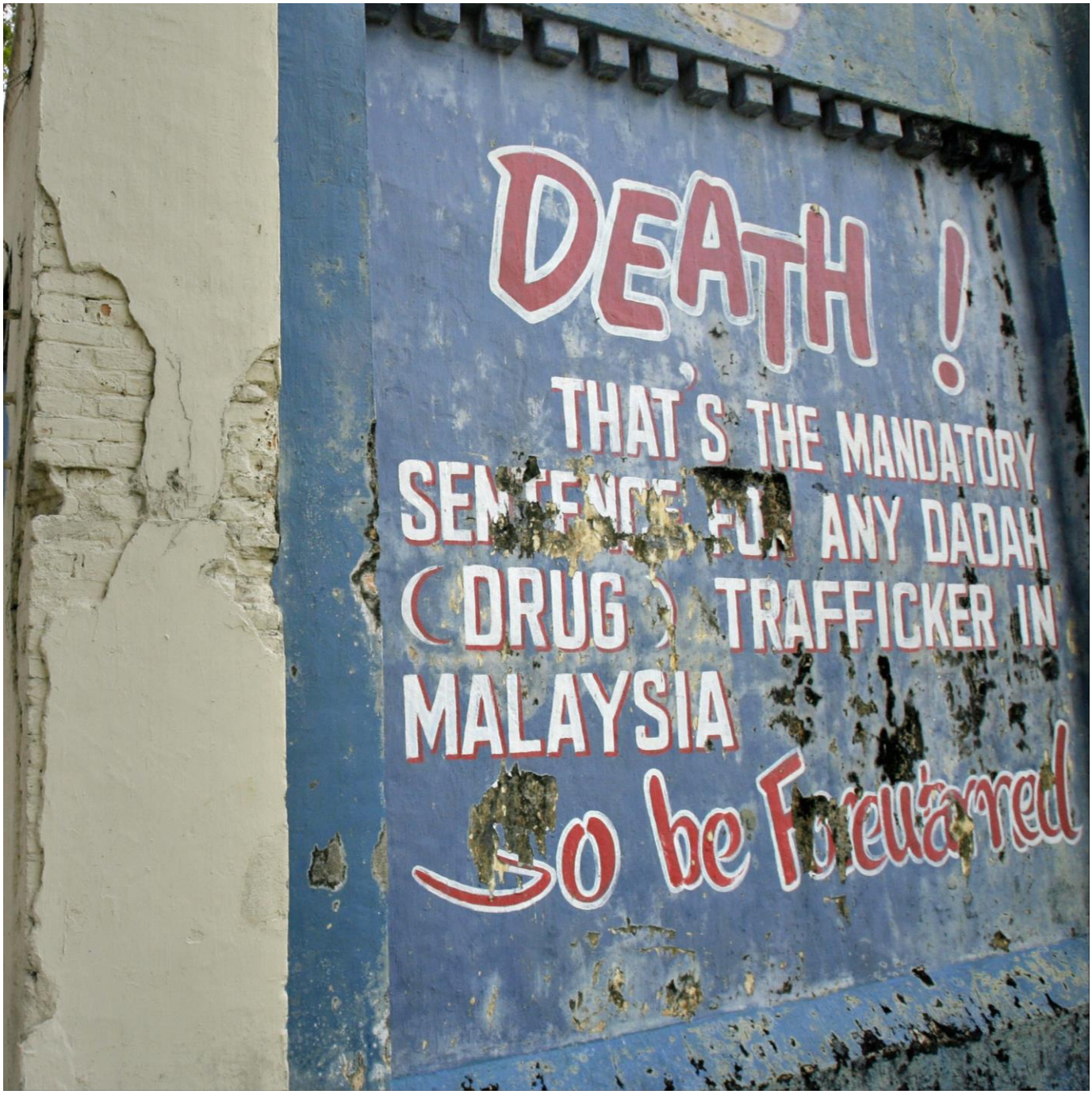

FATALLY FLAWED

WHY MALAYSIA MUST ABOLISH THE DEATH PENALTY

AMNESTY INTERNATIONAL

Amnesty International is a global movement of more than 7 million people who campaign for a world where human rights are enjoyed by all.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

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Cover photo: *A grim warning on Malaysia's mandatory death penalty for drug trafficking adorned the perimeter wall of the historic Pudu Prison complex, in downtown Kuala Lumpur. Picture taken on 1 November 2007. The prison was demolished in 2010.*
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AMNESTY INTERNATIONAL

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EXECUTIVE SUMMARY

> **"In Putrajaya once the judge told me about the sentence, oh my god, I don't want to use that word, gantung (hanging). Purposely, I looked to the other side. For me, as a mother, I want my son to come back before I close my eyes."**
>
> Mother of a man on death row, August 2019

> **"[we need the] abolition of the death penalty, because of the imperfection of the criminal justice system. It is never safe to execute any human being."**
>
> Malaysian lawyer, August 2019

Hoo Yew Wah, a Malaysian national of Chinese ethnicity, has been on death row in Bentong prison, Pahang State, since 2011. Arrested in 2005 at the age of 20 for possession of 188.35 grams of methamphetamine, he was convicted on the basis of a statement he made at the time of arrest in Mandarin, his mother tongue, without a lawyer present and which the police wrote down in Malay. He later contested this statement in court, noting inaccuracies and adding that the police had tortured him by breaking his finger during interrogation and threatened to beat his girlfriend to make him sign it. With the judge dismissing these claims without further investigation, Hoo Yew Wah was automatically presumed to be guilty of the charge of trafficking drugs and was sentenced to death, the only possible punishment for this offence. His judicial appeals failed and his petition for a pardon has been pending since 2014. Like all others on death row, he is not at imminent risk of execution since the government has established a nation-wide moratorium on executions in July 2018 – but remains in limbo.

Hoo Yew Wah's case illustrates the many violations of international human rights law and standards associated with the use of the death penalty in Malaysia, as documented in this report. These include lack of adequate and timely legal assistance, concerns of torture and other ill-treatment during police interrogation, the reliance on statements or information obtained without a lawyer present, the presumption of guilt in cases of drug trafficking, secretive pardon processes and the extensive use of this punishment for offences that do not meet the threshold of the "most serious crimes" or intentional killing to which the death penalty must be restricted under international law.

The scale of the problem is significant. As of February 2019, 1,281 people were reported to be on death row in Malaysia, including 568 (44%) foreign nationals. Of the total, 73% have been convicted of drug trafficking. This figure rises to a staggering 95% in the cases of women. Some ethnic minorities are over-represented on death row, while the limited available information indicates that a large proportion of those on death row are people with less advantaged socio-economic backgrounds.

The death penalty is currently retained for 33 offences in Malaysia, including 12 for which it is the mandatory punishment, and in recent years has been used mostly for murder and drug trafficking. Amnesty International found in the cases it reviewed that most of the women and men on death row were convicted of transporting relatively small quantities of drugs, acting as couriers, without employing violence. International law prohibits the imposition of the mandatory death penalty, and only allows the use of this punishment for offences that meet the threshold of the "most serious crimes", meaning intentional killing.

There is, however, an important opportunity for change in Malaysia. In July 2018, a newly formed government established an immediate moratorium on executions and later committed to fully abolish the death penalty. In late 2019, the government is expected to table legislation in the Malaysian Parliament that will be a step in the right direction by removing the mandatory death penalty for 11 offences, but that falls far short of the previous commitment of full abolition. As the October 2019 parliamentary session begins, Amnesty International recommends that the authorities promptly table draft legislation to address the significant flaws outlined in this report to prevent the arbitrary imposition of the death penalty, as a first step towards the full abolition of this punishment.

This report is based on information that Amnesty International compiled through desk research and interviews, the latest ones conducted in August 2019. The analysis of Malaysian death rows uses data received through official sources in February 2019 and has been complemented by information from 150 court judgments found online. Amnesty International also conducted 32 face-to-face interviews with family members and friends of people under sentence of death, lawyers with significant experience of capital cases, and representatives of foreign embassies, among others. The organization also gathered written information from family members of an additional 13 people on death row. Amnesty International requested information and access to death rows from the Malaysian authorities on several occasions, including for the preparation of this report. All these requests were declined or went unanswered at the time of publication.

FAIR TRIAL CONCERNS

The right to a fair trial is a human right and is legally binding on states as part of customary international law. In researching this report, Amnesty International has found numerous violations of the right to a fair trial at different points of the criminal justice process that leave defendants vulnerable to the imposition of the death penalty.

Restrictions on access to legal counsel remains a critical defect of Malaysia's judicial system. Under the Federal Constitution of Malaysia, detainees are supposed to be able to consult and be defended by the legal practitioner of their choice as soon as possible after arrest. To support this, Malaysia has three legal aid schemes concerning death penalty cases – one managed by the courts providing free representation at trial and appeals, another run by the National Legal Aid Foundation (NLAF) covering the pre-trial stage and the preparation of pardon applications, but for Malaysians-only. Lawyers with Bar Council Legal Aid Centre, a self-funded scheme by the Malaysian Bar, can also provide pro-bono representation at the remand stage to support those in need of a lawyer when they appear before a magistrate court, regardless of the offence and the nationality of the accused.

However, despite these programmes, lawyers and other representatives of prisoners on death row have told Amnesty International that it has been a common experience for those arrested for offences that could result in the death penalty, and who cannot hire a lawyer independently, not to receive legal assistance at the time of arrest or during their time under police remand, before charges are brought. A lawyer associated with the Bar Council Legal Aid Centre also estimated that, due to a lack of resources, coverage of the scheme at the time of arrest and remand hearing is just 60-70%, with coverage dropping outside Kuala Lumpur. Further, because of how legal aid is structured, no legal representatives are assigned to a case until the trial is due to start, leaving defendants without legal assistance during interrogation and for prolonged periods.

Other complaints included delays in notifying legal aid centres, family members and lawyers of a person's arrest. Relatives told Amnesty International that their family member only saw a lawyer for the first time when they were charged at the magistrate court, days after their arrest. Similarly, representatives of foreign embassies indicated that they usually receive a notification of the arrest of their nationals after more than 24 hours, even days, "usually after the statement is taken".

Another issue is the quality of the representation, if and when available. Several family members and lawyers told Amnesty International that the defendants' trial counsel was incompetent, inexperienced or participated in misconduct in representing people of less advantaged backgrounds during trial. This is particularly problematic since in Malaysia it is extremely difficult to introduce new defences on appeal.

An additional problem involves insufficient access to interpreters. Malaysian law guarantees interpretation in court to those who do not understand the language in which evidence is given, but not outside of the

courtroom. The support provided to foreign nationals to prepare their defence therefore can vary greatly depending on the resources made available by the relevant embassy - and in some instances the ethnicity of the foreign defendant. Some legal representatives told Amnesty International that persons who do not understand Malay have been asked by police to sign documents in Malay. A foreign woman was sentenced to death after her boyfriend – who was arrested with her and later released – answered all the questions for her during interrogation, since he was able to speak English. While she claimed that she was not able to provide her own statement to the police, judges rejected her claims as she introduced it too late in the process.

Furthermore, in death penalty cases, a magistrate can authorize the police to detain people suspected of having committed a crime for more than 24 hours to enable completion of the investigation, up to a total of 14 days. Interviewees told Amnesty International that it is common for defendants to "get beaten up" for information to advance the investigation, especially when a lawyer is not present. The practice of torture and other ill-treatment at police stations has been regularly highlighted by leading Malaysian NGO SUARAM. The UN Working Group on Arbitrary Detention also noted after its 2010 visit to the country that "virtually all detainees interviewed stated that they had been subjected to ill-treatment and even torture in police stations and detention centres in order to obtain confessions or incriminatory evidence".

Malaysian law generally precludes the prosecution from using at trial self-incriminating statements, including those obtained under torture and other ill-treatment, but with regard to capital offences these can be admissible as evidence under the Dangerous Drugs Act, 1952. This is additionally concerning as any defence not put forward at the first available opportunity is regarded by judges as an "afterthought", and lack of consistency in the statements by the defendant is considered to their disadvantage.

Amnesty International continues to be concerned about the retention of the presumptions under Section 37 of the Dangerous Drugs Act, 1952, by which defendants found with specified amounts of certain drugs, or even simply in possession or in control of objects or premises in which prohibited substances are found, can be found guilty of drug possession and trafficking without any further evidence linking them to the drugs. In those circumstances, the burden of proof is effectively shifted to the defendant, in violation of the presumption of innocence and fair trial guarantees. Similar provisions can also be invoked under the Firearms (Increased Penalties) Act, 1971. These presumptions have also had the effect of lowering the threshold of evidence needed to secure a conviction in capital cases in which guilt must be proved beyond any reasonable doubt.

These flaws are even more worrying when one considers that Malaysian law does not allow criminal cases to be reopened following a final judgment on the grounds of newly discovered facts – a procedure available in many other countries and before international criminal tribunals. This is a critical safeguard especially in cases involving the death penalty, to ensure that convictions are based upon clear and convincing evidence leaving no room for an alternative explanation of the facts. In one case, the Federal Court has refused the request of a man under the sentence of death, Mainthan A/l Armugam, for a full review of his case, despite his conviction for murder being based on witnesses seeing him near a man they thought he had killed, who later turned out to be alive.

OPAQUE AND ARBITRARY: THE RIGHT TO PARDON

The opacity and secrecy of the pardon processes is another area where the lack of safeguards expose people to the risk of arbitrary decisions that could lead to execution. This has become of even greater concern since Liew Vui Keong, *de facto* Minister in charge of Law in the Prime Minister's Office, has said that Pardon Boards could be a possible mechanism to resentence those already on death row, once the mandatory death penalty is abolished. Such a proposal would transfer the power of sentencing from the judiciary to the executive; and move pronouncements into an opaque and arbitrary structure in which no further recourse is available, and where mitigating circumstances are not adequately presented and investigated.

The process for applying for a pardon is not defined in law in detail, nor does the law set out what criteria should be used for the decision or how the outcome should be communicated.

A legal professional involved in the preparation of pardon petitions learned from prison officials that four factors are usually considered: whether the crime involves the loss of life; good standing in society before arrest; the conduct of the prisoner while in detention; and the conduct of the prisoner during trial. Only slightly over half prisoners with finalized appeals had applied for pardons as of February 2019 (425 out of 764).

Contrary to recommendations under international standards, Malaysian law does not guarantee the right to legal counsel for the pardon application process. In recent years, several pro-bono initiatives have been put

in place to fill this gap but have been quite limited and intermittent, due to a lack of resources. It has also been unclear how prison officials have selected prisoners to benefit from this support. The quality of the pardon petition varies enormously depending on whether it has been prepared with the support of a legal representative or not, including in its argumentation and credibility.

The problem appears to be particularly acute for foreign nationals, who make up over half of those who have not filed a pardon application. Detained far away from their families and support networks, they appear to be at a disadvantage in preparing pardon petitions, particularly those who receive little or no support from their embassies.

Finally, international law and standards require states to provide prompt information at all stages of the clemency process, yet no official announcements on decisions about pardon petitions are communicated to the prisoners or their representatives, and it is not clear how applications are prioritized. If the pardon is not granted, the petition can either be simply set aside, to be reconsidered at the next sitting of the Pardon Board; or it can be rejected, in which case a notification would be sent back to the relevant trial court and prison officials to trigger the process of execution. The prisoner and their families would be notified of the rejection of their petition only days before the execution is carried out.

RECOMMENDATIONS

Given the numerous violations of international law and standards in Malaysia's use of the death penalty, it is time for the authorities to act, and the upcoming legislative reforms to Malaysia's mandatory death penalty laws represent a critical opportunity that must not be missed.

As the October 2019 session of Parliament begins, Amnesty International renews its call on the Malaysian authorities to promptly table in Parliament draft legislation to bring national legislation in line with international human rights law and standards, as an important first step towards fully abolishing the death penalty in the country.

Pending the full abolition of the death penalty, Amnesty International makes the following recommendations to the Government of Malaysia:

1. Continue to observe the moratorium on all executions until the death penalty is fully abolished in the country and all existing death sentences are reviewed and commuted;

2. Table legislation to eliminate the mandatory death penalty for all crimes, including for drug trafficking, and mandate a judicial body to review all cases where people have been sentenced to death, with a view to commuting the death sentences;

3. Bring national legislation in line with international law and standards, including by eliminating legal provisions that allow for the use of the death penalty for offences that do not meet the threshold of the "most serious crimes" or intentional killing; repealing "presumptions" of guilt under the Dangerous Drugs Act, 1952 (DDA) and the Firearms (Increased Penalties) Act, 1971 as well as provisions in the DDA allowing the use of self-incriminating statements; and establishing effective post-conviction recourse procedures.

4. Ensure that all persons facing the death penalty are provided access to competent legal assistance from the moment that they first face criminal charges, and ensure that legal aid schemes for death penalty defendants are adequately resourced.

5. Ensure that there are prompt, thorough, impartial and effective investigations by independent and impartial bodies into all allegations of torture and other ill-treatment by police or other authorities; that victims have access to an effective remedy and receive reparation; and that if there is sufficient admissible evidence, those suspected of responsibility are prosecuted in proceedings which meet international standards for a fair trial and without resort to the death penalty.

6. Establish transparent procedures for the review of pardon applications, so that the pardon process serves the purpose of being a meaningful safeguard of due process.

7. Regularly publish full and detailed information, disaggregated by gender, nationality and ethnic background, about the use of the death penalty, which could contribute to a full and informed public debate of the issue.

A full list of recommendations can be found in section 5 of this report.

METHODOLOGY

This report is based on research carried out by Amnesty International and focuses on developments in the use of the death penalty in Malaysia since December 2017, when the previous administration tabled in Parliament legislative amendments to reform the mandatory death penalty.

The analysis in this report is based on information Amnesty International has compiled through desk research and interviews it conducted directly, including most recently in August 2019. No financial or other compensation was offered or provided in exchange for the information.

The analysis of death row figures included in the second chapter is based on detailed data Amnesty International received through official sources in late February 2019. Some discrepancies exist between the records kept by the Malaysian authorities and the information Amnesty International subsequently gathered through other sources, especially with regard to the number of foreign nationals. This is mainly because of incorrect attribution of nationality or other identification mistakes. Despite these limitations, the organization has included the death row figures in this report, as it believes that these could offer some important insight into an otherwise secretive system and contribute to meaningful debates on the death penalty in Malaysia.

The analysis of death row figures has been complemented by information from judgments published by the judiciary online relating to 150 cases (involving 120 men and 30 women, approximately 12% of the 1,281 people on death row as of February 2019), all held in three facilities in the Kuala Lumpur area. These facilities are the male and female divisions at Kajang prison, in Selangor state (243 men and 34 women); Tapah prison, in Perak state (121 prisoners, including 50 women); and Sungai Buloh prison, in Selangor state (56 men). Amnesty International selected these facilities for the sample for this more detailed analysis as hosting the highest numbers of death row prisoners per prison in the country (Kajang and Tapah), as well as for their geographical location in a better resourced part of Malaysia.

Amnesty International also conducted 32 direct interviews, 27 of which were held in late August 2019. Among those interviewed, Amnesty International spoke to family members and close friends of 12 people under sentence of death at different locations in peninsular Malaysia, engaging them in group discussions and individual conversations. The organization also spoke individually with nine lawyers, who have been involved in over 200 death penalty cases (this is a conservative estimate based on their own recollection); and representatives of foreign embassies of countries with more than 230 nationals under sentence of death in the country. Other interviewees included representatives of the Human Rights Commission of Malaysia (SUHAKAM); the Bar Council Legal Aid Centre in Kuala Lumpur and at its Selangor branch; the Malaysia Medical Association; three civil society groups; and one former prisoner.

Furthermore, Amnesty International circulated a questionnaire to family members of people on death row, either directly or through the support of relatives, gathering written replies from families related to a further 13 prisoners.

Amnesty International faced two significant challenges in gathering evidence for this report. First, the lack of response from Malaysian authorities, after the organization sought information and access to death row prisoners on several occasions. The organization wrote to the Prisons Department and Minister of Home Affairs, requesting a meeting and access to facilities housing prisoners under sentence of death, in June 2015, October 2015, August 2016 and July 2019. Amnesty International further sought to meet Malaysian authorities involved with the administration of justice, including in the Royal Malaysia Police and the Attorney General's Chambers, in the context of the preparation of this report, in August and again in September 2019. All these requests, however, were declined or went unanswered.

In addition, Amnesty International has found that there is little public information relating to the use of the death penalty in the country. Indeed, the lack of transparency around capital proceedings was put forward as a concern by many interviewees. Working within these limitations, several names of those who spoke to Amnesty International have been withheld in this document, at their request, and the details of the cases mentioned removed.

Not least because of these challenges, Amnesty International is grateful to all those who agreed to be interviewed by, or provided information to, representatives of the organization. In particular, we are grateful to the family members who shared their personal and difficult stories, as well as the dedicated lawyers and activists who keep on working to strengthen the protection of human rights in the country.

