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Isolation and desolation. Conditions of detention of people sentenced to death in Malaysia

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ISOLATION AND DESOLATION

CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH

MALAYSIA

CAROLE BERRIH
NGEOW CHOW YING



ANTI
DEATH
PENALTY
ASIA
NETWORK

ECPM
ensemble contre
la peine de mort
together against
the death penalty

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CAROLE BERRIH
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DEATH
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NETWORK

In partnership with:



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As a legal adviser specialising in public international law and a sociology graduate, **Carole Berrih** acted as Delegation Leader and Project Coordinator for international NGOs before founding and running Synergies Coopération, a research centre and training institute aiming to promote and protect human rights. In particular, she carries out research and assessments for NGOs and UN international agencies in the field of criminal justice and the prevention of torture and ill treatment in prisons. She is an auditor at the Institut des Hautes études de défense nationale [Institute of Advanced Studies in National Defence].

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LIST OF ACRONYMS

ADPAN	Anti-Death Penalty Asia Network
ASEAN	Association of Southeast Asian Nations
DAP	Democratic Action Party
ECPM	Together Against the Death Penalty (Ensemble contre la peine de mort)
ESCAR	Essential (Security Cases) Regulations
HAKAM	National Human Rights Society of Malaysia
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
IPC	Indian Penal Code
ISA	Internal Security Act
MADPET	Malaysians Against the Death Penalty and Torture
MCA	Malayan Chinese Association, then Malaysian Chinese Association
MCP	Malayan Communist Party
MIC	Malayan Indian Congress
MRLA	Malayan Races Liberation Army
NEP	New Economic Policy
OPCAT	Optional Protocol to Convention Against Torture
PAS	Parti Islam Se Malaysia
POTA	Prevention of Terrorism Act
SOSMA	Security Offences (Special Measures) Act
SUARAM	Suara Rakyat Malaysia
SUHAKAM	Human Rights Commission of Malaysia (Suruhanjaya Hak Asasi Manusia Malaysia)
UMNO	United Malays National Organisation

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DEATH PENALTY IN MALAYSIA: THE NEW CHALLENGE

Alain Morvan

ECPM's President

We all know that abolishing the death penalty is not an easy task. We take two steps forward and, suddenly, five steps back. It may be a long path that many would not want to follow for various reasons. However, as the president of ECPM, I would like to firmly state ECPM's support to Malaysia in its struggle to abolish the death penalty.

ECPM has closely monitored the positive efforts undertaken by the Malaysian government to abolish the death penalty. The statement on the abolition of the death penalty, made in October 2018 by Datuk Liew Vui Keong, Minister of Law in the then Prime Minister's Department, was a courageous step towards defending the right to life. It took us all by surprise and gave us great hope of seeing the death penalty abolished in Malaysia. This first step was followed by the Malaysian authorities voting, for the first time, in favour of the United Nations Resolution on the use of the death penalty. The death penalty and its abolition were more than ever at the forefront of the political and social debate in Malaysia, showing both great support for the Minister from the international scene and Malaysian abolitionist stakeholders, as well as great resistance coming from some political parties and parts of society.

All the links tied between NGOs, parliamentarians, civil society organisations and lawyers are strong. Since the Regional Congress organised by ECPM in Kuala Lumpur in 2015, ECPM and its partner ADPAN have taken several initiatives: parliamentary roundtables, organised with Parliamentarians for Global Action (PGA); national conferences, workshops and side events at the United Nations in 2018 in Geneva for the Malaysia Universal Periodic Review, and in New York for the UN Resolution on the use of the death penalty. In November 2019, ECPM, ADPAN and PGA had the honour of being invited by the Minister of Law's office to participate in a briefing session with members of the Special Committee to Review Alternative Punishments to the Mandatory Death Penalty. This committee, comprised amongst others of former High Court judges, criminologists, representatives of the Malaysia Bar Council and

INTRODUCTION

SUHAKAM (Malaysian human rights commission) and academics, was tasked to review alternative sentences to the mandatory death penalty, notably through public consultation, and submitted its final report in February 2020. We took this opportunity to share what France experienced when we abolished the death penalty in 1981, almost 40 years ago.

The recent change in government at the end of February 2020 could slow down the work in progress. The previous government, led by the Pakatan Harapan coalition, was a symbol of hope after 60 years of a conservative government, ruled by the United Malays National Organisation (UMNO). We will encourage the new Cabinet in power, supported by UMNO, to continue the work done by the Special Committee and to resume a constructive discussion on the abolition of the death penalty. ECPM and ADPAN are ready to interact with the new government on this issue and build on what has been achieved so far.

Isolation and Desolation - Conditions of Detention of People Sentenced to Death in Malaysia is the first ever fact-finding mission report on the conditions of detention of death row prisoners in Malaysia. It examines the use of death penalty in Malaysia as well as the actual situation of people on death row. This report is not meant to point fingers but rather to put the facts on the table in a transparent manner and work from there. It is mainly an advocacy tool for all abolitionist stakeholders, from civil society actors to the parliamentarians who will keep fighting for the abolition of the death penalty.

Step by step and carefully, courageous human rights defenders, civil society actors and MPs have worked to trace a path towards abolition. In times of hardship, they pooled and created resources, evidence based data and tools, and invested many hours of hard work to strengthen their efforts and change the story.

What we have learnt is that we need the right people who can act at the right time in the right circumstances. However, there are no perfect circumstances to abolish the death penalty. Governments must do what is right under any circumstances.

We will have to continue to push harder in the years to come to achieve our common goal and I have hope that this can be achieved. I would like to thank all our partners here, all the CSOs working in Asia for their spirit, their strength and their passion in our common fight.

April 2020.

RATIONALE FOR THIS REPORT

Little is known about the conditions under which death row prisoners are held in Malaysia. There are currently 1,280 men and women on death row in the country, following trials that do not always respect basic international principles. Recent reports have been published, illustrating violations of the right to a fair trial in death penalty cases.¹ Our report is not intended to duplicate what has been reported in other studies. It aims, through the testimonies of several death row prisoners still in detention, of their families and of religious organisations working in prisons, to take stock of the situation of those sentenced to death, at a time when the authorities are questioning the total abolition of the death penalty. The first part of this report will analyse the history of the death penalty in the country. The second part will review the main stages of the criminal and clemency processes. The third part will detail the conditions of detention of persons sentenced to death. The fourth part will give the floor to the families of those sentenced to death. The fifth and final part will provide some information on the execution process.

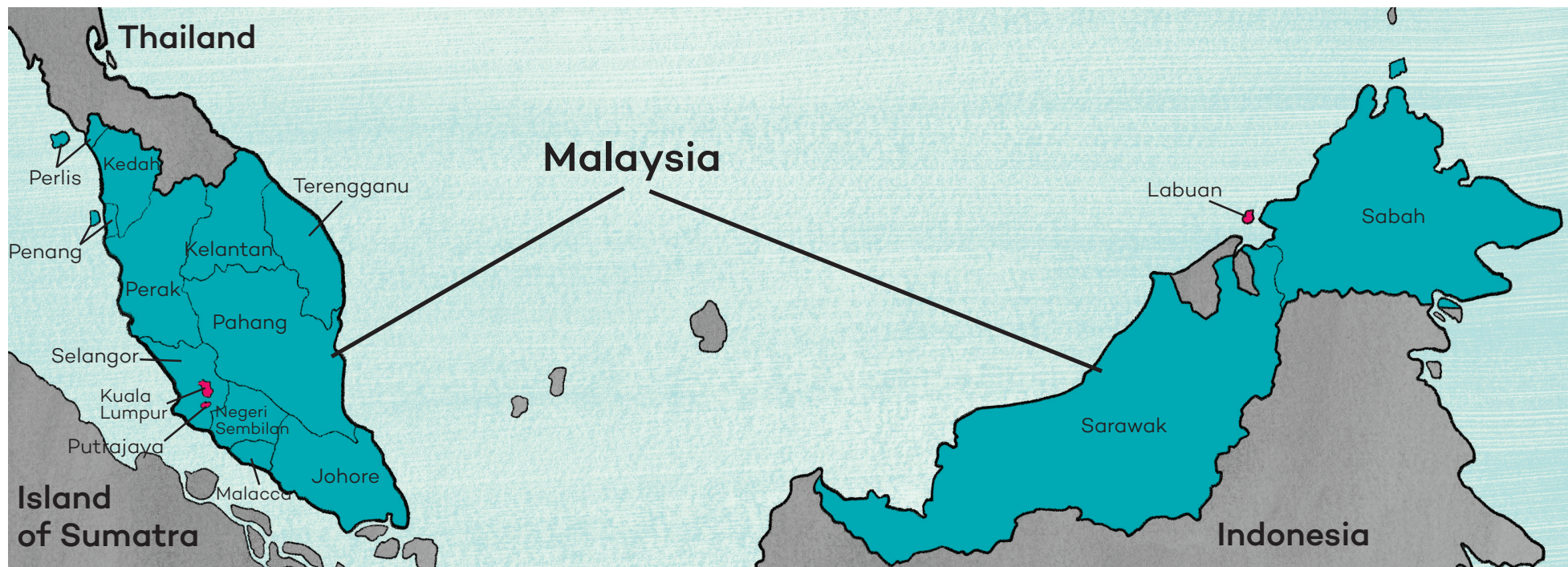
PRESENTATION OF MALAYSIA

Malaysia is a multi-ethnic and multi-cultural country, located in Southeast Asia. It is composed of 13 states (Negeri) and 3 federal territories (Wilayah Persekutuan), separated by the South China Sea into two regions, Peninsular Malaysia and East Malaysia.

Malaysia's population, of more than 32,000,000 inhabitants,² comprises three main ethnic groups: 62% *Bumiputera* (literally translated as "son of the land", representing the Malays and the natives of Sabah and

1 See for instance, Amnesty International, *Fatally Flawed: Why Malaysia Must Abolish the Death Penalty* [ACT 50/1078/2019], 2019.

2 CIA, *The World Fact Book*, 2020.



Sarawak), 21% Chinese and 6% Indian.³ Ethnicity plays an important role in Malaysian politics. Since independence, successive governments have taken affirmative actions to advance the rights of *Bumiputera* over other groups by giving them preferential treatment in many areas, including education, employment or business. Islam is recognised as Malaysia's established religion. The Malaysian Constitution grants freedom of religion to non-Muslims.

Malaysia is a constitutional monarchy. The Federal Head of State is the *Yang di-Pertuan Agong*, commonly referred to as the "King", who mainly plays a ceremonial role, but is of paramount importance in the clemency process in death penalty cases. Malaysia is governed by a Prime Minister. From independence in 1957 until 2018, the country was ruled by a coalition of parties led by the United Malays National Organisation (UMNO). During this period, the number of crimes punishable by the mandatory⁴ or discretionary death penalty steadily increased and included various offences such as: murder,

³ CIA, The World Fact Book, 2020

⁴ The death penalty is mandatory where the judiciary has no discretion in capital punishment cases: judges have no choice but to impose the death penalty for such crimes, regardless of the circumstances of the crime or the situation of the accused.

firearms offences, drug trafficking, terrorism, etc., making Malaysia one of the countries that executed the most convicts in the world. 469 people have been executed since Malaysia's independence, including 229 for drug trafficking.⁵

In 2018, the new coalition party Pakatan Harapan won the elections, ending more than 60 years of UMNO rule. Despite statements announcing the full abolition of the death penalty, the new government, led by Prime Minister Mahathir Mohamad, declared in 2019 that it would abolish only the mandatory death penalty. A Special Committee to Review Alternative Punishments to the Mandatory Death Penalty has been set up and has submitted its report, which had not yet been made public. In February 2020, after 2 years of hope for renewal in the country, Mahathir Mohamad resigned, undermined by internal quarrels within the ruling party and his inability to deliver on his election promises. In March 2020, he was replaced by Muhyiddin Yassin, who defected from the ruling coalition and allied himself with the UMNO party.

⁵ Amnesty International, *op. cit.*, 2019, p. 15.

OVERVIEW OF THE DEATH PENALTY IN MALAYSIA

The legislative framework of the death penalty

While the Federal Constitution recognises the right to life, it provides for exceptions. Section 5 of the Constitution provides that: “No person may be deprived of life or personal liberty except in accordance with law.”⁶ Malaysian law provides for the death penalty for more than 20 offences. The death penalty is mandatory by law for several offences, including murder and offences related to terrorism, making Malaysia one of the few countries where the judiciary has no discretion in capital cases. Malaysia allows the application of Shariah law in Islamic courts, but those courts cannot try capital cases.

Table 1: Offences punishable by the death penalty in Malaysia (2020)

Source	List of offences	Mandatory / Discretionary death sentence
Penal code		
	Waging war against Malaysia (Section 121)	Discretionary death sentence
	Offences against the head of State (Section 121(A))	Mandatory death sentence
	Terrorist offences (Sections 130(C), 130(I), 130(N), 130(O), 130(QA), 130(ZB))	Mandatory death sentence
	Mutiny (Section 132)	Discretionary death sentence
	False testimony resulting in the execution of an innocent (Section 194)	Discretionary death sentence
	Murder (Section 302)	Mandatory death sentence
	Assisted suicide (Section 305)	Discretionary death sentence
	Attempted murder if the offender was serving a sentence of 20 years or more at the time of the offence (Section 307(2))	Mandatory death penalty

⁶ Federal Constitution of Malaysia, Section 5.

	Kidnapping in order to murder a person or put a person in danger of being murdered (Section 364)	Discretionary death sentence
	Hostage-taking resulting in death (Section 374(A))	Mandatory death sentence
	Rape resulting in death (Section 376(4))	Discretionary death sentence
	Gang-robbery with murder (Section 396)	Discretionary death sentence
Other national texts		
Armed Forces Act 1972	Military offences: Assisting enemy, taking part in mutiny, etc. (Sections 38, 41, 47 and 88)	Discretionary death sentence
Arms Act 1960	Manufacturing ammunition (Section 14(1))	Discretionary death sentence
Dangerous Drugs Act 1952	Drug trafficking (Section 39(b))	Mandatory or discretionary death sentence, according to the circumstances
Firearms (Increased Penalties) Act 1971	Crimes (kidnapping, attempted murder, burglary, resisting arrest) committed with a firearm discharge (Sections 3 and 3(a))	Mandatory death sentence
	Trafficking in firearms of illegal possession of more than two firearms (Section 7)	Discretionary death sentence
Kidnapping Act 1961	Kidnapping for ransom (Section 3)	Discretionary death sentence
Water Services Industry Act 2006	Water contamination (Section 121(2))	Discretionary death sentence
Strategic Trade Act 2010	Offences relating to strategic or unlisted items (including arms) (Sections 6, 10, 11, 12)	Discretionary death sentence

Many of these capital offences do not involve any element of intentional killing, such as drug trafficking or kidnapping. The imposition of the death penalty in such cases is contrary to internationally recognised human rights standards, in particular the United Nations (UN) Death Penalty Safeguards recommendations, endorsed by the UN General Assembly in 1984, which state that “Capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.”⁷ The prohibition of the imposition of the death penalty for all but the “Most serious crimes” is also provided in Article 6 of the International Covenant on Civil and Political Rights (ICCPR). Although Malaysia has not ratified several international human rights treaties,⁸ including the ICCPR, the Malaysian government has repeatedly asserted that its legislation is in conformity with the ICCPR.⁹ In October 2018, the UN Human Rights Committee clarified the term “Most serious crimes”: “The term ‘the most serious crimes’ must be read restrictively and appertain only to crimes of extreme gravity, involving intentional killing. Crimes not resulting directly and intentionally in death, such as [...] drug

7 Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in resolution 1984/50 on 25 May 1984 and endorsed by the UN General Assembly in resolution 39/118, adopted without a vote on 14 December 1984, Safeguard No. 1.

