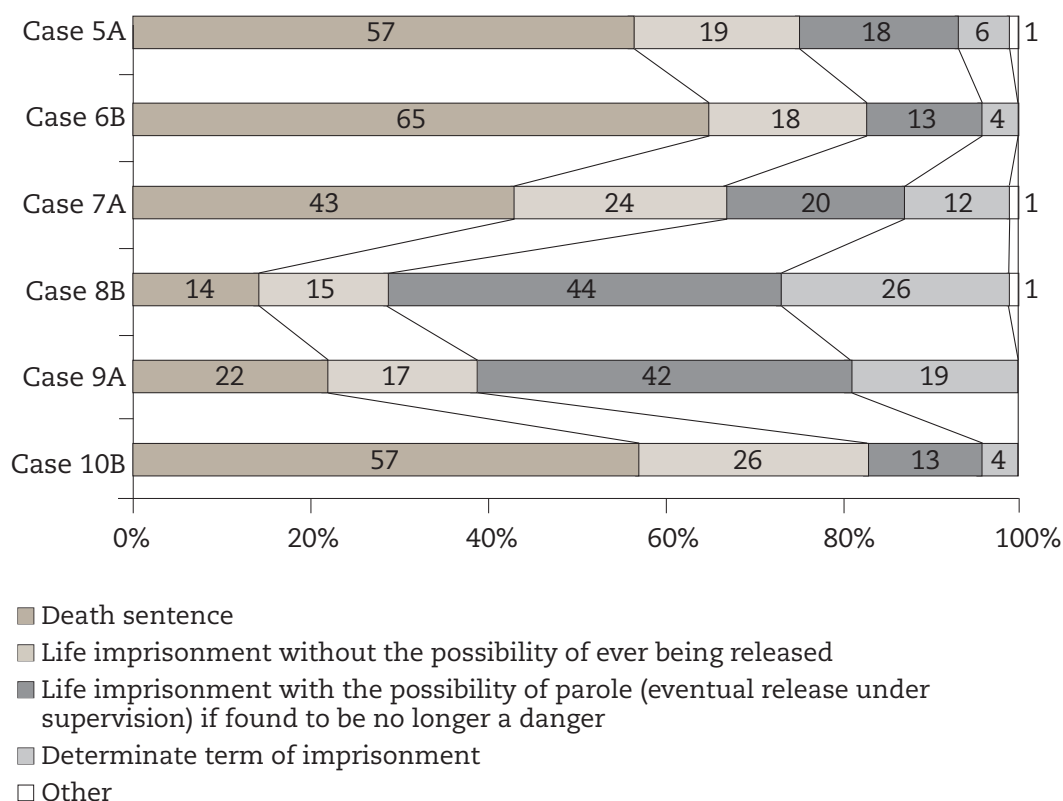
Sentence chosen	Favoured mandatory death penalty (56%)	Did not favour mandatory death penalty (44%)	Total number (N)	Percentage
Death %	65	46	440	57
Not death %	35	54	334	43
Total number (N)	440	334	774	100

Even for this ‘enforcement’ murder by a drug dealer with previous convictions for violence, only 57% chose the death penalty: 43% did not. And of those who said they favoured the *mandatory* death penalty, irrespective of the circumstances, 65% chose death, while 35% did not, even in such serious circumstances.

It should be noted (see Figure 3) that where more than half the respondents chose the death sentence, those not doing so chose, instead, life imprisonment without parole much more frequently than in those scenarios where only a minority chose the death penalty. This suggests that there would need to be discretionary, not mandatory, powers to impose life imprisonment without parole or a determinate sentence of imprisonment, should the death penalty for murder be abolished.

For those who did choose a determinate sentence (ranging from four to 26%), the average length was for no case above 12.5 years, and 85% to 98% (depending on whether the case had an aggravating or mitigating feature) chose 20 years imprisonment or less.

Figure 3: Murder: Sentence preference using scenarios



Summary

- Altogether, the 1,535 people who responded to this survey made 4,605 decisions in murder scenarios (three each) for which the death penalty is the mandatory sentence in Malaysia. Less than half these decisions resulted in a death sentence (43%). The highest proportion who would themselves have chosen death was 65%, followed by two cases where just over half chose death. Only 11% sentenced **all** the murder scenario cases they judged to death, no more than 73% sentenced **any** of the cases to death and 27% sentenced **none** – a considerably lower endorsement of capital punishment than the figure of 91% in favour of the death penalty for murder found in response to the general question of whether they favoured a mandatory or a discretionary death penalty, or no death penalty at all.
- Less than half of the respondents considered that death was the appropriate sentence in three of the scenario cases – in one of them more than 80% did **not** chose death. Thus, it is clear that the majority of these respondents had judged these cases using their *discretion* according to the circumstances.
- Even those who had said they were in favour of the **mandatory** death penalty for murder, most of them being ‘strongly’ in favour, did not, when faced with reality approve of the death sentence in **all** the circumstances they were asked to judge. The proportion of them **not** choosing the death sentence ranged from 22% for the murder/robbery by a recidivist (case 6B) to 82% (case 8B) for the woman who deliberately killed her abusive husband.
- As in the analysis of the drug trafficking scenarios, *saying* that one is in favour of the mandatory death penalty is not the same as choosing to follow this policy in practice when confronted with making a decision of death or life. Thus, the overall percentage of Malaysian

respondents, who actually supported *in practice* the principle of a *mandatory* death sentence for murder, is considerably lower than the response to the general question (56%) might lead one to believe. The most that can be said is that in *only one* case (scenario 6B) did as many as four-fifths of those, who said they favoured a mandatory death sentence, actually impose such a sentence.