Amnesty International opposes the death penalty in all cases and under any circumstances, regardless of the nature of the crime, the characteristics of the offender, or the method used by the state to carry out the execution. The organization considers the death penalty a violation of the right to life as recognized in the Universal Declaration of Human Rights and the ultimate cruel, inhuman and degrading punishment.

1. BACKGROUND

> **"All death penalty will be abolished. Full stop."**
>
> Liew Vui Keong, de facto Minister in charge of Law in the Prime Minister's Office, 10 October 2018[1]

1.1 NEW OPPORTUNITIES AND THE CASE FOR CHANGE

For the first time in 61 years, a new government was elected in Malaysia on 9 May 2018. Pakatan Harapan, an opposition alliance fronted by former Prime Minister Mahathir Mohamad, defeated the Barisan Nasional, until then the long-standing ruling coalition, and established itself with a new Cabinet on 2 July 2018. It was only a matter of days before the new administration announced that it had imposed an official moratorium on executions and renewed its commitment to repeal the mandatory death penalty for all crimes – one of the electoral promises in the manifesto of the Pakatan Harapan.[2]

> **"The Pakatan Harapan Government will revoke the following laws: […] Mandatory death by hanging in all Acts"**
>
> Electoral manifesto of the Harapan ruling coalition, March 2018 [3]

The positive momentum appeared to continue in subsequent months, when on 10 October 2018 Liew Vui Keong, *de facto* Minister in charge of Law in the Prime Minister's Office, announced that the Cabinet had resolved to abolish the death penalty for all offences.[4] This welcome move was followed by the encouraging decision to change Malaysia's long-held position and vote in favour of the 2018 UN General Assembly resolution 73/175 on a moratorium on the use of the death penalty, adopted on 17 December 2018.[5]

The public discussion of the plan to abolish the death penalty, however, was met with vehement opposition from different sides, including from families of crime victims and representatives of law enforcement agencies, which appeared to have adversely affected the momentum towards abolition. On 13 March 2019, Mohamed Hanipa Maidin, Deputy Minister in charge of Law, announced before Parliament that the government was only going to propose legislative amendments to repeal the mandatory death penalty for 11 offences under the Penal Code and Firearms (Increased Penalties) Act, 1971 – a significant departure from the previously stated intention to abolish the death penalty completely.[6] The offences include murder, terrorism-related offences, hostage-taking resulting into death and discharge of firearms with intent to cause death or harm.

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[1] "Minister: Putrajaya to abolish death penalty", *Malaysia Mail*, 10 October 2018, www.malaymail.com/news/malaysia/2018/10/10/minister-putrajaya-to-abolish-death-penalty/1681448

[2] Amnesty International Malaysia, *Malaysia: Full abolition of death penalty must swiftly follow, welcome suspension of executions* (Press release, 3 July 2018), www.amnesty.my/malaysia-full-abolition-of-death-penalty-must-swiftly-follow-welcome-suspension-of-executions/

[3] "Rebuilding our nation, fullfilling our hopes", Manifesto of the Harapan coalition, 8 March 2018, p.61, http://kempen.s3.amazonaws.com/manifesto/Manifesto_text/Manifesto_PH_EN.pdf

[4] Amnesty International, *Malaysia: Parliament must consign death penalty to the history books* (Press release, 10 October 2018), www.amnesty.org/en/latest/news/2018/10/malaysia-death-penalty-abolition/

[5] Amnesty International, *Death penalty: Global abolition closer than ever as record number of countries vote to end executions* (Press release, 17 December 2018), www.amnesty.org/en/latest/news/2018/12/global-abolition-closer-than-ever-as-record-number-of-countries-vote-to-end-executions/

[6] Amnesty International, *Malaysia: repeal of mandatory death penalty should be a first step towards full abolition* (Public statement, 14 March 2019), www.amnesty.org/en/documents/act50/0040/2019/en/

Furthermore, Minister Liew Vui Keong clarified in June 2019 that the Cabinet would not include drug trafficking in the forthcoming legislative proposals, as it intended to wait for the decision of the Federal Court on an ongoing constitutional challenge on the mandatory death penalty under the Dangerous Drugs Act.[7] He said one month later that a task force would be set up to study appropriate alternative punishments for the 11 offences for which new sentencing discretion would be introduced, with a view to introducing the legislative amendments at the October session of Parliament.[8] Citing a lack of public support for the full abolition of the death penalty, the minister said that the Cabinet had decided to consider introducing between 10 to 30 years of imprisonment as an alternative to the mandatory death penalty for the 11 offences under scrutiny.[9] Members of the government have not clarified whether those already on death row would be allowed to benefit from the reforms and, if so, through what process.[10] On 4 July, the minister told the media that the matter was still to be decided and suggested at the Pardon Board having a role in the review of past cases.[11]

As the October session of Parliament is about to begin, Amnesty International publishes the findings of its investigation on the use of the death penalty in Malaysia, with a view to contributing to a meaningful and informed debate on the issue; and encouraging the Malaysian authorities to ensure that legislative amendments are promptly tabled in Parliament and fully comply with international human rights law and standards.

THE DEATH PENALTY GLOBAL TREND: TOWARDS ABOLITION

Despite occasional setbacks and threats to resume executions, the global trend on the death penalty remains unequivocally towards its abolition. (See also Graph 1)

When the Universal Declaration was adopted in 1948, only eight countries had abolished the death penalty for all crimes: Colombia (1910), Costa Rica (1877), Ecuador (1906), Iceland (1928), Panama (1922), San Marino (1865), Uruguay (1907) and Venezuela (1863). In 2015, countries that had abolished the death penalty for all crimes became a majority. As of October 2019, 142 countries in total – more than two-thirds of the world's countries– have abolished the death penalty in law or practice.[12] Additionally, the US states of Connecticut, Delaware, Illinois, Maryland, New Jersey, New Mexico, New York and Washington have all abolished the death penalty since the beginning of the millennium and the governors of California, Colorado, Oregon and Pennsylvania have all established moratoriums on executions.

The number of executing countries has been steadily declining. While three decades ago the number of countries known to have carried out executions ranged between 31 and 41 countries per year, in the past decade this has reduced to between 20 and 25. Amnesty International's report on the global use of the death penalty in 2018 shows that the weight of the death penalty is carried by an isolated group of just 20 countries, of whom just 13 had done so every year over the last five years.[13] In 2018, Amnesty International reported at least 690 known executions worldwide, excluding China, representing a decrease of 31% compared to 2017 – the lowest global total in a decade. Figures in China remain a state secret, but Amnesty believed that thousands of executions were carried out during the year.

The global trend away from the death penalty has also been reflected in the voting on seven resolutions adopted by the UN General Assembly on a moratorium on the use of the death penalty. When the UN General Assembly adopted its first resolution on this issue in December 2007, 104 states supported it;[14] at the most recent vote in December 2018, 121 countries, including Malaysia, voted in favour of the resolution.[15] Although not legally binding, these resolutions from the main deliberative body of the UN with full membership carry considerable moral and political weight and are indicative of the trend away from the death penalty.

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[7] "Putrajaya looks to Apex Court ruling for cue to repeal death sentence", *Malay Mail*, 17 June 2019, www.malaymail.com/news/malaysia/2019/06/17/putrajaya-looks-to-apex-court-ruling-for-cue-to-repeal-death-sentence/1763019

[8] "Govt to table Bill to repeal mandatory death penalty in October", The Star, 13 July 2019, www.thestar.com.my/news/nation/2019/07/13/govt-to-table-bill-to-repeal-death-penalty-in-october/; "Task force to study alternative to death penalty; ex-CJ to lead", *Malaysiakini*, 6 September 2019, https://www.malaysiakini.com/news/490857

[9] "Putrajaya mulls replacing life imprisonment with up to 30 years jail", *Malaysiakini*, 13 July 2019, www.malaysiakini.com/news/483643

[10] As recognized by, among other examples, Safeguard no. 2 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the UN Economic and Social Council in resolution 1984/50 of 25 May 1984; Article 15(1) of the International Covenant on Civil and Political Rights; Rome Statute of the International Criminal Court, Article 24(2); European Court of Human Rights, *Case of Scoppola v. Italy* No. 2 (Application no. 10249/03), Grand Chamber judgment of 17 September 2009, para. 108.

[11] "Minister: Govt to table Bill next week to abolish mandatory death sentence", *Malaysia Mail*, 4 July 2019, www.malaymail.com/news/malaysia/2019/07/04/minister-govt-to-table-bill-next-week-to-abolish-mandatory-death-sentence/1768287

[12] For more information see Amnesty International, *Abolitionist and retentionist countries (as of March 2018),* (Index: ACT 50/6665/2017)

[13] Amnesty International, *Death sentences and executions in 2017* (ACT 50/7955/2018)

[14] UN General Assembly resolution 62/149 of 18 December 2007

[15] UN General Assembly resolution 73/175 of 17 December 2018

Regionally there has been progress as well. Only 3 of the 10 member states of the Association of Southeast Asian Nations - Singapore, Thailand and Viet Nam – reported executions in 2018. In the Pacific, Papua New Guinea – the only country in the Pacific still to hold people on death row – put in place an indefinite stay of executions after its National Court concluded the country's use of the death penalty violated human rights safeguards enshrined in the country's Constitution. In the broader Asia-Pacific region, nine countries carried out executions in 2018, out of 22 that still retain the penalty in law.

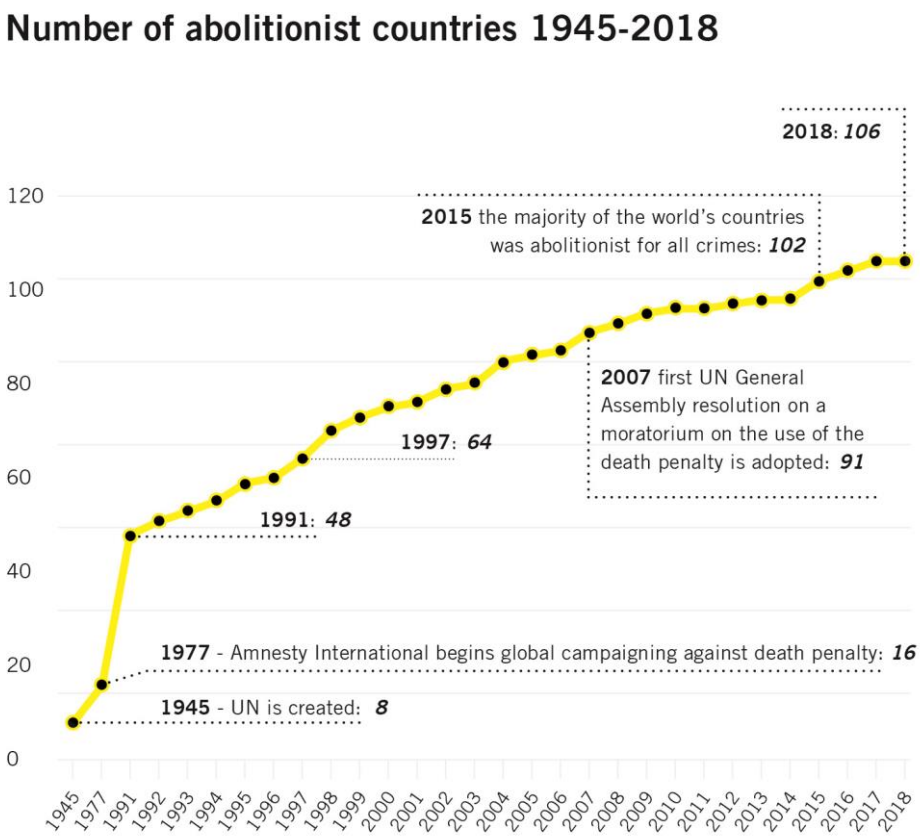

Figure 1 Number of countries that abolished the death penalty 1945-2018

1.2 THE LEGAL FRAMEWORK

The death penalty has been a part of the Malaysian legal system since before the country's independence in 1957. It is currently retained under nine laws for a total of 33 offences, including 12 for which it is imposed as the mandatory punishment.[16] In recent years, the death penalty has been used mostly for murder and drug trafficking, and in fewer cases for firearms-related offences. Malaysia is among only 15 countries in the world where the death penalty is known to have been imposed or carried out for drug-related offences in 2018.[17]

[16] The detailed list of offences is included in Annex I. Drug trafficking still carries the mandatory death penalty when certain circumstances are not met.
[17] The other countries are Bahrain, Bangladesh, China, Egypt, Indonesia, Iran, Iraq, Kuwait, Pakistan, Saudi Arabia, Singapore, Sri Lanka, Thailand, and Viet Nam. Amnesty International, *Death sentences and executions in 2018* (ACT 50/9870/2019), p.12.

THE DEATH PENALTY UNDER INTERNATIONAL LAW AND STANDARDS: ONLY IN EXCEPTIONAL CASES AND NEVER AS MANDATORY PUNISHMENT

The UN and several other international bodies have set out safeguards and restrictions to the use of the death penalty, with a view to its abolition.[18] In particular, the UN Economic and Social Council adopted the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, which set out the most basic guarantees to be observed in all death penalty cases. The UN Safeguards were endorsed by the UN General Assembly in 1984 by consensus.[19]

Among other restrictions, international human rights law provides that, in countries where the death penalty has not yet been abolished, its imposition must be restricted to the "most serious crimes".[20] The UN Human Rights Committee has stated that "[T]he expression 'most serious crimes' must be read restrictively to mean that the death penalty should be a quite exceptional measure"[21] and that "Crimes not resulting directly and intentionally in death, such as […] drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty".[22] The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "The death penalty may not be imposed for drug-related offences unless they meet this requirement."[23]

As recently as March 2019, the UN has reiterated in unequivocal terms that the application of the death penalty for drug-related offences does not respect the spirit of the international drug-control conventions and has the potential to become an obstacle to effective cross-border and international cooperation against drug trafficking.[24] Moreover, both the UN Office on Drugs and Crime (UNODC) and the International Narcotics Control Board (INCB), the UN bodies tasked with drug policy, have unambiguously condemned the use of the death penalty for drug-related offences and have urged governments to move towards abolition.[25]

The imposition of the mandatory death penalty is prohibited under international human rights law.[26] The UN Human Rights Committee has stated that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life […] in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence".[27] In addition, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "the death penalty should under no circumstances be mandatory by law"[28] and that "[the] mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances, is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment".[29]

Malaysia is also a state party to other international human rights treaties that impose safeguards on the application of the death penalty, including the Convention on the Rights of the Child and the Convention on the Rights of Persons with Disabilities.

In Malaysia, individuals who have been charged at a Magistrate Court with an offence for which the death penalty is a possible punishment face trial before one of the 25 High Courts. The conviction and sentence can then be appealed before the Court of Appeal and the Federal Court. The death penalty may be imposed at any stage of the legal process – including at the final stage, by the Federal Court.

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[18] UN General Assembly resolution 2857 (XXVI) of 20 December 1971 affirms that to fully guarantee the right to life, which is provided for in Article 3 of the Universal Declaration of Human Rights, States should progressively restrict "the number of offences for which capital punishment may be imposed, with a view to the desirability of abolishing this punishment in all countries." Subsequent instruments adopted since then, including the International Covenant on Civil and Political Rights, have set abolition as the goal to be achieved in countries that still retain this punishment.

[19] UN Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by Economic and Social Council resolution 1984/50 of 25 May 1984

[20] Article 6(2) of the International Covenant on Civil and Political Rights; UN Safeguards guaranteeing protection of the rights of those facing the death penalty, UN Economic and Social Council resolution 1984/50

[21] Human Rights Committee, General Comment No. 6: The Right to Life (1982), para. 6

[22] Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para.35

[23] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions (2012), UN Doc. A/67/275, para.122

[24] UN Chief Executives Board, "What we have learned over the last ten years: A summary of knowledge acquired and produced by the UN system on drug-related matters", UN Doc. E/CN.7/2019/CRP.10

[25] UN Office on Drugs and Crime, "INCB Report 2018 urges governments to consider abolishing death penalty for drug-related offences" (2019), www.unodc.org/southasia/frontpage/2019/January/incb-report-2018-urges-governments-to-consider-abolishing-death-penalty-for-drug-related-offences.html; "Statement attributable to the UNODC spokesperson on the use of the death penalty" (2019), www.unodc.org/unodc/en/press/releases/2019/June/statement-attributable-to-the-unodc-spokesperson-on-the-use-of-the-death-penalty.html

[26] Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, UN Doc. A/HRC/14/24, para.51

[27] Human Rights Committee, *Pagdayawon Rolando v Philippines*, Communication No. 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, para. 5.2

[28] Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/1999/39, para.63

[29] Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, UN Doc. E/CN.4/2005/7, para. 80

Once the Federal Court has confirmed the death sentence issued by a lower court, or has imposed a new death sentence, the remaining avenue available to those facing the death penalty is to seek pardon from the Ruler of the State, or the King for applications from the federal territories. The pardon process is analysed in more detail in chapter 4 of this report.

Minor changes to the use of the death penalty have been introduced in recent years. Legislative amendments to the Dangerous Drugs Act, 1952, were for the first time adopted by the Parliament at the end of 2017 and came into effect in March 2018. The amendments, however, did little to bring national law in line with Malaysia's international human rights obligations.[30] The amended law allows judges to exercise sentencing discretion only for a narrow range of circumstances of drug trafficking. When those convicted of transporting, sending or delivering a prohibited substance are also found to have co-operated with law enforcement in disrupting drug trafficking activities, judges are ostensibly now able to choose between imposing the death penalty or life imprisonment with no fewer than 15 strokes of the whip – a cruel punishment prohibited under international law. In all other circumstances of drug trafficking, the death penalty remains the mandatory punishment.

Furthermore, the amendments barred those who had already exhausted their legal remedies from enjoying the benefit of the reform. UN safeguards guaranteeing the protection of the rights of those facing the death penalty state that a person sentenced to death must benefit when a change of law imposes a lighter penalty for the crime of which they had been convicted.[31]

1.3 KNOWN FIGURES AND LACK OF TRANSPARENCY

Although there has been a noticeable effort on the part of the present Government to make publicly available information on the use of the death penalty in Malaysia, the enduring lack of transparency has made it impossible to adequately and independently monitor the death penalty's implementation and fully understand the impact of this punishment over the years.

Limited information on executions had come to light primarily when the authorities have had to respond to questions from Members of Parliament. Figures disclosed by previous administrations indicated that 349 people were executed between 1970 and 1996;[32] and that 33 executions were carried out between 1998 and 2015.[33] The previous government released further figures in March and May 2016, in response to three parliamentary questions.[34] This information indicated that 12 people were executed and 829 sentenced to death since 2010; and that 95 others had either received a pardon or had their death sentences commuted.

Most recently, official sources shared information with Amnesty International which indicated that 469 executions in total had been carried out since Malaysia gained independence in 1957. These included 229 executions for drug trafficking, 114 for offences under the Internal Security Act, 1960, 106 for murder, 19 for firearm-related offences, and one for kidnapping.[35] However, the details of the cases and breakdown by year remain unavailable.

Amnesty International is aware of 30 executions for the period 1998-2018. This figure is based on reports the organization received from credible sources, such as families of executed prisoners.[36] The lack of clarity on figures is emblematic of the secretive nature of the death penalty in the country, which greatly affects those subjected to this punishment and their relatives. Recent official figures indicated that 1,293 people were under sentence of death in the country as of September 2019.[37]

EXECUTIONS AND DEATH SENTENCES IN MALAYSIA

In recent years, Amnesty International has recorded the following figures for death sentences and executions. Note that these are minimum figures; "+" standing alone without a figure indicates that executions took place, but that it was not possible to determine exactly how many. Information received

[30] Act A1558 of 29 December 2017

[31] See also footnote no.10

[32] Figures disclosed in March 1996. For more information see Amnesty International, *Against the tide: The death penalty in Southeast Asia* (Index: ASA 03/01/97)

[33] Figures disclosed on 3 November 2015. "Lawyers: Freeze all executions while mandatory death sentences under review", Malay Mail Online, 24 November 2015, http://www.themalaymailonline.com/malaysia/article/lawyers-freeze-all-executions-while-mandatory-death-sentence-under-review Amnesty International is aware of 30 executions for the period 1998-2018.

[34] Written parliamentary replies to Puchong MP Gobind Singh Deo, 30 March 2016; Ramkarpal Singh, 17 May 2016; and Kasthuri Patto, 20 May 2016.

[35] Information on file with Amnesty International

[36] Information on file with Amnesty International

[37] Media Statement by Liew Vui Keong, Minister in the Prime Minister's Department for Legal Affairs, 20 September 2019

through official sources for 2018 indicated a much higher total for death sentences than those compiled by Amnesty International for previous years.

2018: 0 executions; 190 new death sentences imposed, including 136 for drug-related offences.

2017: 4+ executions; 38+ death sentences, including 21 for drug-related offences.

2016: 4 executions; 14+ death sentences, including 5 for drug-related offences.

2015: + executions; 39+ death sentences, including 24 for drug-related offences.

2014: 2+ executions; 38+ death sentences, including 16 for drug-related offences.

2013: 2+ executions; 76+ death sentences, including 47 for drug-related offences.