8 See the ratification status of human rights instruments by Malaysia in Appendix 1. Although Malaysia has not ratified the ICCPR or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, it has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child with some reservation. In 1998, the NGO SUARAM considered that these ratifications mark “An important acceptance by the Malaysian government that the global community does share common standards and values on human rights, regardless of cultural and geographical origins.” Peerenboom R., Petersen C.J., Chen A.H.Y., *Human Rights in Asia: A Comparative Legal Study of Twelve Asian Jurisdictions, France and the USA*, Routledge, 2006, p. 192.

9 In 2013, Malaysia stated in its report during the Universal Periodic Review process: “Malaysia reiterates that the death penalty is only applied on the most serious crimes which are provided for in law and only after all rights of appeal have been exhausted. The existing legal framework provides for stringent safeguards that must be complied with before the death penalty is carried out. The Government maintains that such safeguards are in line with international standards, in particular Article 6 of ICCPR.” UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 [Universal Periodic Review]: Malaysia* [A/HRC/WG.6/17/MYS/1], 2013, para. 45. See also UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 15(A) of the Annex to Human Rights Council Resolution 5/1, Malaysia* [A/HRC/WG.6/4/MYS/1/Rev.1], 2008, para. 89; and UN Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council resolution 16/21, Malaysia* [A/HRC/WG.6/31/MYS/1], 2018, para. 10.

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.”¹⁰ In addition, the use of the death penalty to combat drug-related crimes and the imposition of mandatory death penalty have been identified as clear violations of international law by UN Special Rapporteurs on Summary Executions and on Torture.¹¹ Certain categories of persons are excluded from capital punishment. The execution of pregnant women is prohibited: the law provides for the commutation of the death penalty to life imprisonment once pregnancy has been proven.¹² No death sentence may be passed on people who commit an offence when they are under 18 years of age.¹³ In addition, the legislation provides that people, “By reason of unsoundness of mind, are incapable of knowing the nature of the act, or that [they are] doing what is either wrong or contrary to law”, do not commit criminal offences.¹⁴ Therefore, according to the law,

10 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” [CCPR/C/GC/36], para. 35.

11 On the imposition of the death sentence for drug crimes, see UN Commission on Human Rights, *Extrajudicial, Summary or Arbitrary Executions: Report by the Special Rapporteur, submitted pursuant to Commission on Human Rights resolution 1996/74 [E/CN.4/1997/60]*, 1996, para. 92; and UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak* [A/HRC/10/44], 2009, para. 66. On the imposition of the mandatory death sentence, see UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* [A/HRC/14/24], 2010, para. 51, recalling UN Commission on Human Rights, *Extrajudicial, Summary or Arbitrary Executions* [E/CN.4/2005/7], 2004, paras. 63-64 and 80; and UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: addendum: Mission to Kenya* [A/HRC/11/2/Add.6], 2009, paras. 83-84 and 115.

12 Criminal Procedure Code, Section 275, provides: “Where a woman convicted of an offence punishable with death is alleged to be pregnant, or where the Court before whom a woman is so convicted thinks fit, the Court shall direct one or more medical practitioners to be sworn to examine that woman in some private place and to enquire whether she is pregnant or not, and if upon the report of any of them it appears that she is pregnant the sentence to be passed upon her shall be a sentence of imprisonment for life instead of sentence of death.”

13 Child Act 2001, Article 97(1): “A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.” However, children can still be charged with a capital offence. This is the case for instance of two 16-year-old boys accused of murder after being charged with setting a fire that killed 23 people in Tahfiz school in 2017. At the time of writing, one had been acquitted, the other had entered his defence. See *Free Malaysia Today*, “Accused in Tahfiz Fire Ordered to Enter Defence, Another Acquitted”, 2020, available at: <https://www.freemalaysiatoday.com/category/nation/2020/01/28/accused-in-tahfiz-fire-ordered-to-enter-defence-another-acquitted/> (last visited on February 13, 2020). See also *Malay Mail*, “Murder in Tahfiz School Fire Case Transferred to High Court”, 2018, available at: <https://www.malaymail.com/news/malaysia/2018/01/03/murder-in-tahfiz-school-fire-case-transferred-to-high-court/1545437> (last visited on February 13, 2020).

14 Penal Code, Sections 84, 309(A) and 309(B).

they cannot be sentenced to death. Nevertheless, this is not always the case. Osariakhi Ernest Obyangbon, a Nigerian citizen sentenced to death in 2000, was diagnosed as suffering from schizophrenia in 2007, before his appeal. His sentence to death was upheld by the court. He was spared execution in 2014 after strong protests by human rights organisations. His sentence was commuted in 2017, 10 years after his diagnosis.¹⁵ The method of execution is by hanging.¹⁶

1,280 people on death row in December 2019

Until recently, the Malaysian authorities did not publish detailed data on the implementation of death penalty in the country. Data on death sentences have therefore been estimated by human rights NGOs, based on the limited information provided by the authorities or by the families of people sentenced to death. This lack of transparency does not comply with the UN Economic and Social Council's 1989 Resolution, which urged Member 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 executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law."*¹⁷ In 2018, disaggregated data were made available for the first time to international human rights organisations, which showed that the number of persons sentenced to death was much higher than previously recorded. The estimated data presented in Table 2 below are therefore partial, but nevertheless provide interesting trends. In the last 10 years, the number of death sentences has increased considerably, due to the hard-line policy against drug-related

crimes.¹⁸ 72% of all death sentences recorded in 2018 relate to drug offences.¹⁹ As Harm Reduction International notes in its 2019 report, *"While the overall death row population grew 13.8% between 2017 and 2018, death row prisoners for drug offences specifically increased by 38% during the same period."*²⁰ In December 2019, the Minister of Home Affairs reported to the Parliament that 1,280 persons were awaiting execution in Malaysian prisons,²¹ 70% of whom were convicted of drug trafficking. This is a significant increase since 2011, when 696 people were awaiting execution in Malaysian prisons.²² That is a very large number of people on death row, and one of the highest numbers in the world.²³ Compared to the situation in other countries, the proportion of people on death row among the prison population is 14 times higher in Malaysia than in the United States.²⁴ In addition, while 1,280 people are on death row in Malaysia, the number of people on death row in the United States is 2,656 in 2019, with a population 10 times higher.²⁵

15 Amnesty International, "Malaysia: Commutation of Death Sentence Must Lead to a Moratorium on Further Executions", Public Statement [ACT 50/5656/2017], 2017. Amnesty International, "Death Sentence of Mentally Ill Prisoner Commuted in Malaysia", 2017.

16 Criminal Procedure Code, Article 277: "When any person is sentenced to death, the sentence shall direct that he be hanged by the neck till he is dead, but shall not state the place where nor the time when the sentence is to be carried out."

17 UN Economic and Social Council's Resolution 1989/64 adopted on 24 May 1989.

18 See *infra*, Sub-section "The war on drugs and the imposition of the mandatory death penalty in drug-related crimes".

19 190 people were sentenced to death in 2018 alone, of whom 72% were sentenced to death for drug trafficking (136 persons), 25% for murder (48 persons), 2% for firearms offences (3 persons) and 2% for kidnapping and murder (3 persons), as shown in the following graph. At the time of writing this report in February 2020, data for 2019 was not available. Amnesty International, *Death Sentences and Executions in 2018, 2019*, p. 23.

20 Girelli G., *The Death Penalty for Drug Offences: Global Overview 2018*, Harm Reduction International, 2019, p. 14.

21 Response of the Minister of Home Affairs to the Parliament on December 3, 2019, p. 30, available at: <https://vdokumen.net/penyata-rasmi-parlimen-dewan-rakyat-parlimen-dr-3122019-4-tun-dr-mahathir-bin.html> (last visited February 13, 2020). See also *Malay Mail*, "Minister: Putrajaya Aims to Reduce Prison Population, Not Build More Jails", 2019, available at: <https://www.malaymail.com/news/malaysia/2019/03/09/minister-putrajaya-aims-to-reduce-prison-population-not-build-more-jails/1730804> (last visited January 24, 2020).

22 *Free Malaysia Today*, "Time to Abolish Death Sentence", 2011, available at: <http://www.malaysia-today.net/2011/04/03/time-to-abolish-death-sentence/> (last visited January 22, 2020).

23 Malaysia is the fourth Asian country with the highest number of people on death row after Pakistan (4,864), Bangladesh (1,500+) and Sri Lanka (1,299). China is not represented in this ranking as there are no official figures. Amnesty International, *op. cit.*, 2019, p. 19.

24 As of December 2019, the death row population in the United States represents 0.12% of the prison population (2,656 persons on death row, for a total prison population of 2,121,600). Sources: Prison Studies, World Prison Brief: Malaysia, 2019, available at: <https://www.prisonstudies.org/country/malaysia> (last visited January 23, 2020) and NAACP Death Row U.S.A., report, 2019. The death row population in Malaysia represents 1.73% of the prison population (1,280 persons on death row, for a total prison population of 74,000).

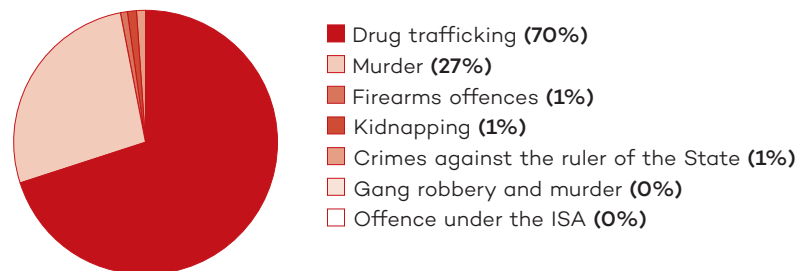
25 As of December 2019, there are 2,656 people on death row in the United States, for a total population of 323,000,000. There are 1,280 people on death row in Malaysia, for a total population of 32,000,000.

Table 2: Evolution of death sentences in Malaysia 2007-2018²⁶

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
# recorded death sentences	12	22+	68+	114+	108+	60+	76+	38+	39+	14+	38+	190
# recorded death sentences for drug-related offences	N/A	22	50+	63	83	N/A	47	16	24	5	21	136

The vast majority of the 1,280 persons on death row has been convicted for drug trafficking. According to December 2019 data, persons on death row were convicted of the following offences: 70% for drug trafficking (899 persons), 27% for murder (350 persons), 1% for firearms offences (15 persons), 0.6% for crimes against the ruler of the State²⁷ (8), 0.4% for kidnapping (5), 0.2% for gang robbery and murder (2), and 0.1% for an offence under the Internal Security Act (ISA) (1 person) – an offence that has since been repealed.²⁸

Figure 1: % of persons on death row in Malaysia, by offence (December 2019)



26 We used Amnesty International “+” notation, to indicate that the data represent a minimum. Amnesty International, Annual reports on death sentences and executions in 2007, 2008, 2009, 2010, 2011, 2012; 2013 to 2018 data: Amnesty International, *op. cit.*, 2019, p. 16. See also Harm Reduction International, *op. cit.*, (2019). For 2009-2011 data on drug-related offences, see Gallahue P., Gunawan R., Rahman F., El Mufti K., U Din N., Felten R., *The Death Penalty for Drug Offences: Global Overview 2012, Tipping the Scale for Abolition*, Harm Reduction International, 2012, p. 30. For 2008 data on drug-related offences, see Gallahue P., Lines R., *The Death Penalty for Drug Offences: Global Overview 2010, Harm Reduction International, 2010*, p. 29.

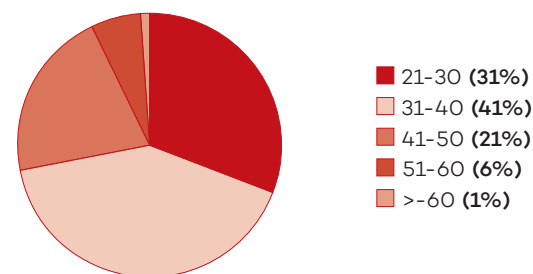
27 Nine Filipino men were sentenced to death in connection with Lahad Datu intrusion. See *The Star Online*, “Nine in Lahad Datu Intrusion to Hang”, 2018, available at: <https://www.thestar.com.my/news/nation/2018/01/16/nine-in-lahad-datu-intrusion-to-hang-federal-court-dismisses-prosecutions-appeal-against-acquittal-o> (last visited January 24, 2020).

28 Response of the Minister of Home Affairs to the Parliament on December 3, 2019, p. 30.

The death penalty is highly dependent on the gender of the convicted person. 141 women are on death row, representing 11% of the death row population.²⁹ The percentage of women on death row in Malaysia is very high compared to other countries such as Sri Lanka (6.5%), Indonesia (2.2%) or the United States (2%).³⁰ Figures released in March 2019 show that women are over-represented in the population of people sentenced to death for drug-related crimes: 95% of women on death row have been convicted of drug-related crimes, compared to 70% of men.³¹

The people on death row are mostly young: 397 people awaiting execution are between 21 and 30 years old (31%). 17 persons on death row are over 60 (1%).³²

Figure 2: % of persons on death row in Malaysia, by age group (December 2019)



In terms of nationality, 43% of persons on death row are foreign nationals from 43 countries (546 people).³³ 73% of foreign citizens have been convicted of drug-related offences and 25% of murder. According to Amnesty International, the most represented nationalities are Nigerian (21%), Indonesian (16%), Iranian (15%), Indian (10%), Filipino (8%) and Thai (6%).³⁴ The Malaysian population is divided among Malay (349), Indian (193), Chinese (158) and other ethnic groups (34).³⁵

29 Amnesty International, *op. cit.*, 2019, p. 19.

30 In 2018, 84 women were on death row in Sri Lanka (total death row population of 1,299 people), 6 women in Indonesia (total death row population of 268 people) and 53 in the United States (total death row population of 2,656).

31 *Ibid.*, p. 5.

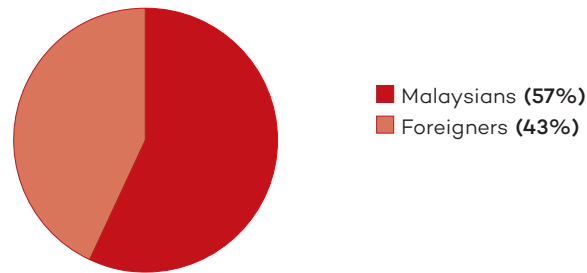
32 Response of the Minister of Home Affairs to the Parliament on December 3, 2019.

33 *Ibid.*

34 Amnesty International, *op. cit.*, 2019, p. 19.

35 Response of the Minister of Home Affairs to the Parliament on December 3, 2019.

Figure 3: % of persons on death row in Malaysia, by nationality (December 2019)³⁶



An analysis conducted by Prisons Department among 48% of the death row population revealed that the most represented group was the unemployed (240 people out of 613 analysed). The other groups are divided between workers (143), businessmen (140) and people who own their businesses (90).³⁷

Evolution of executions in Malaysia

The lack of transparency on the application of the death penalty has prevented international and national human rights organisations from closely monitoring its imposition for decades. Moreover, executions are carried out in secret, without prior notice – a practice that has been regularly denounced by international and national human rights institutions and by families of those executed.³⁸

469 people have been executed since the 1957 independence.³⁹ The following figure shows a significant decrease in executions since the mid-1990s. 20 persons have been hanged by the Malaysian authorities in the last 10 years, between 2010 and 2019.⁴⁰

³⁶ *Ibid.*

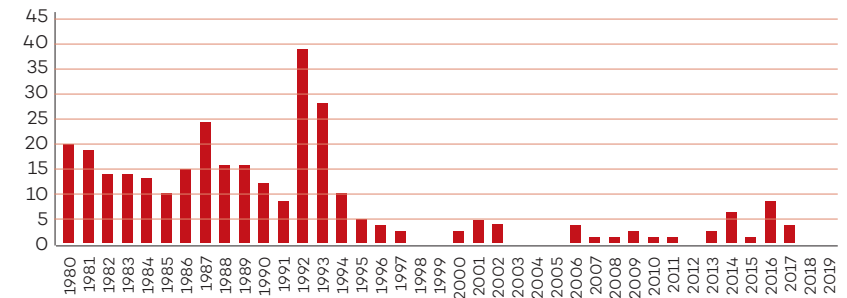
³⁷ Response of the Minister of Home Affairs to the Parliament on December 3, 2019. The division of the Prisons Department between the last two groups is not very clear. Nor is it clear why the analysis was performed on less than half of the individuals on death row. These data should therefore be taken with caution.