- Furthermore, as Table 5.6 shows, among the 56% (866/1,535) who originally said they were in favour of the *mandatory* death penalty for murder – most of them ‘very strongly’ in favour – only 117 (14%) choose death *for all three* scenario cases they were asked to ‘judge’. In other words, they stuck to their principle. As many as one in eight (12%) did not choose death in *any* of the cases. The figure of 56% of the 1,535 people interviewed who said they favoured the mandatory death penalty is, therefore, closer to eight per cent (117/1,535) when tested against the requirement of the law to impose the death penalty in *all* cases.

Table 5.6: Percentage of respondents favouring the mandatory death penalty for murder by number of scenarios for which they imposed the death penalty

	Total	Per cent
Death for <i>all three</i> scenarios	117	14
Death for <i>at least one</i> scenario	760	88
Death <i>not chosen for any</i> scenario	106	12
Total in favour of mandatory death penalty for murder	866	100

6. Joint enterprise in murder

Under section 34 of the Malaysian Penal Code, ‘when a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone’. This is known as ‘joint enterprise’. Respondents were given two examples of murder involving two convicted persons. In both examples (allocated so that one half of the respondents, Group A, responded to scenario one and the other half, Group B, to scenario two) one of the convicted persons had actually killed the victim, while the other was judged to have assisted in the crime and was, therefore, guilty of murder. Both offenders were convicted of murder and, under Malaysian law, would be mandatorily sentenced to death.

The purpose of this question was to see whether there was support for the conviction for murder and, consequently, a mandatory death sentence imposed on the offender who did not do the killing.

Scenario 1 Group A:

Mr A and Mr B, two 23-year-old men, were hanging around together when Mr C appeared, who Mr A did not like. Mr A and Mr C started arguing over a young woman they were interested in. A fight began during which Mr A pulled out a knife and stabbed Mr C to death. Mr B had shouted to Mr A ‘go on’, but otherwise simply stood and watched, making no attempt to intervene. However, both Mr A and Mr B were subsequently convicted of the murder of Mr C and both were sentenced to death.

Seventy-six per cent of respondents thought it would not be appropriate to convict Mr B of murder in these circumstances, for which, under Malaysian law, the penalty is a mandatory death sentence:

Guilty of murder	24%
Guilty of culpable homicide punishable by imprisonment	59%
Not guilty of murder or culpable homicide	11%
Don't know	6%

Scenario 2 Group B:

Mr X and Mr Y, two 23-year-old men, decided to rob a bank. Mr Y, who knew that Mr X had a gun, drove them to the bank and waited outside in the car. Mr X went in, waved the gun and demanded that the cashier hand over money. The cashier pressed the alarm bell. Mr X shot her dead and ran out of the bank. He jumped into the car and was driven away by Mr Y. Both Mr X, the killer, and Mr Y, the driver, were subsequently convicted of the murder of the cashier and robbing the bank for which they were both sentenced to death.

Even in circumstances where Mr Y was aware that Mr X was going to commit a robbery with a gun and actively assisted him, seven out of 10 respondents thought that it would not be appropriate to convict him of murder for which he would be subject to a mandatory death penalty:

Guilty of murder	30%
Guilty of culpable homicide punishable by imprisonment	58%
Not guilty of murder or culpable or homicide	9%
Don't know	3%

7. Judging Firearms Act offences

Time constraints imposed by the length of time that a respondent could be expected to allocate to this survey, meant it was only possible to select one crime circumstance where discharging a firearm with intent to kill or injure (whether any injury occurred or not) took place. The common crime of night-time household burglary was chosen. Group A responded to a case in which a shot was fired but no injury had resulted, and group B to a case where the householder had been shot and injured.

As with the judgments made on the drug trafficking and murder scenarios, support for the death penalty for a firearms offence, in reality, was much lower than the 83% elicited by the general question of whether they were in favour of the death penalty for such a crime.

Case 11 (mitigating) Group A:

A man, *aged 19*, broke into a house at night carrying a loaded pistol and, when disturbed by the householder carrying a stick, shot at him but missed. He had *no previous convictions*.

Table 7.1

Sentence chosen	Favoured mandatory death penalty (42%)	Did not favour mandatory death penalty (58%)	Total number (N)	Percentage
Death %	21	8	99	13
Not death %	79	92	662	87
Total number (N)	321	440	761	100

Eighty-seven per cent of Malaysian respondents did not think that death was the appropriate sentence in such circumstances. This is the inverse of the 83% who favoured the death penalty when asked in general about the punishment for such a crime. Furthermore, eight out of 10, who had said they favoured the mandatory death penalty, did not impose it in these circumstances.

Case 12 (aggravating) Group B:

A man, aged 30, broke into a house at night carrying a loaded pistol. The householder heard him come into the residence and went to see what was happening, carrying a stick. The burglar shot at the householder and *caused a wound in his arm, which was not fatal*. He ran away, but was later caught by the police, convicted under the Firearms (Increased Penalties) Act and sentenced to death. He had *a previous conviction for housebreaking and had served a prison sentence*.

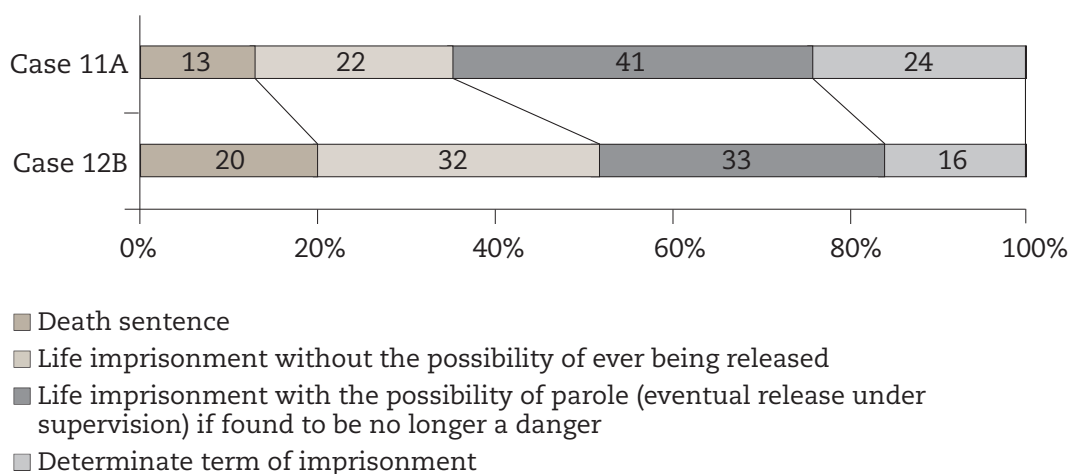
Table 7.2

Sentence chosen	Favoured mandatory death penalty (47%)	Did not favour mandatory death penalty (53%)	Total number (N)	Percentage
Death %	31	11	155	20
Not death %	69	89	619	80
Total number (N)	363	411	774	100