The limited information that the Malaysian authorities have occasionally released does not fulfil the duty to be transparent in the use of the death penalty. International human rights law recognizes the importance of making public the information on decisions in criminal matters and protects the right to seek, receive and impart information.[38] The UN Human Rights Committee has, in particular, stressed the importance of the right of access to information held by public bodies, including information on public affairs; [39] this includes information on important public policy matters such as the use of the death penalty and associated legislative reforms. It is critical that the Malaysian authorities reveal complete and accurate information on their use of the death penalty, so that it is possible to assess their practices against international human rights law and standards.

As highlighted by the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, publishing regular and comprehensive information on the use of the death penalty is in the interest of the public as it gives the opportunity to analyse whether this punishment is applied in a fair and non-discriminatory manner. This, in turn, contributes to building public confidence in the state justice institutions.[40]

Publicly available information would also allow for the consideration of important factors – such as the risk of wrongful execution, the unfairness of trials, the extent to which capital punishment disproportionately affects defendants living in poverty or people with mental disabilities – which could contribute towards the development of a fully informed view on capital punishment. Access to accurate information is particularly important in the context of the ongoing reforms, in order to ensure a meaningful and informed debate on the death penalty.[41]

FIGURES ON THE USE OF THE DEATH PENALTY: WHAT SHOULD BE MADE PUBLIC?

Several UN bodies have considered the issue of transparency on the death penalty and have called upon states that have not yet abolished the death penalty to publish information on their use of this penalty. In 1989, the UN Economic and Social Council called upon states "to publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency can be granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law" (resolution 1989/64 of 24 May 1989).The then UN Commission on Human Rights urged states to "make available to the public information with regard to the imposition of the death penalty and to any scheduled execution" (resolution 2005/59 of 20 April 2005).

The UN Human Rights Council more recently called on states "to make available relevant information, disaggregated by sex, age and other applicable criteria, with regard to their use of the death penalty, inter alia, the number of persons sentenced to death, the number of persons on death row, the number of executions carried out and the number of death sentences reversed, commuted on appeal or in which amnesty or pardon has been granted, which can contribute to possible informed and transparent national and international debates, including on the obligations of States with regard to the use of the death penalty" (resolution 30/5 of 1 October 2015). Similar calls have been echoed in seven resolutions adopted with overwhelming support by the UN General Assembly since 2007, including most recently resolution 73/175 of 17 December 2018.

[38] Article 19 of the Universal Declaration on Human Rights; Article 19 of the International Covenant on Civil and Political Rights.
[39] Human Rights Committee, General comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc. CCPR/C/GC/34; and *Toktakunov v Kyrgyzstan*, Communication No. 1470/2006, UN Doc. CCPR/C/101/D/1470/2006.
[40] Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/67/275
[41] The UN General Assembly has called on states to make "available relevant information with regard to their use of the death penalty, which can contribute to informed and transparent national debates on this issue" (resolution 69/186 of 18 December 2014).

2. WHO IS ON DEATH ROW?

> **"In Putrajaya once the judge told me about the sentence, oh my god, I don't want to use that word, gantung (hanging). Purposely, I looked to the other side. For me, as a mother, I want my son to come back before I close my eyes."**
>
> Mother of a man on death row, August 2019[42]

Amnesty International has analysed information it received through official sources on the death row population of Malaysia. The picture that emerges suggests that the majority of those under sentence of death were convicted of drug-related offences, in violation of international law and standards, and that a disproportionate number of those on death row – 44% of the total - are foreign nationals.

The overrepresentation of foreign nationals on death row is even more glaring when considering its female population. According to the numbers available to Amnesty International, 86% of all women sentenced to death – and 90% of women sentenced for drug trafficking - are foreign nationals.

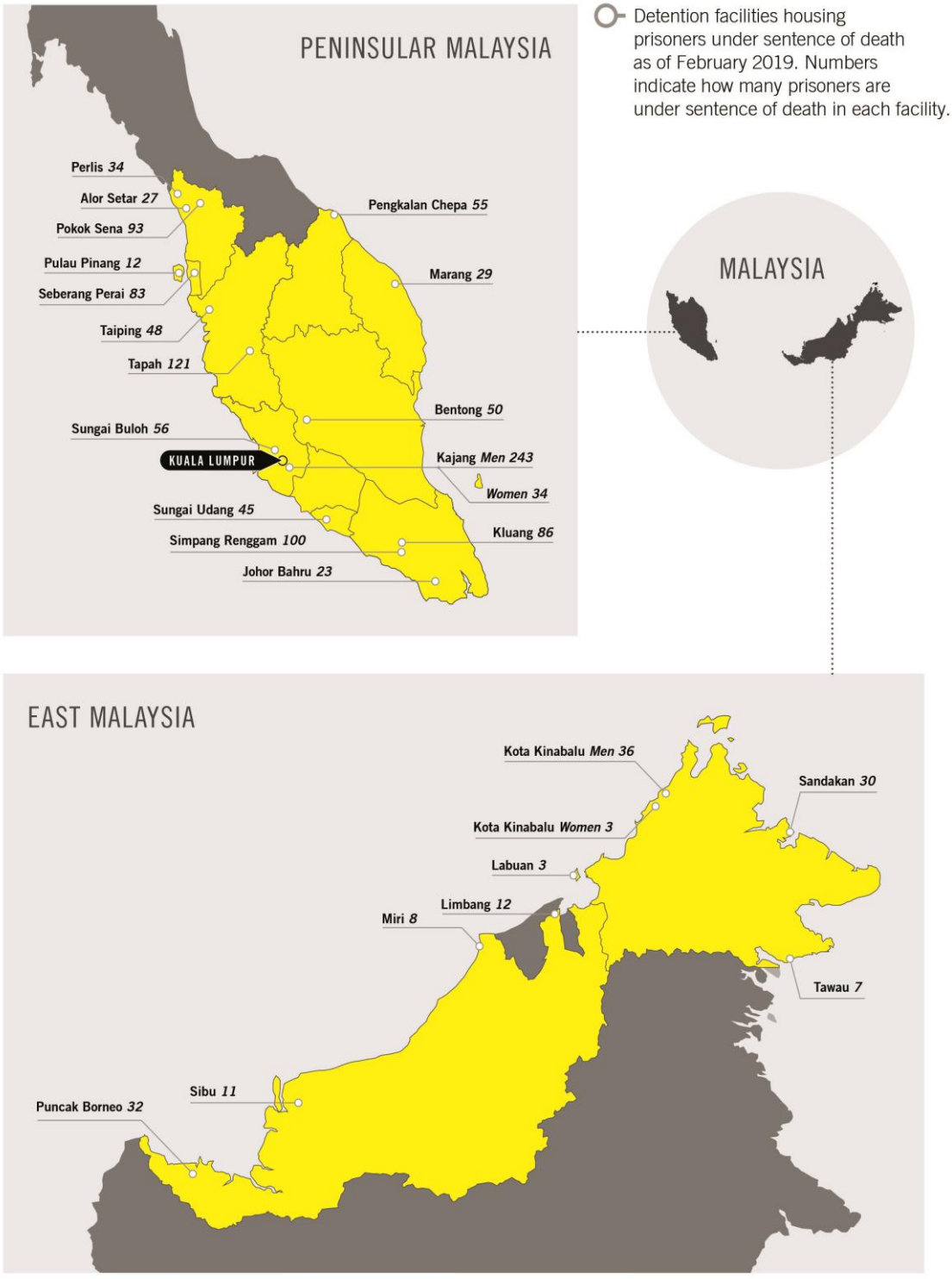
In cases involving Malaysian nationals, some ethnic minorities are also over-represented on death row.

Limited information available also suggests that a large proportion of those on death row have less advantaged socio-economic backgrounds, which becomes particularly relevant in a criminal justice system where safeguards in death penalty cases are especially lacking, both in law and in practice, for foreign nationals and people convicted under the Dangerous Drugs Act, 1952.

The vast majority of those on death row were convicted before the legislative amendments to the Dangerous Drugs Act, 1952, came into effect in March 2018 and before one of the most recent legal aid schemes providing legal support at the time of arrest was established, in 2014.

[42] Interview with Amnesty International, 24 August 2019

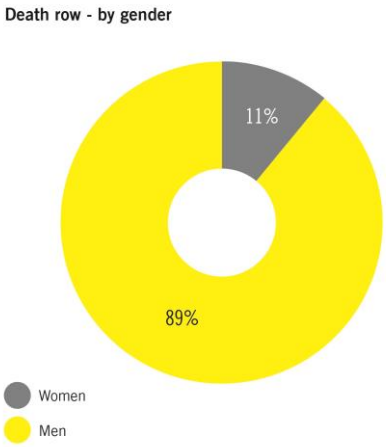
Death rows of Malaysia



2.1 DEATH ROWS IN MALAYSIA: THE OVERALL OUTLOOK

As of 22 February 2019, 1,281 people were under sentence of death in Malaysia, held in 26 detention facilities across the country.[43]

Seventeen prisons in peninsular Malaysia – where the industrial and financial centres of the country are located, as well as most international airports – held the great majority of people in death row (1,139, or 89%), more than two-thirds of whom had been convicted of drug-related offences.[44] A remaining nine facilities in East Malaysia accounted for only 11% of the national total, with the majority of these death row prisoners held for murder.[45]



Those under sentence of death in Malaysia were mostly men, 89% (or 1,140). The 141 women were held in nine facilities, with just 8 detained in East Malaysia.[46]

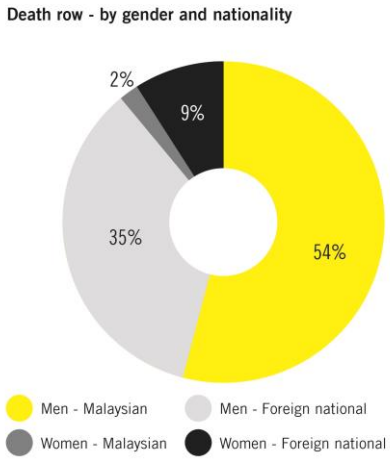
The facility with the largest number of people under sentence of death was the male division of Kajang prison, in Selangor state, with 19% of the national total. This was followed by Tapah prison in Perak state (9%) and Simpang Renggam prison in Johor state (8%).

2.2 NATIONALITY, GENDER AND OFFENCES

A startling 44% (568) of all those under sentence of death were foreign nationals, from 43 countries. Nationals from Nigeria made up 21% of this group, with those from Indonesia (16%), Iran (15%), India (10%), Philippines (8%) and Thailand (6%) following suit.[47] The composition of the death row population across prisons seems to reflect this split by nationality, with limited variation.

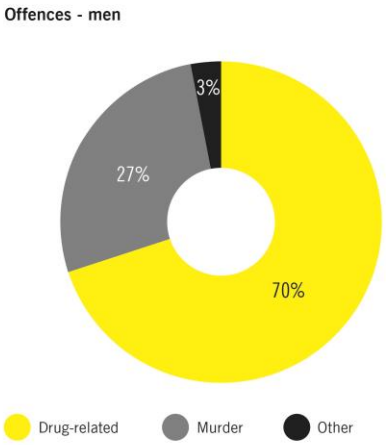
The considerable proportion of foreign nationals assumes even greater significance when considered along the gender divide. Of the 1,140 men on death row, (39%) were categorized as foreign nationals; while for women that increases to 86% (121).

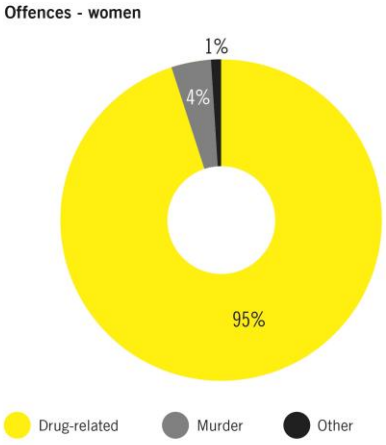
A significant 73% of all those under sentence of death have been convicted of drug trafficking under section 39(b) of the Dangerous of Drugs Act, 1952 – an extremely high figure for an offence that does not even meet the threshold of the "most serious crimes" under international law and standards and for which the death penalty must not be imposed.[48] A further 25% were convicted of murder and the remainder of offences related to use of firearms, robbery and waging war against the King or Ruler of a State, some of which are also non-lethal offences.



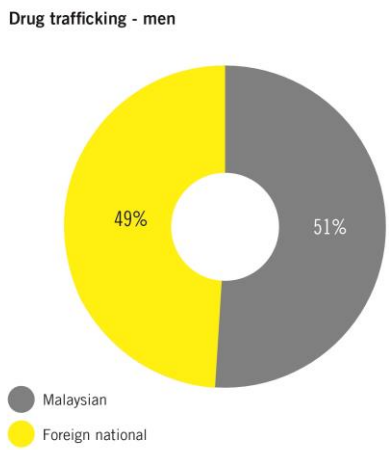
[43] Unless otherwise specified, figures contained in this section are based on information received from official sources in February 2019, on file with Amnesty International. A breakdown of these figures as by prison is included in Annex II of this report.
[44] Alor Setar, Bentong, Johor Bahru, Kajang – Men, Kajang – Women, Kluang, Marang, Pengkalan Chepa, Perlis, Pokok Sena, Pulau Pinang, Seberang Perai, Simpang Renggam, Sungai Buloh, Sungai Udang, Taiping and Tapah.
[45] In detention facilities in Kota Kinabalu- Men, Kota Kinabalu - Women, Labuan, Limbang, Miri, Puncak Borneo, Sandakan, Sibu and Tuwau. Those convicted of murder in East Malaysia were 91 out of 142, or 64%, compared to 20% in peninsular Malaysia.
[46] Kajang - Women, Kota Kinabalu - Women, Pengkalan Chepa, Pokok Sena, Puncak Borneo, Seberang Perai, Sibu, Sungai Udang, Tapah.
[47] Representatives of foreign embassies indicated that there is a discrepancy between figures held by the Malaysian authorities and their embassies, mostly linked to mistakes with the identification and attribution of nationality.
[48] See textbox on p.20

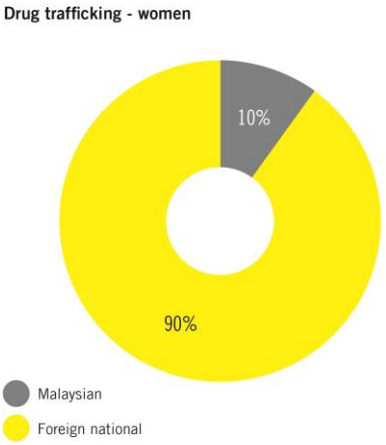
The division by offences appears remarkably different when considering the gender of those convicted. While in the cases of men the number of those convicted of drug trafficking reflected the national total (70%), the use of the death penalty for this offence has a disproportionate impact on women, with 95% of the total under sentence of death for this reason. Of all male cases, 28% of those on death row were convicted of murder, but only 4% of women were.





While overall the numbers of those convicted of drug-related offences are split almost equally between Malaysian (49%) and foreign (51%) nationals, this division is again significantly different for the 134 women on death row for this offence (90% foreign nationals).





For the offence of murder, 76% of those under the sentence of death (318) were Malaysian nationals.

WOMEN ON DEATH ROW: A COMMON STORY OF COERCION AND DECEIPT

Amnesty International selected and reviewed 30 cases of women (3 Malaysian and 27 foreign nationals) on death row for drug trafficking at Kajang and Tapah prisons. All cases have already been reviewed by the Federal Court. In total, 82 women (4 Malaysian and 78 foreign nationals) are under sentence of death for this offence at these prisons.

The cases were selected on the basis of proportionate representation by prison and nationality, as well as availability of judgments. The organization also spoke to lawyers and representatives of embassies who have been involved in cases of

women under sentence of death for this offence. The information relating to their situations portray some common stories that recur frequently in cases of people convicted of drug trafficking more broadly.

In 25 of the cases that Amnesty International reviewed, the women were convicted of trafficking after they were caught with drugs as they tried to enter into Malaysia at international airports. The drugs were mostly found in bags; in some cases these were tied to their bodies and in two others the drugs were found in capsules that had been swallowed. The substances and amounts they carried varied, but among those caught with methamphetamine (25 people), for example, 11 were caught with quantities lower than 1kg (between 117and 900 grams) and seven with amounts between 1,200 and 1,730 grams – the equivalent of 5 to 70 doses.

In most cases, the women said that they were not aware that they were carrying illicit drugs. During the trial, some women argued that they were asked to carry a bag containing items for sale, such as clothes or shoes, for a person known to them, without obtaining any financial compensation. In other cases, the women had agreed to travel to Malaysia to transport fashion items, for example, for a business contact or a known person, in exchange for some money (in several cases it was indicated as the equivalent approximately USD500), but stated that they were not aware they were transporting drugs, or the plan was changed at the last minute. Even those found with drugs tied to their bodies told the police and judges that they were not informed of the content and weight of the drugs found in the packages.

Several of these women were meant to travel to Malaysia with their partner or a friend, who at the last minute had to pull out of the trip for visa or other reasons. In some cases, the women claimed that they had gotten into financial trouble and were coerced by the circumstances to take on or continue the job.

The effect of the mandatory death penalty for drug trafficking, combined with presumptions of guilt under section 37 of the Dangerous Drugs Act, 1952, has had the effect of judges giving little consideration to the facts that led to the discovery of the drugs by the Malaysian police, even when they had no other reason to disregard the accounts that the women put forward as their defence (see also section 3.5 of this report).

In an emblematic case considered by the organization, a foreign national travelled to Bangkok to visit a friend who asked her to travel to Brazil, at the expense of her company, to carry back confidential documents in exchange for USD500. Once in Brazil, the woman was told by the man who was supposed to hand over the documents that she was instead to bring back two bags containing 10 towels, which were later found to contain dried-in cocaine. Her travel arrangements were changed when she was already in Brazil and she was directed to fly back to Malaysia and return to Bangkok by bus. The trial and appeal judges did not accept that she did not have knowledge of the drugs and stated that she should have not trusted the man who assured her that the towels were not illegal – without investigating or taking into consideration the context and possible circumstances she would have faced if she did not agree to carry the bags back.[49]

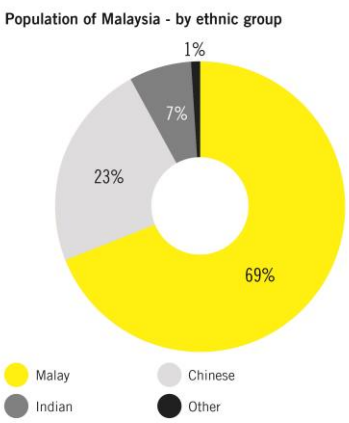
In another case, a foreign national who was found with 689.10 grams of cocaine in small bags in her body, testified in court that a friend had promised her the equivalent of approximately USD2,200 to carry some diamonds back from Brazil. Once there, a contact of her friend locked her in a house, blindfolded her and asked to swallow round-shaped objects for four hours, which she was told were diamonds. She said that she was threatened to be killed if she refused to do so. She was then made to swallow four pills which made her feel drowsy and sleepy, and when she woke up the two men inserted more small bags in her vagina. The trial and appeal judges dismissed her defence, stating for example that "if indeed she was under duress, she had ample time while at the Sao Paolo airport to inform the relevant authorities of her condition. However, she chose not to do so. […] This is […] inconsistent with the conduct of someone who was at one point of time under the threat of being killed. What we could make out from the above evidence was that the evidence which the defence sought to adduce was no more than a mere attempt to convince the trial judge that she did not have custody and control of the sausage-shaped capsules, knowledge and thus possession of the impugned drug therein which is one of the requisite elements of the offence with which the appellant was charged. There was not a scintilla of doubt in our minds that the capsules were swallowed and inserted into the appellant's vagina voluntarily".[50]

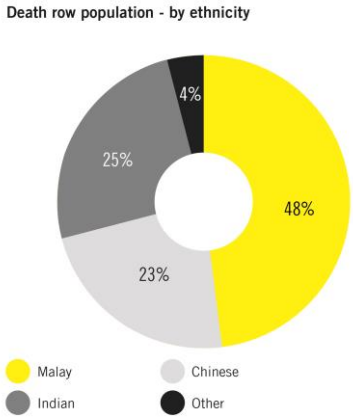
[49] Court of Appeal of Malaysia, B-05-23-01/2012 (PHL) (2014)
[50] Court of Appeal of Malaysia, P-05(M)-237-09/2015

2.3 COMPOSITION BY ETHNIC GROUPS

When looking into the cases of Malaysian nationals that have been sentenced to death, some ethnic minorities are over-represented compared to official estimates of the total population of Malaysia, in which 69% belonged to the predominant Malay ethnic group, 23% are of Chinese ethnic background and 7% Indian. Other ethnicities were estimated to account for less than 1%.[51]

Figures provided to Amnesty International by official sources as of 28 October 2018 indicated that out of the 713 Malaysian nationals on death row, 48% belonged to the Malay ethnic group; 24% to the Chinese group; 25% to the Indian group; and 4% to other ethnic groups.[52] This indicates that the Indian population and people belonging to other ethnic minorities are overrepresented on death row, while the Malay ethnicity has a lower proportion compared to its national comparative.