³⁸ More information on the execution process *infra*, “Rushed and secretive executions”.

³⁹ Amnesty International, *op. cit.*, 2019, p. 15.

⁴⁰ More information on the history of the imposition of the death sentence *infra*, “History of Malaysia and the death penalty”.

Figure 4: Evolution of the number of executions in Malaysia 1980-2019⁴¹



No execution was carried out since 2017. An official moratorium on executions was imposed in 2018, a few weeks after the election of the new government, led by the party Pakatan Harapan.⁴² According to the government, as of December 2019, all those sentenced to death either had pending legal appeals (827 persons) or were seeking clemency (453 persons).⁴³ Since executions while legal actions and clemency procedures are ongoing are prohibited by international standards, no executions can be carried out legally. It should be recalled, however, that two prisoners, the Batumalai brothers, were executed in March 2017, while their applications for clemency were still pending.⁴⁴

Malaysia's position on the moratorium on the death penalty

Until 2018, Malaysia had continuously voted against the UN Resolution for a universal moratorium on execution. In December 2018, for the first time in the country's history, Malaysia reversed its vote from “against” to “in favour” of the resolution. A few months later, on the occasion of the 31st session of the Universal Periodic Review, Malaysia has accepted several recommendations of the

⁴¹ 1980-2012 data: Pascoe D., *Last Chance for Life: Clemency in Southeast Asian Death Penalty Cases*, Oxford University Press, 2019, p. 129; 2013, 2017 and 2019 data: see Amnesty International annual reports, note supra. 2014 to 2016 data: see Amnesty International, *Death Sentences and Executions in 2016, 2017*, citing official figures.

⁴² Amnesty International, *op. cit.*, 2019, p. 11.

⁴³ Response of the Minister of Home Affairs to the Parliament on December 3, 2019.

⁴⁴ More information on the illegality of the executions *infra*, “Rushed and secretive executions”. *Malaysia Kini*, “Batumalai Brothers Hanged at Dawn Today”, 2017, available at: <https://www.malaysiakini.com/news/375744> (last visited February 10, 2020).

international community to amend its legislation on the death penalty, but not for all crimes.⁴⁵

METHODOLOGY

This report is based on in-depth research⁴⁶ and semi-directive interviews conducted from July 2019 to February 2020. Interviews with people sentenced to death, families and NGOs were conducted by the team of Anti-Death Penalty Asia Network (ADPAN). Interviews with the Human Rights Commission of Malaysia – *Suruhanjaya Hak Asasi Manusia Malaysia* (SUHAKAM) – and a psychiatry expert before Malaysian criminal courts were conducted by the author of the report.

While the government is now more open to the publication of data on death row prisoners, it still strongly restricts access to those sentenced to death. Permission to monitor prison conditions or talk to death row prisoners is only granted to SUHAKAM, the International Committee of the Red Cross (ICRC), religious organisations, lawyers and families.⁴⁷ The ADPAN team has been able to visit three persons on death row, whom they represent in legal matters. Among them, two Malaysian men and a foreign woman from China. All meetings were held in their mother tongue and then translated into English by the interviewer. All three cases are final, with an ongoing clemency application. Interview data were collected using a standardized questionnaire.

⁴⁵ Malaysia supported the recommendations of 12 countries to abolish death penalty (Moldova, Albania, Portugal, Romania, Spain, Cyprus, Georgia, Fiji, Italy, Switzerland, Norway and Paraguay) and noted the recommendations of seven countries to completely abolish the death penalty and/or ratify the second option protocol to the ICCPR (Ukraine, Australia, Germany, Sweden, Finland, France and Montenegro). During the previous review in 2013, Malaysia did not support any recommendation aiming to abolish the death penalty. The sole recommendation that was supported was the recommendation from Egypt to “Maintain its good example in observing the legal safeguards surrounding the application of death penalty.” UN Human Rights Council, *Report of the Working Group on the Universal Periodic Review, Malaysia, Addendum – Views on Conclusions and/or Recommendations, Voluntary Commitments and Replies Presented by the State Under Review [A/HRC/40/11/Add.1]*, 2019; UPR of Malaysia (31st session), Thematic list of recommendations; UPR of Malaysia (17th session), Thematic list of recommendations. More information on the hesitations regarding abolition *infra*, sub-section “A U-turn on the abolition of the death penalty?”.

⁴⁶ See complete list of documents consulted in Appendix 2.

⁴⁷ Interview with national NGOs. See also *infra*, Sub-Section “Restricted human interactions”. See also United States Department of State – Bureau of Democracy, Human Rights and Labor, *Malaysia 2018 Human Rights Report*, 2019.

Although these three persons are not representative of the entire death row population, the interviews provide information that may be applicable beyond their own situation. These interviews were triangulated with interviews with other people or institutions: SUHAKAM; medical doctors; faith-based organisations providing religious counselling to Muslim, Buddhist or Christian women and men sentenced to death; human rights NGOs; and nine relatives of death row prisoners: mother, sister, brother or friend. Several relatives of persons sentenced to death cried during the interviews, showing their great emotion about their loved ones’ situation. Some interviews were conducted in persons, others by telephone.

For security reasons, no interviews were recorded. Detailed notes were taken during all interviews. In order to ensure the safety of the men and women sentenced to death who were interviewed, the names of respondents have been changed and their place of detention is not indicated.

HISTORY OF MALAYSIA AND THE DEATH PENALTY



The following sections aim to provide an overview of the history of the use of death penalty in Malaysia since the 19th century. Archaeological evidence shows that the death penalty existed in territories composing modern Malaysia as early as the 14th century. Colonisation in the 19th and 20th centuries led to the application of British legislation, including the death penalty legislation. After independence, the death penalty remained in force and was incorporated into the new national criminal legislation. Since colonial times, the history of the use of the death penalty has been linked to the application of special texts.

DEATH PENALTY LAWS IN PRE-COLONIAL MALAYSIAN STATES

Before the British arrived in Malaya, the inhabitants of the various territories now composing Malaysia followed a legal system based on their own laws and traditions, which incorporated elements of Sharia or Islamic law. The earliest mention of Islamic law in Malaysia has been identified on an inscribed stone in Terengganu, which dates back to 1303. According to researchers and UNESCO, the inscriptions on the stone are one of the oldest testimonies of the establishment of Islam as a State religion in the region.⁴⁸ Some inscriptions relate directly to the death penalty for adulterous women:

“Peril be to adulterers.

To repent, the following be done, command the Almighty.

A hundred whips, for free man, a wife hath.

A married woman, to be buried

To the waist and stoned to death.”⁴⁹

The influence of Islamic law was found in other subsequent texts, in particular the 15th century’s compilation of laws in Malacca, *Undang-undang Melaka*, which provided for the death penalty in several cases, including apostasy, murder (*“He who kills shall be killed”*), and adultery or sodomy.⁵⁰ *Undang-undang Melaka* was then adapted

48 UNESCO, Memory Of The World Register, Batu Bersurat, Terengganu (Inscribed Stone of Terengganu), Malaysia [Ref. No. 2008-37], 2009, available at: http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/mow/nomination_forms/Malaysia+Terengganu.pdf (last visited January 15, 2020). See also Nor M.R.M., Abdullah A.T., Ali A.K., *From Undang-Undang Melaka to Federal Constitution: the Dynamics of Multicultural Malaysia*, SpringerPlus 5, 1683 (2016), 5:1683.

49 UNESCO, *op. cit.*, 2009, p. 2. Nor M.R.M., Abdullah A.T., Ali, A.K., *op. cit.*, 2016, p. 2.

50 *Ibid.*, pp. 3-4.

and applied in several Malay States, including Pahang, Johore and Kedah.⁵¹ The arrival of the British in the early 19th century led to the replacement of customary law by British legislation, which also provided for the death penalty.

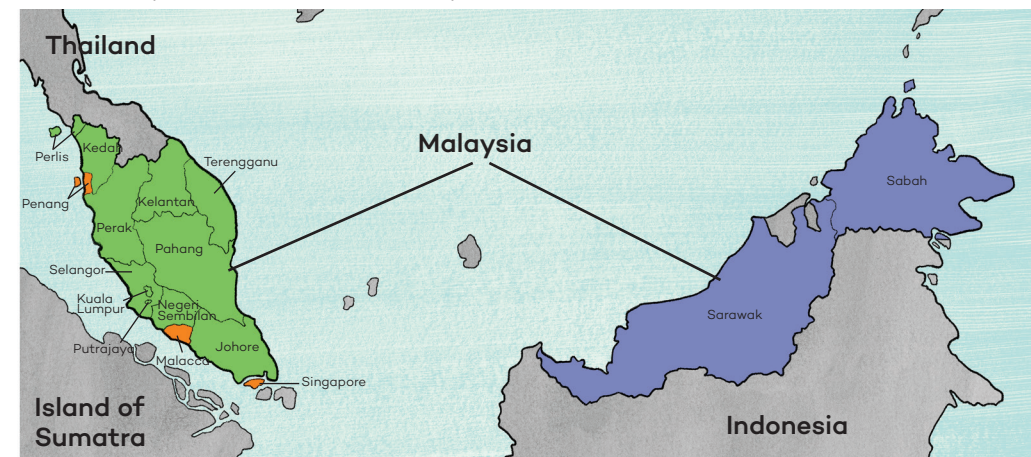
DEATH PENALTY AS A POLITICAL TOOL DURING BRITISH COLONISATION

When Malaysia was established, it was composed of several territories formerly under British rule: Malaya (now Peninsular Malaysia), the island of Singapore (independent since 1965) and the colonies of Sarawak and Sabah in Northern Borneo.

British influence and control over the territories (1819-1942)

From 1819 onwards, the British established their control over Malaya in various ways: direct colonial rule in Penang, Malacca and Singapore, headed by a governor under the supervision of the Colonial Office in London; indirect control in some sultanates; and control by families or businesses in Northern Borneo.

Malaysia – End of the 19th century



■ “Straits Settlements” (direct colonial rule)
 ■ Sultanates (indirect control)
 ■ Control by British families or businesses

51 Ibrahim, 2010, in Nor M.R.M., Abdullah A.T., Ali, A.K., *op. cit.*, 2016, p. 5.

British influence began in 1819, when the British representative Sir Raffles occupied the island of Singapore, in the southern part of Malaya peninsula, which quickly became a major economic and political centre. The Anglo-Dutch treaty of 1824, which divided the Malay States between Great Britain and the Netherlands, ensured British hegemony over these territories: Great Britain obtained Malacca and directly governed three ports of the “Straits Settlements”, namely Penang, Malacca and Singapore. The Straits Settlements were considered part of the British Indian Empire: the Charter of Justice of 1826 was introduced and Muslim law remained in force in matters of marriage and divorce.⁵² In 1871, the “Straits Settlement Penal Code”, first Penal Code in Malaya, was introduced in Penang and Malacca.⁵³ This code was based on the 1860 Indian Penal Code (IPC), drafted by the British, which served as a model for the legal systems of the British colonies in Asia and Africa. The IPC recognised the death penalty for a variety of crimes including waging war against the Queen,⁵⁴ giving or fabricating false evidence by means of which an innocent person is convicted and executed⁵⁵ or committing murder.⁵⁶ While the Straits Settlements were colonies under direct British administration, the rest of the States composing Malaya were ruled by Sultans. Beginning in the 1870s, Great Britain established strong political influence over several Malay sultanates by entering into treaties, under which the sultanates accepted the settlement of British residents in exchange for their protection. Officially, British residents had only an advisory role to the Sultans. However, they quickly became the effective rulers, although they pledged not to interfere in matters of religion and customs and in the political role of the Sultans. British residents advised the Sultans to enact laws also based on the IPC.⁵⁷ At the beginning of the 20th century, Great Britain indirectly controlled nine Malay States, including four Federated Malay States and five Unfederated Malay States.⁵⁸

52 Nor M.R.M., Abdullah A.T., Ali, A.K., *op. cit.*, 2016, p. 6.

53 Nazeri N.M., “Criminal Law Codification and Reform in Malaysia: An Overview”, *Singapore Journal of Legal Studies*, December 2010, p. 375

54 1860 Indian Penal Code, Section 121, available at: https://archive.org/stream/indianpenalcode00macpgoog/indianpenalcode00macpgoog_djvu.txt (last visited January 15, 2020).

55 *Ibid.*, Section 194.

56 *Ibid.*, Sections 302, 303, 305 and 396.

57 Nor M.R.M., Abdullah A.T., Ali, A.K., *op. cit.*, 2016, p. 6

58 Federated Malay States included the States of Pahang, Selangor, Perak and Negeri Sembilan; Unfederated Malay States included the States of Johore, Kedah, Kelantan, Perlis and Terenggan

some of which retained some autonomy over local matters but were administered by the Governor of the Straits Settlements, who acted as High Commissioner.⁵⁹ In 1936, a new Penal Code, based on the 1871 Penal Code, was introduced in all Federal Malay States.⁶⁰ Meanwhile, Sarawak territory, located in northwestern Borneo Island, was ruled by an English family (the “Brooke Raj” dynasty) and became an independent State under British protection at the end of the 19th century. Northeast Borneo (now Sabah) was controlled by the British under the British North Borneo Company. Sarawak and Northeast Borneo became British Crown colonies in 1945. The Penal Code was extended to the Federation of Malaya in 1948.⁶¹

The use of the death penalty during the Malayan Emergency (1942-1957)

During the Second World War, between February 1942 and September 1945, Japan invaded the territories of Malaya and Borneo. After the Japanese defeat, the British proposed to form a “Malayan Union”, incorporating all the territories, except Singapore, into a single Crown colony. This proposal was largely rejected by the Malays, who feared that it would pave the way for a reduction in the autonomy of the States and for equal citizenship for all. Indeed, several million Chinese and Indian people entered the territories to work between 1900 and 1941. The colonial authorities favoured a compartmentalized society, in which Malay, Chinese and Indian communities lived in their own localities, practiced their own religions, spoke their own languages, and developed their own political organisations.⁶² At the end of the 19th century, Chinese immigrants accounted for about half of the total population of the States of Perak, Selangor and Sungai Ujung.⁶³ Ensuring equal citizenships was a major political issue for Malays, who were worried about becoming a minority population in their country. The United Malays National Organisation (UMNO), headed by Chief Minister Johor Dato’ Onn bin Jaafar, was established in 1946 in

59 Ahmad S.S.S., *Introduction to the Malaysian Legal System and Sources of Law*, 2014, available at: https://www.nyulawglobal.org/globalex/Sources_Law_Malaysia1.html (last visited January 14, 2020).

60 Nazeri N.M., *op. cit.*, 2010, p. 376.

61 *Ibid.*

62 “The Impact of British Rule”, in *Encyclopaedia Britannica*, available at: <https://www.britannica.com/place/Malaysia/The-impact-of-British-rule> (last visited January 14, 2020).

