This article examines the recent changes to the death penalty for certain murder offences. It explores many of the problems associated with granting Judges a complete discretion in deciding whether or not to impose the death penalty in such cases. It argues that if discretion is to be the better part of valour, then Judges do need some guidance in making rational and consistent sentencing decisions in murder cases.

The Death Penalty and the Desirability of Judicial Discretion

“There is no way to really do it right. The final decision has always come down to the members of our (Supreme Court) as to whether someone should live or someone should die ... I am not smart enough to make that decision on any fair and consistent basis given the tremendous range of facts and circumstances that affect every victim and every defendant and every set of facts that make up a case.”

Arizona Supreme Court Judge Stanley Feldman (July 15, 2002)

Introduction

The changes to the death penalty for murder were finally announced in Parliament late last year.\(^1\) As promised earlier by the Law Minister, this followed consultations with law officers, legal practitioners and academics. The new murder provisions \(^2\) contain no surprises as the mandatory death penalty is to be retained, as previously announced, only for intentional killing under s 300(a) of the Penal Code. For the three remaining forms of murder under s 300(b) to s 300(d) of the Code, namely, intentionally causing a bodily injury the offender knows is likely to cause death, intentionally causing a bodily injury sufficient in the ordinary course of nature to cause death and committing an act the offender knows is so imminently dangerous that it must in all probability cause death, the death penalty is to be imposed at the sole discretion of the trial Judge. He may opt instead to impose life imprisonment with caning.

A Matter of Discretion

An assumption that surrounded some of the debates in Parliament on the death penalty was the importance of granting Judges discretion in sentencing. This was said to be important in ensuring that Judges are able to decide whether the death penalty ought to be imposed according to the circumstances of each case. This is an attractive proposition especially for liberalists and constitutional lawyers. It is consistent with our constitutional ideals of allowing Judges rather than Parliament to decide the appropriate sentence. This, it has been suggested, is in keeping with judicial sovereignty, the doctrine of separation of powers and the independence of the judiciary.

The truth is that, with mandatory punishment, minimum sentences, statutory sentencing guidelines and the like, sentencing has long ceased to be the dominant preserve of Judges in many countries, including Singapore. Indeed, in one of his last judgments before his retirement, Chief Justice Chan Sek Keong ruled that since the power to prescribe punishments for offences rests with Parliament and not the Judges, it must follow that no written law of general application prescribing any kind of punishment for an offence, whether such punishment be mandatory or discretionary and whether it be fixed or within a prescribed range, can be said to be a trespass onto the judicial power.\(^3\)

Consequently, a constitutional challenge in Mohammad Faizal bin Sabtu \(^4\) against s 33A of the Misuse of Drugs Act, which directs the Courts to impose, at the very least, the mandatory minimum punishments of imprisonment and caning based on a previous executive decision by the Director of the CNB to detain the accused at a Drug Rehabilitation Centre, failed. The Court was not convinced that treating a DRC admission as a previous conviction, for the purposes of imposing an enhanced minimum mandatory punishment, was a violation of the constitutional safeguard of separation of powers.
Has one outcome of the new death penalty provisions, therefore, resulted in a victorious wrestling of the actual sentencing-decision process back to the Judges? And more importantly, will the new law represent a triumph for justice for victims and offenders alike?²

The Problem with Judicial Discretion

When the applause, for having finally succeeded in giving Judges an absolute discretion whether or not to impose death in certain murder cases, subsides, we may perhaps realise the true significance of what we have done. We have imposed on individual Judges the awesome responsibility of solely deciding whether or not to impose the death penalty. Would such an imposition even on Judges experienced in criminal practice always lead to desirable outcomes?⁶

Judicial discretion has and always will play a vital role in the criminal justice system. However, its desirability in the sentencing process depends largely on the manner in which it is exercised. Obviously, such a discretion must not be exercised in an arbitrary or irrational fashion leading to unjust and inconsistent outcomes. This is all the more important in respect of the discretionary death penalty. It is the irreversible nature of the death penalty and its categorical difference from other forms of punishment that make any possibility of inconsistency in sentencing unacceptable. On the other hand, a reluctance to impose the penalty in deserving cases will also defeat the intent of Parliament that the death penalty must remain as a deterrent punishment in our law.⁷ Because consistency in sentencing in like cases is so much about equality of treatment, fairness and ultimately justice, ensuring consistency in sentencing is crucial. Any inconsistency in the imposition of the death penalty will thus be an unwelcome outcome and will lead to both injustice and public disquiet.