These figures in themselves cannot be used to infer discrimination in the criminal justice system. In the preparation of this document, Amnesty International has not assessed whether any discriminatory laws or practices have been in place, targeted at some minorities, that could justify the disparity in proportions; nor how the socio-economic backgrounds of the prisoner or the circumstances of the crime could be a factor in the overrepresentation of some ethnic groups on death row.

Notwithstanding this, the identity and ethnicity of the defendant can be critical factors in their experience in the criminal justice system and should be taken into consideration in the analysis of the present state of the death penalty in Malaysia, including to inform policy and legislative deliberations in the context of the announced reforms.

2.4 SOCIO-ECONOMIC BACKGROUNDS

Although Amnesty International was not able to assess how a particular socio-economic background may have impacted the conduct of the trials and the overall outcome of the individual cases of those on death row in Malaysia, official figures do shine a dim light about the challenges that people from disadvantaged backgrounds face in death penalty cases. According to official sources, 440 people, or 34%, of all those on death row were classified as unemployed or not having a permanent job; and a further 126, or 10%, as "labourers". The socio-economic backgrounds of others is not clear given ambiguous categorizations, such as "businessman" or "contractor". More generally, although it is not possible to infer socio-economic status merely on the basis of the stated profession, it is likely that the proportion of those on death row with less advantaged background is significantly higher. In a country where free legal assistance is only guaranteed by

[51] Department of statistics Malaysia, Current Population Estimates, Malaysia, 2018, 31 July 2018, www.dosm.gov.my/v1/index.php?r=column/pdfPrev&id=c1pqTnFjb29HSnNYNUpiTmNWZHArdz09
[52] Including Bajau, Bidayuh, Bugis, Dusun, Iban, Kadazan

law from the time of trial, the financial ability to hire and retain a lawyer from the moment of arrest becomes of critical importance, as shown in the next two chapters.

Research into the use of the death penalty has long shown that those living in poverty or with less financial means are often unable to fully realize their right to competent and effective legal counsel, at all stages of the proceedings. Defendants from disadvantaged socio-economic backgrounds were often unable to engage or retain competent legal representation, as well as benefit from the much-needed support of forensic and medical experts to prepare their defence. For example, a comprehensive study by the National Law University in Delhi (India) on death rows in India has shown that low literacy levels among prisoners facing the death penalty, as well as their marginalized or absent social networks, can in some cases be factors influencing their understanding of, and engagement with, the judicial institutions and their own legal representatives. This in turn has had the effect of further disempowering and marginalizing certain sections of society, along lines of class, gender, caste, religion and levels of educational attainment.[53]

DEATH PENALTY FOR DRUGS: NEVER THE SOLUTION

Malaysia is among a minority of states that continue to impose the death penalty for drug-related offences. As part of the public debates on the announced legislative reforms, several calls have been made to retain this punishment because of its perceived deterrent effect.[54] However, not only there is no evidence that the death penalty acts as a unique deterrent; it has also not been proven either to be a deterrent to drug use nor an effective way to prevent drug-related deaths.

Through its research for the preparation of this report, Amnesty International has found that those on death row for drug trafficking were frequently convicted after they were found in possession of and transporting relatively small quantities of drugs without having committed or being involved in any form of violence, and were often people that are at the low-end of the drug chain (drug couriers). In many cases, they claimed that they were forced or lured into the drug trade by their partners or people they knew, for example, or because of their lack of financial means. Given the low-ranking and the elevated risks such positions entail, many of those who have been sentenced to death have shown to have little or no control over what drugs and what amounts they were asked to carry; they had little or no information about where the prohibited substances were coming from or going to, and were in many cases only in possession of a name and a mobile phone to call once arrived at their assigned destination. This situation leaves couriers more exposed to the risk of the death penalty, as they usually have no information about those occupying higher positions in the hierarchy of criminal drug networks, which they can share with the authorities to assist with the disruption of further drug trafficking activities and avoid being sentenced to death.

The use of the death penalty for drug-related offences is the most extreme sign of the predominantly punitive response that states have put in place in the context of the so-called "war on drugs". As has been shown in recent UN studies, such policies have been detrimental to the enjoyment of human rights,[55] Having a particular dire effect on the most marginalized sectors of society. Nevertheless, the negative impacts on the lives of people continue to be frequently ignored as the effectiveness of the international drug control regime is measured by the amount of drugs seized or the number of people arrested for drug offences.[56]

The heavy reliance on criminal laws, repressive policies and other measures based on prohibition has resulted in widespread human rights violations. Current drug policies have failed to address the underlying socio-economic factors that increase the risks that lead people to engage in the drug trade, including ill-health, denial of education, unemployment, lack of housing, poverty and discrimination. As seen by the cases documented in this report, drug control laws and policies have worsened structural sources of vulnerability, stigma and discrimination that affect people who engage in the drug trade, especially women and those belonging to marginalized and disadvantaged communities.

[53] National Law University, "Death Penalty India Report," Delhi Press, February 2016, vol. I
[54] See, for example, "Yoursay: Death penalty debate – a law without heart has no grandeur", Malaysiakini, 29 May 2019, https://www.malaysiakini.com/news/477788 "Keep death penalty to win war on drugs, says terrorism expert", Free Malaysia Today, 24 January 2019, https://www.freemalaysiatoday.com/category/nation/2019/01/24/keep-death-penalty-to-win-war-on-drugs-says-terrorism-expert/
[55] UN Human Rights Council, Study on the impact of the world drug problem on the enjoyment of human rights, UN Doc. A/HRC/30/65 (2015); Implementation of the joint commitment to effectively addressing and countering the world drug problem with regard to human rights, UN Doc. A/HRC/39/39 (2018).
[56] UN Doc. A/HRC/30/65 (2015), para. 35

Drug control policies should therefore be understood as a means to achieve broader objectives, including the protection of the right to the highest attainable standard of health, ensuring equality and non-discrimination, and avoiding the violence associated with illicit markets. Addressing the root causes of drug-related harm requires states to put in place a wide set of gender-sensitive and holistic socio-economic protection measures tackling the different stages of the drug trade, from cultivation and production to distribution and use.

2.5 STAY ON DEATH ROW AND PARDON APPLICATIONS

The vast majority of those on death row were convicted before March 2018, when the legislative amendments to the Dangerous Drugs Act, 1952, introducing limited sentencing discretion, came into effect. Many were also convicted by the High Court before one of the most recent legal aid schemes providing legal support at the time of arrest was established, in 2014, and have not been able to benefit from these legislative changes. At least 5 people had been on death row for more than 15 years as of October 2018.

DATE OF CONVICTIONS OF THOSE ON DEATH ROW

Since 2018: 205 (16%)
2014-2017: 533 (42%)
2009-2013: 464 (36%)

The majority of those on death row also spent 2-5 years in pre-trial detention.

More than half of those on death row (60%) had their legal appeals finalized as of February 2019. Of these 764 people, just 425 had submitted their petition for pardon. Approximately half of the foreign nationals at the final stage of their case did not file their pardon petition, while the figure is slightly higher in the case of Malaysians (approximately 60%).

3. FAIR TRIAL CONCERNS

> **"[We need the] abolition of the death penalty, because of the imperfection of the criminal justice system. It is never safe to execute any human being."**
>
> Malaysian lawyer, 24 August 2019[57]

The right to a fair trial is a fundamental human right and one of the universally applicable guarantees proclaimed in the Universal Declaration of Human Rights.[58] It has become legally binding on states as part of customary international law and the key elements that define it are set out in Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[59] These must be observed by all states, regardless of whether they are state parties to the ICCPR, and include:

- the right of anyone facing a criminal charge to a fair and public hearing by a competent, independent and impartial tribunal;
- the right to be presumed innocent until proven guilty;
- the right to be informed promptly and in detail in a language which they understand of the nature and cause of the charges against them;
- the right to adequate time and facilities to prepare a defence;
- the right to communicate with counsel of the defendant's choosing;
- the right to free legal assistance for defendants unable to pay for it;
- the right to examine witnesses for the prosecution and to present witnesses for the defence;
- the right to free assistance of an interpreter if necessary;
- the right not to be compelled to testify against themselves or to confess guilt;
- and the right to appeal to a higher court.

Respecting and protecting the right to a fair trial, from the time of arrest, is all the more important in death penalty cases, where the life of the defendant is at stake. In 1984, the UN Economic and Social Council (ECOSOC) affirmed the importance of safeguards to protect the right to a fair trial for those facing the death penalty. It stated that such safeguards must be "at least equal to those contained in article 14" of the ICCPR and must include "adequate legal assistance at all stages of the proceedings".[60] Violation of fair trial guarantees provided for in Article 14 of the ICCPR would render the death sentence arbitrary in nature;[61]

[57] Interview with Amnesty International, 24 August 2019
[58] Available at https://www.un.org/en/universal-declaration-human-rights/
[59] See Amnesty International, *Fair Trial Manual, Second Edition* (Index: POL 30/002/2014)
[60] Safeguard no.5 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, UN Economic and Social Council Resolution 1984/50 of 25 May 1984
[61] Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para.41

and the arbitrary deprivation of life, together with torture and other ill-treatment and punishment, is absolutely prohibited under customary international law.[62]

In this chapter, Amnesty International outlines its concerns on selected aspects of the right to a fair trial in the context of death penalty proceedings in Malaysia. The analysis is based on provisions contained in the Penal Code, the Criminal Procedure Code, and special legislation such as the Dangerous Drugs Act, 1952.[63] The chapter further draws from information the organization gathered through direct interviews with legal professionals and relatives of people who have been sentenced to death, as well as through the analysis of 150 judgments obtained online.

Taken together, the concerns outlined in this section show a worrying lack of safeguards that have led to numerous violations of the right to a fair trial at different points of the criminal justice process, which leave defendants vulnerable to the imposition of the death penalty. The chapter highlights concerns in relation to defendants being held without access to legal counsel from the time of arrest and the failure to enable foreign nationals to access consular assistance in a timely fashion; allegations of torture or other ill-treatment in pre-trial detention in order to obtain a statement or information that is later used to secure convictions, leading to death sentences; failure to provide effective interpretation for foreign nationals and others who could not adequately understand the language used in the proceedings; access to adequate time and facilities to prepare the defence; and the reliance on "presumptions" of guilt, which shift the burden of proof on to the defendant and breach the right to the presumption of innocence. It further identifies failures to respect the defendants' right to appeal against their conviction, including in cases where new evidence undermines the conviction at its core.

3.1 RESTRICTIONS ON ACCESS TO COMPETENT AND EFFECTIVE LEGAL COUNSEL

All persons arrested or detained on a criminal charge have the right to competent and effective legal counsel from the start of a criminal investigation and as soon as they are deprived of their liberty.[64] This enables defendants to protect their rights and prepare their defence, and serves as an important safeguard against torture and other ill-treatment, and against coerced "confessions" or other self-incriminating statements. This right extends to all stages of criminal proceedings, including the preliminary investigation, before and during the trial, and appeals.[65] If the defendant cannot afford to pay, a lawyer must be assigned to them free of charge.[66]

The state and the court have a particular obligation in death penalty cases to ensure that the appointed counsel is competent, has the requisite skills and experience commensurate with the gravity of the offence, and is effective.[67] The UN Human Rights Committee has also stated that if counsel shows "blatant misbehaviour or incompetence", or if the authorities "hinder appointed lawyers from fulfilling their task effectively," the state may be responsible for a violation of the right to fair trial under the ICCPR.[68] If the authorities or the court are notified that counsel is not effective, or if the counsel's ineffectiveness is manifest, the court must ensure that the counsel performs his or her duties or is replaced.

Death penalty cases should not proceed unless the accused is assisted by competent and effective counsel.[69]

Article 5(3) of the Federal Constitution of Malaysia guarantees the right of a person to be allowed to consult and be defended by a legal practitioner of their choice as soon as possible after arrest. However, gaps in

[62] Human Rights Committee, Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.6, para.8; Report of the Special Rapporteur on Extrajudicial Executions, UN Doc. A/67/275, 2012, para. 11; Committee Against Torture, General Comment No. 2: Implementation of Article 2 by States Parties, UN Doc. CAT/C/GC/2, para.1.
[63] Penal Code, As at 1 February 2018, Act 574; Criminal Procedure Code, As at 1 November 2012, Act 593
[64] See Amnesty International, *Fair Trial Manual*, Chapter 3. The UN Human Rights Committee has stated that the "assistance of counsel should be ensured, through legal aid as necessary, immediately on arrest and throughout all subsequent proceedings to persons accused of serious crimes, in particular in cases of offences carrying the death penalty". Human Rights Committee, Concluding observations of the Human Rights Committee: Trinidad and Tobago, UN Doc. CCPR/CO/70/TTO, para.7.
[65] Principle 1 of the UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990
[66] Article 14(3)(d) of the ICCPR
[67] Principle no. 13 of the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN General Assembly resolution 67/187 of 20 December 2012
[68] The UN Human Rights Committee, General Comment No. 32, para. 38
[69] Human Rights Committee, *Robinson v Jamaica*, Communication No. 223/1987, paras. 10.2-10.3, *Abdool Saleem Yasseen* and *Noel Thomas v Guyana*, UN Doc. CCPR/C/62/D/676/1996, para. 7.8.

legislation and practical barriers have frequently undermined the realization of this right, particularly for those who do not have the means to instruct their legal representatives independently.[70]

The framework through which the legal aid works in Malaysia creates some clear, critical first gaps. There are three types of legal aid schemes in Malaysia that concern death penalty cases.[71] The main legal aid scheme is managed by the courts. It provides legal representation for those facing capital charges who are unable to engage a lawyer independently, and covers representation both at trial before the High Court and during the appeal stages, before the Court of Appeal and the Federal Court. This scheme is available both for Malaysian citizens and foreign nationals. The costs of the legal representation are carried by the courts and lawyers, who are selected from a pre-approved list, and are generally assigned to a case by the judge on a rotating fashion.

The court-managed scheme, however, does not cover the pre-trial stage of the criminal process, a critical phase in the development of a defence. To address this, a new state-funded scheme, called the National Legal Aid Foundation (NLAF; Yayasan Bantuan Guaman Kebangsaan, YBGK), became operational in 2012.[72] This scheme, created by the state but set up as a charity, provides legal aid and advice only to Malaysian nationals at the stage of arrest, remand and bail application and – to a lesser extent, because of limited resources available – to those on death row who want to prepare pardon applications. It has centres all over peninsular Malaysia, but in East Malaysia it is only operational in eight locations. It is administered through the networks of the Bar Council Legal Aid Centres of the Malaysian Bar, Sabah Law Association and the Advocates' Association of Sarawak. In order to qualify to assist defendants through this scheme, lawyers are required to undertake additional training and are paid a flat rate for their services. This scheme does not cover the trial and appeal phases, which are already covered under the court-managed scheme, and – critically – does not provide assistance to foreign nationals.

As noted in the previous chapter, a significant proportion of those on death row are foreign nationals, and the lack of coverage in legal aid services at the time of arrest in their cases is cause for significant concern. The Malaysian Bar has made repeated calls to the authorities to ensure foreign nationals are able to get legal counsel through the YBGK scheme and initiatives to maximize coverage have already been contemplated, for example through cooperation with foreign embassies.[73] According to officials of the Bar Council Legal Aid Centre, a self-funded scheme by the Malaysian Bar, lawyers who provide pro-bono representation at the remand stage can fill this gap, supporting all those under arrest and at the time of their appearance before the Magistrate Court, regardless of the offence committed and the nationality of the individual.[74] The Bar Council Legal Aid Centre has also sought to develop dedicated legal aid schemes with foreign embassies, to maximize the reach of its legal support. One such initiative is the Thai Citizens Legal Aid Scheme (T-CLAS), established jointly with the Thai Embassy and launched in December 2017 to provide legal assistance at nominal costs when Thai nationals are accused of serious crimes, among other services.[75] Some other foreign representations in Malaysia have also put in place mechanisms to engage with a private law firm independently, to maximise support for their own nationals.[76]

Amnesty International was not able to obtain figures on legal aid coverage in death penalty cases and information on any legal support received at pre-trial stages is rarely included in publicly available documents, such as judgments. Lawyers and other representatives of prisoners on death row told Amnesty International that it has been a common experience for those arrested for offences that could result in the death penalty and who cannot hire a lawyer independently not to receive legal assistance at the time of arrest, or during their time on police remand, before the charges are brought.[77]

A lawyer associated with a Bar Council centre in an interview with Amnesty International estimated the coverage of the legal aid scheme at the time of arrest and remand hearing at 60-70%, indicating also that the figure reduces further away one gets from the centre of Kuala Lumpur.[78] Representatives of the legal aid

[70] An overview of concerns relating to the Malaysian criminal justice process is outlined in International Centre for Law and Legal Studies (I-CeLLS), "Justice Audit Malaysia", http://malaysia.justiceaudit.org/?page_id=34

[71] A fourth, established under the Legal Aid Act 1971 and managed by the Legal Aid Department, does not cover offences that could result in the imposition of the death penalty.

[72] For more information, visit: www.sprm.gov.my/index.php/en/enforcement/legal-jurisdiction/81-uncategorised/1040-yayasan-bantuan-guaman-kebangsaan-ybgk

[73] "Provide legal aid to all foreigners, Bar urges Putrajaya", *Free Malaysia Today*, 30 October 2018, www.freemalaysiatoday.com/category/nation/2018/10/30/provide-legal-aid-to-all-foreigners-bar-urges-putrajaya/

[74] Interview with representatives of representatives of the Bar Council Legal Aid Centre, 26 August 2019

[75] Malaysian Bar, Bar Council, "Thai embassy set up scheme for Thai nationals in Malaysia", 17 December 2017, www.malaysianbar.org.my/bar_news/berita_badan_peguam/bar_council_thai_embassy_set_up_scheme_for_thai_nationals_in_malaysia.html The costs of each service is published on the website of the Thai embassy at this link: https://bit.ly/2mjGtQ9.

[76] Interviews with representatives of two foreign embassies on 27 and 29 August 2019

[77] Interviews conducted by Amnesty International in August 2019

[78] Interview conducted on 29 August 2019. Amnesty International requested official figures from the Secretariat of the Bar Council Legal Aid Centre. However, official data was not received at the time of publication of this report.

scheme stated that the lack of overall resources was a concern inhibiting the delivery of services through the various legal aid schemes, both financially but also with regard to the availability of lawyers to provide pro-bono services, particularly at evening time. As highlighted in the section below, the assistance of a lawyer is critical when giving statements during police interrogation, among other issues. When a conviction may lead to the death penalty, the geographical disparity in the provision of free and competent legal assistance raises further concerns in relation to the unequal protection of the law against arbitrary deprivation of life. It is further concerning that, because of how legal aid is structured in the different schemes that provide no free legal representatives until the trial is due to start, many defendants are left awaiting trial without any legal assistance for significant periods that have extended from months to, in most cases, two to five years (as noted in section 2.4 of this report).

The limited resources available to the lawyers appointed by the court has also impeded the ability of the defendant to enjoy an adequate and effective legal representation. The court appointed lawyers do not have the means to appoint experts to challenge the evidence of the prosecution, for example chemist and DNA experts. In the absence of the defendant's own experts, the evidence of the prosecution experts becomes irrefutable.[79]

Another barrier to the full enjoyment of the right to effective legal counsel for those facing the death penalty in Malaysia relates to the quality of the representation, when it is available. Amnesty International did not receive any specific complaints with regard to the representation afforded to defendants appearing at the Magistrate Court for remand hearings. However, several family members and lawyers who represented prisoners appealing against their conviction and sentence claimed that the defendants' trial counsel was incompetent, inexperienced or participated in misconduct in the representation of people of less advantaged backgrounds during trial. They said, for example, that some attorneys would rush through cases in two to three days to claim their fees and move quickly to the next one; or ask for substantial amounts of money from family members without taking the requested action in the case. This is particularly problematic when considering that it is extremely difficult to introduce new defences after the conviction has been obtained, and many judges have rejected such arguments during appeal. In an effort to ensure effective legal representation, the Bar Council Legal Aid Centre has put in place training and enhanced requirements for lawyers wanting to offer representation through the YBGK programme;[80] and has an operating complaints mechanism which has resulted in disciplinary actions.[81]

3.2 DELAYS IN NOTIFICATION OF ARREST

The right of all suspects and accused people to access to and assistance of counsel from the very start of a criminal investigation is further undermined by delays in notifying legal aid centres, family members and lawyers of the arrest. Article 5(3) of the Federal Constitution of Malaysia guarantees the right of a person to be informed as soon as possible of the grounds of their arrest as well as the right to consult and be defended by a legal practitioner of their choice. Similarly, the Criminal Procedure Code guarantees the rights of suspects to be informed promptly of the grounds for their arrest, to contact a legal representative of their choice within 24 hours of arrest, and to communicate with a relative or friend as to their whereabouts.[82]

Representatives of legal aid schemes who spoke with Amnesty International did not express concern at the timeliness of the notification of arrest that they had received from law enforcement agencies. However, they mentioned concerns related to practical issues, such as the receipt of the fax or email notifications after office hours which would not be acted on until the following day; and the low availability of lawyers when the notification comes in. Overall, the legal aid representatives seemed to be satisfied that all defendants would have access to a legal representative at the Magistrate Court, when they are taken for their remand hearing within 24 hours of their arrest.