Even when the victim had been shot and injured, only one in five supported the infliction of the death sentence. Of those respondents (47%), who had stated that they were in favour of the mandatory death penalty for this type of offence, only 31% actually sentenced this person to death, as did only 11% of those who did not support the mandatory death penalty.

These two scenarios show, as in drug trafficking and murder cases, a wide difference between the proportion of respondents who claim that they approve of the death penalty and of the mandatory death penalty, and the proportion who think that the cases put before them deserved to be sentenced to death. When faced with the reality of circumstances which would, in law, attract the death sentence automatically, only a minority of the Malaysian respondents supported such a penalty.

Figure 4: Firearms: Sentence preference using scenarios



With regard to the other sentences imposed, Figure 4 shows that life imprisonment without the option of parole was chosen by a third (32%) of respondents for the case of the burglar with previous convictions who shot and injured the home owner, but by only a fifth (22%) in the case of the burglar who had no previous convictions and whose shot missed the victim. The average length of imprisonment chosen by those who favoured a determinate sentence was 12 years, in both cases 10 years or less was chosen by just over 60%, and 95% chose 20 years or less. As with drug trafficking and murder, there was very little support for sentences as long as 30 years.

8. Support for the mandatory death penalty: conclusions drawn from 12 scenario cases

The response to the simple question: ‘Are you in favour of the mandatory death sentence, the discretionary death sentence, or are you opposed to the death sentence and would like to see it abolished, or are unsure?’, indicated strong support for capital punishment in Malaysia – about nine out of 10 citizens endorsed the death penalty for murder, between 74% and 80% for drug trafficking and 83% for Firearms Act offences. Fifty-six per cent endorsed the mandatory death penalty for murder (50% very strongly) but considerably fewer did so for drugs and firearms offences.

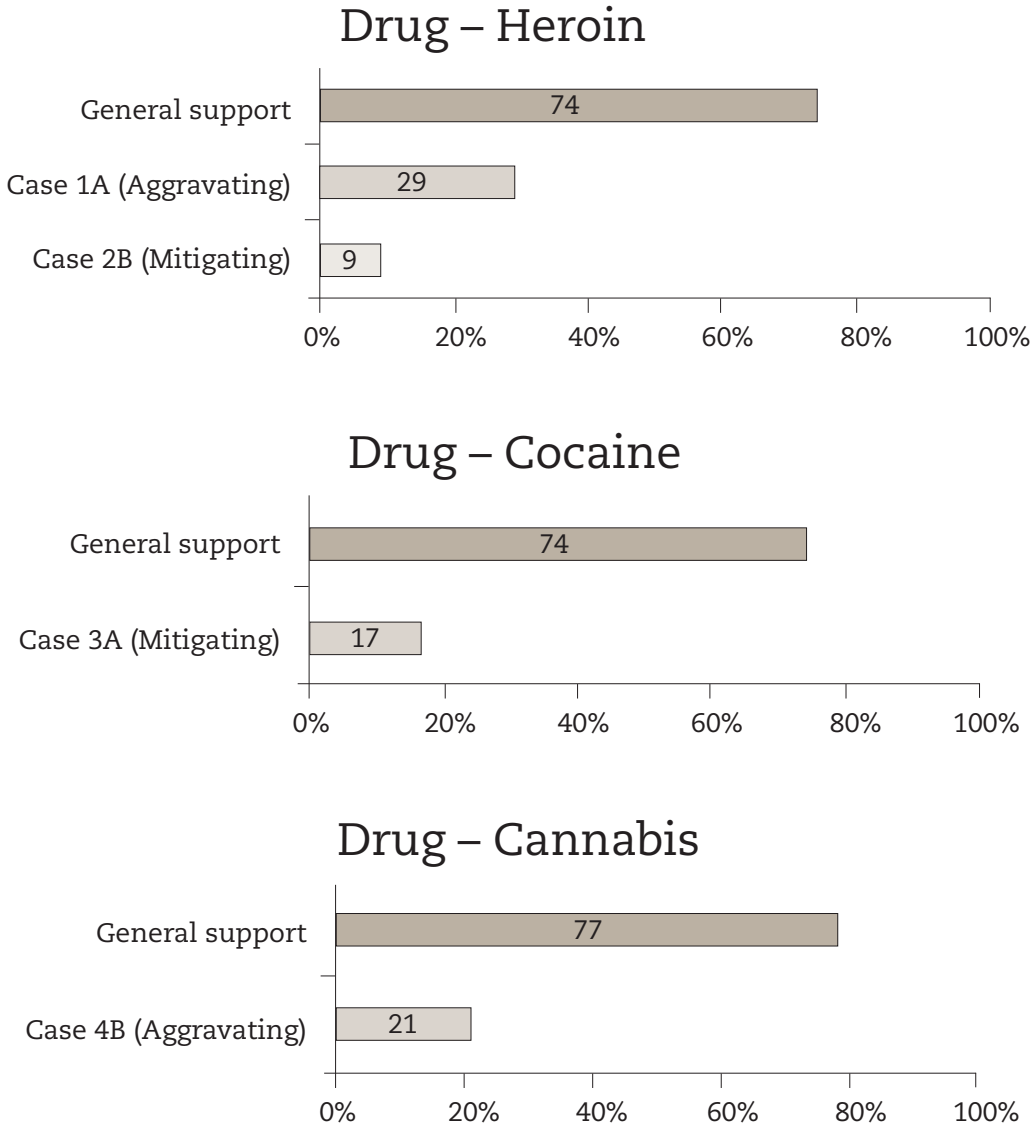
Figure 5 contrast these ‘general’ responses – what might be called support ‘in theory’ – with their responses when faced with the ‘reality’ of making a decision related to specific circumstances. It will be recalled that roughly half the sample judged six scenarios (three of murder, two of drug trafficking and one firearms offence) and the other half judged six different examples of the same kinds of offence.

