

BRIEFING FOR 3RD CYCLE OF UNIVERSAL PERIODIC REVIEW - MALAYSIA

THE DEATH PENALTY FOR DRUG OFFENCES

This briefing details developments in the legislation and practice surrounding the death penalty for drug offences in Malaysia since the last session of the UPR (2013), ahead of the 3rd examination cycle (31st Session of the UPR Working Group, 6th November 2018), and suggests strategic recommendations for Member States.ⁱ

Malaysia is one of the leading death-sentencing states in the world. Despite some small steps towards reducing application and increasing transparency in 2017, Malaysia continues to resort to sentencing individuals to death for often minor drug offences, in violation of international human rights law.

BACKGROUND

- Malaysia has not **ratified** the International Covenant on Civil and Political Rights and its Second Optional Protocol, nor the Convention against Torture.
- During the **second cycle of Universal Periodic Review** (UPR) in October 2013, Malaysia received twenty recommendations specifically on the death penalty, making it the fourth most addressed topic.ⁱⁱ Most of the recommendations addressed the issues of the mandatory death penalty (calling for its abolition) and the implementation of a moratorium. Malaysia rejected all those recommendations, except for one.

STRATEGIC RECOMMENDATIONS FOR MEMBER STATES

- ✓ Ratify without reservations the International Covenant on Civil and Political Rights and its Second Optional Protocol;
- ✓ Ratify without reservations the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol.

THE DEATH PENALTY FOR DRUGS IN MALAYSIA: CONTEXT AND DEVELOPMENTS

- Under the Dangerous Drugs Act 1952, drug trafficking may be punishable by death, despite international human rights law prohibitions on the imposition of capital punishment for drug offences. Drug trafficking is the main offense for which death sentences are handed out in Malaysia.
- During the 2013 UPR, the Government of Malaysia held that *“the death penalty is only applied on the most serious crimes [...] and only after all rights of appeal have been exhausted.”* The Government also noted that *“in recent years there has been more debate on the issue of the death penalty in Malaysia. [...] The Government remains open and will continue the engagement and consultation with the public on this matter including on possible alternatives to the death penalty.”*ⁱⁱⁱ
- In November 2017, Parliament amended the Dangerous Drugs Act to abolish the **mandatory death penalty** for drug trafficking.^{iv} This reform, which came into force on 15 March 2018,^v allows judges to use their discretion – under specific conditions – in sentencing drug trafficking offences where capital punishment was previously applied automatically. While this reduction in scope of the application of the death penalty is laudable, several aspects of this reform appear problematic. Among others:
 - a. Judicial discretion is still significantly limited by the restrictive conditions set out in the amended Section 39B(2A) of the Dangerous Drugs Act;
 - b. The alternative punishment available to the judge is life imprisonment and at least fifteen strokes of caning. Caning is an inhuman and degrading punishment that violates international law; while mandatory life imprisonment is often disproportionate to the offences under consideration;
 - c. The reform does not apply retroactively, thus subjects already sentenced to death will not be able to have their case reviewed in line with the new legislation.

STRATEGIC RECOMMENDATIONS FOR MEMBER STATES

- ✓ Consider establishing a moratorium on all executions and commuting existing death sentences; suspend and review all previous convictions of drug trafficking resulting in a death sentence, including persons sentenced prior to the amendment of the Dangerous Drugs Act;
 - ✓ Review Section 39(B) of the Dangerous Drugs Act to allow judges to consider any special circumstances concerning the defendant or the reasons for the crime; remove caning as alternative form of punishment when the death penalty is not imposed.
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- While the secrecy around the use of the death penalty was lifted to a limited extent in 2016,^{vi} **data** on death sentences for drug offences remain opaque. According to research by Harm Reduction International, the last known execution for drug crimes dates back to 2013; however, of the estimated 1124 people on death row in 2017, at least 675 –over 60% – were charged with drug offences.^{vii} In 2018 alone, at least seventeen sentences for drug trafficking and smuggling were recorded, of which eight against foreign nationals.^{viii}
 - Executions are carried out in secret with no established procedure to notify the person sentenced to death or their family.^{ix} Very short notice (two days at most) is the norm.
 - Over 400 **foreign nationals** (including migrant workers) are reportedly on death row in Malaysia,^x many for drug-related crimes. Foreign nationals are particularly vulnerable to violations of basic human rights and due process guarantees. According to the NGO Iran Human Rights, there are more than 80 Iranians currently on death row in Malaysia for drug charges in solitary confinement; they were not provided with Farsi interpreters during their interrogations or trials and were not given fair due legal process.^{xi}
 - Very little is known about the status and **living conditions of individuals in death row** in Malaysia. Once their sentence has been imposed, they are usually kept in solitary confinement,^{xii} where prisoners often lack hygienic conditions or access to potable water, creating conditions of disease and ill health.