63 The first census took place in 1891. Andaya B., Andaya L., *A History of Malaysia*, Palgrave, Third edition, 2017, p. 18.

response to this proposal. Unrest, strikes and demonstrations led by the UMNO spread throughout the territory, forcing the British to negotiate with the organisation. In 1948, negotiations led to the creation of the Federation of Malaya, which provided special guarantees for the rights of Malays. However, the Chinese-dominated Malayan Communist Party (MCP), concerned that the Federation would lead to racial inequality, launched guerrilla operations against British plantation managers. On 16 June 1948, following a long series of attacks in the States of Penang, Selangor and Johore, three European rubber plantation managers were shot dead by MCP guerrillas in northern Malaya. The British government declared a state of emergency in Perak and Johore, which was extended a few days later to the whole of Malaya. The MCP was banned and more than 1,000 people were arrested by the British authorities.⁶⁴ Former members of the MCP created the Malayan Races Liberation Army, which led a violent insurgency. Repressive regulations were promulgated by the British, resulting in the displacement and confinement of 650,000 persons.⁶⁵ “Seditious” publications were banned.⁶⁶ The Emergency Regulations Ordinance 1948 gave the High Commissioner the unlimited right to make regulations and prescribe sanctions, including the death penalty – the only limitation being that no regulation made by the High Commissioner could confer the right to punish without trial.⁶⁷ A few weeks after the declaration of the state of emergency, the High Commissioner imposed a mandatory death penalty on those convicted of firearms offences.⁶⁸ In an attempt to reduce the amount of food and supplies for the insurgents, the death penalty was extended in June 1950 to anyone convicted of extorting food or money on behalf of the insurgents.⁶⁹ Shortly afterwards, the burden of proof in criminal matters was reversed: it was now up to the suspects to prove their innocence.⁷⁰

64 Deery P., “Malaya 1948: Britain’s Asian Cold War?”, *Journal of Cold War Studies*, Vol. 9, No 1, Winter 2007, p. 29.

65 Renick R., “The Emergency Regulations of Malaya, Causes and Effects”, *Journal of Southeast Asian History*, 1965, 6(2), p. 35.

66 Sedition Act, 1948.

67 Emergency Regulations Ordinance 1948 as cited in Renick R., *op. cit.*, 1965, p. 17.

68 TNA CO 717/161/1, “High Commissioner Malaya to Colonial Secretary, 2 July 1948”, in French D., *The British Way in Counter-Insurgency, 1945-1967*, Oxford University Press, 2011, p. 80.

69 TNA CAB 21/1681/MALC(50)23, “Federation Plan for the Elimination of the Communist Organisation and Armed Forces in Malay, 24 May 1950”, *Ibid.*, p. 80.

70 TNA CO 822/729, “Emergency Regulations Made Under the Emergency Powers Order-in-Council, Regulation 33”, *Ibid.*, p. 80.

As a result of the new regulations, 62 people were executed under the Emergency Regulations, charged with unlawful possession of arms and ammunition, during the first 11 months following the declaration of the emergency.⁷¹ During this first period, the Federal Executive Council called for the introduction of summary trials: “[...] *Judicial arrangements should be made whereby, without sacrificing any of the principles of British justice, clear-cut cases of possession of arms and murder should be immediately brought to trial, and if convictions are secured the sentences be immediately carried out.*”⁷² When the British High Commissioner, Sir Henry Gurney, was assassinated in 1951, many members of the Federal Executive Council insisted on retaliating by speeding up legal proceedings and executions. However, these suggestions were rejected by British military officials, as they considered them to be “*A result of panic and emotion.*”⁷³ This reaction was viewed as having prevented a more widespread use of the death penalty during the Malayan Emergency.⁷⁴ Nonetheless, during the 12 years of the state of the emergency, which lasted until 1960, 226 people were executed for insurgent offences.⁷⁵

CREATION OF THE MULTI-ETHNIC FEDERATION AND FIRST PERIOD POST-INDEPENDENCE (1957-1975)

The Federal Constitution and the Independence

The British generally agreed with the principle of the country’s independence. In 1955, UMNO, the new party Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC) joined forces to form a coalition that won the legislative elections. The elections marked the beginning of a permanent political alliance, the main force of which was UMNO, led by Tunku Abdul Rahman. In January and February 1956, a Constitutional conference was held in London, attended by representatives of Malay, Alliance and

71 “Written answers on Arms (Unlawful Possession)”, Hansard HD 18 May 1949, vol 465 c20W, available at: <https://api.parliament.uk/historic-hansard/written-answers/1949/may/18/arms-unlawful-possession> (last visited January 15, 2020).

72 TNA CO 537/3692, “Minutes of an Extraordinary Meeting of the Federal Executive Council, 26 June 1948”, in French D., *op. cit.*, 2011, p. 93.

73 TNA CO 1022/58, “Minutes, 21 November 1951”, in French D., *op. cit.*, 2011, p. 93.

74 *Ibid.*, p. 94.

75 Bonner D., *Executive Measures, Terrorism and National Security: Have the Rules of the Game Changed?*, Routledge, 2007, p. 147, as cited in French D., *op. cit.*, 2011, p. 93.

British representatives. An agreement was reached and the “London Treaty” was signed by Tunku Abdul Rahman on 8 February 1956. From March 1956 to February 1957, the Reid Commission – a team of five international legal experts led by British judge William Reid – drafted the Federal Constitution of Malaya. It should be recalled that the Constitution was drafted during the state of emergency: it provided extended powers for the government, such as the power to use any means to stop political opposition.⁷⁶ Nevertheless, the Constitution included a few fundamental rights, including the right to life. However, while its Section 5 expressly recognises the right to life, it then provides for the legality of the death penalty: “No person may be deprived of life or personal liberty except in accordance with law.”⁷⁷ In accordance with Section 162(1) of the Constitution, existing laws remained in force, including the British Emergency regulations and the imposition of mandatory death penalty for murder.⁷⁸ On 31 August 1957, Tunku Abdul Rahman addressed the population: “For many years past our fortunes have been linked with those of Great Britain and we recall in particular the comradeship of two world wars. We remember too the products of our association; justice before the law, the legacy of an efficient public service and the highest standard of living in Asia. We shall therefore always remember with gratitude the assistance which we have received from Great Britain down our long path to nationhood; an assistance which culminates today with the proclamation of Malaya’s Independence. [...] At this solemn moment therefore I call upon you all to dedicate yourselves to the service of the new Malaya: to work and strive with hand and brain to create a new nation, inspired by the ideals of justice and liberty – a beacon of light in a disturbed and distracted world. High confidence has been reposed in us; let us unitedly face the challenge of the years. And so with remembrance for the past, and with confidence in the future, under the providence of God, we shall succeed.”⁷⁹

76 Lent J., “Human Rights in Malaysia”, *Journal of Contemporary Asia*, 14:4, 1984, p. 442

77 Federal Constitution of Malaysia, Section 5(1).

78 Federal Constitution of Malaysia, Section 162(1) provides: “Subject to the following provisions of this Article and Article 163, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.”

79 Tunku Abdul Rahman, Address at the proclamation of independence of Malaya, 1957, available at: https://www.cvce.eu/content/publication/2015/10/20/1603372c-fc78-4d4b-b156-d737106ee1a2/publishable_en.pdf (last visited February 14, 2020).

The independence of the Federation of Malaya, “A sovereign democratic and independent State founded upon the principles of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations”,⁸⁰ is declared. A few years later, North Borneo, Sarawak and Singapore merged with the new Federation. North Borneo was renamed Sabah. The Malaysia Act 1963 created the State called Malaysia, consisting of Malaya, Sabah, Sarawak and Singapore. The Constitution was amended in 1963 to admit the additional Member States of the Federation. In August 1965, after 2 years of merger, Singapore became an independent State.

The 1960 Internal Security Act to fight communist activities

In 1960, in view of the defeat of communist forces, the state of emergency was lifted, as well as the Emergency Regulations. However, in the same year, the Malayan government passed the Internal Security Act (ISA), on the ground that it was still necessary to counter the remaining communist threat within the country.⁸¹ The Deputy Prime Minister at the time said in Parliament:

*“The Bill was introduced mainly because the emergency was to be lifted. But the government does not intend to relax its vigilance against the enemy who remained a threat and who are now attempting by subversion to succeed by force of arms. [...] The ISA has two aims. [...] First, to counter subversion throughout the country, and second to enable the necessary measure to be taken on the border area to counter terrorism. The armed terrorist still exists at the Malaysian border waiting or remaining in existence waiting for an opportunity to revive their arm struggle against the people of Malaysia. This remain as a potential threat to the security of the country, which cannot be disregarded.”*⁸²

Acknowledging the “Immense powers given to the government under the ISA”, the Deputy Prime Minister gave “A solemn promise to Parliament and the nation that [these powers] would never be used to stifle legitimate opposition and silence lawful dissent.”⁸³

Unlike the Emergency Regulations of 1948, the ISA was intended to be

80 Malayan Declaration of Independence 1957, para. 10.

81 Amnesty International, *Malaysia: The Internal Security Act (ISA)* [ASA 28/06/2003], 2003.

82 Hansard Malaysia, House of Representatives, Part 1, vol II, 1960, in Nazeri N.M., *Child offender. Policies and the Emergency Rule*, 2008, p. 3. See also Human Rights Watch, *Abdication of Responsibility: The Commonwealth and Human Rights*, 1991, p. 36.

83 *Ibid.*

a permanent law that could not be repealed by an act of Parliament.⁸⁴ The ISA was strongly criticized, as its provisions constituted serious violations of due process of law. The ISA provided for preventive detention. The security forces had the powers to search and arrest, on the simple basis of hearsay and suspicion, and to detain people for 60 days. The ISA also provided that initial detention could be followed by 2 years' detention without trial before a court, which could be extended every 2 years at the discretion of the Minister of Home Affairs.⁸⁵ Over the years, the use of the ISA was widespread: 1,119 people were arrested and detained between 1960 and 1969, and 1,713 between 1970 and 1979.⁸⁶ More importantly for our topic, the ISA prescribed a mandatory death penalty for certain firearms offences, such as the possession of a firearm. Its Section 57(1) provides: “(1) Any person who without lawful excuse, the onus of proving which shall be on that person, in any security area carries or has in his possession or under his control—
(a) any firearm without lawful authority therefor; or
(b) any ammunition or explosive without lawful authority therefor, shall be guilty of an offence and shall, on conviction, be punished with death.”

The mandatory death penalty for those security offences was not immediately applied. In fact, no execution is reported from 1965 to the mid-1970s. However, this provision will be widely used afterwards, after the promulgation of repressive security regulations.⁸⁷

The 1969 riots

The new multi-ethnic State quickly faced serious challenges. The organisation of populations along racial lines was established during British colonisation, resulting in significant inequalities. The Chinese were perceived as controlling the economy, while the Malays were generally poorer workers. In order to give greater support to the *Bumiputera*, Article 153 of the Federal Constitution recognised the need to safeguard a special position to these groups, in relation to other ethnic groups residing in the country.

84 Lee, T., “Malaysia and the Internal Security Act: the Insecurity of Human Rights after September 11”, *Singapore Journal of Legal Studies*, July 2002, p. 57.

85 Lent J., *op. cit.*, 1984, p. 443.

86 Amnesty International, *Human Rights Undermined* [ASA 28/06/99], 1999, p. 21.

87 See *infra*, Sub-Section “New regulatory procedure for security offences”.

The government has taken “affirmative actions” in favour of *Bumiputera* on the basis of the Constitution, first of all in the education sector. The 1961 Education Act established common curriculum in which Malay language was the main medium of instruction, and the use of the Malay and English languages was the basis for the national public examination system, excluding the Chinese language from the reform. Moreover, after Singapore’s separation from Malaysia, Nanyang University of Singapore became a foreign university. In 1967, the Minister of Education made it compulsory to issue certificates to go abroad for higher education, which was difficult to obtain: most Chinese could not afford to go to university. In response to this policy, Chinese political parties were established, including the Democratic Action Party (DAP), which advocates in favour of ethnic equality and opposes the principle of separation between *Bumiputera* and non-*Bumiputera*.⁸⁸ Although the plan to create a new university using Chinese as its main medium of instruction was approved by the government a few weeks before the 1969 general election, the election was a major setback for the Alliance coalition. The coalition had won less than half of the popular vote, losing the Chinese votes to the DAP and non-*Bumiputera* votes to Parti Islam Se Malaysia (PAS), an Islamic party that considered the pre-eminence of the Malay race as a fundamental of Malaysian politics.⁸⁹ Race riots broke out the day after the election. Between 100 (according to the police) and 600 people (according to other data) were killed during the riots.⁹⁰ The state of emergency was declared, and the Constitution and Parliament were suspended until 1971.⁹¹

The government had been heavily criticized. Professional imbalances between the predominantly rural Malay communities and the more urban Chinese communities had been identified as

88 See Setapak Declaration, DAP National Congress of Kuala Lumpur on July 29, 1967.

89 Eldridge P.J., *The Politics of Human Rights in Southeast Asia*, Routledge, 2002, p. 91. De Ting Hui L., *Chinese Schools in Peninsular Malaysia: The Struggle for Survival*, ISEAS Singapore, 2011, pp. 110-111.

90 *Time*, “Race War in Malaysia”, 23 May 1969, available at <https://web.archive.org/web/20070518061525/http://www.time.com/time/magazine/article/0%2C9171%2C900859%2C00.html> (last visited January 15, 2020). The Mercked University was prohibited from raising funds. The idea to create a university using Chinese as its main medium of instruction was finally abandoned. De Ting Hui L., *op. cit.*, 2011, p. 112.

91 Amnesty International, *op. cit.*, 1999, p. 4.

a factor behind the 1969 riots. The Prime Minister Tunku Abdul Rahman resigned and was replaced by Tun Abdul Razak. The ruling coalition was enlarged and renamed “Barisan Nasional”. In 1970, the National Principles (*Rukun Negara*) were declared, with a view of strengthening harmony and unity among races for the sake of the success and stability of the country. In 1971, the new Prime Minister developed the New Economic Policy (NEP), which aimed at economic equality, by narrowing the economic gap between *Bumiputera* and other communities in Malaysia, while advancing the situation of rural Malay communities.⁹² Ethnic quotas were imposed on several aspects of the economy and education.⁹³ Although several changes have been made over the years, the promotion of *Bumiputera* communities remains a cornerstone of Malaysian State policy today.⁹⁴

THE INCREASE IN EXECUTIONS (1975-1996): MORE THAN 350 PERSONS HANGED IN 20 YEARS

While the death penalty has not been executed since 1965, several legislations adopted in the mid-1970s have contributed to the resurgence of executions. The year 1975 was a turning point in the modern history of the death penalty in Malaysia. Between 1975 and 1996, 358 people were executed by hanging, 150 of them for drug-related crimes.⁹⁵ In 1992 alone, 39 executions were recorded.⁹⁶

92 The NEP aimed at “Reducing and eventually eradicating poverty among all Malaysians, irrespective of race” and at “Restructuring Malaysian society to correct the economic imbalance among racial groups and reduce and eventually eradicate the identification of race with economic function.” Prime Minister’s Department, *Malaysia: 30 Years of Poverty Reduction, Growth and Racial Harmony*, 2004, p. 2.

93 For instance, 30% of shared capital was to be reserved for *Bumiputera*. A quota system – 55% *Bumiputera*, 45% non-*Bumiputera* – has been imposed for entry into the public universities in the country. See Barlow C., *Modern Malaysia in the Global Economy*, Edward Elgar Publishing, 2001, p. 80; and DeBernardi J., *Penang: Rites of Belonging in a Malaysian Chinese Community*, NUS Press, 2009, p. 120.

94 Eldridge P.J., *op.cit.*, 2002, p. 91 and p. 101.

95 *Malaysia Kini*, “Gov’t Reveals Execution Statistics: 358 Hanged in 24 Years”, 2005, available at: <http://madpet06.blogspot.com/2005/02/mkini-govt-reveals-execution.html> (last visited January 20, 2020).