Given that such high proportions said in response to the general question that they were in favour of the death penalty (whether mandatory or discretionary), how many actually thought that it was the right penalty for the cases they judged?

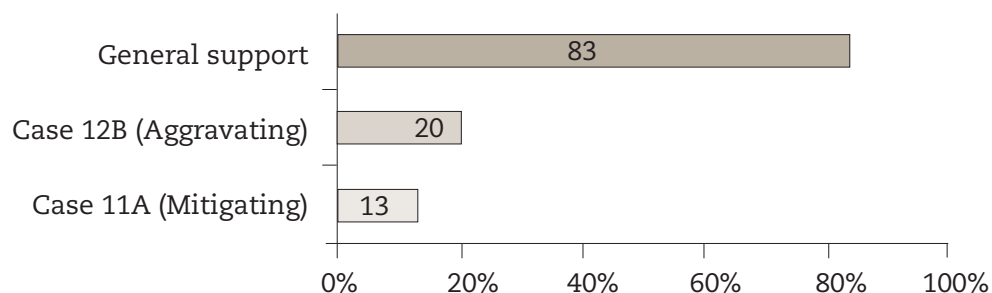
Figure 5 shows that, for only three scenarios that described a murder – two of them with an aggravating feature – did more than half the Malaysian respondents choose the death penalty; for three other murder scenarios, two with a mitigating feature, fewer than half, and as many as 85% in one case, chose a form of imprisonment.

In none of the scenarios that illustrated a case of drug trafficking or of a firearms offence did as many as 30% choose a death sentence and, in one of these scenarios only nine per cent did.

Figure 5: Percentage support for the death penalty in ‘theory’ and in ‘reality’



Firearms offences



Murder

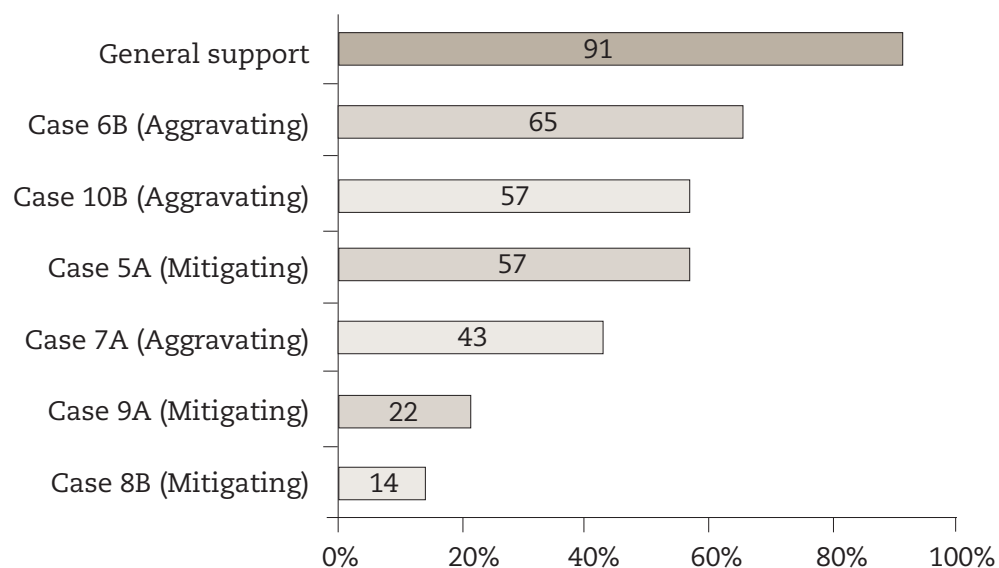


Table 8.1 shows the proportions which endorsed the death penalty for *all six* scenarios they were asked to judge; the proportion which endorsed it for *at least one* of the scenarios and the proportion which did *not* chose death for *any* of the scenarios.

Table 8.1: Respondents choosing the death penalty for six scenarios in Sub-sample A and six in Sub-sample B (12 scenarios in all)

	Sub sample A (N)	Sub sample B (N)	Total (N)	Per cent
Death for <i>all</i> scenarios	9	10	19	1.2
Death for <i>at least one</i> scenario	582	619	1201	78
Death <i>not chosen for any</i> scenario	179	155	334	22
Total	761	774	1535	100

This shows clearly that:

- Hardly any respondents (just 1.2 in 100) considered that **all** the cases they judged were worthy of death. In other words they did not support a general practice of mandatory death sentencing across three different types of crime where the circumstances of the case would be ignored
- As a corollary, just over three quarters applied their discretion in judging these cases. In fact, of the 1,201 respondents who chose death for **at least one** of the six scenario cases, 85% chose it for **no more than three** of the six they were asked to judge
- Twenty-two per cent of respondents were unwilling to sentence **any** of cases they judged to death

Thus, the cumulative evidence from the decisions made by 1,535 Malaysian respondents to scenario cases, all of which would have been sentenced to death mandatorily by a court, shows that only a very small minority of them were, when faced with the reality of making a life or death decision, really in favour of the *mandatory* death penalty for **every case** even for murder.