This assessment seemed to be in contrast to what some family members told Amnesty International, who mentioned that their relatives only saw a lawyer for the first time when they were charged at the Magistrate Court, days after their arrest. The sister of a man on death row for drug trafficking told Amnesty International that she and her family were even denied access to him while he was held at the police station.[83]

[79] Interview with lawyer, 24 August 2019
[80] One of the requirements is that lawyers have five years of experience in criminal matters
[81] See, for example, "Bar deplores 'fraud' allegations in legal aid scheme", *Free Malaysia Today*, 28 October 2016, www.freemalaysiatoday.com/category/nation/2016/10/28/bar-deplores-fraud-allegations-in-legal-aid-scheme/.
[82] Section 28(a) of the Criminal Procedure Code, As at 1 November 2012, Act 593
[83] Interview with Amnesty International, 24 August 2019

Similarly, representatives of foreign embassies indicated that they usually get the notification of arrest of their own nationals with a time gap of more than 24 hours or even days, "usually after the statement is taken".[84] In several cases, they heard about an arrest by some concerned community members first, or in a few instances from the media. Some mentioned that the police officers add all notices to a pile and sent to the relevant embassy in a list which has included in some instances more than 100 individuals under arrest for capital and other offences, adding further delays to the process "as it is difficult to even identify which cases to prioritize". International and domestic law guarantee foreign nationals the right to be promptly informed of their right to communicate with their embassy or consular representative as soon as they are arrested, detained or imprisoned.[85] Consular assistance can be critical for defendants to gather evidence in their defence, including to present mitigating factors to support their case and, at the final stage, pardon applications.

Amnesty International was also told by representatives of foreign embassies that in several cases involving foreign nationals, the Malaysian authorities had failed to correctly identify or verify the identity and nationality of the defendants, with the result that those defendants were not able to exercise their right to seek assistance from the consular authorities of their states of origin at the time of arrest.

3.3 LACK OF LEGAL REPRESENTATION: RISK OF ILL TREATMENT AND SELF-INCRIMINATING STATEMENTS

People suspected or accused of criminal offences who are being questioned have the right to the presence and assistance of a lawyer.[86] They have the right to communicate and consult with their counsel privately and in confidence.[87] They should be notified of these rights before being questioned. Individuals who are unable to communicate in the language used by their lawyer are entitled to an interpreter (paid for by the state).[88] Statements elicited as a result of torture, ill-treatment or other forms of coercion must be excluded as evidence in criminal proceedings, except those brought against suspected perpetrators of such abuse (as evidence that the statement was made).[89] The UN Human Rights Committee has stated that this exclusion applies not only to statements and confessions, but also, in principle, to other forms of evidence elicited as a result of torture or other ill-treatment, at all times.[90]

The prohibition of torture and other cruel, inhuman or degrading treatment or punishment is a norm of customary international law that applies to all people in all circumstances.[91] Whenever an individual alleges they have been subjected to torture or other ill-treatment, the authorities have an obligation to conduct a prompt, independent, impartial and effective investigation with a view to ensuring that all those responsible are brought to justice, and victims must have access to an effective remedy and receive adequate reparations.[92]

In Malaysia, the police can detain people suspected of having committed a crime for more than 24 hours to enable the police to complete their investigation.[93] Within 24 hours, the arrested person has to be brought before a magistrate who can authorize their detention for a period of up to seven days which, in death penalty cases, can be extended by a further seven days.[94] This period of time is critical both for the investigating police officers and the defendant, and judicial oversight of the detention serves to safeguard the presumption of innocence and also aims to prevent other human rights violations, including torture and other ill-treatment.

[84] Interview with Amnesty International, 27 August 2019
[85] Article 36 of the Vienna Convention on Consular Relations (1963); Article 17(2)(d) of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED); Article 16(7) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW). Malaysia is a state party to the Vienna Convention on Consular Relations and the ICMW, but only a signatory to the CPED.
[86] Special Rapporteur on the independence of judges and lawyers, United Kingdom, UN Doc. E/CN.4/1998/39/add.4, para.47
[87] Principle 8 (29) of UNODC, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN General Assembly resolution 67/187
[88] HRC General Comment 32, para.32
[89] Article 15 of the Convention Against Torture; Article 14(3) of the ICCPR.
[90] Human Rights Committee General Comment No. 32, para. 6
[91] Article 5 of the Universal Declaration of Human Rights, Article 7 of the ICCPR, Article 2 of the Convention against Torture, Articles 37(a) and 19 of the Convention on the Rights of the Child, Article 10 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.
[92] Articles 2 and 7 of the ICCPR; Articles 12-14 of the Convention against Torture; Human Rights Committee General Comment 31, on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, paras 15-16
[93] Section 28 of the Criminal Procedure Code
[94] Section 117 of the Criminal Procedure Code

Torture and other ill-treatment at police stations throughout Malaysia are a widespread concern, although there has been only limited reporting on these violations.[95] In its 2011 report on Malaysia, the UN Working Group on Arbitrary Detention noted that "virtually all detainees interviewed stated that they had been subjected to ill-treatment and even torture in police stations and detention centres in order to obtain confessions or incriminatory evidence. Many detainees told the Working Group that they were not informed of their rights while in police detention, particularly the right to contact their relatives or to consult a defence lawyer. Some reported that police officers even told them that to consult a lawyer would make their situation even more complicated".[96]

SUARAM, a leading NGO in Malaysia that has monitored police abuses extensively, states in its most recent annual report that "Torture has been and remains a well-documented and reoccurring issue in Malaysia. Incidents of physical violence inflicted upon detainees under remand or during investigation are prevalent especially when there are elements of chain remand or detention under security laws. In general, it is difficult to provide the appropriate medical evidence to prove torture has been inflicted as detainees are often locked away until their next court appearance and subjected to threats of further violence by investigating officers if they were to reveal what had been inflicted upon them".[97] 'Chain remand' refers to a police practice to take a defendant to a different Magistrate Court when the initial 14 days of remand have expired, to further extend the period in which a defendant can be kept before charges are brought. SUARAM indicates in its report that it remains a common occurrence and that complaints of this practice were received by the respective state Legal Aid Centres and YBGK.

A lawyer with significant experience in representing death penalty cases told Amnesty International that it is common for defendants to "get beaten up" to extract information or statements when a lawyer is not present, especially for those in police custody for murder and firearm-related offences.[98] He also noted that it is a treatment reserved for men, not women. Other lawyers also referred to this treatment during their interviews with Amnesty International. Family members also raised concern at the fairness of the process of interrogation, hindering the principle of equality of arms especially when the lawyer is not present.

As a relative explained:

> **"He was not too sure what he should say, to the extent that you need to write the report, but he had no choice but to write it. In that spur of the moment, when they have been caught, they are not in a good state to make their own judgment. They need someone to advise them or supervise them, which is the lawyer. By right, during that time, family members should be allowed to get representatives."[99]**

Malaysian law generally precludes the prosecution from using "confessions" or other self-incriminating statements at trial. However, in cases tried under the Dangerous Drugs Act, 1952, such statements are admissible, though even in these cases the Attorney General's Chambers have observed an informal policy not to put them forward as evidence at trial.[100] Nevertheless, a significant concern that lawyers raised with Amnesty International was the fact that through these "confessions", the prosecution would get further leads to support their investigation of the crime, which would in turn strengthen the case against the defendant.

Furthermore, as the statements taken without the support of a lawyer would usually include information that can be both advantageous and disadvantageous for the defendant, the legal defence team would generally choose not to put forward these police statements as evidence at trial, missing out on an opportunity to challenge some of the evidence against them or strengthen their defence. It is additionally concerning that legal support is lacking at the critical time of the police interrogation because under Malaysian legal standards any defence not put forward at the first available opportunity is regarded as an "afterthought", and lack of consistency in the account of the facts put forward by the defendants is considered to their disadvantage.[101] For those unfamiliar with the legal process, the presence of a lawyer is a critical safeguard that can make the difference between life and death.

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[95] See, for example, Human Rights Watch, *No Answers, No Apology - Police Abuses and Accountability in Malaysia*, 2014, www.hrw.org/report/2014/04/01/no-answers-no-apology/police-abuses-and-accountability-malaysia#4ab8e3

[96] Report of the Working Group on Arbitrary Detention - Mission to Malaysia, UN Doc. A/HRC/16/47/Add.2, para. 50

[97] SUARAM, *Human Rights Overview Report on Malaysia 2018*, November 2018, www.suaram.net/wp-content/uploads/2018/12/HR-Overview-2018-28-Nov.pdf

[98] Interview with Amnesty International, 30 August 2019

[99] Interview with Amnesty International, 24 August 2019

[100] Under section 37(b) of the Act

[101] *Ahmad Najib Aris v Public Prosecutor*, Federal Court of Malaysia, [2009] 2 CLJ 800 FC. See also section 3.5 of this document.

Hoo Yew Wah, a Malaysian national of Chinese ethnicity, remains on death row at Bentong prison, Pahang State, central Malaysia. In March 2005, at the age of 20, he was found in possession of 188.35 grams of methamphetamine, automatically presumed to be trafficking drugs and later convicted of trafficking under section 39(b) of the Dangerous Drugs Act, 1952. He was sentenced to the mandatory death penalty on 12 May 2011 and his appeals were later rejected. His April 2014 petition for a pardon to the Sultan of Johor State, where the offence took place, remains pending. He turned 33 years old in 2018 and said he repented of his offence.

Hoo Yew Wah was convicted on the basis of a statement he made at the time of arrest in Mandarin language, his mother tongue, without a lawyer present, and the content of which he contested at trial and on appeal. He also said that on the day after his arrest, and during his police investigation at the District Police Headquarters in Johor, the police broke his finger and threatened to beat his girlfriend to make him sign a statement. While these concerns were raised before the courts, the judges dismissed them without ordering an investigation and upheld his conviction and sentence.

↑ *© Christine Hoo*

3.4 ACCESS TO LANGUAGE INTERPRETATION AND ADEQUATE TIME AND FACILITIES TO PREPARE THE DEFENCE

Everyone, including those accused of criminal offences and victims of crime, has an equal right to access to the courts.[102] Foreign nationals who are in the territory of a state or otherwise subject to its jurisdiction must enjoy access to the courts on an equal basis to citizens, whatever their status.[103] The defendant must have adequate time and facilities, including language interpretation, to prepare his or her defence.[104] International fair trial standards require that foreign nationals or others who do not understand or speak the language used by the authorities are entitled to the assistance of an interpreter, free of charge, following arrest, including during questioning, and at all other stages of the proceedings. [105]

Section 270 of the Code of Criminal Procedure guarantees interpretation in open court to those who do not understand the language in which evidence is given and grants the court discretion in deciding to what extent translation should be offered for documents put forward as evidence. Malaysian law, however, does not make any provision for interpretation support outside of the courtroom, for example during interrogation or when preparing one's trial defence.

Through its interviews, Amnesty International has learned that the experience of foreign nationals can vary greatly depending on the resources made available by the relevant embassy. Worryingly, Amnesty International also heard about disparities in the provision of consular assistance depending on the ethnicity of the foreign defendant, where those belonging to targeted minorities in the country of origin receive little support – which adds another layer of arbitrariness in the application of the death penalty.[106]

Some legal representatives spoke with concern to Amnesty International about how those who do not understand Malay would not be able to understand the statement that the police would have compiled at the time of arrest, and which they would be asked to sign – making yet again the presence of a lawyer and an

[102] Article 8 of the Universal Declaration of Human Rights; Articles 2, 3, 14(1) and 26 of the ICCPR; Articles 2 and 15 of the International Convention on the Elimination of All Forms of Discrimination Against Women; Articles 5-6 of the International Convention on the Elimination of Racial Discrimination; Articles 13 (and 9) of the Convention on Rights of Persons with Disabilities; Article 18 of the Migrant Workers Convention; the UN Human Rights Committee General Comment No. 32, paras 8-11

[103] 6 Article 18 of the CMW; Article 5 of the Declaration on the Human Rights of Individuals Who are not Nationals of the Country in Which They Live, UN Doc. A/RES/40/144, 13 December 1985; the UN Human Rights Committee General Comment No. 32, para 9.

[104] See Amnesty International, *Fair Trial Manual*, Chapter 28.6.1

[105] Articles 16(8) and 18 of the Migrant Workers Convention; Article 14(3) of the ICCPR; Article 40(2) of the Convention on the Rights of the Child.

[106] Interview with lawyer, 30 August 2019

interpreter a critical factor.[107]Amnesty International was told that in some cases the police would get an interpreter for the cautioned statement, but the extent to which this practice was followed was limited. A lawyer who represented foreign nationals also told Amnesty International that some of clients had difficulties communicating with the interpreters provided by law enforcement officials, because of the limited level of competency or knowledge of the language expert.[108]

According to a lawyer interviewed by Amnesty International:

> **"Depending on your nationality, you might be better off."**
>
> Interview with lawyer, 30 August 2019

Even with regard to preparing the defence, lawyers have had to resort to expediency in cases involving foreign nationals. By the time a case gets to the High Court months or – more frequently – years after their arrest, a defendant has usually gained a basic command of Malay, allowing for some communication with their assigned legal counsel in the days preceding the court hearings. However, to ask more complicated questions or to get a better understanding of the circumstances of the case, lawyers have told Amnesty International that they would go to the court early on the day of the hearings and use the court-assigned interpreter to facilitate their conversation with the defendant, usually for 1.5-2 hours before the proceedings begin.[109]

This following case illustrates how the lack of interpretation can hinder a defence:

A foreign woman was arrested on suspicion of carrying over 2,000 grams of methamphetamines in March 2010.[110] A single mother, she travelled to Malaysia with one of her children to meet her boyfriend of a year, who owned a restaurant in the country. All three were arrested as soon as they arrived at their hotel lobby in Kuala Lumpur. She only spoke a little English and relied on her boyfriend, who had a better command of the language, for assistance – he told her not to worry. She claimed at trial that when they were arrested their similar bags got wrongly attributed and that she signed the police statement confirming sequestration of her items without understanding it, as his boyfriend had told her to do so. In her trial testimony, she said that there was no interpreter available and she asked for one, but the boyfriend told her that it would not be necessary as he understood English. During the interrogation, the police asked all questions to her boyfriend and he answered them for her. She said that he told her not to worry, as he was organizing something with the police and they would all be released. He was released; she was convicted and sentenced to death in 2013. Concerns over the lack of interpretation during the proceeding was raised at trial, but not taken into consideration by the judges, who instead noted that before trial she did not raise the fact that the bag containing drugs did not belong to her.

3.5 PRESUMPTION OF INNOCENCE REVERSED – SECTION 37 OF THE DANGEROUS DRUGS ACT, 1952

Everyone has the right to be presumed innocent, and treated as innocent, unless and until they are convicted according to law in the course of proceedings which meet at least the minimum prescribed requirements of fairness.[111] The right to be presumed innocent is a norm of customary international law – it applies at all times, in all circumstances.[112] It is an essential element of the right to fair criminal proceedings and the rule of law.

The requirement that the accused be presumed innocent means that the burden of proving the charge rests on the prosecution. A court may not convict unless guilt has been proven beyond reasonable doubt. If there is reasonable doubt, the accused must be acquitted. In death penalty cases, the death penalty may be

[107] Interview with lawyers 24, 29 and 30 August 2019
[108] Interview with lawyer, 24 August 2019
[109] Interview with lawyers, 29 and 30 August 2019
[110] Judgment of the Court of Appeal of Malaysia, November 2015, W-05-144-05/2013
[111] Among other instruments, Article 11 of the Universal Declaration on Human Rights, Article 14(2) of the ICCPR, Article 40(2)(b)(i) of the Convention on the Rights of the Child, Article 18(2) of the Migrant Workers Convention
[112] Human Rights Committee, General Comment No. 24, para.8

imposed only when the guilt of the person charged is based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.[113]

An issue of further concern for Amnesty International is the retention of the presumptions, under Section 37 of the Dangerous Drugs Act, 1952, that defendants found with specified amounts of certain drugs, or even simply in possession or in control of objects or premises in which prohibited substances are found, are guilty of drug trafficking. In those circumstances, the burden of proof on a balance of probabilities is shifted to the defendant, in violation of the presumption of innocence and fair trial rights.

In a recent judgment, the Federal Court of Malaysia found Section 37(a) of the Act to be unconstitutional as it allowed the prosecution to rely on "double presumptions" - more than one presumption in the same case - to prove guilt. However, the judgment did not address the question of reliance on one presumption of guilt at the time, nor what should happen in the cases of people already convicted on the basis of multiple presumptions.[114] Similar presumptions can also be invoked under the Firearms (Increased Penalties) Act, 1971.[115]

> **"The application of what may be termed the "double presumptions" under the two subsections gives rise to a real risk that an accused may be convicted of drug trafficking in circumstances where a significant reasonable doubt remains as to the main elements of the offence. In such circumstance, it cannot be said that the responsibility remains primarily on the prosecution to prove the guilt of the accused beyond a reasonable doubt."[116]**
>
> *Alma Nuda Atenza and Orathai Prommatat v. Public Prosecutor*, Federal Court of Malaysia, 5 April 2019

In addition to undermining the right to a fair trial, the presumptions of guilt have also had the effect of lowering the threshold of evidence needed to secure a conviction in capital cases. As soon as a person is found in control of a bag or item in which controlled drugs are found, they can be considered to be in possession of the substances; their knowledge of the drugs can be inferred by the appearance of the defendant through signs such as nervousness, sweatiness. In the words of a judge:

> **"[The officer] said the appellant who was standing beside him started crying and remarked "Oh, what is this? I don't know" and she started sweating. [The officer] told her to relax, be calm and sit down. A truly innocent person in such a situation as faced by the accused would have blurted out the name of the person the very moment when the drug was being discovered in the bag at the airport"[117]**

Once the possession is established, the quantity of drugs seized can allow the prosecution to invoke the presumption that the person was involved in drug trafficking.

A lawyer described to Amnesty International the case of a young foreign national he is currently representing. She was arrested at one of Malaysia's international airports, after the police scanned her bag and found drugs hidden inside. She claims she did not know her bag contained prohibited substances. She stated that she had in fact returned to the custom area of the airport, to check whether she needed to put her bag under the scanner since she had forgotten to do so the first time she passed through. The custom officers asked her to do so, triggering the discovery of the substances. Fearful and under shock, she did raise this point during the police interrogation but she claims that the officers did not record her objection in her statement The trial judge blamed her then lawyer for not seeking to bring footage from CCTV cameras of the airport as evidence in her defence. Her current lawyer has been seeking to retrieve the footage and introduce it on appeal, but procedural grounds prevent the introduction of new evidence at this stage of the process.

Particularly in cases of drug trafficking, the statements made by police officers at the time of arrest can be deemed sufficient to link the person to the drugs. In the frequent circumstances where the accounts of the facts show discrepancies between the versions of the defendant and of the prosecution, in the great majority

[113] Safeguard No.4 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty
[114] *Alma Nuda Atenza and Orathai Prommatat v. Public Prosecutor,* Federal Court of Malaysia, Criminal Appeal No_ 05-94-05-2017(B) (2019)
[115] Sections 3(a), 7(2) and 9 of the Firearms (Increased Penalties) Act, 1971.
[116] *Alma Nuda Atenza and Orathai Prommatat v. Public Prosecutor,* para.148
[117] Court of Appeal of Malaysia, Criminal Appeal No. P-05-4-1/2012

of the cases whose judgments were reviewed by Amnesty International, the judge chose in favour of the prosecution. In the words of a judge:

> **"The court finds no reason to doubt the credibility of all the prosecution witnesses. They had no axe to grind against the accused as they do not know her at all and were just carrying out their routine duties when they stumbled on the hidden drugs."[118]**

A Malaysian woman was convicted and sentenced to the mandatory death penalty after she was found in possession of 117.88 grams of methamphetamine. She was arrested after police officers saw her leaving a restaurant with two men and enter her car with a bag, which was later found to contain the drugs. One of the two men was holding another bag. She said that one of the two men had asked her to put the bag in her car and that he would join her shortly, and that she was unaware of the contents of the bag. As soon as she placed the bag in her car, she was arrested while the other man ran away before he got to her car. Significant discrepancies in the statements of the arresting officers as well as the report of the arrest cast doubts on the identification of the bag, but relying on presumptions of possession and knowledge of the drugs, the judge convicted her and sentenced her to death.

3.6 LACK OF PROCEDURE TO REOPEN CONCLUDED CASES IN LIGHT OF NEW EVIDENCE

Unlike many countries and international criminal tribunals, Malaysian law does not allow criminal cases to be reopened following a final judgment on the grounds of newly discovered facts.[119] When new evidence that challenges the facts that led to a conviction becomes available, either the accused or the prosecution can request a reopening of the case because of the discovery of potentially decisive information not previously known despite due diligence by the party.