96 *Amnesty International Malaysia*, “A Brief History of the Death Penalty in Malaysia”, 2019, available at: <https://www.amnesty.my/abolish-death-penalty/a-brief-history-of-the-death-penalty-in-malaysia/> (last visited January 17, 2020).

Mahathir Mohamad’s Prime Ministership 1981-2003: Human Rights and the Asian values

In 1981, Mahathir Mohamad became Prime Minister. He advocated in favour of the “Asian values”. According to this concept, Western political values are not compatible with Asian societies because they promote individualism and undermine social order. Thus, in Asia, democratic rights may be limited in the name of national interest. Prime Minister Mahathir Mohamad said in 1995: “Let us not be slaves to democracy. [...] If by practicing certain aspects of democracy we run the risk of causing chaos in our party and country, we have to choose our party and country above democracy.”⁹⁷ Economic development should be a key priority over the enjoyment of individual rights. According to Datuk Abdallah Badawi, the then Minister of Foreign Affairs: “For us, the underlying foundation of a democratic and successful nation remains the need for strong and good governance for a disciplined and productive society, for continuing emphasis on political stability and quality economic growth with human beings at the centre of development efforts...”⁹⁸ This strategy was incorporated into the 1993 Bangkok Declaration of the countries of the Association of Southeast Asian Nations (ASEAN), which provides that the State Parties are “Convinced that economic and social progress facilitates the growing trend towards democracy and the promotion and protection of human rights.”⁹⁹ The imposition of this policy was the basis of Mahathir’s administration, until the Asian financial crisis in 1997.¹⁰⁰

97 Mahathir M., in Christie K., *Regime Security and Human Rights in Southeast Asia*, Political Studies, 1995, XLIII, p. 215.

98 Peerenboom R., Petersen C. J., Chen A.H.Y., *op. cit.*, 2006, p. 193.

99 The ASEAN was established on 8 August 1967 in Bangkok by Indonesia, Malaysia, Philippines, Singapore and Thailand. Bangkok Declaration 1993, Preamble.

100 Tinio M.L., *Les Droits de l’Homme en Asie du Sud-Est*, L’Harmattan, 2004, p. 39.

THE WAR ON DRUGS AND THE IMPOSITION OF THE MANDATORY DEATH PENALTY IN DRUG-RELATED CRIMES

Although the Dangerous Drugs Act was enacted in 1952 during colonisation, increased use of drugs by Malays and Indian communities in the 1970s and 1980s became a national problem in Malaysia.¹⁰¹ Legislative amendments to the Dangerous Drugs Act were passed in 1975,¹⁰² prescribing the death penalty as a discretionary sentence for drug traffickers.¹⁰³ In 1977, the definition of trafficking was broadened to include possession of drugs and provided a series of statutory presumptions to establish the elements of the offence of trafficking.¹⁰⁴ Numerous criticisms were expressed, considering that the presumption of guilt was contrary to the fundamental principles of Malaysian jurisprudence and the international legal guarantee that the accused has the right to be presumed innocent until proved guilty.¹⁰⁵

In 1983, the government further amended the law and introduced the mandatory death penalty for drug trafficking under Section 39B of the Dangerous Drugs Act.¹⁰⁶ During Parliamentary debates, the government indicated that life imprisonment and whipping did not have the desired deterrent effect, as drug trafficking activities increased between 1980 and 1983. Drug traffickers were regarded as “*Traders of death, destruction and misery*”, and their acts as “*Acts of treason*”, which could not be pardoned or sympathized.¹⁰⁷ For the government, the mandatory death penalty was a mean of ending inconsistencies in sentencing, because the highest courts in Malaysia – the Federal Court and its successor the Supreme Court – created a “*Presumptive death penalty*” for

drug traffickers, where lower courts imposed life sentences.¹⁰⁸ With the mandatory death penalty, the Parliament has followed the doctrine created by the judiciary. According to the Act, “*trafficking*” includes “*Manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug.*”¹⁰⁹ The amendment also reduced the quantity in possession required to invoke the presumption of trafficking: 15 grams of heroin or morphine, 1,000 grams of opium or 200 grams of cannabis.¹¹⁰

Malaysia’s policy on drug trafficking was clearly expressed by Prime Minister Mahathir Mohamad in 1986:

*“Malaysia views the drug problem as a major threat to the security and well-being of the country. Drugs have been used in the past to subjugate a country. We do not wish to be colonised once again or to have our security and economy undermined. Accordingly we have promulgated the death penalty against drug traffickers. We make no apology for this punishment. The traffickers are killing our people and causing untold misery. They deserve the death penalty, irrespective of colour.”*¹¹¹

In 1987, the country’s involvement in narcotics control increased when Prime Minister Mahathir Mohamad was elected Chairman of the Vienna International Conference on Drug Abuse and Illegal Trafficking.¹¹² In 1987 alone, 14 executions were recorded for drug trafficking.¹¹³ The anti-drug law was then the toughest in the world.¹¹⁴ As Kamariah noted in 1988: “*Drugs became the Nation’s Number One Enemy.*”¹¹⁵

The first execution took place in 1985, when a Malaysian citizen was executed after being sentenced to death for carrying 79.93 grams of heroin.¹¹⁶ In 1986, Barlow and Chambers were the first non-

101 Haring S., “Death, Drugs and Development: Malaysia’s Mandatory Death Penalty for Traffickers and the International War on Drugs”, *Columbia Journal of Transnational Law*, Vol 29, 1991, pp. 364-365.

102 Dangerous Drugs (Amendment) Act 1975.

103 Other punishments include life imprisonment and/or whipping. Kamariah M., “Amendments to the Dangerous Drugs Act”, *Journal of Malaysian and Comparative Law*, 1988, p. 134.

104 Dangerous Drugs (Amendment) Act 1977. Haring S., *op. cit.*, 1991, p. 374.

105 Amnesty International, *The Death Penalty, No Solution to Illicit Drugs* [ACT 51/02/95], 1995, pp. 54-55.

106 Dangerous Drugs (Amendment) Act 1983.

107 Kamarudin A.R., “The Misuse of Drugs in Malaysia: Past and Present”, *Malaysian Anti-Drugs Journal*, 2007, p. 16.

108 Haring S., *op. cit.*, 1991, p. 378; Kamariah M., *op. cit.*, 1988, p. 149.

109 Dangerous Drugs Act, Section 2.

110 Haring S., *op. cit.*, 1991, p. 375; Amnesty International, *op. cit.*, 1995, p. 53.

111 Mahathir Mohamed’s declaration during the 1987 Conference of Heads of State or Government of the Non-Aligned Movement in Harare, Zimbabwe, available at: <https://www.pmo.gov.my/ucapan/?m=p&p=mahathir&id=990> (last visited January 21, 2020).

112 Sodhy P., “Malaysia and the United States in the 1980s”, *Asian Survey*, Vol 27, No. 10, 1987, p. 1081.

113 Amnesty International, *op. cit.*, 1995, p. 54.

114 Pascoe D., *op. cit.*, 2019, p. 128.

115 Kamariah M., *op. cit.*, 1988, p. 156.

116 Amnesty International, *op. cit.*, 1995, p. 53.

Malaysian citizens – an Australian and a person with dual British and Australian citizenship – to be hanged for drug trafficking, despite calls for clemency from the Australian and British Prime Ministers.¹¹⁷ Numerous other executions followed. From 1990 to 1992, at least five persons were sentenced to death under this legislation, for crimes committed when they were minors. Two sentences have been commuted; human rights organisations did not know whether the other sentences had been carried out.¹¹⁸

Since 1991, the proportion of convictions under Section 39B has declined due to a combination of factors: an increase in the number of acquittals, the creation by the judiciary of common law exceptions to the mandatory death sentence,¹¹⁹ and more frequent dropping of charges by the police.¹²⁰ Meanwhile, more and more voices have risen to denounce the ineffectiveness of the mandatory death penalty in the fight against drugs. As Harring pointed out in 1991: “*Drug wars, like many other wars, originate in failed social and political policy. Drug use is deeply rooted in social problems. Addressing the causes of these problems is distinct from conducting a drug war to combat their manifestations.*”¹²¹ Between 1991 and 1995, the number of executions for drug-related crimes decreased, with an average of six executions per year.

In total, between 1975 and 1996, Malaysian authorities hanged more than 150 persons convicted of drug-related offences.¹²²

New regulatory procedure for security offences

In the early 1970s, the ISA was the only regulation applicable to firearms possession offences. As the ISA was originally intended to combat subversion, another regulation was passed to address other “more common” firearms offences. In 1971, the Firearms (Increased Penalties) Act was enacted. This new regulation provides for the death penalty for trafficking in firearms or discharging a firearm in the commission of a prescribed offence. In the case of illegal possession of firearms, the new Act excludes the death penalty

117 *Ibid.*, pp. 53-54.

118 *Ibid.*, p. 56.

119 This included, for instance, finding defendants guilty of possession but not of trafficking. See Harring S., *op. cit.*, 1991, p. 404.

120 *Ibid.*, pp. 400-401.

121 *Ibid.*, p. 405.

122 Johnson D.T, Zimring F.E., *The Next Frontier. National Development, Political Change and the Death Penalty*, 2009, p. 307.

and sets a maximum penalty of 14 years’ imprisonment, with a presumption of guilt.¹²³

In 1975, the government, under the justification of a resurgence of communist subversion attributed to the Chinese community, bypassed Parliament and promulgated the controversial Essential (Security cases) Regulations (ESCAR).¹²⁴ The then Minister of Law, Tan Sri Abdul Kadir, said:

*“The communist agents as well as the communists themselves have come into town areas and started killing people. The communist tries to disrupt the country’s development by instilling fear into the people, by killing people at random. Their ideology was spreading fast. [...] If there is more peace and if there is less attack in the urban area, ESCAR will be repealed. The regulation is a temporary measure and it will not be forever and will not be used for the future.”*¹²⁵

The ESCAR modified the rules of evidence and procedure for the trial of “security offences”, i.e. offences related to firearms, explosive and ammunition, as provided for by one of the existing legislation applicable, including the ISA and the Firearms (Increased Penalties) Act 1971.¹²⁶ The ESCAR allowed for the arrests of individuals without a warrant and for the detention for questioning for more than 60 days. Severe limitations on the right to cross-examine witnesses have been implemented, undermining the principle of fairness and equality of arms. The ESCAR also placed a presumption of guilt on the accused, as was the case with the anti-drug law. Consequently, the new ESCAR procedures meant that those accused of capital crimes under the ISA, as in cases of firearms possession, had to prove their innocence in order to avoid the death penalty.¹²⁷ This new regulation was applicable regardless of the age of the accused.¹²⁸

123 Firearms (Increased Penalties) Act, Section 9 provides: “Any person who consorts with, or is found in the company of, another person who is in unlawful possession of a firearm in circumstances which raise a reasonable presumption that he knew that such other person was in unlawful possession of the firearm shall, unless he proves that he had reasonable grounds for believing that such other person was not in unlawful possession of the firearm, be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less than six strokes.”

124 Lent J., *op. cit.*, 1984, p. 444.

125 Nazeri N.M., *op. cit.*, 2008, pp. 3-4.

126 Munro-Kua A., *Authoritarian Populism in Malaysia*, MacMillan Press, 1996, p. 96.

127 Amnesty International, *op. cit.*, 1999, p. 35.

128 Regulation 3(3) provided: “Where a person is accused of or charged with a security offence, he shall regardless of his age, be dealt with in accordance with the provision of the Regulations, and the Juvenile Courts Act 1947 shall not apply to such person.” The Juvenile Courts Act 1947 indeed prohibited the death sentence against a person convicted of an offence if he/she was a juvenile when the offence was committed. See Nazeri N.M., *op. cit.*, 2008.

In September 1977, the death sentence of Lim Heang Seoh, a 14-year-old boy charged with illegal possession of a firearm under Section 57(1) of the ISA caused a national and international outcry.¹²⁹

The presiding judge was firm. He stated:

*“It must be made clear that any juvenile, any person who has attained the age of criminal responsibility described in Section 8 of the Penal Code, that is 10 and under the age of 18, is liable to be sentenced to death if he is convicted under the Internal Security Act.”*¹³⁰

The first anti-death penalty movement in Malaysia was born out of this case.¹³¹ The Malaysian Bar Council strongly protested and unanimously adopted a resolution calling on lawyers to boycott trials under ESCAR, considering that *“Regulations are oppressive and against the rule of law.”*¹³² A major signature campaign was conducted and joined by opposition parties.¹³³ The boycott of ISA cases was observed by a majority of lawyers and lasted 3 years.¹³⁴ The schoolboy’s sentence was eventually commuted and the child was placed in a juvenile detention centre.

The ISA was widely invoked until the mid-1990s, including for ordinary offences that should have been prosecuted under the Firearms (Increased Penalties) Act 1971.¹³⁵ While the ISA was originally intended solely to combat the communist insurgency, the regulation was transformed into a catch-all.¹³⁶ Common criminals were arrested and hanged, such as Botak Chin, a gangster known for his numerous armed robberies in Kuala Lumpur. This notorious criminal, who saw himself as a modern Robin Hood, was arrested in 1976. He was the first person to plead guilty under the ISA for the possession of a pistol and ammunitions. He was hanged in June 1981.¹³⁷

The new regulations resulted in 31 to 39 executions – figures vary depending on the author – and 64 death sentences for unlawful

129 Lent J., *op. cit.*, 1984, p. 445.

130 Mr Justice Arulanandon, in Munro-Kua A., *op. cit.*, 1996, p. 96.

131 See *infra*, Sub-Section “A growing anti-death penalty movement”. Nazeri N.M., *op. cit.*, 2008, p. 1.

132 Lent J., *op. cit.*, 1984, p. 445.

133 Munro-Kua A., *op. cit.*, 1996, p. 97.

134 *Ibid.*, p. 98.

135 This is one of the arguments of DAP lawyer Karpal Singh. Donoghue T., *Karpal Singh, Tiger of Jelutong. The Full Biography 1940-2014*, Marshall Cavendish Editions, 2014.

136 Munro-Kua A., *op. cit.*, 1996, p. 89.

137 Donoghue T., *op. cit.*, 2014.

possession of firearms from 1976 to 1984.¹³⁸ The first woman to be executed under the ISA was a seamstress named Thye Siew Hong, accused of belonging to a communist group. She was hanged in March 1983 next to her husband, also convicted.¹³⁹ Additional statistics provided by the government revealed that another 12 people were hanged for security offences between 1984 and 1993.¹⁴⁰ According to some, such as DAP lawyer Karpal Singh, the ESCAR legislation has been more frequently used against Chinese communities.¹⁴¹

A NEW DYNAMIC (1997-2018)

While the government had justified repressive laws by the need to advance economic development, the 1997 Asian financial crisis changed that. Since the implementation of the NEP, Malaysia had had one of the most dynamic and fastest growing economies in Asia.¹⁴² After years of economic growth, Malaysia was threatened by the financial crisis in the region and its discourse on Asian values had lost its legitimacy. In neighbouring countries, a wave of democracy had spread, paving the way for political and legislative reforms.¹⁴³ In Malaysia, disparities in wealth within the Malay community had become increasingly apparent.¹⁴⁴ Strong differences of opinion on public policy emerged between Prime Minister Mahathir Mohamad and his Deputy Prime Minister Anwar Ibrahim, who argued for a less authoritarian regime.¹⁴⁵ In 1998, Anwar Ibrahim was dismissed

138 According to Lent, 31 executions were carried between 1976 and 1984. Lent J., *op. cit.*, 1984, p. 445. According to Donoghue, in March 1963, the Deputy Minister in the Prime Minister’s Department reported the execution of 39 people between 1980 and 1983 for offences under the ISA. Donoghue T., *op. cit.*, 2014.