9. Reasons for supporting the mandatory or discretionary death penalty

It might be thought that deterrence would be the most important reason for choosing to support the *mandatory* death penalty, but as Table 9.1 shows, this was not the case: not even as far as murder was concerned, for which only a third (32%) placed deterrence as their *main* reason. Retribution was the reason placed first for all three types of offence.

Table 9.1: The main, first ranked, reason for supporting the mandatory death penalty

	Murder	Drug Trafficking (All offences combined)	Firearms offences
No excuses, all convicted deserve to die	47	40	45
Unless certain will not be a deterrent to others	32	25	11
Judges vary, everyone to be treated equally	15	26	20
Only way to satisfy victims'/relatives	6	9	9

Those respondents (76% of the total) who answered the general question on support for the death penalty by stating that they favoured a *discretionary* death penalty for at least one of the three crimes for which it is mandatory at present in Malaysia, were asked what their *main* reason was for preferring it. They were presented with three reasons and asked to put them in rank order. Table 9.2 shows that relatively similar proportions, mentioned desert, mitigation, opportunity to be rehabilitated, and parsimonious use of the death penalty for only the most heinous forms of these crimes.

These responses clearly show that the majority of Malaysians base their support for, or rejection of, the mandatory death penalty on the principles of desert and proportionality.

Table 9.2: Reason ranked first for favouring a discretionary death penalty for murder, or drug trafficking, or a firearms act offence

Main reason for preferring a discretionary death penalty	Per cent ranked first
Circumstances differ, not everyone who commits one of these crimes deserves to die. Mitigating circumstances should always be taken into account	31
Some people ... may deserve another chance, they can be rehabilitated. The death penalty should be reserved only for those who could never be rehabilitated	39
The death penalty should be reserved only for those that have committed the heinous forms of these crimes	30

10. Reasons given when choosing whether or not to sentence to death in scenario cases

When judging the scenario cases, respondents were asked to identify the *main* reason why they chose the death penalty, or did not think it was appropriate in the circumstances. These main reasons are summarised in Table 9.3 below for drug trafficking, murder and firearms offences:

- This also shows that the main reasons for choosing, or not choosing the death penalty, relate to the extent to which *retribution in the form of capital punishment* was **either** deemed to be deserved and proportionate **or** an excessive punishment, given the circumstances of the crime and the characteristics of the offender
- In only two scenarios of murder was prevention of repeat offending a reason given, by as many as one in five, for choosing the sentence
- The deterrence of others was not a highly ranked main reason either in cases of murder or in those of drug trafficking: no more than 15% referring to it for **any** of the scenarios
- Thus, one of the main justifications for a mandatory death penalty – *to ensure that no one would doubt that the penalty would be death if convicted of one of these crimes* – was not supported by the majority of the Malaysian citizens as the most important reason for choosing the sentence when they came to judge the scenario cases

Table 10.1: Main reasons for choosing the sentence in 12 scenario cases

	Drug trafficking heroin Case 1 (A) Aggrav.	Drug trafficking heroin Case 2 (B) Mitig.	Drug trafficking cocaine Case 3 (A) Mitig.	Drug trafficking cannabis Case 4 (B) Aggrav.	Robbery murder Case 5 (A) Mitig.	Robbery murder Case 6 (B) Aggrav.	Domestic murder Case 7 (2A) Aggrav.	Domestic murder Case 8 (B) Mitig.	Drug related murder Case 9 (A) Mitig.	Drug related murder Case 10 (B) Aggrav.	Firearms burglary Case 11 (A) Mitig.	Firearms burglary Case 12 (B) Aggrav.
Death sentence	29%	9%	17%	21%	57%	65%	43%	14%	22%	57%	13%	20%
Life for life / desert	13	4	7	8	25	23	16	4	6	16	6	10
Deter others	12	3	8	9	15	15	9	4	8	15	4	5
Prevent repeat	4	2	2	3	10	19	7	3	6	23	3	5
Satisfy victims	-	-	-	-	7	7	9	3	1	3	-	-
Not death sentence	71%	91%	83%	79%	43%	35%	57%	86%	78%	43%	87%	80%
Death excessive	44	32	40	52	23	24	40	40	29	31	45	49
Mitigation & reform	21	54	36	24	16	7	13	42	45	8	36	24
Against in principle / other	6	5	7	4	4	4	5	4	5	5	6	7

11. Level of support for the death penalty: impact of deterrence and innocence

Even so, belief in general deterrence must have been a factor given some consideration in deciding whether to support the death penalty in general. To test how great an influence it might have, all respondents were presented with the following statement and question:

‘Suppose that new scientific evidence proved that the death penalty was *not* a better deterrent than life or very long-term imprisonment for *murder or drug trafficking or firearms offences*.’¹⁹

Would you then/still favour the use of the death penalty or change your mind?

- The proportion in favour of the death penalty, whether mandatory or discretionary, for *murder* dropped from 91% to 57%, with 24% now saying they would oppose it if this were the case, and 19% saying that they now did not know what to think – making as many as 43% no longer clearly in favour of the death penalty
- For *drug trafficking* 42%, rather than about 75%, said they would still favour the death penalty
- For offences under *The Firearms Act*, the proportion favouring the death penalty fell from 83% to 40%
- ***Thus, for both drug trafficking and non-fatal firearms offences, there would be no majority public opinion in favour of the death penalty***

Given that the most frequent reason given for imposing a death sentence for all three types of crime – murder, drug trafficking and firearms offences – was retributive, namely that it was ‘deserved’ given the seriousness of the offence, and the main reason for not choosing the death penalty was that it would be excessive in the circumstances, respondents were asked to consider:

If it was proved to your satisfaction that *innocent* people have in fact sometimes been executed, would you then still favour the use of the death penalty for *murder, drug trafficking and firearms offences, or change your mind*?