STRATEGIC RECOMMENDATIONS FOR MEMBER STATES

- ✓ Annually publish official detailed information on the use of the death penalty (including, but not limited to: the number of people sentenced to death and executed; the nature of offenses; the identity of executed prisoners; the number of overturned death sentences on appeal; the number of pardoned convicts);
- ✓ Ensure that all persons at risk of the death penalty are questioned in the presence of a lawyer or legal counsel, and an interpreter when needed;
- ✓ Ensure fundamental rights of prisoners in death row are upheld, including visitation rights, and that death row prisoners be guaranteed safe and humane conditions of detention.

ⁱ More detailed information on the use of capital punishment in Malaysia is provided in the report 'Death Penalty in Malaysia: Joint stakeholder report for the 31st session of the Working Group on the Universal Periodic Review – March 2018' submitted by: Anti-Death Penalty Asia Network (ADPAN), Ensemble contre la peine de mort (ECPM), The Advocates for Human Rights, Harm Reduction International (HRI), The World Coalition Against the Death Penalty (WCADP), Kuala Lumpur and Selangor Chinese Assembly Hall Civil Rights Committee (KLSCAHC/Malaysia), Malaysians Against the Death Penalty (MADPET)

ⁱⁱ 'UPR Statistics on Malaysia', *UPR Info*, accessed 1 March 2018, https://www.upr-info.org/database/statistics/index_sur.php?action_type=104&cycle=2.

ⁱⁱⁱ Working Group on the Universal Periodic Review (Human Rights Council), 'National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21: Malaysia', 6 August 2013. UN Doc. A/HRC/WG.6/17/MYS/1

^{iv} 'Dangerous Drugs (Amendment) Act 2017', *Dangerous Drugs Act 1952 (2017)*

^v 'Malaysia: Death Penalty no longer Mandatory for Drug Trafficking' (Hands off Cain, 4 May 2018). Available at: <http://www.handsoffcain.info/notizia/malaysia-death-penalty-no-longer-mandatory-for-drug-trafficking-40304354>

^{vi} Amnesty International, 'Death Sentences and Executions 2016' (London: Amnesty International, 2017), 22. Available at: <https://www.amnesty.org/download/Documents/ACT5057402017ENGLISH.PDF>

^{vii} Gen Sander, 'The Death Penalty for Drug Offences: Global Overview 2017' (London: Harm Reduction International, 2018), 27. Available at: <https://www.hri.global/files/2018/03/06/HRI-Death-Penalty-Report-2018.pdf>.

^{viii} Information about individual cases available on file with Harm Reduction International

^{ix} Amnesty International, 'Report 2017/18. The State of the World's Human Rights', 250. Available at: <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF>

^x Amnesty International, 'Death Sentences and Executions 2016', 29–30.

^{xi} 'Special Report: 80 Iranian Death Row Prisoners in Malaysia' (Iran Human Rights, 10 October 2017). <https://iranhr.net/en/articles/3089/>

^{xii} 'Special Report: 80 Iranian Death Row Prisoners in Malaysia' (Iran Human Rights, 10 October 2017). <https://iranhr.net/en/articles/3089/>