Sentencing benchmarks and guidelines have been set by judiciaries the world over to have some semblance of consistency. Indeed, the Singapore Court of Appeal has had occasion to admonish even High Court Judges for not following its sentencing guidelines.⁸

In Public Prosecutor v UI,⁹ Chief Justice Chan Sek Keong, in delivering the judgment of the majority in the Court of Appeal, highlighted the importance of consistency in sentencing:

A high level of consistency in sentencing is desirable as the presence of consistency reflects well on the fairness of a legal system. In contrast, the presence of inconsistency in sentencing diminishes the idea of justice being equal to all in a legal system; it also leads to public cynicism about the legal system in question and eventually, to the loss of public confidence in the administration of justice.

Judicial experience in India and the US, which have in place the discretionary death penalty for first-degree murder, highlights some of the problems of judicial discretion. In India, for example, the death penalty is only imposed on crimes which have been deemed by Judges as the “rarest of the rare” offences which has resulted in a de facto abolition¹⁰ of the death penalty by the judiciary. Much literature has centered on how the “rarest of the rare” formula has resulted in the death penalty being arbitrarily and inconsistently applied or withheld in India.¹¹ As noted by one commentator, there is “no consistent or reliable pattern under which Judges will exercise their discretion. The gnawing uneasiness that the same case if heard by a different set of Judges may have resulted in a different punishment will always rankle in the minds of those successful death row convicts facing the noose”.¹²

This is especially so in cases which involve rape and murder, dowry killings and honour killings. For instance, in the case of Dhana v State of Bengal¹³ and Raosaheb v State of Maharashtra,¹⁴ both accused had committed rape and murder of their victim aged thirteen and four and a half years old respectively. However, only Dhananjoy’s sentence was upheld while Raosaheb’s death sentence was reduced to life imprisonment by the Supreme Court.

In the US, some notable cases also suggest that the death penalty has been meted out inconsistently. For example, Timothy McVeigh,¹⁵ who was responsible for the bombing of Oklahoma City building in 1995 in which more than 100 people were killed, was executed but his accomplice Terry Nichols was given life sentences despite being found guilty of conspiracy in the same crime.

Another unintended consequence of the move towards judicial discretion is that even perceived inconsistency in imposing the death penalty will provide fodder to the death penalty abolitionist school. Amnesty International, for example, has readily relied on its study of Court decisions involving rape and murder in India in support of its claim that there is “ample evidence to show that the death penalty [in India] has been an arbitrary, imprecise and abusive means of dealing with defendants”.¹⁶

There are a number of other questions that arise with this new found discretion in murder cases. What is to be the
basic approach, given that Judges are human beings and may have some underlying philosophical and other personal differences in their approach to imposing the death penalty.17

If the choice of either life of death is largely influenced by a Judge’s subjective inclinations then the consequences of that decision will be unjustly borne by the offender or the public. As noted by authors Julian V. Roberts and David P. Cole, “there may well be variation among judges in terms of sentencing purposes and the sentence imposed: judges may favour different sentencing purposes, which will give rise to different disposition”, thereby resulting in disparity in sentencing.18 Such subjectivity has the potential to cause like cases to be sentenced differently.

It is interesting to note that from ancient times the law has attempted to deal with similar dilemmas Judges face. Some familiar doctrines have provided creative solutions to such problems. One such example is the concept that an accused person can only be convicted if his guilt is proved “beyond a reasonable doubt”.

The origins of this cherished doctrine apparently lie in ancient Christian theology.19 The “beyond a reasonable doubt” rule was originally not intended to protect the accused, as we believe the rationale of the rule to be to-day, but to protect “the souls of the jurors against damnation”.20 In a criminal trial in the Christian past, the fate of the Judge was apparently as much at stake as the fate of the accused. Convicting an innocent person was regarded as a potential mortal sin. The result was that Judges and jurors were reluctant to convict and impose the then standard “blood punishments” of execution and mutilations. Philosopher William Paley described the situation in 1785 when English jurors were reluctant to convict as they experienced “a general dread lest the charge of innocent blood should lie at their doors”.21 The reasonable doubt rule came about only because of this religious reluctance to convict. The rule was thus not designed to make it more difficult for the jurors to convict, but to make it easier for them to do so by assuring them that they could convict without risking their own salvation so long as they had no “reasonable doubts” as to the accused person’s guilt.22

The greatest advantage of the mandatory imposition of the death sentence is that it generally masks or suppresses a Judge’s subjective moral inclinations and makes a duty to enforce the law more relevant than resorting to personal beliefs and convictions.

The Pursuit of Consistency in Sentencing

The real question that will plague our Judges is how is consistency in sentencing murder cases to be maintained? Which type of murders under ss 300(b) to (c) qualify more readily for the death penalty, if at all? Is the difference in liability between the various sub-sections other than perhaps 300(d) that clear? Do Judges begin by imposing a death sentence or is life imprisonment to be the default sentence?