Currently, in Malaysia any application to review a wrongful conviction has to be made to the Federal Court under Rule 137 of the Federal Court Rules 1995. The Federal Court may apply Rule 137 in "limited grounds and very exceptional circumstances" only.[120] This high threshold has made it extremely challenging for any case of wrongful conviction to be reopened.

Amnesty International is of the view that the possibility to reopen concluded cases when new evidence emerges that cast doubts over the conviction is an essential safeguard that must be guaranteed in all cases – but especially when a person is sentenced to death - to ensure that convictions are based upon clear and convincing evidence leaving no room for an alternative explanation of the facts.[121]

MAINTHAN A/L ARUMUGAM: STILL ON DEATH ROW DESPITE SUPPOSED VICTIM TURNING UP ALIVE

Mainthan a/l Arumugam is currently on death row at Kajang prison, awaiting the decision on his pardon petition. The High Court of Shah Alam convicted and sentenced him to death, for the murder of an Indian national which occurred in August 2004. Three others were initially convicted and sentenced to death with him, but they later had their convictions overturned by the Federal Court in 2014.[122]

The evidence against them essentially consisted of a medical pathologist's report, which identified different human body parts found on 10 August as belonging to a man with a different name from that indicated in the charge sheet; and the testimonies of three prosecution witnesses, which showed severe inconsistencies and which were used by the trial court to link Mainthan a/l Arumugam and his co-defendants to the crime.

Two witnesses said in court, in fact, that they had seen Mainthan a/l Arumugam on the same night of the murder hold a knife in the proximity of a man who was on the floor and had a visible head injury, in an

[118] Court of Appeal of Malaysia, Criminal Appeal No. P-05-311-11/2011
[119] Article 84(1) of the ICC Statute; Article 2(3) of the ICCPR.
[120] Federal Court of Malaysia, *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance* (Malaysia) Bhd [2008] 6 CLJ 1
[121] Safeguard No.4 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty
[122] *Adiswaran A/L* Tharumaputrintar, Mainthan A/L Arumugam and others v. Public Prosecutor, Federal Court of Malaysia, Criminal appeal no. 05-314-11/2011(B) (2014)

area close to where the human remains were found. Mainthan a/l Arumugam and his co-defendants stated at trial and on appeal that they had been beating another man that night, whom they thought had stolen items from the shop owned by Mainthan a/l Arumugam. This man was subsequently taken to hospital and treated, but could not later be traced to come forward as a witness for the defence. The trial judge doubted the existence of this man and dismissed this defence as an "afterthought", since it was not raised when the prosecution produced its evidence in the first part of the trial. The appeal courts concurred.

On 26 March 2017, three years after the Federal Court upheld the conviction and sentence of Mainthan a/l Arumugam, the same man who had seen lying on the floor in front of him on the night of the murder attended the funeral of Mainthan a/l Arumugam's mother and learned about his conviction and death sentence. He signed a statutory declaration to support the reopening of the case, detailed how he had moved to another region and he feared for his safety when he was asked to appear in court, since he did not understand the nature of the judicial proceedings. However, the Federal Court has rejected application for the review of the case.

4. THE LAST RESORT: THE RIGHT TO PARDON

> **"When I did the pardon application for him, I followed up with [a lawyer] since she did the appeal. She said that the results are out already and I should follow-up with the prison. I called the prison, they said, 'No, [we] haven't received anything'. Then I called another prison. They said, '[We] haven't received anything'. Everyone was pushing me on a merry-go-round. It took me one month to get the news. Finally, they said his appeal was rejected. They don't want to tell."**
>
> Friend of a man on death row, August 2019[123]

Once all ordinary legal avenues are exhausted, the last recourse available to prisoners under sentence of death and their families is to apply for pardon from the King or State Ruler (the Sultan of each state).

In the context of the announced reforms to the death penalty, Liew Vui Keong, *de facto* Minister in charge of Law in the Prime Minister's Office, has publicly referred to the Pardon Boards as a possible way to deal with the issue of the resentencing of convicted prisoners, once the mandatory death penalty is abolished.[124]

Amnesty International is extremely concerned at the proposal, partly because of the secrecy that surrounds the pardon system as it currently functions, which exacerbates the cruel, arbitrary and discriminatory nature of the death penalty. The organization is also concerned that any such decision would *de facto* transfer the power of sentencing from the judiciary to the executive and move decisions on the implementation of the new laws into an opaque and arbitrary structure, in which no further recourse is available.

Furthermore, the potential reforms would not allow prisoners to adequately and effectively put forward any mitigating circumstances in relation to their cases or the offence of which they have been convicted, which they were not able to bring forward at the time of their trial as the death penalty was the only punishment

[123] Interview with Amnesty International, 24 August 2019
[124] "Minister: Govt to table Bill next week to abolish mandatory death sentence", *Malaysia Mail*, 4 July 2019, www.malaymail.com/news/malaysia/2019/07/04/minister-govt-to-table-bill-next-week-to-abolish-mandatory-death-sentence/1768287

available for the offence. Any judicial input in the pardon decision in such a circumstance would be – according to the limited reports available on the matter - limited.

Because of these concerns, coupled with the lack of clarity in the law on the handling of the pardon applications, Amnesty International recommends that a judicial body, whether existing or established specifically for this aim, is mandated to review all cases where people have been sentenced to death, with a view to commuting the death sentences. In particular, in all cases where the death penalty has been imposed for drug offences or where the trial did not meet the most rigorous international fair trial standards, or in cases where the procedures were seriously flawed, a remedy in the form of a retrial that fully complies with international fair trial standards, and which does not resort to the death penalty, must be provided.

4.1 THE RIGHT TO PARDON UNDER MALAYSIAN AND INTERNATIONAL LAW

In Malaysia, the power to grant pardons or clemency, or to commute death sentences, is established under Article 42 of the Federal Constitution.[125] This power lies in the hands of the King (*Yang di-Pertuan Agong*) in relation to offences that have been tried by court-martial, irrespective of the location; and offences committed in, or tried by a court exercising jurisdiction over, the Federal Territories of Kuala Lumpur, Labuan and Putrajaya.[126] The Ruler of a State (*Yang di-Pertua Negeri* or Sultan, depending on the state) has the power to grant pardons and commutations with respect to all other offences committed in that State.

In their exercise of this power, the King and the Ruler of a State are required to consult with a Pardons Board, but they are not bound to follow its recommendations.[127] Article 42 of the Federal Constitution establishes as members of the Pardons Board for each state and the federal level the Attorney General of the Federation, or a person delegated by them; the Minister responsible for the federal territories or Chief Minister of the State; and up to three other members, appointed by the Ruler. These appointees cannot be members of the Legislative Assembly of a State or of the national House of Representatives. The Pardons Board, presided by the King or Ruler, is required to consider any written opinion which the Attorney General may have delivered on the case.

No laws explicitly describe the process for applying for a pardon, nor does any law set out what criteria should be considered or how pardon decisions should be communicated. Some guidance, however, is included in the Prison Regulations.[128] Regulation no. 54 requires prison officers to compile a report for every prisoner who has served four, eight, 12 or 16 years of their sentence, and every subsequent year after that, with reference to the work and conduct of the prisoner, as well as their "mental and bodily condition, with particular reference to the effect of imprisonment on his health". Within six months, this report should be forwarded to the Director of the Prison who could add a further recommendation before forwarding it to the Chief Minister of the State (or to the Federal authorities, as applicable) where the relevant offence in the case was committed, for the purpose of the exercise of pardon as set out under Article 42 of the Federal Constitution. The King or Ruler of a State would either remit the sentence or direct "at what later time or times the case shall again be submitted for his consideration".

Under the Prison Regulations, all those under sentence of death are granted the right to petition the King or Ruler of the State "freely", without time limitations.[129]

THE RIGHT TO PARDON UNDER INTERNATIONAL LAW AND STANDARDS

Article 6(4) of the International Covenant on Civil and Political Rights (ICCPR) and Paragraph 7 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty guarantee to anyone sentenced to death the right to seek pardon, clemency or commutation (substitution of a lighter penalty). The competent officials must **genuinely consider** such requests. The International Court of Justice has taken the view that such clemency procedures, though carried out by the executive rather than the judiciary, are an integral part of the overall system for ensuring **justice and fairness in the legal process**.[130]

The UN Human Rights Committee stated that "**No category of sentenced persons can be a priori excluded** from such measures of relief, nor should the conditions for attainment of relief be **ineffective, unnecessarily**

[125] Adopted on 31 August 1957 and last amended in December 2007
[126] Malaysia is a federation of 13 states and three federal territories
[127] *Chow Thiam Guan v. Superintendent of Pudu Prison & The Government of Malaysia and Connected Appeals* [1983] 2 MLJ 116
[128] Prisons Act 1995 [ACT 537], P.U. (A) 325/2000, Prison Regulations 2000, Regulation 54, www.prison.gov.my/images/content/pdf/pua193y2003bi.pdf
[129] Prison Regulations 2000, Regulation 114
[130] *Avena Case (Mexico v United States)*, ICJ (2004) para. 142

burdensome, discriminatory in nature or applied in an arbitrary manner".[131] It further noted that pardon or commutation procedures should be specified in domestic legislation and "must offer certain **essential guarantees**, including certainty about the processes followed and the substantive criteria applied; a right for individuals sentenced to death to initiate pardon or commutation procedures and to make representations about their personal or other relevant circumstances; a right to be informed in advanced when the request will be considered; and a right to be informed promptly about the outcome of the procedure".

In several of its resolutions, the UN General Assembly has called on all states to ensure that "clemency procedures are **fair and transparent** and that **prompt information** is provided at all stages of the process".[132]

The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, adopted in 2012, recommend that states introduce measures to ensure that prisoners have **access to legal aid including to prepare appeals and requests for pardon**, in particular when facing capital punishment.[133]

4.2 PARDON PETITIONS IN PRACTICE

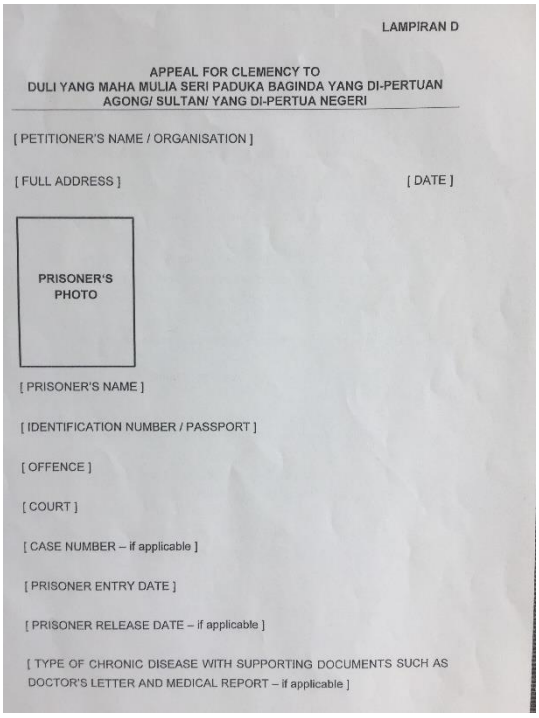
The absence of a clear, regulated process has led to the development of some "unwritten rules" to apply for pardon, as described by many of those to whom Amnesty International spoke. Amnesty International sought to interview the Prisons Department and the Attorney General's Chambers for the preparation of this report, as central figures in the pardon process, but they did not respond to our requests to meet.

All interviewees explained to Amnesty International that, once the legal appeals in a case are finalized, prison officers would approach a death row prisoner and encourage them to apply for pardon under Article 42 of the Federal Constitution. Amnesty International found no cause to believe that prisoners are not being made aware of their right to make this application, or that this happens selectively. The reasons that a relatively low number of prisoners with finalized appeals have elected to apply for pardons (425 out of 764 as of February 2019) appear to be multiple. Some family members and lawyers have referred to being discouraged by the implied admission of guilt in any pardon applications, as well as the fear of expediting their execution and depression as some of the reasons. Some have even stated that when a pardon application is due but not submitted, the prison officers would keep on asking for it to be prepared.[134]

Families and lawyers described the application process as simple but "not satisfactory", largely because of lack of transparency and prolonged periods without any feedback. The prison officers would ask the prisoners to prepare their pardon petitions by filling in a form, which Amnesty International has seen in Malay and English and which is reproduced in the photographs below (Fig.1). The form essentially consists of a letter to the King or Ruler of a State, outlining the background of the case; the details of the personal history of the applicant, including education, family and the likely impact of the punishment on their relatives; the justification for the appeal, suggested as "remorse, regret, rehabilitation" and "appeal to return to family, redemption of sins, etc."; and a final call for mercy.

An accompanying leaflet prepared by the Prisons Department clarifies that the prisoner, their family and their lawyer can all submit the pardon petition to the Pardon Board of the state where the offence was committed and tried.[135] All interviewees indicated that, after the first pardon application has been submitted, prison officials would usually ask to submit further updated ones every four years – possibly to coincide with the preparation of the prisons report to the Chief Minister, as required under Prison Regulation no. 54.

[131] Human rights Committee, General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, 30 October 2018, para. 47
[132] See, most recently, UN General Assembly resolution 73/175 of 17 December 2018, para.7(f)
[133] Guideline 6 of the Principles on Legal Aid (the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems), UN Doc. E/CN.15/2012/L.14/Rev.1, para. 47(c)
[134] Interview with lawyer, 28 August 2019.
[135] Available in Malay only at www.kehakiman.gov.my/sites/default/files/Lampiran%20B_Pamflet_v.final%20Pengurusan%20Petisyen%20Pengampunan.pdf



LAMPIRAN D

APPEAL FOR CLEMENCY TO
DULI YANG MAHA MULIA SERI PADUKA BAGINDA YANG DI-PERTUAN AGONG/ SULTAN/ YANG DI-PERTUA NEGERI

[PETITIONER'S NAME / ORGANISATION]

[FULL ADDRESS] [DATE]

PRISONER'S PHOTO

[PRISONER'S NAME]

[IDENTIFICATION NUMBER / PASSPORT]

[OFFENCE]

[COURT]

[CASE NUMBER – if applicable]

[PRISONER ENTRY DATE]

[PRISONER RELEASE DATE – if applicable]

[TYPE OF CHRONIC DISEASE WITH SUPPORTING DOCUMENTS SUCH AS DOCTOR'S LETTER AND MEDICAL REPORT – if applicable]

1. [SALUTATION TO DULI YANG MAHA MULIA SERI PADUKA BAGINDA YANG DI-PERTUAN AGONG/ SULTAN/ YANG DI-PERTUA NEGERI/ TUAN YANG TERUTAMA]

2. [APPEAL FOR LIGHTER SENTENCE / FULL PARDON]

Ampun Tuanku, beribu-ribu ampun, sembah patik mohon diampun.

3. [CASE BACKGROUND –explain chronology of case from the date charged until punishment sanctioned]

4. [PETITIONER'S APPEAL– provide background details of prisoner including education, family, prisoner responsibility towards his/her family, the effect of sanction to the family and any other relevant information]

Ampun Tuanku, beribu-ribu ampun, sembah patik mohon diampun.

5. [JUSTIFICATION FOR APPEAL – example: remorse, regret, rehabilitation (to be specified)]

Ampun Tuanku, beribu-ribu ampun, sembah patik mohon diampun.

6. [REMORSE/ REGRET OVER OFFENCE THAT HAD BEEN COMMITTED – appeal to return to with family, redemption of sins, etc]

7. [CLOSING – beg for mercy DULI YANG MAHA MULIA SERI PADUKA BAGINDA YANG DI-PERTUAN AGONG/ SULTAN/ YANG DI-PERTUA NEGERI]

8. [PETITIONER'S SIGNATURE/ THUMB PRINT]

Form distributed to people under sentence of death and their representatives to prepare their pardon petitions. Photo taken by Amnesty International.

Contrary to international standards, Malaysian law does not guarantee the right to legal counsel to support the pardon application process.[136] In recent years, several initiatives have been put in place to fill this gap in the law, either through the National Legal Aid Foundation programme (YBGK), pro-bono work by lawyers – whether individually or coordinated by the Malaysian Bar or its state chapters – or through legal aid support provided with the support of foreign embassies (for example, the Thai Citizens Legal Aid Scheme, TCLAS, scheme established with the Thai Embassy). However, by the admission of those involved, the reach of these initiatives has been quite limited and has been intermittent over time, particularly due to lack of resources in the programme and up-take by the lawyers themselves.

An experienced lawyer indicated that it would cost approximately US $1,000 to 2,000 (4,000-8,000 Malaysian Ringgit) to hire a lawyer to prepare a pardon petition. While some can afford to hire a lawyer privately to assist them, the lawyers indicated that in the majority of cases prisoners on death row have been preparing such petitions by themselves or with the support of their families and, to some extent, prison officials. Some lawyers have told Amnesty International that the quality of the pardon petition varies enormously depending on whether it has been prepared with the support of a legal representative or not, including in its structure, argumentation and credibility. Some pardon petitions seen by Amnesty International appear to confirm this. The lawyers would prepare a detailed summary of the case and any issues experienced during the proceedings and would chase external actors, including family members abroad or community groups, to obtain evidence of the good character of the prisoner or relating to the case itself. They would also chase information on the consideration of the application itself, once submitted. As a lawyer underlined:

> **"Where you are from can be a factor, including within Malaysia."[137]**

However, even when legal aid resources and pro-bono legal support are available, the decision on who gets that support is not transparent and creates an additional degree of arbitrariness and discrimination in the death penalty system. A lawyer who had recently visited two different prisons on three occasions to provide assistance with the pardon applications told Amnesty International, for example, that he generally arrives at the prison with other volunteer lawyers on the agreed date and the prisoners have already been selected by the officials. On all three occasions, no foreign nationals were included in the groups, despite the high number of non-Malaysians under sentence of death in those prisons.[138]

[136] Human rights Committee, General comment No. 36
[137] Interview with lawyer, 28 August 2019
[138] Interview with lawyer, 28 August 2019

As of February 2019, 568 foreign nationals were held under sentence of death across the country and 353 of them had their legal avenue finalized. Only half were recorded as having filed a pardon petition compared to approximately 60% of Malaysian nationals. Detained far away from their families and communities, foreign nationals are at particular disadvantage in preparing their pardon petitions, particularly if no additional support is offered from the relevant embassies. Amnesty International has found that the assistance provided for pardon applications by foreign diplomatic representatives varies greatly on the country policies and resources allocated to the consular sections of the Embassies. Representatives of the Indonesian embassy said that they regularly visit the prisons and encourage their nationals to file pardon petitions, and the Ambassador would also send a letter of support directly to the relevant Pardon Board, among other supportive initiatives. Similarly, officials from the Embassy of the Philippines confirmed that they provide support when their nationals seek pardon. At the other end of the spectrum, some lawyers indicated that foreign nationals from some African and Middle Eastern countries, and those belonging to targeted minorities in the country of origin are left with little or no support, making nationality and ethnicity additional arbitrary factors in the lethal lottery of the death penalty – even at the last stage of the process.[139]

4.3 A SECRETIVE PROCESS: THE "UNWRITTEN RULES"

> **"My biggest complaint is the lack of news or information about my pardon application."**
>
> Interview with former prisoner, 30 August 2019

Once the pardon petition is compiled, prisoners who are not assisted by a lawyer hand it over to the prison officials who submit it to the Pardon Board on their behalf. After this, the prisoner and their families have said that they are not informed of when the petition would be considered. Legal representatives have told Amnesty International that they submitted the petitions they had been involved with directly to the Pardon Board, but equally were not informed of when and how the petition would be considered.[140]

No information is publicly available on criteria used by Pardon Boards in the decision-making process. Amnesty International repeatedly sought to meet the Malaysian Prison Department, including to discuss the pardon process, but such requests were not granted. A lawyer who attended a training session organized by the Bar Council learned from prison officials that there are four criteria that are critical in the consideration of pardon petitions, each of which raise concerns:[141]

- Whether the crime involves the loss of life: This is obviously a serious obstacle to the pardon petitions of those convicted of murder. The criterion could undermine the right of some categories of prisoners to have their application meaningfully considered, as required by international law and standards.
- Good standing in society before arrest: This is shown through community contributions and volunteer work, for example. Those under sentence of death without the support of family members or lawyers would not be able to put forward such evidence – and this becomes even harder for foreign nationals detained far away from their countries of origin and support networks.
- The conduct of the prisoner while in detention: the assessment of this would be based on the report submitted by the prison officials, in line with Prison Regulation no.54. Achieving outstanding results in activities carried out while on death row can strengthen one's case – for example by winning a national drawing competition, have received pardons. Amnesty International heard from some family members that death row prisoners were afraid of reporting ill-treatment in some specific detention facilities for fear of undermining their recommendation for the pardon application. Amnesty International was unable to independently verify these allegations.
- The conduct of the prisoner during trial: this is allegedly assessed through the notes compiled by the trial judge in the form of a "confidential letter" (*surat sulit*), which the relevant judge supposedly compiles at the end of the proceedings and keeps on file.[142] The letter supposedly focuses more on the human aspect of the case, as opposed to the legal factors in the case, and could also include the view of the judge on whether the person should be hanged or not on the basis of the defences put forward in court. Amnesty International wrote to the Chief Justice to verify this information on any

[139] Interviews with lawyers, 24-30 August 2019
[140] Interviews with lawyers, 28 and 30 August 2019
[141] Interview with lawyer, 28 August 2019
[142] In line with section 281 of the Criminal Procedure Code, as of 1 November 2012

input given by the judiciary for the consideration of pardon petitions, but no response was received by the publication deadline.