139 Donoghue T., *op. cit.*, 2014.

140 *Malaysia Kini*, “Gov’t Reveals Execution Statistics: 358 Hanged in 24 Years”, 2005, available at: <http://madpet06.blogspot.com/2005/02/mkini-govt-reveals-execution.html> (last visited January 20, 2020).

141 Donoghue T., *op. cit.*, 2014.

142 Amnesty International, *op. cit.*, 1999, p. 4.

143 In Indonesia, President Suharto resigned in 1998 after 32 years in power.

144 Amnesty International, *op. cit.*, 1999, p. 4.

145 Anwar for instance stated: *“I emphasize the issues of civil society, fundamental liberties and the trust and wisdom that the public, with exposure to education and knowledge, should be able to exercise.”* Anwar in Langlois A.J., *The Politics of Justice and Human Rights: Southeast Asia and Universalist Theory*, Cambridge University Press, 2001, p. 15. It shall be noted that the economic policies supported by Mahathir have caused the economy to rebound, contrary to many other Asian countries.

from office and arrested for sodomy and corruption under the ISA. Between September 1998 and early 1999, at least 27 others were arrested under the ISA, including Anwar's political associates, friends and members of student movements.¹⁴⁶ Nallakaruppan, a friend of Anwar Ibrahim's, was charged with illegal possession of ammunition, an offence punishable by death. Several observers saw this detention as a means of increasing pressure on Anwar.¹⁴⁷ Nallakaruppan's lawyer indicated that he was offered a reduction of his charges if he agreed to testify falsely against Anwar Ibrahim. His charges were eventually reduced in 1999. Anwar's politicized trial and subsequent conviction for sodomy and corruption were seen by the international community as signs of the decline of democracy in Malaysia.¹⁴⁸ The *Reformasi*, a protest movement launched after Anwar Ibrahim's arrest, spread throughout the country and brought civil society closer together.¹⁴⁹ Prime Minister Mahathir Mohamad remained in power until his voluntary resignation in 2003.

A growing anti-death penalty movement

From the mid-1990s onwards, human rights became an increasingly prominent issue in the public debate in Asia. The ASEAN Ministers recognised the importance of establishing a regional human rights mechanism and initiated numerous meetings to enhance dialogue on this subject.

The debate on the death penalty has grown and the anti-death penalty movement has strengthened. While the Malaysian Bar Council took its first anti-death penalty resolution in 1986, it was in 2006 that its public stand in favour of the abolition of the death penalty became more and more visible. Anti-death penalty resolutions have been regularly adopted since then. In 2009, SUHAKAM recommended the abolition of the death penalty: *"SUHAKAM views the death penalty as a cruel, inhuman and degrading punishment. A serious review is required in terms of its relevance and effectiveness in Malaysia as a form of punishment toward retribution and deterrence. In the short term, the Government should consider a moratorium on the death*

146 Amnesty International, *op. cit.*, 1999, pp. 25-26.

147 Hwang I., *Personalized Politics: The Malaysian State Under Mahathir*, ISEAS, 2003, p. 304; Singh D., *Southeast Asian Affairs*, ISEAS, 2000.

148 Eldridge P., *op. cit.*, 2002, p. 11. Several countries, including the Philippines and the United States, expressed regrets over this conviction. In 1999, Amnesty International declared him a prisoner of conscience.

149 Eldridge P., *op. cit.*, 2002, p. 99.

sentence or commuting the death sentence to life imprisonment, especially for those who have been on death row for more than 5 years. In the long term, the Commission recommends abolition of the capital sentence."¹⁵⁰ Since 2009, SUHAKAM is accredited with an A status, meaning that it fully complies with the Principles relating to the Status of National Institution, illustrating, among others, its independence and impartiality.¹⁵¹ SUHAKAM is one of the world's most active National Human Rights Institutions on the abolition of the death penalty.

Since that time, the abolitionist movement, led by the Bar Council and SUHAKAM,¹⁵² has become more and more structured. In 2010, the campaign in favour of Yong Vui Kong, a Malaysian citizen sentenced to death when he was 19 for carrying out 47.27 grams of heroin in Singapore, was overwhelmingly supported by Malaysian and Singaporean citizens and opposition parties: more than 100,000 signatures were collected in one month.¹⁵³ Yong Vui Kong's death penalty was eventually lifted in 2013, after amendments in Singapore's anti-drug law.

The abolitionist movement has been joined and actively supported by a number of national, regional and international actors. At the national level, numerous abolition activities were implemented by the Civil Rights Committee of the Kuala Lumpur and Selangor Chinese Assembly Hall, Malaysians against the Death Penalty and Torture (MADPET), Lawyers for Liberty, SUARAM and the National Human Rights Society of Malaysia (HAKAM). At the international level, the movement was supported by Amnesty International, The Death Penalty Project, Harm Reduction International, Together Against the Death Penalty (ECPM) and the World Coalition Against the Death Penalty. At the regional level, the Anti-Death Penalty Asia Network (ADPAN), initially led by Amnesty International, was transformed in 2012 into an independent network: building on the existence of a structured network in Malaysia, the headquarters of ADPAN was established in Kuala Lumpur, strengthening abolitionist action in the country. The rise of the anti-death penalty movement led notably to the organisation by ECPM, in partnership with ADPAN and the Malaysian Bar Council,

150 SUHAKAM, *Annual report 2009 – Human Rights Commission of Malaysia*, 2010.

151 Global Alliance of National Human Rights Institutions, Accreditation status as of 8 August 2018.

152 See the many activities carried out by SUHAKAM in ECPM, *Abolition of the Death Penalty: A Practical Guide for NHRIs*, 2019, pp. 70-71.

153 *The Online Citizen*, "Vui Kong's Family Pleads at Istana", 2010, available at: <https://www.theonlinecitizen.com/2010/08/24/breaking-news-vui-kongs-family-pleads-at-istana/> (last visited January 20, 2020).

of the Second Regional Congress against the Death Penalty in Kuala Lumpur in 2016. These efforts towards abolition have been reinforced by an advocacy work with Parliamentarians, led by ADPAN, ECPM, and Parliamentarians for Global Action, in partnership with the Ministry of Justice. Several round tables, consultations and interviews were organised with Malaysian Members of the Parliament, in Malaysia and abroad. A regional seminar was held in Kuala Lumpur in 2018 with representatives of the Australian, Filipino, Malaysian, Pakistani and Papua-New-Guinean Parliaments. In 2018, the Malaysian Coalition Against the Death Penalty was born: initially composed of three organisations (the Civil Rights Committee of the Kuala Lumpur and Selangor Chinese Assembly Hall, SUARAM and Amnesty International Malaysia), the Coalition has since expanded to include individual members (lawyers Abdul Rashid Ismail, Khaizan Sharizad Bt Ab Razak (Sherrie) and Andrew Khoo).¹⁵⁴

In the meantime, a number of reports and studies have been published, illustrating the many flaws and miscarriages of justice in the administration of the death penalty.¹⁵⁵ In 2018, a study by the Penang Institute, conducted on 289 court cases, revealed that 28% of the High Court and 50% of the Court of Appeal judgments on death penalty cases were overturned by the respective immediate higher courts.¹⁵⁶ The frequency and inconsistency of court decisions in death penalty cases illustrate the high likelihood of wrongful executions and miscarriages of justice.¹⁵⁷

Decrease in executions and signs of a change in attitude

Since 1997, the number of executions has decreased considerably. Between 1997 and 2015, Amnesty International reported an average of two executions recorded per year, with no executions recorded in 1998-1999, 2003-2005 and 2012.¹⁵⁸ Nevertheless, at least 13 people were executed in 2016 and 2017.¹⁵⁹

154 Read Khaizan Sharizad Bt Ab Razak (Sherrie) and Andrew Khoo's interviews on p. 66 and 69.

155 See for instance, reports of SUHAKAM, Amnesty International, ADPAN, MADPET or ECPM.

156 Chee Han L., Chow Ying N., Arivananthan H., *High Incidence of Judicial Errors in Capital Punishment Cases in Malaysia*, Penang Institute, 2018, p. 9.

157 *Ibid.*

158 Amnesty International Malaysia, "A Brief History of the Death Penalty in Malaysia", 2019, available at: <https://www.amnesty.my/abolish-death-penalty/a-brief-history-of-the-death-penalty-in-malaysia/> (last visited January 17, 2020). See also Johnson D.T., Zimring F.E., "Death Penalty Messons from Asia", *The Asia-Pacific Journal*, Vol 7, Issue 39, 2009; and Pascoe D., *op. cit.*, 2019, p. 129-130.

159 Amnesty International, *op. cit.*, 2019, p. 16.

The death penalty was last introduced into Malaysian law in 2003 for people convicted of rape resulting in death and child rape. Since then, decision-makers have begun to recognise the ineffectiveness of the death penalty in combating drug trafficking and to criticize the application of the death penalty. After long considering the death penalty as a symbolic deterrent to drug use and drug-related crime, a member of the ruling party stated during a Parliamentary debate in 2005 that "*The mandatory death sentence [...] has not been effective in curtailing drug trafficking.*"¹⁶⁰

In 2006, the Ministry of Justice stated that he supported the abolition of the death penalty because "*No one has the right to take someone else's life, even if that person is a murderer.*"¹⁶¹ In 2010, the Minister in the Prime Minister's office in charge of Legal and Parliamentary affairs declared his opposition to the death penalty. He stated: "*If it is wrong to take someone's life, then the government should not do it either.*"¹⁶² However, he made abolition conditional on public support.¹⁶³ In fact, despite the success of the Vui Kong campaign, it has often been said that the public supports the use of the mandatory death penalty, which would be an obstacle to any reform of the death penalty in Malaysia.¹⁶⁴ In 2013, the report on Malaysian citizens' attitudes and opinions towards the use of death penalty concluded that "*There would be little public opposition to abolition of the mandatory death penalty for drug trafficking, murder, and firearms offences. Public support for the death penalty for murder is also lower than is perhaps assumed, so may not be regarded as a definite barrier to complete abolition.*"¹⁶⁵

In 2013, the Malaysian government demonstrated a change in attitude towards the death penalty during the UPR review. It stated: "*The Government had taken the initiatives to undertake a study on comprehensive reform of administration of criminal justice in Malaysia, including on death penalty. [...] Only very few cases result*

160 *Malaysia Kini*, "229 Executed for Drug Trafficking in Past 30 Years", in *Harm Reduction International*, "I'm a Believer"... Singapore's Use of the Death Penalty for Drugs Defended Using Faith-Based Evidence", 2009.

161 Citations in "Malaysians Against the Death Penalty and Torture blog", in Johnson D.T., Zimring F.E., *op. cit.*, 2009.

162 Chee Han L., Chow Ying N., Arivananthan H., *op. cit.*, 2018.

163 Hood R., Hoyle C., *The Death Penalty. A Worldwide Perspective*, Oxford University Press, 2008, p. 106.

164 Lehfrend S., Jabbar P., in Hood R., *The Death Penalty in Malaysia. Public Opinion on the Mandatory Death Penalty for Drug Trafficking, Murder and Firearms Offences*, The Death Penalty Project, p. iii-iv.

165 *Ibid.*, p. 43.

in the accused being sentenced to death. In this connection, it seems fair to conclude that there exists to a certain extent a conscious initiative or trend against the implementation or execution of the death penalty.¹⁶⁶ This shift was confirmed several times subsequently, including in 2016 by Nancy Shukri, the then Minister of Law, who stated at the Oslo Congress against the Death Penalty that: “There are positive signs in Malaysia and a steady momentum towards possible change in the death penalty legislation.”¹⁶⁷

Several amendments were made to the legal framework. In 2012, the ISA was repealed, resulting in the removal of the mandatory death penalty for illegal possession of firearms.¹⁶⁸ In 2017, the Dangerous Drug Act was amended to abolish, under certain conditions, the mandatory requirement of the death penalty for drug crimes. The reform has allowed judges to use their discretion and take mitigating factors into account in sentencing. However, this discretion can be exercised only if: 1) the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia; and 2) there is no evidence of buying and selling of a controlled substance at the time when the person convicted was arrested; or 3) there is no involvement of agent provocateur;¹⁶⁹ or 4) the involvement of the person convicted is limited to the role of courier.¹⁷⁰ These conditions are difficult to reach. If they are not met, the death penalty remains mandatory. In other cases, the penalty is imprisonment and whipping. It should be noted the amendment has retained the presumption of guilt of drug trafficking if defendants are found with a specific quantity of drugs. Furthermore, the amendment, which came into force in March 2018, does not apply

166 UN Human Rights Council, *op. cit.*, 2013, para. 47.

167 *The Star Online*, “Nancy: Malaysia One Step Closer to Amending Death Penalty”, 2016, available at: <https://www.thestar.com.my/news/nation/2016/06/22/nancy-malaysia-one-step-closer-to-abolishing-death-penalty/> (last visited March 5, 2020).

168 Since its enactment in 1960, more than 4,000 have been detained under the ISA to counter the remain communist threat in Malaysia, to justify inter-ethnic harmony or to fight terrorism. Amnesty International, 2003. Despite the abolition of the ISA, the indefinite detention without trial provided in the ISA will remain, since the act was replaced by other security laws which fail to meet international human rights standards and may result in torture or ill-treatment. The Security Offences (Special Measures) Act (SOSMA) which was introduced in April 2012, allows police to detain suspects *incommunicado* for 48 hours and allows detention without charge or access to courts for up to 28 days. The Prevention of Terrorism Act (POTA) provides for the indefinite detention of terrorism suspects without charge, trial or judicial review.

169 An agent provocateur may be an undercover police or customs officer, used to entice or provoke the commission of an offence.

170 The role of courier is defined as transporting, carrying, sending or delivering a controlled substance.

retroactively: those sentenced to death for drug trafficking before that date do not benefit from the change of the law, contrary to norms of international law.¹⁷¹ Thus, hundreds of men and women may currently be on death row in Malaysia for crimes that are no longer punishable by the death penalty.

While the number of people executed has decreased, Malaysian judges continued to impose the death penalty. As a result, the death row population has continued to increase, from 245 persons in 1996 to 1,280 in 2019.¹⁷²

Focus on the death penalty and public opinion

By Roger Hood and Saul Lehrfreund¹⁷³

In 2013, The Death Penalty Project, with the support of the Bar Council and the Human Rights Commission, published a public opinion survey aimed to assess the level of support for the death penalty and, in particular, for the mandatory death penalty.

This showed conclusively that when faced with making decisions on 12 “scenarios” representing various examples of cases where persons had been convicted of murder, trafficking in narcotics or intentionally discharging a firearm while committing various crimes – for all of which the legal penalty was a mandatory death sentence – only 1.2 per cent of the sample of 1,535 citizens chose death as the appropriate penalty for all the cases they were asked to judge. As far as cases of drug trafficking were concerned, only one in 12 of the respondents chose death as the punishment for all four examples of drug trafficking, as the law would have required them to do. In fact, death was rarely chosen when a mitigating circumstance was present and even when they were asked

171 The UN Death Penalty Safeguard No. 2 provides that: “Capital punishment may be imposed only for a crime for which the death penalty is prescribed by law at the time of its commission, it being understood that if, subsequent to the commission of the crime, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”

172 Liew Chin Tong, Deputy Defence Minister of Malaysia, in *The Malaysian Insight*, “Rethinking the Death Penalty”, 2018 available at: <https://www.themalaysianinsight.com/s/105908> (last visited January 20, 2020).