The proportions who said they would now ***definitely still favour*** the death penalty fell dramatically:

- For murder from 91% to 33%
- For drug trafficking, from around 75% to 26%
- For The Firearms Act offences, from 83% to 23%

It is clear, therefore, that public support for capital punishment in Malaysia is contingent on it being administered not only fairly and proportionately, but without the possibility of error leading to a wrongful conviction and execution.

¹⁹ This statement reflects the findings of empirical research in the USA on deterrence of murder. For reviews of these findings see, Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective*, 4th edition (2008), Chapter 9, at pp. 347-349. Also, the most recent review carried out by a panel of experts for the American National Academy of Sciences, Daniel S. Nagin and John V. Pepper (eds.) *Deterrence and the Death Penalty*, (2012), Washington DC: The National Academies Press.

12. More executions compared with other policies

Further evidence that the execution of offenders was not regarded as of prime importance in dealing with drug trafficking, murder and firearms offences was revealed when respondents were asked to rank the likely impact on ‘very violent crime leading to death’ and ‘reducing the amount of trafficking in illegal drugs’ of ‘a greater number of executions’ compared with the other policies. Figure 6 shows these rankings, with the percentage placing each policy first and last, and the modal ranking in stars (with the policy most frequently highly ranked given the most stars and the policy least frequently ranked highly given one star).

Figure 6: Modal rank given to five policies most likely to reduce very violent crime leading to death and four policies most likely to reduce the amount of trafficking in illegal drugs. Five/four stars, the highest average (modal) ranking, to one star, the lowest average (modal) ranking

Reduce very violent crimes leading to death	Modal ranking (5 to 1)	Rank %	
		First	Last
‘Better moral education of young people’	★★★★★	39	14
‘More effective policing to bring criminals to justice and make punishment more certain’	★★★★☆	25	9
‘More effective policies to control conflict between drug traffickers and dealers’	★★★★☆	13	13
‘More effective policies to control the possession of firearms’	★★★☆☆	11	15
‘Greater number of executions of murderers’	★★☆☆☆	12	48

Reduce the amount of trafficking in illegal drugs	Modal ranking (4 to 1)	Rank %	
		First	Last
‘Better moral education of young people to reduce the demand for drugs’	★★★★	38	22
‘More effective policing to bring the leading drug dealers to justice’	★★★★☆	24	16
‘More effective border controls to reduce the trade in drugs’	★★★☆☆	23	20
‘Greater number of executions of people caught trafficking in illegal drugs’	★★☆☆☆	15	42

The evidence is clear: among citizens of Malaysia the least-effective policy, in their opinion, would be to seek an increase in the number of executions. This finding underscores those that have emerged from this public opinion poll, namely:

- That when questioned in more detail about the apparent high support for the death penalty, and the mandatory death penalty in particular, we have found, save for the most serious types of murder, that only a minority favour execution as the most appropriate punishment. Even for the most egregious case of drug trafficking, the majority did not support execution, neither did they for the use of firearms when committing crime, even when a person was injured

13. Malaysia and world trends

Respondents were asked two questions regarding Malaysian policy when seen in relation to world-wide trends to abolish the death penalty.

They were first told that, since 1989, the number of countries that have abolished the death penalty completely for all crimes – in peacetime and wartime – has increased from 35 to 99 and then asked:

Do you think that Malaysia should aim to follow this practice and abolish the death penalty completely for all crimes?

- Fifty-nine per cent definitely said ‘No’ but 41% did not reject this idea: 16% being definitely in favour and 25% unsure. This is much lower than the 91% who originally said that they supported the death penalty for murder. When taken together with the findings from the scenario cases, this does not suggest that there would be overwhelming public opposition to abolition of the death penalty in Malaysia

Of all who responded to this survey, 70% had supported the *mandatory* death penalty for at least *one* of the three categories of crime for which it remains the mandatory penalty. They were told that:

‘Most countries have abolished the mandatory death penalty for all offences or are in the process of abolishing it, leaving the decision whether to impose it for the very worst cases to the judge.’

Then they were asked: **Does this information affect your support for the mandatory death penalty? Should Malaysia follow other countries and abolish the mandatory death penalty?**

- Two-thirds of the 70% (ie 46%) who had favoured the *mandatory* death penalty for at least one type of crime said ‘No’ it should be retained.
- Thus, when those already opposed to the mandatory death penalty (30%) for all three types of crime were added to those who now thought that Malaysia should follow these other countries (11%) or were not sure (13%), it became clear that more than half the respondents (54%) were not opposed to Malaysia following the path towards abolition of the mandatory death penalty. Given the information about the world trend, the proportion who *definitely*

wanted to retain the mandatory death penalty fell to 46%: much lower than the 70% who in response to the general question, had supported the mandatory death penalty for at least one of the three types of offence included in this survey

A close-up, slightly blurred photograph of a hand holding a pen, poised to write on a document. The lighting is soft and warm, creating a professional and thoughtful atmosphere. The background is out of focus, showing what appears to be a desk or a similar surface.

PART THREE:

Conclusions and
policy implications

Conclusions and policy implications

Do the findings of this survey support the view that public opinion stands in the way of abolishing the mandatory death penalty for drug trafficking, offences under the Firearms (Increased Penalty) Act, or murder?

The conclusion, **as far as drug trafficking and firearms offences** are concerned is clearly 'no'. Indeed the findings would give strong support to those who believe that the death penalty could be abolished for both these offences without a public outcry. Fewer than half the respondents favoured the mandatory death penalty and for none of the six scenario cases, which they were asked to judge, did more than 30% say that they would have favoured the death penalty. Furthermore, when asked which of four crime prevention policies would be most effective in reducing drug trafficking, 'increasing the number of executions' was ranked last, being ranked first by only 15% and last by 42%. Although a majority of Malaysians had said they favoured the death penalty for drug trafficking and firearms offences, the evidence of this survey, which tested what proportion would, in fact, enforce it, suggests that there would be relatively few who would oppose its complete abolition.