In the absence of statutory guide lines, what factors ought the trial Judge to take into consideration in imposing the
death sentence? How different are these factors from those that would already been taken into account between him, in finding the offender guilty, and the Public Prosecutor in bringing the particular murder charge before the Court? How does a Judge maintain sentencing consistency between like cases and at the same time allow for adequate consideration for cases with different factual matrixes as he is also required to do? 23

It ought to be pointed out that the discretionary death penalty is not something entirely new in our judicial history. Section 3 of the Kidnapping Act 24 provides Judges with the discretion to impose either life imprisonment and caning or the death penalty. A general observation from the reported kidnapping cases is that the death penalty has almost never been imposed.25 In Sia Ah Kew and Others v Public Prosecutor,26 the Court of Appeal substituted the death sentence imposed in the High Court with life imprisonment and caning for an offence of kidnapping. The Court rejected the view of the trial Judges that “the alternative sentence of life imprisonment should be imposed only when there are some very exceptional circumstances which do not justify the imposition of the death sentence” as erroneous.27 Chief Justice Wee Chong Jin explained:28

It is a long and well established principle of sentencing that the Legislature in fixing the maximum penalty for a criminal offence intends it only for the worst cases.
However, in the case of kidnapping for ransom the discretion given to the courts as regards the sentence is, as earlier stated, very limited in scope. In our opinion the maximum sentence ... would be appropriate where the manner of the kidnapping or the acts or conduct of the kidnappers are such as to outrage the feelings of the community.

It follows from this reasoning that the default position in murder cases, other than in s 300(a), is life imprisonment. Consequently, the imposition of the death penalty ought to be the exception rather than the rule and reserved for the worst cases or where the manner of the killing can be said to “outrage the feelings of the community”. This mirrors the position that is taken in India. Section 354(3) of the Indian Criminal Procedure Code provides that where the alternative sentence of death penalty is imposed, Judges must record “the special reasons for such a sentence”.29

The object of the changes to the mandatory death penalty after all, as explained in the ministerial statement is that it “will result in the mandatory death penalty applying to a narrower category of homicides, compared to the situation today”.30 The changes are aimed “to ensure that our sentencing process balances various objectives: justice to the victim, justice to society, justice to the accused and mercy in appropriate cases”.31

The Need for General Sentencing Guidelines

Recognising that some form of inconsistency is inevitable, countries with the discretionary death penalty have sought to keep it within limits by formulating sentencing guidelines either as statutory guidelines or guidelines developed by the judiciary. Such guidelines often involve the weighing of pre-determined aggravating and mitigating factors in order to determine whether the death sentence should be imposed. A principled approach guided by clear factors in the sentencing process for murder offences must thus be the way forward.

It may now fall on the Chief Justice or the Council of Judges to lay down some general guidelines as to when the death sentence ought to be imposed until further clarification from the Court of Appeal. What then should these guidelines contain?

In his first announcement in Parliament on changes to the death penalty in July 2012, the Law Minister gave his opinion as to some factors which have to be considered in their totality “in deciding whether and how to apply the death penalty to a particular offence”32:

1. The seriousness of the offence, both in terms of the harm that the commission of the offence is likely to cause to the victim and to society;
2. The personal culpability of the accused;
3. How frequent or widespread the offence is in our society; and
4. The need for deterrence.

If we consider the decisions of the Court of Appeal in the kidnapping cases then the following factors are relevant:33

1. How rampant the particular type of offence is;
2. The manner in which the offence was committed; and
3. Whether the conduct of the accused can be said to outrage the feelings of the community.

In addition to the seriousness of the particular offence and the offender’s culpability, our Courts have always considered an accused person’s antecedents to be relevant to sentencing. Whether the accused has been convicted of offences previously, which may demonstrate his violent propensities or the danger he poses to society, would certainly be a factor that the Court ought to take into consideration.

One of the difficulties with the new regime is that it now suggests an obvious disparity in liability between “intentional killing” under s 300(a) of the Penal Code and infliction of intentional injuries resulting in death in the other sub-sections of s 300. The framers of the Code, however, did not think the degrees of culpability were significant to warrant a different punishment other than death for all types of murders.34 If premeditated murder under s 300 (a) deserves the mandatory death penalty, what other cases of murder would be close to its heinousness to warrant the discretionary death penalty being imposed? Indeed, as a UK Commission recognised, “among the worst murders are some which are not premeditated such as murders committed in connection with rape, or murders committed by criminals who are interrupted in some felonious enterprise and use violence without premeditation, but with a reckless disregard of the consequences to human life”.35 On the other hand, there are cases of premeditated murders such as suicide pacts and mercy killings not deserving harsh punishment although these are not likely to be prosecuted for murder by the Public Prosecutor.
Looking at foreign jurisdictions such as India and the US, some common factors that are considered for first-degree murder include:

**Aggravating Factors**
1. Whether the manner in which the murder was committed was brutal or vicious;\(^36\)
2. Whether the accused was in a position of power or trust over the victim, and abused that position; and\(^37\)
3. Whether the victim was in a position of vulnerability.\(^38\)

**Mitigating Factors**
1. Whether the defendant was an accomplice in a murder committed by another person and his participation in the offence was relatively minor;\(^39\)
2. Whether the defendant has no significant history of prior criminal activity;\(^40\)
3. Whether the defendant was a youth at the time of the crime.\(^41\)

The foreign guidelines are calibrated for the crime of murder with the intention to kill, which include cases where the mandatory death penalty would apply in Singapore. However, these guidelines ought to assist to ensure legal objectivity and to reduce judicial subjectivity in order to achieve some degree of consistency in sentencing.

In countries where the death penalty has been abolished, those convicted of murder are sentenced to mandatory life imprisonment or to substantial prison terms. It is observed that in such countries, unless the murder is of an outrageous nature, the maximum sentence for murder, that is, life imprisonment without parole, is rarely imposed.\(^42\)

Of course, one needs to bear in mind that the discretion of our Judges is limited to a decision between life imprisonment and death. This is in contrast with some countries where the Judges have the discretion to determine the length of incarceration period to be imposed. Nonetheless, the factors which these Judges consider in sentencing cases of murder could provide us some insights to the factors relevant in determining when the death penalty should or should not be imposed.
In England for instance, the “starting point” for murder committed by an accused over 21 years of age is 30 years’ imprisonment. A life imprisonment is reserved for offences of seriousness considered to be “exceptionally high”. These include:\(^43\)

1. a murder of a child involving abduction or sexual or sadistic motivation;
2. a murder done for the purpose of advancing a political, religious, racial or ideological cause;
3. a murder by a person previously convicted of murder;
4. the murder resulted of two or more persons involving a substantial degree of premeditation or planning, abduction, or sexual or sadistic conduct.

Additional aggravating or mitigating factors may result in the minimum sentence or a whole life order being imposed.\(^44\) Additional aggravating factors include degree of planning, vulnerability of the victim due to age or disability, abuse of trust, infliction of mental or physical suffering, duress or threats against another person to facilitate commission of the murder, the fact that the victim was providing a public service and concealment or dismemberment of the body. Due to the gravity of the offence of murder, relevant mitigating factors other than the age or mental disability of the accused are confined to the degree of culpability as regards the manner in which the murder was committed.

In Australia, only four states impose mandatory life imprisonment for murder cases. Even when Courts have such discretion to impose non-parole sentence, it is rarely imposed.\(^45\)

In New Zealand, the mandatory life imprisonment for murder has been replaced with a presumption in favour of life imprisonment, a presumption which can be rebutted by the accused person if he establishes, to the satisfaction of the Court, that an indefinite period of imprisonment would be manifestly unjust.\(^46\) If the presumption is rebutted, the offender must still serve a minimum period of 10 years in prison.\(^47\) In cases where the Court regards the murder to be of a heinous nature, the Court will impose a minimum period of 17 years’ imprisonment. Such cases usually consist of the following:

1. The murder was committed in the course of another serious crime;
2. It was committed with high level of brutality, cruelty and depravity;
3. If it was part of a terrorist act; or
4. If the offender has been convicted of two or more murders.\(^48\)

Conclusion

Admittedly, judicial discretion has its fair share of problems. Yet, its significance lies in the fact that it allows individualised considerations to be taken into account during the sentencing process which the mandatory death penalty fails to ensure. That, however, must be balanced with the need for consistency in sentencing between cases and between Judges with human predilections which a mandatory sentence does deliver. It is hoped that there will be broad sentencing guidelines in murder cases that will make the sentencing process in such cases more objective, rational and transparent. Only then can the new found judicial discretion in murder cases truly represent the better part of valour.

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Notes

2 Introduced by the Penal Code (Amendment) Act 32 of 2012 which came into force on 1 January 2013.
3 Mohammad Faizal bin Sahbu v PP [2012] SGHC 163 at [45].
4 [2012] SGHC 163
5 According to the Law Minister’s statement in Parliament on 9 July 2012, the changes will ensure that our sentencing framework will balance various objectives, namely, justice to the victim, to society and to the accused, although he acknowledged that it is a “matter of judgment and the approach being taken is not without risks”.\(^5\)
6 Interestingly, the Law Minister revealed in Parliament during a debate on changes to the death penalty for drug offences the views of the senior judiciary that “ it is best that the legislature define in the clearest possible terms when the ultimate punishment is justified”: Singapore Parliamentary Debates, Official Report (14 November 2012) volume 89.