173 Authors of *The Death Penalty in Malaysia. Public Opinion on the Mandatory Death Penalty for Drug Trafficking, Murder and Firearms Offences*, The Death Penalty Project, 2013

to “judge” the very serious offence of attempting to import a large amount of heroin, only 30% thought that the person convicted deserved the death penalty: even though 74% had said they were in favour of the death penalty for trafficking heroin. In six cases of murder, 91% said they supported the death penalty, but the highest proportion of citizens choosing the death penalty when presented with the facts of a case was 65%, for an aggravated case of a robbery-murder by a previously twice-convicted robber. In two of the three scenarios where there were mitigating circumstances, less than a quarter imposed the death penalty. Thus “saying” that one is in favour of the death penalty was not the same as choosing death as the appropriate punishment in all, or even the majority of, circumstances. The findings of this research were widely accepted in Malaysia and ought to be remembered when people turn to public opinion as their justification for resisting proposals to abolish capital punishment.

THE “NEW MALAYSIA” (2018-2020)

The momentum towards full abolition of the death penalty

In May 2018, for the first time since the country’s independence, Malaysia experienced a change of government. The Pakatan Harapan alliance (Alliance of Hope), led by former Prime Minister Mahathir Mohamad, won the elections with the commitment to “*Make [Malaysia’s] human rights record respected by the world*” and to abolish oppressive laws, including all acts providing for mandatory death by hanging.¹⁷⁴ In July 2018, the government imposed a moratorium on executions. In August 2018, the death sentence of Muhammad Lukman Mohamad, convicted of possessing, processing and distributing cannabis oil to cancer patients, provoked a wave of protests in the country and internationally.¹⁷⁵

174 Principles 26 and 27, in Pakatan Harapan, *Rebuilding our Nation, Fulfilling our Hopes*, 2018, pp. 60–61.

175 See for instance *The New York Times*, “Malaysia to Repeal Death Penalty and Sedition Law”, 2018, available at: <https://www.nytimes.com/2018/10/11/world/asia/malaysia-death-penalty-repeal.html> (last visited February 18, 2020).

In September 2018, the Prime Minister pledged at the UN General Assembly that “*The ‘New Malaysia’ will firmly espouse the principles promoted by the United Nations in its international engagements*”, which include “*The principles of truth, human rights, the rule of law, justice, fairness, responsibility and accountability, as well as sustainability*.”¹⁷⁶ A few weeks later, on 10 October 2018, on the occasion of the World Day Against the Death Penalty, the government pledged to officially abolish the death penalty for all crimes. At the end of October, and for the first time, the Malaysian government took an interest in the situation of its citizens sentenced to death abroad and intervened before the authorities of Singapore to stop the execution of one of its nationals.¹⁷⁷

In December 2018, the country voted for the first time in favour of the UN Resolution on the abolition of the death penalty.

A U-turn on the abolition of the death penalty?

While the abolitionist movement warmly welcomed the government’s announcements, some civil society, opposition movements and victims’ families expressed strong dissatisfaction, calling for demonstrations against abolition.¹⁷⁸ Several surveys on the death penalty were carried out by media, with percentages of people opposed to the abolition of the death penalty varying from 45% to 82%, illustrating the strong polarization of the public opinion on this matter.¹⁷⁹ This vehement opposition to abolition had not been expected by the authorities, and led to a policy change.

In March 2019, the government stated that it only planned to abolish the mandatory death penalty for 11 offences under the Penal Code

176 *New Straits Times*, “Dr M Pledges to Uphold UN Principles in New Malaysia”, 2018, available at: <https://www.nst.com.my/news/nation/2018/09/415933/dr-m-pledges-uphold-un-principles-new-malaysia> (last visited January 20, 2020).

177 *New Straits Times*, “Despite Pleas, Malaysian Prabu Pathmanathan Executed in Singapore”, 2018, available at: <https://www.nst.com.my/news/crime-courts/2018/10/425084/despite-pleas-malaysian-prabu-pathmanathan-executed-singapore> (last visited February 18, 2020).

178 *The Star Online*, “Ummah Threatens to March if Govt Goes Ahead with Death Penalty Abolition”, 2019, available at: <https://www.thestar.com.my/news/nation/2019/02/12/ummah-threatens-to-march-if-govt-goes-ahead-with-death-penalty-abolition> (last visited March 05, 2020).

179 *The Star Online*, “45% Against Total Abolition of Death Penalty”, 2018, available at: <https://www.thestar.com.my/news/nation/2018/10/13/45-against-total-abolition-of-death-penalty> (last visited March 05, 2020); *New Straits Time*, “Online Poll Reveals Majority of Netizens Opposed to Death Penalty Abolition”, 2018, available at: <https://www.nst.com.my/news/nation/2018/10/420315/online-poll-reveals-majority-netizens-opposed-death-penalty-abolition> (last visited March 05, 2020).

and the Firearms (Increased Penalties) Act 1971, leaving it to the courts to decide on the death sentence. No further amendments to the Dangerous Drugs (Amendment) Act are envisaged, although 72% of those sentenced to death have been convicted on this basis in 2018 alone.¹⁸⁰ According to observers, this reversal of commitments was due to pressure from opposition parties, specifically the MCA.¹⁸¹ Human rights organisations expressed their profound disappointment.¹⁸² A Special Committee to Review Alternative Punishments to the Mandatory Death Penalty has been set up and has submitted its report, but its conclusions had not yet been made public at the time of writing this report.

In February 2020, the Pakatan Harapan alliance collapsed, undermined by internal struggles and controversies. The abrupt resignation of Prime Minister Mahathir Mohamad came as a surprise. In March 2020, the nomination of Muhyiddin Yassin, a Malay nationalist supported by UMNO, created unprecedented uncertainty about the reforms initiated by the previous government, in particular regarding the abolition of the death penalty.

Death sentence cases continued to be handed down. In 2018 alone, official figures indicate that 190 people were sentenced to death during the year, including 136 for drug-related offences (72%), 48 for murder (25%), 3 for firearms offences (2%) and 3 for kidnapping and murder (2%).¹⁸³

180 Amnesty International, *op. cit.*, 2019, p. 23.

181 SUARAM, *Human Rights Report 2018: Civil and Political Rights*, 2019, p. 132.

182 *The Star Online*, "Pakatan's Human Rights Reforms a 'Profound Disappointment', Says Human Rights Watch", 2019, available at: <https://www.thestar.com.my/news/nation/2019/05/08/pakatans-human-rights-reforms-a-profound-disappointment-says-human-rights-watch> (last visited January 20, 2020).

183 Amnesty International, *op. cit.*, 2019, p. 23.

THE LONG JOURNEY THROUGH THE CRIMINAL JUSTICE SYSTEM



Between their arrest for a capital offence and the result of their clemency application, people sentenced to death undergo a long journey through the criminal justice system. Research conducted in recent years and interviews have shown that each of these steps is likely to result in a miscarriage of justice. Moreover, the duration of this process, in particular the wait for a response to a clemency application, which can take more than 10 years, is extremely trying.

A CRIMINAL JUSTICE PROCESS FAR FROM PERFECT

Malaysian criminal procedure for capital cases has four main phases: arrest, remand, trial – which may comprise three procedural stages – and the clemency process.

Figure 5: Main phases of the criminal justice system



Arrest and remand phases

According to the Constitution and laws of Malaysia, people arrested in the country hold several rights, such as the right to be informed as soon as may be of the grounds of their arrest, the right to consult and be defended by a legal practitioner of their choice,¹⁸⁴ or the right to communicate with a relative or a friend to inform of their whereabouts.¹⁸⁵ Despite the legal framework, human rights organisations have repeatedly revealed the critical restrictions on access to legal counsel, which prevent persons arrested for capital crimes from receiving good quality legal assistance before charges are brought.¹⁸⁶ The situation of foreign citizens or Malaysian nationals who do not speak Bahasa Malaysia is particularly concerning: they do not always receive professional interpretation during the

¹⁸⁴ Federal Constitution, Section 5(3); Criminal Procedure Code, Section 28(A).

¹⁸⁵ Criminal Procedure Code, Section 28(A).

¹⁸⁶ Amnesty International, *op. cit.*, 2019, p. 30. See also ADPAN, ECPM, The Advocates for Human Rights, MADPET, The KL and Selangor Chinese Assembly Hall, Harm Reduction International and the World Coalition Against the Death Penalty, *Malaysia – 31st session of the working group on the Universal Periodic Review*, 2018, p. 7.

investigation, while interviews are the basis of the entire subsequent criminal process.¹⁸⁷

According to the legislation, the police may hold a person in custody without a warrant for up to 24 hours to complete the investigation,¹⁸⁸ but this remand phase may be extended to 7 days, renewable once if the offence is punishable by a prison sentence of 14 years or more, including in cases of capital punishment.¹⁸⁹ NGOs report that this period may in practice be much longer than what is provided for in the legislation, due to the practice of “Chain Remand”, whereby the police re-arrests a person for a different or similar offence when the remand order expires.¹⁹⁰ Numerous cases of police brutality have been reported during this period of detention. According to the Malaysian NGO Suara Rakyat Malaysia (SUARAM), the number of people who have been tortured or ill-treated and who die in police custody is quite high. Between 2014 and 2018, 59 people died in police custody.¹⁹¹

Proceedings in court

There are three levels of courts in Malaysia. At the first level, while several courts have jurisdiction over criminal cases, the High Courts are the only ones with jurisdiction over capital offences.¹⁹² The Court of Appeal (second level) hears appeals from the High Court. The Federal Court (third level) hears appeals from the Court of Appeal. In Malaysia, the death sentence can be imposed at any stage of criminal proceedings: High Court, Court of Appeal and Federal Court. It is quite common for the death penalty to be handed down in the Court of Appeal or Federal Court, even if a person has been acquitted by the lower court.

Detailed provisions on appeal procedures and on the execution are set out in Section 281 of the Malaysia Criminal Procedure Code.

¹⁸⁷ *Ibid.*, p. 7.

¹⁸⁸ Criminal Procedure Code, Section 28(3).

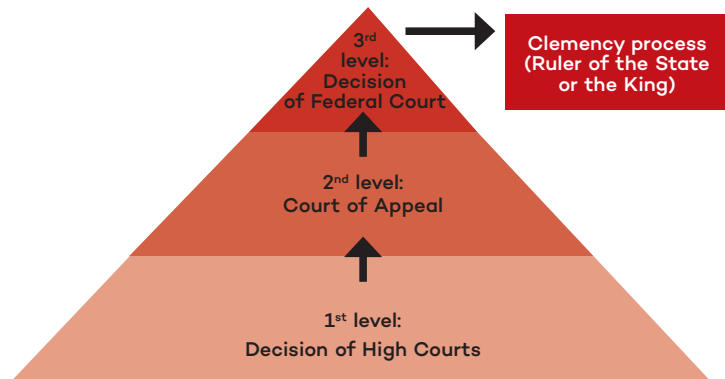
¹⁸⁹ Criminal Procedure Code, Section 117(2)(b).

¹⁹⁰ See for instance SUARAM, *Malaysia: Human Rights Report 2017 Overview*, 2017, p. 14. See also Amnesty International, *op. cit.*, 2019, p. 30.

¹⁹¹ SUARAM, *op. cit.*, 2019, p. 18: 18 people died under police custody in 2014, 12 in 2015, 15 in 2016, 10 in 2017 and 4 in 2018. These figures do not include figures of death in immigration centres or prisons.

¹⁹² In criminal matters, the first instance is divided between High Courts, Sessions Courts (which have jurisdiction to try all criminal offences except those punishable by death) and Magistrates Courts (for smaller offences). For the jurisdiction of High Courts, see Courts of Judicature Act 1964, Section 22.

Figure 6: Stages of court proceedings in capital cases



Several recent reports have highlighted the many shortcomings of the right to a fair trial before the criminal courts in Malaysia. The quality of legal representation was found to be poor. In addition, while extortion of confessions is a criminal offence carrying a penalty of imprisonment and a fine, coerced confessions or statements are often used in drug trafficking cases by the prosecution to strengthen their evidence against defendants.¹⁹³ Furthermore, the presumption of guilt established under the Dangerous Drug Act and the Firearms (Increased Penalties) Act¹⁹⁴ is in direct contradiction with the fundamental principle of the presumption of innocence, which is one of the foundations of criminal justice. Article 11(1) of the Universal Declaration of Human Rights provides: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.” In Malaysia, people have been sentenced to death simply because they failed to prove that they were not guilty.¹⁹⁵

193 Amnesty International, *op. cit.*, 2019, p. 30. On the penalties applicable to forced extortion, see Penal Code, Sections 330 (extorting confession by voluntarily causing hurt), 331 (extorting confession by voluntarily causing grievous hurt) and 348 (wrongful confinement to extort confession).

194 Contrary to the Dangerous Drugs Act, that provides for a presumption of guilt in death penalty cases, the Firearms (Increased Penalties) Act provides for a presumption of guilt in cases of unlawful possession of firearms, but this offence does not carry the death penalty. See Firearms (Increased Penalties) Act, Section 9.

195 See for instance ADPAN, *Malaysia: Reza Mohammed Shah Bin Ahmed Shah*, 2011; The Advocates for Human Rights and Harm Reduction International, *Report to the 17th Session of the Working Group on the Universal Periodic Review*, United Human Rights Council, 2013, para. 15.

The lack of due process of law in Malaysia is contrary to the 1984 UN Safeguards which provide that “Capital punishment may be 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”.¹⁹⁶ In a legal system where a person is presumed guilty of committing an offence carrying the death penalty, may be forcibly compelled to make a confession and may not always be represented by quality counsel, there is indeed a significant risk of sentencing innocent people to death, and a high probability of irreversible wrongdoing. As one Malaysian lawyer interviewed said: “How do you bring back a dead person?”

Lack of information on the clemency process

“It is all in limbo”

– Lawyer, speaking of a case awaiting the outcome of a clemency application

An application for clemency is the last resort available to people sentenced to death. If these proceedings are successful, they can have their sentence commuted to a prison term, a full pardon or be granted a temporary stay of execution.¹⁹⁷ The power to grant clemency is exercised, on the advice of a Pardons Board,¹⁹⁸ by the Malaysian King (the *Yang di-Pertuan Agong*) in federal and security cases, and by the rulers of the State in other cases.¹⁹⁹ While Section 42 of the Constitution and Sections 300 and 301 of the Malaysian Criminal Procedure Code provide some information on the composition of the Pardons Board and the power to suspend or commute sentences, the clemency process is very opaque. There are no laws or regulations describing clemency application procedures or the criteria used in such procedures. Some families explained that they had no idea they had this last resort. Mohamed, whose brother has been on death row

196 UN Death Penalty Safeguards No. 4. See, among others, the numerous Amnesty International reports on death penalty cases; Chee Han L., Chow Ying N., Arivananthan H., *op. cit.*, 2018.

197 Pascoe D., *op. cit.*, p. 134; and Criminal Procedure Code, Sections 281(C) and 281(D).

198 Section 42 of the Constitution provides: “The Yang di-Pertuan Agong has power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya; and the Ruler or Yang di-Pertua Negeri of a State has power to grant pardons, reprieves and respites in respect of all other offences committed in his State.”