This conclusion also applies to **the mandatory death penalty for murder**. Although a higher proportion of respondents (56%) said they favoured the death penalty being the mandatory punishment in all cases of murder, when they were asked to say what sentence they themselves would pass when shown a mixture of 'scenario' murder cases, some with aggravating and some with mitigating features, only a minority of them (a mere 14%) actually chose death as the appropriate penalty for *all* the cases they were asked to judge. This is only eight per cent of all 1,535 respondents. Furthermore at least 70% did not think that persons convicted of murder in a 'joint enterprise' who had not actually killed the victim, should be found guilty of murder and, thus, liable to be punished by death. It was clear that when faced with the reality of punishment, the majority of Malaysians favoured being able to exercise discretion whether or not to sentence persons convicted of murder to death.

As regards support for the death penalty for murder *in general*, the evidence from the judgments made on the types of murder represented by the scenario cases shows that it was considerably lower than the 91% first elicited by a general question, even for aggravated cases of murder. In only three of six cases did more than half of all respondents, who judged them, choose death (the highest proportion being 65%) and 29% did not choose the death penalty for any of the murder scenarios they judged. When asked to rank five preventive policies in terms of their likely effectiveness in 'reducing very violent crimes leading to death', 'greater number of executions' was placed last, being ranked first by only 12% and last by 48%. Furthermore, if evidence were to be forthcoming that an innocent person had been executed, support for capital punishment would drop dramatically. Taken together, this evidence shows that the level and strength of support among the Malaysian public for the death penalty for murder is lower than is perhaps commonly supposed. This suggests that public opinion ought not to be regarded as a definite barrier to abolition of the death penalty for murder.

Appendix – a note on methods

This method involved the interviewer carrying out one interview per household and skipping three dwelling units for each successful interview, with an average of 10 to 12 successful interviews in each primary sampling unit consisting of 180-200 separate dwellings, profiled by race and housing type from luxury to low cost, in each housing area in sub-districts of the various States in Peninsular and East Malaysia.

In order to achieve a nationally representative quota sample, stratified by race, gender, age (between 18 and 65), income group, location and central, other urban or rural residence, quotas were set using general population profiles derived from *Population Distribution and Demographics Characteristics* (Department of Statistics Malaysia) and the *Media Index Survey* (Ipsos Malaysia). When the resulting sample (N=1,535) is compared with the national population according to these demographic variables (Table A1) it can be seen that it is almost identical. Hence no calibration weights need to be applied to the dataset. Analyses presented in this report, unless otherwise stated, are for the whole dataset (N=1,535).

- Notes: ¹ For age group, gender, race and strata, the *2010 Population Distribution and Basic Demographic Characteristics* provided by the Department of Statistics Malaysia was used to set the quotas.
- ² For monthly household income, the *2011 Media Index Survey* conducted by Ipsos Malaysia was used to set the quota.

Table A1: Comparison of quotas reflecting distribution of characteristics of the Malaysian population with the sample selected obtained

	Quotas	Resulting sample		Quotas	Resulting sample
Age Group			Strata		
18-24	22%	22%	Market centre	30%	29%
25-34	26%	26%	Other urban	44%	43%
35-44	21%	22%	Rural	26%	28%
45-54	18%	18%	Location		
55-65	12%	12%	Johor	12%	12%
Gender			Melaka	3%	3%
Male	51%	51%	Negeri Sembilan	4%	4%
Female	49%	49%	Perlis	1%	1%
Race			Kedah	7%	7%
Malay	53%	56%	Penang	6%	6%
Chinese	27%	26%	Perak	9%	9%
Indian	8%	8%	Kelantan	5%	5%
Non-Malay Bumiputera	13%	10%	Pahang	5%	5%
Monthly household income			Terengganu	4%	4%
Below RM 1,000	20%	16%	KL	7%	9%
RM 1,000 - RM 1,499	16%	18%	Selangor	21%	19%
RM 1,500 - RM 1,999	13%	13%	Sabah	8%	9%
RM 2,000 - RM 2,999	20%	19%	Sarawak	9%	9%
RM 3,000 - RM 4,999	17%	18%			
RM 5,000 - RM 6,999	7%	8%			
RM 7,000 and above	8%	8%			

Table A2 shows the sequence with which the scenario cases were allocated to the sub-samples A and B

Table A2: Allocation of scenarios to Groups A and B

Scenarios by offence type	Aggravating / Mitigating factors	Groups
Drug trafficking, heroin: case 1	Aggravating	Group A
Drug trafficking, cocaine: case 2	Mitigating	Group B
Drug trafficking, heroin: case 3	Mitigating	Group A
Drug trafficking, cannabis: case 4	Aggravating	Group B
Murder, robbery: case 5	Mitigating	Group A
Murder, robbery: case 6	Aggravating	Group B
Murder, domestic: case 7	Aggravating	Group A
Murder, domestic: case 8	Mitigating	Group B
Murder, drug-related: case 9	Mitigating	Group A
Murder, drug-related: case 10	Aggravating	Group B
Discharge firearm, housebreaking: case 11	Mitigating	Group A
Discharge firearm, housebreaking: case 12	Aggravating	Group B

The author



Roger Hood is Professor Emeritus of Criminology at the University of Oxford and Emeritus Fellow of All Souls College.

From 1973 to 2003 he was Director of the Oxford Centre for Criminology and has been a Visiting Professor at the University of Virginia Law School and City University Law School, Hong Kong. In 1986 he received the Sellin-Glueck Award of the American Society of Criminology for 'Distinguished International Contributions to Criminology'; in 2011 the Cesare Beccaria Medal from the International Society of Social Defence; and in 2012, the European Criminology Award from the European Society of Criminology. As consultant to the United Nations, he was responsible for preparing the Secretary-General's 5th, 6th and 7th Quinquennial reports on the status of the death penalty worldwide. Among other books he is author of *The Death Penalty: a Worldwide Perspective* (1st edition 1989; 4th edition with Carolyn Hoyle, 2008) which has been translated into Chinese and Persian. Dr Hood has been appointed CBE (Commander of the Order of the British Empire), Honorary Queen's Council, a Fellow of the British Academy, an Honorary Doctor Laws by Birmingham and Edinburgh Napier Universities, and is a member of the UK Foreign Secretary's Death Penalty Expert Group.