While no official announcements are made, the decisions on pardons are usually taken once a year on the occasion of the birthday of the King or the Ruler of a State. However, how the decisions are taken is unclear to most people on death row and their families. According to a lawyer with extensive experience of the pardon process, a "quota" appears to be set in advance for each year, and on the basis of that figure, pardons are granted to applications that are deemed meritorious. Amnesty International was not able to independently verify this. However, the lack of transparency in the process also means that it is not clear how the applications are put forward for consideration in every given year.

In the case of a positive outcome, the response is sent back to the relevant prison officials who would then communicate the result to the prisoner and their family. Death sentences are usually commuted to a lesser sentence such as life imprisonment. Amnesty International has received information related to two positive decisions which highlighted how the outcome was communicated to the prisoners and their families with a delay of many weeks or months.[143] International law and standards require states to provide prompt information at all stages of the clemency process.

If the pardon is not granted, the petition can either be simply set aside and put among those to be reconsidered at the next sitting of the Pardon Board; or it can be rejected altogether, in which case a notification would be sent back to the relevant trial judge and prison officials to trigger the process of execution.[144] Left without any feedback, many prisoners re-submit their pardon applications every four years.

Irrespective of the outcome, most family members and lawyers who Amnesty International spoke to have complained about the secrecy and uncertainty associated with the process of pardon applications:

> **"The authorities don't take the process seriously. They do not answer to you, they would not show you [what it is happening]."**
>
> Interview with family member of man on death row, 24 August 2019

CRUEL AND SECRETIVE: THE PROCESS OF EXECUTIONS IN MALAYSIA

When a pardon application is rejected, the decision is communicated to the prison authorities only. The relatives of several prisoners who were executed or faced execution told Amnesty International that they would receive a letter informing them that the execution of their relative would be carried out "soon."

The letters, some copies of which have been seen by Amnesty International, did not include the scheduled date and time of the executions. Instead the immediate family members were invited to go to the correctional facility on a set date and time, for a last visit with the prisoners and to discuss funeral arrangements. It was only when the family members went to the prison in person that the authorities provided them with the exact dates of the execution and informed them that the execution would be carried out less than 24 hours later. Furthermore, some of the letters handed over to the families were dated two weeks earlier, suggesting that the prison authorities had held on to this information until days before the scheduled date of the hangings.

The testimony of a former prisoner corroborated this as the practice.[145] He stated that one week before the execution, the family would go to the prison to see their relative whose execution had been set. The prisoner and the family members would be told that the hanging would take place that week, but with no clear timeline. The exact date and time of the set execution would only be disclosed 24 hours in advance. "They ask people to clean the place beforehand, so people would know a hanging will happen, but they would not know of whom. In that prison, people can hear [the noise]". The families of other former death row prisoners told Amnesty International that their relatives could hear other prisoners being dragged to the gallows, sometimes kicking and screaming; and that they can also hear the trapdoor giving way and then know that an execution had happened.

[143] The death sentence imposed on Nigerian national Osariakhi Ernest Obayangbon was commuted by the King in August 2016, but the decision was communicated in February 2017. Amnesty International, *Malaysia: Commutation of death sentence must lead to a moratorium on further executions* (Index: ACT 50/5656/2017). Similarly, Shahrul Izani bin Suparaman was pardoned by the Ruler of Selangor in December 2016 but was not notified of the decision until the end of February 2017. Amnesty International, *Malaysia: Decisive action against death penalty needed after second pardon announced in a month* (Index: ACT 50/5802/2017

[144] Section 281 of the Criminal Procedure Code

[145] Interview with former prisoner, 30 August 2019

There is currently an official moratorium on all executions in place in Malaysia. Transparency on the use of the death penalty not only avoids aggravating the mental trauma of prisoners sentenced to death,[146] but is also a critical safeguard to guaranteeing their rights and protecting against unlawful executions.

4.4 REFORMING THE LAW: ALTERNATIVE PUNISHMENTS AND BENEFIT OF LEGISLATIVE CHANGE

International human rights law sets the rehabilitation of the offender as the goal of incarceration;[147] and requires that penalties imposed following fair proceedings be commensurate with the gravity of the crime and the circumstances of the offender.[148] It requires that neither the punishment itself, nor the way that a punishment is imposed, violate international law and standards. In Malaysia, however, recent amendments to the Dangerous Drugs Act, 1952, which came into force on 15 March 2018 and introduced sentencing discretion in limited circumstances of drug trafficking, allowed life imprisonment and no less than 15 strokes of the whip – a cruel punishment that contravenes the absolute prohibition of torture and other ill-treatment – as the only available alternative penalty.

When considering approaches used in different jurisdictions with regard to long custodial sentences, it may be helpful to note that the Rome Statute of the International Criminal Court – which has jurisdiction over the most serious crimes of concern to the international community, often involving multiple homicides – prescribes that all sentences imposed by the Court must be subject to review after a certain period of time. The Court has the power to impose a sentence of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person; otherwise, the maximum term of imprisonment it can impose is 30 years.[149] After serving two-thirds of a determinate sentence, or 25 years of a life sentence, the Court must review the sentence to determine whether or not it should be reduced, taking into account any factor establishing a change of circumstances sufficient to justify reduction of sentence. If at that time the Court determines it is not appropriate to reduce the sentence, it must review the question again regularly thereafter.[150]

International human rights law and standards also require states to apply the lighter penalty retroactively if legal reform reduces the penalty for an offence after the crime was committed.[151] Furthermore, UN Safeguards guaranteeing the protection of the rights of those facing the death penalty state that a person sentenced to death must benefit when a change of law imposes a lighter penalty for the crime of which they had been convicted.[152]

In the context of current discussions about the death penalty and, more generally, about drug control policy in Malaysia, the government should consider implementing alternatives to the criminalization of minor and non-violent drug-related offences such as transporting drugs that, in the absence of harm to others, have proven to be unnecessary and disproportionate to any legitimate aim. When determining whether to make or maintain a specific drug-related conduct as a criminal offence, it must be ensured that the crime is clearly defined in law, that proscribing the conduct is aimed at addressing a specific public health problem directly associated with the possible abuse of a particular drug, and that the conduct puts others at risk of serious harm, for example by knowingly supplying adulterated drugs. This discussion should be informed by the root causes that lead people to engage in the drug use, such as ill-health, denial of education, unemployment, lack of housing, poverty and discrimination, which should be reflected in any legislative reform.

[146] Interim report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/67/279, para. 50. See also Human Rights Committee, Concluding observations of the Human Rights Committee, Japan, UN Doc. CCPR/C/JPN/CO/5; and Committee against Torture, Concluding observations on the second periodic report of Japan, adopted by the Committee at its fiftieth session (6-31 May 2013), UN Doc.CAT/C/JPN/CP/2.
[147] Article 10 of the International Covenant on Civil and Political Rights
[148] See Amnesty International, *Fair Trial Manual*, section 25.4
[149] Rome Statute of the International Criminal Court, Article 77(1)
[150] Rome Statute of the International Criminal Court, Article 110
[151] Article 11 of the UDHR, Article 15(1) of the ICCPR
[152] This is contrary to, among other examples, Safeguard no. 2 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the UN Economic and Social Council in resolution 1984/50 of 25 May 1984; Article 15(1) of the International Covenant on Civil and Political Rights; Rome Statute of the International Criminal Court, Article 24(2); European Court of Human Rights, *Case of Scoppola v. Italy* No. 2 (Application no. 10249/03), Grand Chamber judgment of 17 September 2009, para. 108.

All those currently serving a sentence for drug-related offences should be able to benefit from these legislative reforms, and the authorities should put in place a clear and transparent mechanism for them to be able to bring their claims before the authorities.

5. CONCLUSIONS AND RECOMMENDATIONS

Since taking office in July 2018, Malaysia's new administration has made some important advances towards the full abolition of the death penalty, including by immediately establishing an official moratorium on all executions. Despite this, violations of international human rights law and standards associated with the use of this punishment in Malaysia require immediate attention by the authorities to prevent the arbitrary imposition of death sentences.

The death penalty is still retained under Malaysian law for more than 30 offences and is regularly imposed for acts – such as drug trafficking – that do not meet the threshold of the "most serious crimes" to which the use of this punishment must be restricted under international law and standards. Research by Amnesty International has highlighted that the burden of the death penalty in Malaysia has disproportionately fallen on those convicted of drug-related offences, especially women and foreign nationals, and has seen disparities in the representation of people belonging to certain ethnic minorities. A significant proportion of those on death row also involves those from less advantaged socio-economic backgrounds, who could face additional challenges with retaining a lawyer independently.

These findings gain an even greater significance when considered in the context of laws and policies that are in contravention of international law and standards that have tainted the administration of this punishment.

In this report, Amnesty International has highlighted particular concerns in relation to the right to a fair trial in cases that carry the death penalty, including the rights to timely access to legal counsel and, in the cases of foreign nationals, to consular assistance and interpretation and allegations of torture and other ill-treatment in pre-trial detention to obtain statements or information that are used to secure convictions. Amnesty International has further considered the reliance on "presumptions" of guilt, which shift the burden of proof on to the defendant in violation of the right to be presumed innocent; and the lack of legal avenues to allow for the consideration of new evidence after a conviction has been finalized.

Additionally, Amnesty International has found that the arbitrariness and secrecy that surrounds the handling of pardon petitions in Malaysia – the last recourse available to prisoners under sentence of death before execution – has aggravated the mental trauma of the prisoners and their families and exacerbated the systemic flaws that undermine their right to this last review. These include the absence of a clearly regulated process, the lack of legal support to prepare the petitions and the prolonged delays in the communication of the decision on the pardon application and lack of notification of execution.

In this context, the announced forthcoming legislative reforms to Malaysia's mandatory death penalty laws represent a critical opportunity that must not be missed. With more and more countries joining the global trend towards abolition of the ultimate cruel, inhuman and degrading punishment, Malaysia is uniquely positioned to play a leadership role in advancing the protection and promotion of human rights in the Asia-Pacific region, including in the context of criminal justice reforms.

As the October session of Parliament is about to begin, Amnesty International hopes that the findings of its investigation on the use of the death penalty in Malaysia will contribute to a meaningful and informed debate on the issue. The organization encourages the Malaysian authorities to ensure that legislative amendments are promptly tabled in Parliament to bring national legislation in line with international human rights law and standards, as important first steps towards fully abolishing the death penalty in the country.

Pending the full abolition of the death penalty, Amnesty International makes the following recommendations:

TO THE GOVERNMENT OF MALAYSIA

1. Continue to observe the moratorium on all executions, first established in July 2018, until the death penalty is fully abolished in the country and all death sentences are reviewed and commuted;

2. Table legislation to remove the mandatory death penalty for all crimes, including for drug trafficking, and mandate a judicial body, whether existing or established specifically for this aim, to review all cases where people have been sentenced to death, with a view to commuting the death sentences as a matter of urgency;

3. Bring national legislation in line with international law and standards, including by:

- removing legal provisions that allow for the use of the death penalty for offences that do not meet the threshold of the "most serious crimes" or intentional killing, and ensuring that all those who have been sentenced to death for other offences, in particular for drug-related offences, have their sentences commuted accordingly;
- repealing "presumptions" of guilt under Section 37(b) of the Dangerous Drugs Act, 1952 (DDA) and Sections 3(a), 7(2) and Section 9 of the Firearms (Increased Penalties) Act, 1971, as well as Section 37(a) of the DDA allowing the use of self-incriminating statements, which undermine the right of a defendant to a fair trial and shift the burden of proof onto them;
- making appeals mandatory in all death penalty cases, including when the death sentence is imposed by a higher court during the appeal process, and establishing post-conviction recourse procedures.

4. Ensure that all persons facing the death penalty – including those from disadvantaged or marginalized socio-economic backgrounds – are provided access to competent legal assistance, from the moment of arrest or when they first face criminal charges, all the way through to appeals and other recourse procedures, and ensure that the Bar Association Legal Aid Council is provided sufficient resources to appoint competent pro bono lawyers in all regions.

5. Ensure that there are prompt, thorough, impartial and effective investigations by independent bodies into all allegations of torture and other ill-treatment by police or other authorities; that victims have access to an effective remedy and receive adequate reparations; and that if there is sufficient admissible evidence, those suspected of responsibility, including superior officers who knew or should have known that those under their command were resorting to torture or other ill-treatment and who did not take all measures in their power to prevent, halt or report it, are prosecuted in proceedings which meet international standards of fairness.

6. Establish transparent procedures for the exercise of the power to grant pardon applications, in order to fulfil its purpose of being a meaningful safeguard of due process.

7. Regularly publish full and detailed information, disaggregated at least by gender, nationality and ethnic background, about the use of the death penalty which can contribute to a public debate on the issue. The data should include: the number of persons sentenced to death and for what offences; the number of prisoners appealing the sentences and at what level; location of detention; information on past and imminent executions; the total number of persons under sentence of death; the number of death sentences reversed or commuted on appeal; and the number of instances in which pardon has been granted.

8. Remove the death penalty and other provisions of the Dangerous Drugs Act, 1952 that have disproportionate impact on those with less advantaged socio-economic backgrounds, women, young people, some ethnic minorities and foreign nationals; and implement alternatives to the criminalization of minor and non-violent drug-related offences that do not cause harm to others.

9. Put in place a wide set of gender-sensitive and holistic socio-economic protection measures to ensure that drug control laws and policies contribute to overcoming structural sources of vulnerability, stigma and discrimination that affect people who use drugs or who engage in the drug trade, especially women and those belonging to marginalized and disadvantaged communities. These include ill-health, denial of education, unemployment, lack of housing, poverty and discrimination.

TO THE HEAD OF THE POLICE SERVICE

1. Ensure that all people held at police detention facilities are notified of, and able to effectively exercise, their right to legal assistance (and, if foreign nationals, their right to seek consular assistance and interpretation), are allowed to access to and consult with their lawyer in private, as well as access to their families, as required by international law and standards.

2. Conduct a thorough review of police tactics and the use of force during arrest and investigation, with a view to ensuring that they meet international standards, in particular the UN Code of Conduct for Law Enforcement Officials and ensure that adequate systems and mechanisms are in place, alongside training and regulations, to guarantee that police officers comply with international standards on the use of force in their daily work.

TO THE JUDICIARY

1. Exclude from proceedings statements or other evidence extracted through torture or other ill-treatment or other forms of coercion regardless of the stage at which defendants make the allegation, and ensure that any allegations made in court or to a judge or other judicial officer that a defendant or witness has been subjected to such treatment are thoroughly and independently investigated.

2. Ensure that defendants have competent legal representation from the time of arrest and throughout the whole process.

3. Ensure that the identity of the defendants is appropriately attributed and that they enjoy all protections afforded to them by the law, and that in disputed circumstances the benefit of the doubt is given in favour of the defendant.

TO THE PARDON BOARDS

1. Provide genuine consideration to all pardon applications by persons under sentence of death and ensure clemency procedures are an integral part of the overall system for ensuring justice and fairness in the legal process.

2. Disclose all relevant information with regards to the criteria used for the consideration of pardon requests, to allow prisoners to adequately prepare their application and ensure a fair process.

3. Promptly notify the prisoners, their family members and legal representative of the set time for the consideration of their petition and of the outcome of such deliberations.

TO THE PARLIAMENT

1. Support measures to abolish the death penalty in national law and, most urgently, to repeal the mandatory death penalty and exclude from the scope of this punishment any crimes other than intentional killing.

2. Establish a judicial body, or mandate an existing one, to review all cases where a death sentence has been imposed, with a view to commuting them as a matter of urgency.

3. Establish an independent mechanism to receive and deal with allegations of torture or other ill-treatment by the police or other officials within the criminal justice system. The body should be operationally independent of the government, political influence and the police itself, and accessible to complainants throughout the country. Its mandate should empower it to, among other things, carry out effective investigations and refer cases to the Public Prosecutor.

4. Amend the Legal Aid Act, 1971, to ensure that access to a competent and effective legal representative is guaranteed to all those who cannot afford to hire a lawyer independently, promptly from the time of arrest and throughout their time in detention, including by allocating enough resources to legal aid bodies. This should include Malaysian and non-Malaysian nationals.

TO LEGAL AID BODIES

1. Ensure that the quality of representation is effective and guaranteed to all, including foreign nationals, without discrimination.

2. Investigate any reports of misconduct and corruption; and refer any cases to the competent authorities as relevant for further investigation and prosecution.

TO THE INTERNATIONAL COMMUNITY, INCLUDING GOVERNMENTS AND INTERGOVERNMENTAL AGENCIES

1. Provide consular assistance to foreign nationals facing criminal charges in the country, including by ensuring that they are able to receive legal representation at all stages of the process and have adequate time and facilities to prepare their defence, including through interpretation.

2. Raise concerns with the Malaysian authorities regarding the use of death penalty in the country and advocate for its full abolition and compliance with international law and standards in all cases.

3. Provide technical support to the Malaysian authorities to assist them to improve the administration of justice in the country and to review legislation with a view to bringing it in line with international law and removing provisions that allow for the imposition of the death penalty for crimes other than intentional killing, pending full abolition.

4. Ensure that any financial and technical assistance provided to the Malaysian authorities does not contribute, or carries a real risk of contributing, to the imposition of the death penalty. Any such cooperation, including training or technical advice, must be halted if used (or if there is a real risk of it being used), either directly or indirectly, to commit human rights abuses or violations.

ANNEX I: LIST OF OFFENCES PUNISHABLE OR PUNISHED BY DEATH UNDER MALAYSIAN LAW

Law	Offence
Armed Forces Act, 1972	38. (1) Every person subject to service law under this Act who with intent to assist the enemy (a) abandons or delivers up any place or post which it is his duty to defend, or induces any person to abandon or deliver up any place or post which it is that person's duty to defend; […] (j) causes the capture or destruction by the enemy of any of His Majesty's ships or aircraft or the ships or aircraft of any force co-operating with His Majesty's armed forces, shall, on conviction by court-martial, be liable to suffer **death or any other punishment** provided by this Act. 41. (1) Every person subject to service law under this Act who with intent to assist the enemy communicates with or gives intelligence to the enemy shall, on conviction by court-martial, be liable to suffer **death or any other punishment** provided by this Act. 47. (1) Every person subject to service law under this Act who— (a) takes part in a mutiny involving the use of violence or the threat of the use of violence; enemy, or the impeding of the performance of any such duty or service; or (c) incites any other person subject to service law under this Act to take part in such a mutiny, whether actual or intended, shall, on conviction by court-martial, be liable to suffer **death or any less punishment** provided by this Act. 48. Every person subject to service law under this Act who, knowing that a mutiny is taking place or is intended— (a) fails to use his utmost endeavour to suppress or prevent it; or (b) fails to report without delay that a mutiny is taking place or is intended, shall, on conviction by court-martial— (i) if the offence was committed with intent to assist the enemy, be liable to suffer **death or any less punishment** provided by this Act; and (ii) in any other case, be liable to suffer imprisonment or any less punishment provided by this Act. 88. (1) Every person subject to service law under this Act who commits a civil offence whether in Malaysia or elsewhere shall be guilty of an offence against this section. […] (3) A person convicted by court-martial of an offence against this section shall— (a) if the corresponding civil offence is treason be liable to suffer **death or any other punishment** provided by this Act; (b) if the corresponding civil offence is murder be liable to suffer **death or any other punishment** provided by this Act; […]

Law	Offence
Arms Act, 1960	14. (1) Any person who manufactures an arm or ammunition— (a) without a valid licence granted under section 12; or (b) in contravention of any condition imposed under paragraph 12(2)(a), shall, on conviction, be liable to punishment with— (i) **death; or** (ii) **imprisonment for life and whipping** with not less than six strokes, and, in the case of a company, firm, society or body of persons, with a fine not exceeding five hundred thousand ringgit.
Dangerous Drugs Act, 1952	39B. (1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia— (a) traffic in a dangerous drug; (b) offer to traffic in a dangerous drug; or (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug. (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction **with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than fifteen strokes**. (2A) In exercising the power conferred by subsection (2), the Court **in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances**: (a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested; (b) there was no involvement of agent provocateur; or (c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and (d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.
Firearms (Increased Penalties) Act, 1971	3. Any person who at the time of his committing or attempting to commit or abetting the commission of a scheduled offence discharges a firearm with intent to cause death or hurt to any person, shall, notwithstanding that no hurt is caused thereby**, be punished with death.** 3A. Where, with intent to cause death or hurt to any person, a firearm is discharged by any person at the time of his committing or attempting to commit or abetting the commission of a scheduled offence, each of his accomplices in respect of the offence present at the scene of the commission or attempted commission or abetment thereof who may reasonably be presumed to have known that such person was carrying or had in his possession or under his custody or control the firearm **shall, notwithstanding that no hurt is caused by the discharge thereof, be punished with death**, unless he proves that he had taken all reasonable steps to prevent the discharge**.** 7. (1) Any person trafficking in firearms shall be punished with— (a) **death; or** (b) **imprisonment for life and with whipping** with not less than six strokes. (2) Any person proved to be in unlawful possession of more than two firearms shall be presumed to be trafficking in firearms.
Kidnapping Act, 1961	3. (1) Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with **death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping**.
Penal Code	121. Whoever wages war against the Yang di-Pertuan Agong or against any of the Rulers or Yang di-Pertua Negeri, or attempts to wage such war, or abets the waging of such war, shall be punished with **death or imprisonment for life**, and if not sentenced to death shall also be liable to fine. 121A. Whoever compasses, imagines, invents, devises or intends the death of or hurt to or imprisonment or restraint of the Yang diPertuan Agong or any of the Rulers or Yang di-Pertua Negeri, their heirs or successors, shall be **punished with death** and shall also be liable to fine. 130C. (1) Whoever, by any means, directly or indirectly, commits a terrorist act shall be punished— (a) if the act results in death, **with death**; [...] 130I. Whoever intentionally directs the activities of a terrorist group shall be punished—(a) if the act results in death, **with death**; [...]