About The Death Penalty Project

For more than 20 years, The Death Penalty Project has worked to protect the human rights of those facing the death penalty. Although the Project operates in all jurisdictions where the death penalty remains an enforceable punishment, its actions are concentrated in those countries which retain the Judicial Committee of the Privy Council in London and in other Commonwealth countries, principally in the Caribbean, Africa and Asia.

The Project's main objectives are to promote the restriction of the death penalty in line with international minimum legal requirements; to uphold and develop human rights standards and the criminal law; to provide free and effective legal representation and assistance for those individuals who are facing the death penalty; and to create increased awareness and encourage greater dialogue with key stakeholders on the death penalty.

The provision of free legal representation to men and women on death row has been critical in identifying and redressing a significant number of miscarriages of justice, promoting minimum fair trial guarantees, and establishing violations of domestic law. The Project has also submitted numerous complaints to the United Nations Human Rights Committee, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights on behalf of prisoners sentenced to death, alleging breaches of international human rights standards.

Some of the Project's landmark cases, which have restricted the implementation of the death penalty in the Caribbean, include *Pratt & Morgan v the Attorney General of Jamaica* [1994] 2 AC 1, *Lewis v the Attorney General of Jamaica* [2001] 2 AC 50, *Reyes v the Queen* [2002] 2 AC 235, *The Queen v Hughes* [2002] 2 AC 259, *Fox v the Queen* [2002] 2 AC 284 and *Bowe & Davis v the Queen* [2006] 1 WLR 1623. Other landmark cases include *Mutiso v Republic*, judgment of the Court of Appeal at Mombasa, 30 July 2010 (abolition of the mandatory death penalty for murder in Kenya); *Attorney General v Kigula et al.*, judgment of the Supreme Court of Uganda, 21 January 2009 (abolition of the mandatory death penalty and delay on death row in Uganda); *Kafantayeni et al. v Attorney General* 46 ILM 564 (2007) (abolition of the mandatory death penalty in Malawi); *Boyce et al. v Barbados*, decision of the Inter-American Court, 20 November 2007 (savings clause, mandatory death penalty and prison conditions found to be in violation of the American Convention on Human Rights) and *Cadogan v Barbados*, decision of the Inter-American Court, 24 September 2009 (mandatory death penalty and lack of psychiatric evidence at trial).

Notable publications include *A Penalty Without Legitimacy: the Mandatory Death Penalty in Trinidad and Tobago* (2009) by Professor Roger Hood and Dr Florence Seemungal; *Public Opinion on the Mandatory Death Penalty in Trinidad* by Professor Roger Hood and Dr Florence Seemungal; *The Death Penalty in Japan* co-authored by Maiko Tagusari, Professor David Johnson and Dr Mai Sato; and *A Guide to Sentencing in Capital Cases* by Edward Fitzgerald QC and Keir Starmer QC.

Summary

In Malaysia, the death penalty is the *mandatory* and, thus, the *only* punishment available to the courts for persons convicted of murder; for trafficking in narcotics in various amounts; and for discharging a firearm during the commission of various crimes, even if no-one is hurt. There is a growing political and public debate. Should the mandatory death penalty be abolished and replaced by a discretionary system where capital punishment is used only in exceptional circumstances, or abolished altogether? This study reports the findings of a major public opinion survey of the views of a representative sample of 1,535 Malaysian citizens on this issue. A large majority said they were in favour of the death penalty, whether mandatory or discretionary: 91% for murder, 74% to 80% for drug trafficking depending on the drug concerned, and 83% for firearms offences. Concerning the *mandatory* death penalty, a majority of 56% said they were in favour of it for murder, but only between 25% and 44% for drug trafficking and 45% for firearms offences.

When asked to say what sentences they would themselves impose on a series of 'scenario' cases, all of which were subject to a mandatory death sentence, a large gap was found between the level of support 'in theory' and the level of support when faced with the 'reality':

- For none of four scenario drug trafficking cases did more than 30% choose the death penalty, even when one case involved smuggling 25kg of heroin. Only 8% chose death for all the scenario cases they judged
- Regarding 6 murder scenarios, a majority chose death for only 3 of the cases, the highest proportion being 65% for a recidivist robber
- Of the 56% who said they favoured the mandatory death penalty for murder whatever the circumstances, only 14% of them actually chose the death penalty for all the scenario cases they judged. This was only 8% of the total number of respondents
- When judging two scenarios where a firearm had been discharged during a burglary, only 20% chose death in the most serious case where the person fired at had been wounded
- Only 1.2 persons in 100 thought that the death penalty was the appropriate punishment for all 12 scenario cases of murder, drug trafficking and firearms offences that were judged – showing decisively that the vast majority favoured a discretionary use of the death penalty
- The main reason why people chose the death penalty was retribution and when against it they said it would be a disproportionate punishment. Deterrence was mentioned by no more than 15%
- When interviewees were asked whether they would support the death penalty if it were proven that innocent persons had been executed, the proportion in favour for murder fell to 33%, for drug trafficking to 26%, and to 23% for firearms offences
- 'Greater number of executions' was ranked as the least-effective policy for reducing very violent crimes leading to death and for reducing the amount of trafficking in illegal drugs
- These findings suggest that there would be little public opposition to abolition of the mandatory death penalty for drug trafficking, murder, and firearms offences. Public support for the death penalty for murder is also lower than is perhaps assumed, so may not be regarded as a definite barrier to complete abolition