Law	Offence
	130N. Whoever, by any means, directly or indirectly, provides or collects or makes available any property intending, knowing or having reasonable grounds to believe that the property will be used, in whole or in part, to commit a terrorist act shall be punished— (a) if the act results in death, **with death**; [...] 130O. (1) Whoever, directly or indirectly, provides or makes available financial services or facilities— (a) intending that the services or facilities be used, or knowing or having reasonable grounds to believe that the services or facilities will be used, in whole or in part, for the purpose of committing or facilitating the commission of a terrorist act, or for the purpose of benefiting any person who is committing or facilitating the commission of a terrorist act; or (b) knowing or having reasonable grounds to believe that, in whole or in part, the services or facilities will be used by or will benefit any terrorist, terrorist entity or terrorist group, shall be punished— (aa) if the act results in death, **with death**; [...] 130QA. Whoever accepts gratification to facilitate or enable the commission of any terrorist act shall be punished— (a) if the act results in death, **with death**; [...] 130ZB. Whoever accepts gratification to facilitate or enable any organized criminal activity shall be punished— (a) if the act results in death, **with death**; [...] 132. Whoever abets the committing of mutiny by an officer, soldier, sailor or airman in the Malaysian Armed Forces, shall, if mutiny is committed in consequence of that abetment, be punished with **death or with imprisonment** for a term which may extend to twenty years, and shall also be liable to fine; 194. Whoever gives or fabricates false evidence, intending thereby to cause, or knowing it to be likely that he will thereby cause, any person to be convicted of an offence which is capital by the law for the time being in force in Malaysia, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine; and if an innocent person is convicted and executed in consequence of such false evidence, the person who gives such false evidence shall be punished either **with death or the punishment** hereinbefore described. 302. Whoever commits murder shall be punished **with death.** 305. If any person under eighteen years of age, any insane person, any delirious person, any idiot, or any person in a state of intoxication, commits suicide, whoever abets the commission of such suicide shall be punished **with death or imprisonment** for a term which may extend to twenty years, and shall also be liable to fine. 307. (1) Whoever does any act with such intention or knowledge and under such circumstances, that if he by that act caused death he would be guilty of murder, shall be punished with imprisonment for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable to imprisonment for a term which may extend to twenty years. (2) When any person offending under this section is under sentence of imprisonment for life or for a term of twenty years, he **may**, if hurt is caused, be **punished with death**. 364. Whoever kidnaps or abducts any person in order that such person may be murdered, or may be so disposed of as to be put in danger of being murdered, shall be punished **with death or imprisonment** for a term which may extend to thirty years and shall, if he is not sentenced to death, also be liable to whipping. 374A. Whoever seizes or detains and threatens to kill, to injure or to continue to detain another person ("the hostage") to compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organization or any other person or group of persons to do or refrain from doing any act as an explicit or implicit condition for the release of the hostage shall be punished— (a) if the act results in death, **with death**; [...]

Law	Offence
Strategic Trade Act, 2010	(6) A person who contravenes subsection (3) commits an offence and shall, on conviction— (a) in relation to strategic items or unlisted items which are arms or related material— (i) where the act is done with the intent to unlawfully export, tranship or bring in transit such items or with knowledge that the export, transhipment or bringing in transit of such items is unlawful— (A) where death is the result of the act, be **punished with death or imprisonment** for natural life, and in the case of a body corporate, be punished with a minimum fine of thirty million ringgit; […] 10. (1) No person shall provide any technical assistance within or outside Malaysia if such technical assistance is intended for use in connection with a restricted activity. (2) A person who contravenes subsection (1) commits an offence and shall, on conviction— (a) where death is the result of the act, **be punished with death or imprisonment for natural life**, and in the case of a body corporate, be punished with a minimum fine of thirty million ringgit; […] 11. (1) No person shall carry out an act of brokering of any strategic items unless he is registered under section 19, and where required under the related laws, holds a valid permit for the brokering of such strategic items from the relevant Authority under the related laws where (a) he has been notified by the relevant Authority or an authorized officer that such strategic items may be intended or are likely to be used, wholly or in part, for or in connection with a restricted activity; (b) he knows that such strategic items are intended to be used, wholly or in part, for or in connection with a restricted activity; (c) he has reasonable grounds to suspect that such strategic items are intended or are likely to be used, wholly or in part, for or in connection with a restricted activity. (2) A person who contravenes subsection (1) commits an offence and shall, on conviction— (a) in relation to strategic items which are arms or related material— (i) where death is the result of the act, be **punished with death or imprisonment** for natural life, and in the case of a body corporate, be punished with a minimum fine of thirty million ringgit; […] 12. (1) If a person is informed by the relevant Authority or otherwise knows or has reason to believe that any unlisted item will or may be used for a restricted activity, then the person shall notify the relevant Authority of his intention to export, tranship or bring in transit that unlisted item at least thirty days before that export, transhipment or bringing in transit is to be carried out. (2) Upon such notification, the relevant Authority shall decide whether or not to allow that export, transhipment or bringing in transit to proceed. (3) The relevant Authority may decide to allow that export, transshipment or bringing in transit to proceed subject to the granting of a permit under this Act. (4) A person who contravenes subsection (1) commits an offence and shall, on conviction— (a) in relation to unlisted items which are arms or related material— (i) where the act is done with the intent to unlawfully export, tranship or bring in transit such unlisted items without a permit or with knowledge that the export, transhipment or bringing in transit of such unlisted items without a permit is unlawful— (A) where death is the result of the act, **be punished with death or imprisonment for natural life**, and in the case of a body corporate, be punished with a minimum fine of thirty million ringgit; […]
Water Services Industries Act, 2006	121. (1) A person who contaminates or causes to be contaminated any watercourse or the water supply system or any part of the watercourse or water supply system with any substance— (a) with the intention to cause death; (b) with the knowledge that he is likely to cause death; or (c) which would likely endanger the life of any person, commits an offence. (2) A person found guilty of an offence under subsection (1), on conviction— (a) where death is the result of the act, shall be **punished with death or imprisonment** for a term which may extend to twenty years, and where the punishment is not death, he shall also be liable to whipping;

ANNEX II: FIGURES BY PRISON

The tables below contain a breakdown of figures on people under sentence of death in Malaysia as of 22 February 2019.

Prison/ Category	Alor Setar	Bentong	Johor Bahru	Kajang – Men	Kajang – Women	Kluang	Marang	Pengkalan Chepa	Perlis
Number of prisoners	27	50	23	243	34	86	29	55	34
Gender	M: 27 F: 0	M: 50 F: 0	M: 23 F: 0	M: 243 F: 0	M: 0 F: 34	M: 86 F: 0	M: 29 F: 0	M: 48 F: 7	M: 34 F: 0
Nationality	Malaysian 14, foreign 13	Malaysian 27, foreign 23	Malaysian 13, foreign: 10	Malaysian 134, foreign 109	Malaysian 7, foreign 27	Malaysian 58, foreign 28	Malaysian 19, foreign 10	Malaysian 20, foreign: 35	Malaysian 19 Foreign: 15
Offence	Drugs: 25 Murder: 1 Kidnapping and murder: 1	Drugs: 40 Murder: 10	Drugs: 23	Drugs: 173 Murder: 60 Firearms: 3 Kidnapping: 1 Kidnapping with murder: 2 Waging war against the ruler: 3 S.57(1) Internal Security Act: 1	Drugs: 30 Murder: 3 Kidnapping and murder: 1	Drugs: 53 Murder: 30 Firearms: 1 Murder in commission of gang robbery: 2	Drugs: 17 Murder: 12	Drugs: 47 Murder: 7 Firearms: 1	Drugs: 28 Murder: 6

Nationality by crime	Drugs: 13 Malaysia, 12 foreign Murder: 1 Malaysian Kidnapping: 1 foreign national	Drugs: 19 Malaysian, 21 foreign Murder: 8 Malaysian, 2 foreign	Drugs: 13 Malaysian, 10 foreign	Drugs: 83 Malaysian, 90 foreign Murder: 47 Malaysian, 13 foreign Firearms: 3 Malaysian Kidnapping: 1 foreign Kidnapping and murder: 2 Malaysian Waging war against the ruler: 3 foreign Internal Security Act: 1 foreign	Drugs: 4 Malaysian, 26 foreign Murder: 2, 1 foreign Kidnapping and murder: 1 Malaysian	Drugs: 31 Malaysian, 22 foreign Murder: 25 Malaysian, 5 foreign Firearms: 1 foreign national Gang robbery: Malaysian	Drugs: 7 Malaysian, 10 foreign Murder: 12 Malaysian	Drugs: 12 Malaysian, 35 foreign Murder: 7 Malaysian Firearms: 1 Malaysian	Drugs: 13 Malaysian, 15 foreign Murder: 6 Malaysian
Women: nationality and offences	n/a	n/a	n/a	n/a	Malaysian 7, foreign 27 Drugs: 30 including 4 Malaysian and 26 foreign Murder: 3, including 2 Malaysian and 1 foreign Kidnapping: 1, Malaysian	n/a	n/a	Malaysian 0, foreign: 7 Drugs: 7	n/a
Time under sentence of death	2 since 2018 5 between 2014-2017 18 between 2009-2013 2 between 2004-2008	7 since 2018 21 between 2014-2017 20 between 2009-2013 1 between 2004-2008 1 in 2005	2 since 2018 14 between 2014-2017 6 between 2009-2013 1 between 2004-2008	83 since 2018 119 between 2014-2017 38 between 2009-2013 3 between 2004-2008	7 since 2018 20 between 2014-2017 7 between 2009-2013 0 between 2004-2008	20 since 2018 30 between 2014-2017 24 between 2009-2013 4 between 2004-2008 8 unspecified	4 since 2018 4 between 2014-2017 12 between 2009-2013 4 between 2004-2008 1 in 2003 2 in 2002 2 in 2001	2 since 2018 21 between 2014-2017 30 between 2009-2013 1 between 2004-2008 1 in 2003	2 since 2018 10 between 2014-2017 20 between 2009-2013 1 between 2004-2008 1in 2002
Judicial appeals finalized	22, including 12 foreign nationals	30, including 16 foreign nationals	9, including 3 foreign nationals	90, including 42 foreign nationals	12, including 10 foreign nationals	47, including 19 foreign nationals	23, including 9 foreign nationals	47, including 30 foreign nationals	26, including 12 foreign nationals

Pardon petition: filed	10, including 4 foreign nationals	18, including 7 foreign nationals	5, including 1 foreign national	33, including 12 foreign nationals	9, including 7 foreign nationals	24, including 6 foreign nationals	20, including 8 foreign nationals	24, including 14 foreign nationals	20, including 11 foreign nationals

Prison/ category	Pokok Sena	Pulau Pinang	Seberang Perai	Simpang Renggam	Sungai Buloh	Sungai Udang	Taiping	Tapah
Number of prisoners	93	12	83	100	56	45	48	121
Gender by prison	M: 71 F: 22	M: 12 F: 0	M: 72 F: 11	M: 100 F: 0	M: 56 F: 0	M: 36 F: 9	M: 48 F: 0	M: 71 F: 50
Nationality	Malaysian 63, foreign: 30	Malaysian 12, foreign 0	Malaysian 65, foreign: 18	Malaysian 44, foreign 56	Malaysian 39, foreign: 17	Malaysian 20, foreign: 25	Malaysian 29, foreign: 19	Malaysian 48, foreign 73
Offence	Drugs: 82 Murder: 11	Drugs: 10 Murder: 1 Firearms: 1	Drugs: 73 Murder: 9 Firearms: 1	Drugs: 81 Murder: 19	Drugs: 37 Murder: 16 Firearms: 1 Kidnapping: 2	Drugs: 30 Murder: 13 Kidnapping: 2	Drugs: 33 Murder: 10 Firearms: 2 Waging war against the ruler: 3	Drugs: 97 Murder: 19 Firearms: 4 Kidnapping: 1
Nationality by crime	Drugs: 52 Malaysian, 30 foreign Murder: 11 Malaysian	Drugs: 10 Malaysian Murder: 1 Malaysian Firearms: 1 Malaysian	Drugs: 56 Malaysian, 17 foreign Murder: 8 Malaysian, 1 foreign Firearms: 1 Malaysian	Drugs: 30 Malaysian, 51 foreign Murder: 15 Malaysian, 4 foreign	Drugs: 26 Malaysian, 11 foreign Murder: 12 Malaysian, 4 foreign Firearms: 1 Malaysian Kidnapping: 2 foreign	Drugs: 7 Malaysian, 23 foreign Murder: 11 Malaysian, 2 foreign Kidnapping: 2 Malaysian	Drugs: 19 Malaysian, 14 foreign Murder: 9 Malaysian, 1 foreign Firearms: 1 Malaysian, 1foreign Waging war against the ruler: 3 foreign	Drugs: 26 Malaysian 71 foreign Murder: 17 Malaysian, 2 foreign Firearms: 4 Malaysian Kidnapping: 1 Malaysian
Women: nationality and offences	Malaysian: 4 Foreign: 18 Drugs: 22		Malaysian: 5 Foreign: 6 Drugs: 11			Malaysian: 1 Foreign: 8 Drugs: 8, all foreign Murder: 1, Malaysian		Malaysian: 2 Foreign: 48 Drugs: 49, including 1 Malaysian and 48 foreign Murder: 1, Malaysian
Time under sentence of death	15 since 2018 39 between 2014-2017	2 between 2014-2017 10 in 2009-2013	19 since 2018 30 between 2014-2017	3 since 2018 22 between 2014-2017	2 between since 2018 15 between 2014-2017	5 since 2018 18 between 2014-2017	7 since 2018 19 between 2014-2017	9 since 2018 77 between 2014-2017

	33 between 2009-2013 1 between 2004-2008 5 unspecified		33 between 2009-2013 1 between 2004-2008	63 between 2009-2013 8 between 2004-2008 1 in 2003 1 in 2001 1 in 2000 1 in 1992	28 between 2009-2013 10 between 2004-2008 1 in 2002	19 between 2009-2013 3 unspecified	18 between 2009-2013 2 between 2004-2008 1 between 2003 1 unspecified	32 between 2009-2013 3 between 2004-2008
Judicial appeals finalized	60, including 23 foreign nationals	10, all Malaysian nationals	50, including 15 foreign nationals	87, including 45 foreign nationals	44, including 10 foreign nationals	28, including 22 foreign nationals	32, including 15 foreign nationals	67, including 37 foreign nationals
Pardon petition: filed	47, including 18 foreign nationals	10, all Malaysian nationals	18, including 11 foreign nationals	18, including 16 foreign nationals	24, including 9 foreign nationals	24, including 13 foreign nationals	24, including 6 foreign nationals	52, including 29 foreign nationals

Prison/ category	Kota Kinabalu-Men	Kota Kinabalu - Women	Labuan	Limbang	Miri	Puncak Borneo	Sandakan	Sibu	Tawau
Number of prisoners	36	3	3	12	8	32	30	11	7
Gender by prison	M: 36 F: 0	M: 0 F: 3	M: 3 F: 0	M: 12 F: 0	M: 8 F: 0	M: 28 F: 4	M: 30 F: 0	M: 10 F: 1	M: 7 F: 0
Nationality	Malaysian 24, foreign 12 (Indonesia 3, Nigeria 1, Philippines 8)	Malaysian 0, foreign 3 (China 3)	Malaysian 2, foreign 1 (Philippines 1)	Malaysian 4, foreign 8 (India 2, Indonesia 6)	Malaysian 6, foreign 2 (Indonesia 2)	Malaysian 23, foreign 9 (Cambodia 1, Indonesia 4, Nigeria 1, Philippines 1, Thailand 1, Viet Nam 1)	Malaysian 10, foreign 20 (Indonesia 4, Philippines 16)	Malaysian 10, foreign 1 (Indonesia)	Malaysian 3, foreign 4 (Indonesia 2, Philippines 2)
Offence	Drugs: 13 Murder: 23	Drugs: 3	Drugs: 1 Murder: 2	Drugs: 5 Murder: 7	Drugs: 2 Murder: 6	Drugs: 15 Murder: 17	Drugs: 8 Murder: 22	Drugs: 1 Murder: 10	Drugs: 3 Murder: 4
Nationality by crime	Drugs: 11 Malaysian, 2 foreign Murder: 13	Drugs: 3 foreign	Drugs: 1 Malaysian Murder: 1 Malaysian, 1 foreign	Drugs: 3 Malaysian, 2 foreign	Drugs: 2 Malaysian Murder: 4 Malaysian, 2 foreign	Drugs: 7 Malaysian, 8 foreign Murder: 16	Drugs: 5 Malaysian, 3 foreign	Drugs: 1 Malaysian Murder: 9 Malaysian, 1 foreign	Drugs: 1 Malaysian, 2 foreign

	Malaysian, 10 foreign			Murder: 1 Malaysian, 6 foreign		Malaysian, 1 foreign	Murder: 5 Malaysian, 17 foreign		Murder: 2 Malaysian, 2 foreign
Women: nationality and offences		Malaysian 0, foreign 3 Drugs: 3, foreign				Malaysian 0, foreign: 4 Drugs: 4, foreign		Malaysian: 1 Murder: 1	
Time under sentence of death	5 convicted since 2018 14 in 2014-2017 15 in 2009-2013 1 2004-2008 1 in 2003	0 convicted since 2018 3 convicted in 2014-2017	0 convicted since 2018 1 in 2014-2017 1 in 2009-2013 1 in 2004-2008	0 convicted since 2018 7 in 2014-2017 5 in 2009-2013 0 in 2004-2008	4 convicted since 2018 1 in 2014-2017 3 in 2009-2013 0 in 2004-2008	4 convicted since 2018 15 in 2014-2017 (including 1 resentenced first time 1996) 10 in 2009-2013 3 in 2004-2008	0 convicted since 2018 18 in 2014-2017 12 in 2009-2013	2 convicted since 2018 4 in 2014-2017 5 in 2009-2013	1 convicted since 2018 4 in 2014-2017 2 in 2009-2013 0 in 2004-2008
Appeals finalized	23, including 10 foreign nationals	2, including 2 foreign nationals	3, including 1 foreign national	7, including 4 foreign nationals	3, all Malaysian nationals	14, all Malaysian nationals	19, including 13 foreign nationals	5, including 1 foreign nationals	4, including 2 foreign nationals
Pardon petition: filed	16, including 4 foreign nationals	n/a	2, all Malaysian nationals	6, including 3 foreign nationals	3	9	2, including 1 foreign national	5, including 1 foreign national	2, all Malaysian nationals

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WHY MALAYSIA MUST ABOLISH THE DEATH PENALTY

The death penalty is retained under Malaysian law for more than 30 offences and is regularly imposed for acts – such as drug trafficking – that do not meet the threshold of the "most serious crimes", to which the use of this punishment must be restricted under international law and standards. As of September 2019, more than 1,290 people remained on death row.

Research by Amnesty International has highlighted that the burden of the death penalty in Malaysia has largely fallen on those convicted of drug trafficking, who disproportionately include women and foreign nationals. A significant part of those on death row involves people from less advantaged socio-economic backgrounds and certain ethnic minorities are overrepresented on death row. These findings gain an even greater significance when considered in the context of laws and policies that are in contravention of international law and standards and which have added multiple layers of arbitrariness into the use of this punishment. This report highlights specific concerns in relation to the right to a fair trial and to seek pardon or commutation of a death sentence.

Amnesty International calls on the Malaysian authorities to take prompt action to repeal the mandatory death penalty for all offences and bring national legislation in line with international human rights law and standards, as critical first steps towards full abolition of the ultimate cruel, inhuman and degrading punishment.

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