199 There are nine States which have hereditary rulers (Sultans of State, or Yang di-Pertuan Besar). There are four States which do not have rulers. In these States, the clemency is exercised by appointed State governors (Yang di-Pertua Negeri). See Pascoe D., *op. cit.*, 2019, p. 133.

for 20 years, has just discovered that this recourse exists, thanks to an NGO. Anna, wife of a man sentenced to death 10 years ago, was also only recently informed of the right to seek clemency by an NGO. She explained that she is lost in the process: *“The process is vague. There are no procedure or guidelines to refer to.”* The law also does not provide for the right to legal counsel in a clemency procedure. In addition, there is no statutory time limit for the hearing of a clemency application: the Attorney General requests an audience with the ruler or the governor before a Pardons Board meeting is initiated, but it is the ruler or governor who decides if and when the meeting will take place. It can take several years for a Pardons Board to meet, although in recent years the Pardons Boards have been meeting more frequently.²⁰⁰

Once the application is sent, no information is provided to the prisoners or their families until the outcome is known. Some people are not even sure that the clemency petition was received. Amirah, a friend of a person detained for drug use, said: *“I have submitted documents related to the clemency petition to the Ministry of Home Affairs. They said they would submit it to the Pardons Board. But when I went there and checked, the Board said they had not received anything from the Ministry.”* Michelle, a foreigner from China, was arrested in 2010 and her last appeal was finalized in 2015. She filed the clemency application on her own, after her appeal: *“I cannot write in their language, so I wrote my petition in Chinese. I do not know what has happened to my petition.”*

In 2018, the Prison Department reported that 165 persons sentenced to death between 2007 and 2017 had had their sentence reduced by the Pardons Boards of various States.²⁰¹ This is a relatively high clemency rate. Pascoe estimates that 55-63% of all finalized death penalty cases were granted clemency between 1991 and 2016.²⁰² On the basis of his studies, he explained that most clemency grants *“May have been based on good behaviour, religious piety, and expressed remorse over the course of a long period spent on death row.”*²⁰³ Pascoe points out that the long stay on death row may have been used by the authorities as a justification for granting clemency, as it

200 Pascoe D., *op. cit.*, 2019, pp. 153-154.

201 *The Star Online*, “165 on Death Row Escaped the Gallows From 2007 to 2017”, 2018, available at: <https://www.thestar.com.my/news/nation/2018/06/28/165-on-death-row-escaped-the-gallows-from-2007-to-2017/> (last visited February 10, 2020).

202 Pascoe D., *op. cit.*, 2019, p. 136

203 *Ibid.*, p. 139.

may increase remorse and positive change of attitude of prisoners. However, the secrecy of the clemency process has very serious consequences for the mental state of prisoners and their families, as will be discussed in the next section.

THE INDEFINITE WAIT: 63 PEOPLE ON DEATH ROW FOR MORE THAN 10 YEARS

“I am old, and I do not have much time to live. I just wish that we can have information about the clemency process”
– Rina, mother of a man detained since 2003

Figure 7: Duration of the criminal justice process in capital cases



The length of time in prison is often *“interminable”*.²⁰⁴ Pre-trial detention may be quite long. Amnesty International estimates that the majority of those sentenced to death have spent between 2 and 5 years in pre-trial detention.²⁰⁵ If the accused appeals the decision up to the Federal Court, the time elapsed between the initial conviction and the final appeal can take up to 10 years.²⁰⁶ This was confirmed by the lawyers interviewed for this report. According to discussions with SUHAKAM, it is common for prisoners sentenced to death to wait 10 to 12 years for a clemency decision. The total length of the criminal proceedings in capital cases can therefore be of up to 27 years.

The duration of stay in prison under a death sentence can be very long. As Pascoe points out, *“With neither acquittals on appeal nor clemency being granted as often as is needed to reduce the size*

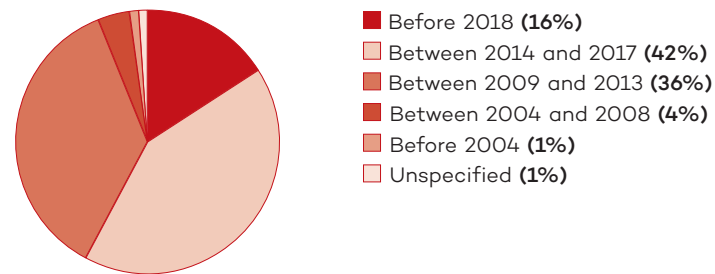
204 *Ibid.*, p. 154.

205 Amnesty International, *op. cit.*, 2019, p. 24.

206 SUARAM, *Human Rights Report 2016: Civil and Political Rights*, 2016, p. 173.

of death row, the present pattern for most condemned prisoners is indefinite delay.”²⁰⁷ In 2019, Amnesty International reported that 453 persons sentenced to death (36% of death row prisoners) have spent between 6 and 10 years in Malaysian prisons, awaiting execution. 49 persons (4%) have been on death row between 11 and 15 years, and 14 people (1%) for more than 15 years.²⁰⁸ One person, detained in Simpang Renggam prison, was sentenced to death in 1992, 27 years at the time of publication of Amnesty International’s report.

Figure 8: % of persons on death row in Malaysia, by year of death sentence (February 2019)²⁰⁹



Prisoners, families and institutions interviewed indicated that the anxiety of waiting for the outcome of the clemency is the worst of all. Ali, who has been on death row for 12 years, said: “*Waiting for my clemency petition feels like hanging out of nowhere.*” He has attempted suicide twice since his incarceration.²¹⁰

²⁰⁷ Pascoe D., *op. cit.*, 2019, p. 132.

²⁰⁸ Information based on Amnesty International, *op. cit.*, Annex 2, 2019, pp. 52-56.

²⁰⁹ *Ibid.*

²¹⁰ See more information on the mental health of death row prisoners *infra*, Sub-Section “Death row syndrome: Extreme psychological distress of people sentenced to death”.

INTERVIEW WITH **ANDREW KHOO**

Lawyer, elected member of the Malaysian Bar Council, Co-Chair of the Constitutional Law Committee

What has been the role of the Malaysian Bar Council in the fight against the death penalty?

The Malaysian Bar Council is the principal body of practising lawyers in peninsular Malaysia. Our current membership is approximately 20,000. One of the objectives of the Malaysian Bar pursuant to our establishing legislation, the Legal Profession Act 1976, has been to uphold the rule of law and the cause of justice, without fear or favour. As part of these objectives, the Malaysian Bar seeks to explain the law to members of the public, and to intervene in cases of manifest injustice. Explanations and education normally take the form of press statements, 'op-eds' and other articles published both in print and online media. Members of the Malaysian Bar have also been interviewed on television, radio and online to disseminate our views on the abolition of the death penalty. Intervention may take the form of directly speaking, writing or advocating to the Malaysian government, or commencing or participating in legal proceedings in Malaysian courts. Members of the Malaysian Bar who practise criminal law offer themselves as counsel in capital punishment cases as part of a legal representation system managed by the courts. The Malaysian Bar has also worked to prevent or defer executions of death-row inmates both in Malaysia and Singapore, including by making last-minute verbal appeals to the government of Malaysia and also petitions to the High Commission of Singapore in Kuala Lumpur.

What have been the main actions undertaken by the Bar, and by you in particular?

The Malaysian Bar has on several occasions over the past years adopted resolutions at its Annual General Meetings, calling upon the Malaysian government to totally abolish the death penalty. They have been reaffirmed several times. In furtherance of these resolutions, the Malaysian Bar has both organised and participated in public forums, seminars and workshops where the rule of law, access to justice, criminal law reform and the death penalty have

been discussed. The Malaysian Bar has also brought up this issue in its dialogues and discussions with the government, the judiciary, the police and officials from the prisons department.

The Malaysian Bar has continued to highlight the issue of the death penalty, and also the mandatory death penalty, at various international human rights meetings and conferences, including all three cycles of the Universal Periodic Review of Malaysia by the United Nations Human Rights Council in 2008, 2013 and 2018. I am the author/editor of the three Malaysian Bar's written submissions to the Universal Periodic Review process. In each, I have highlighted the injustice of the death penalty, in line with the Malaysian Bar's position. I have been a part of many civil society efforts to abolish the death penalty in Malaysia.

More recently, in 2017, when the then-government proposed to amend the Dangerous Drugs Act 1952 to provide for judicial discretion in imposing the death penalty for drug trafficking, I was part of a delegation of lawyers that briefed the parliamentary opposition on the drawbacks of the government's proposals. This led to the government withdrawing some of the more objectionable provisions. In 2018, after the new government came into office in Malaysia, I wrote to several ministers of the new government to ask them to totally abolish the death penalty in Malaysia. This was above and beyond the new government's manifesto pledge to abolish only the mandatory death penalty. On 10 October 2018 the government of Malaysia agreed to totally abolish the death penalty. Sadly, however, within a few months that decision was reversed due to domestic political pressure.

I was invited to be part of a joint European Union-United Kingdom delegation that visited Taiwan in March 2019 to lobby the government of Taiwan to abolish the death penalty. Our visit was favourably received. In February 2019 I was invited to speak at one of the panels of the 7th World Congress Against the Death Penalty in Brussels, Belgium. In October 2019, I returned to Taiwan to speak about the role of civil society in abolishing the death penalty at the 40th Congress of the International Federation of Human Rights. I have also spoken at various conferences, meetings, forums, seminars and workshops on the abolition of the death penalty in Belgium, Canada, Indonesia, Nepal, Switzerland, Thailand and the United States, and in Malaysia. I have spoken to governments, human rights commissions, law enforcement agencies, lawyers and law associations, university students and members of the public. I have also done radio and online media interviews.

Did the Bar have any specific role during the Task Force consultations?

The Malaysian Bar was invited to nominate one representative to be a member of the Task Force. I was nominated and then appointed by the Prime Minister. The Task Force conducted various town hall meetings around the country, focus group discussions and invited written opinions and submissions from lawyers, scholars, civil society organisations and interested individuals. We also interviewed death row inmates. The Task Force conducted an online questionnaire as well. Eventually, the Task Force produced a report and recommendations which were submitted to the government of Malaysia in February 2020.

INTERVIEW WITH
KHAIZAN SHARIZAD BT AB RAZAK (SHERRIE)

Filmmaker and lawyer

How did you come to represent death row prisoners?

I was assisting my former law firm partner Amer Hamzah Arshad, who is a senior criminal law counsel.

You've been following death row prisoners for several years. From your point of view, how does detention, especially prolonged detention, affect their psychological state?

In my view, it depends on the individual. Those with whom I have been in contact remained hopeful of their chances to be released. It also depends on the support from family and friends that they received either via physical visits or phone calls.

Has the representation of prisoners sentenced to death changed the way you work as a lawyer?

Not really because access to justice for marginalised groups cuts across different criminal offences. Their knowledge of their rights and access to legal representation are usually the biggest hurdles. Most of those I have worked with are from the lower income and less educated groups. From the moment they were arrested, what they were told by the police and what exactly their legal rights are, are usually blurred. There is a huge misinformation gap and/or pressure to confess a crime that they may not have committed.

My experience in assisting people facing the death penalty is more harrowing because the end result if the appeal and/or the pardon is not allowed is an irreversible punishment for them. It is after all an imperfect justice system that we are working with.

You co-directed a documentary, *Menunggu Masa*, about a man wrongfully sentenced to death for murder and on death row for more than 15 years now. What message did you want to convey with that documentary?

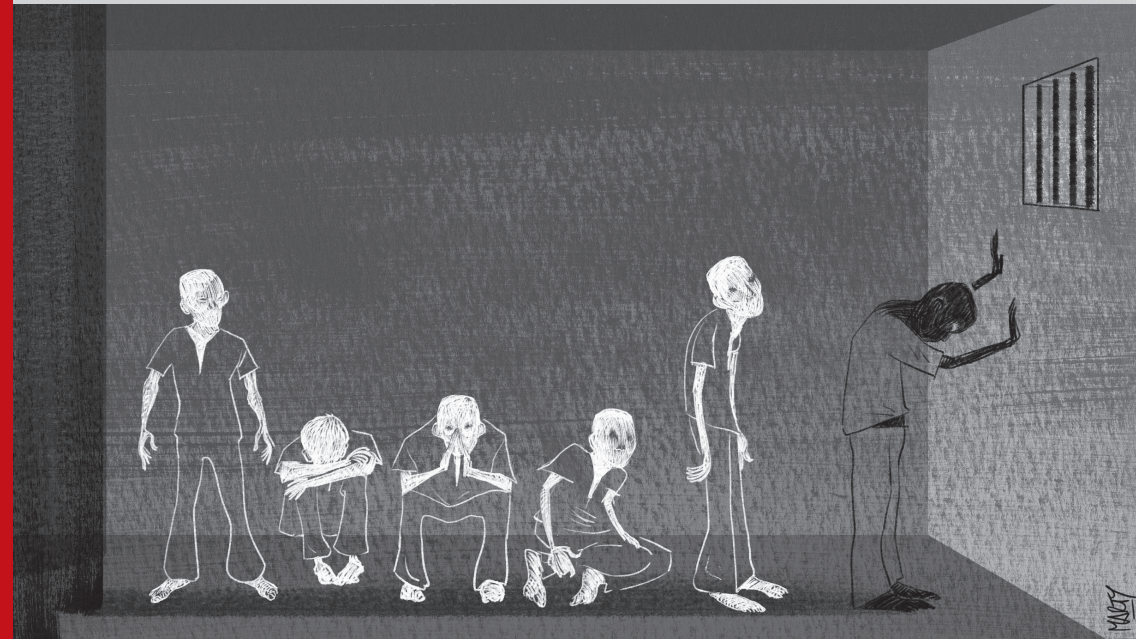
We wanted to highlight the impact of the death penalty. It affects not only the accused, but also his family and people around him.

For 15 years, Mainthan's wife, who was a housewife with four young children, had to find a job to be the sole earner, not only to provide for herself and her kids but also to look after Mainthan's parents when they were still alive. We also wanted to show how his family's support and encouragement is important to him and how much he cares about the well-being of his wife and children despite being on death row.

We wanted to show how the justice system is imperfect and that despite all the doubts present in the case, Mainthan was still convicted and his conviction was confirmed on appeal to the Federal Court, whereas the other three co-accused, who gave a consistent defense similar to Mainthan's, were acquitted by the Federal Court. We wanted to highlight that there were so many loopholes in the case, despite the existence of new evidence. For example, the alleged victim of the crime is still alive: he presented himself at the Federal Court during the review application, yet the Federal Court rejected the application.

At this stage, Mainthan has exhausted all the legal avenues and his last chance to escape the gallows is the pardon board's decision, which is currently pending.

SERIOUSLY DEFICIENT CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH



“All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment, for which no circumstances whatsoever may be invoked as a justification...”
 – Rule 1, UN Standard Minimum Rules for the Treatment of Prisoners (also known as the “Nelson Mandela Rules”)

Malaysia’s Constitution does not prohibit torture or cruel, inhuman and degrading treatment or punishment. Malaysia has also not ratified the Convention Against Torture nor the Optional Protocol to Convention Against Torture (OPCAT), which obliges States to establish an independent National Preventive Mechanism (NPM) to monitor places where people are deprived of their liberty.²¹¹ The NPM is an important tool for the prevention of torture and ill-treatment in prisons, as it keeps an outside eye on prison conditions and provides public recommendations. To date, no NPM has been set up in Malaysia, and only SUHAKAM and the ICRC are authorized to monitor conditions of detention, on a case-by-case basis.²¹²

PLACES OF DETENTION FOR PERSONS SENTENCED TO DEATH IN MALAYSIA

The situation of persons sentenced to death is governed by the Prisons Regulations 2000.²¹³ Although death row prisoners may be housed in the same prison than other prisoners, they live in separate blocks and in individual cells. Prisoners on death row are spread across 26 prisons in Malaysia, most of which are located on the peninsula.²¹⁴ Some prisons house more than 100 people sentenced to death. For instance, Kajang men prison houses more than 240 people on death row.²¹⁵ Women are held in nine institutions. According to Amnesty International 2019 data, people sentenced to death are

211 The prohibition of torture is, however, a norm of international customary law that applies even if countries have not ratified the Convention. See International Criminal Tribunal for the Former Yugoslavia (2018), *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T.

212 United States Department of State – Bureau of Democracy, Human Rights and Labor, *op. cit.*, 2019.

213 Prisons Regulations 2000, P.U.(A) 325/2000.

214 89% of death row convicts are held in prisons in peninsular Malaysia. Amnesty International, *op. cit.*, 2019, p. 18.

215 *Ibid.*, p. 18.

housed in the following prisons:²¹⁶

Table 3: Prisons housing death row convicts (February 2019, Amnesty International)

Prison	Male prisoners	Female prisoners	Prison	Male prisoners	Female prisoners
Peninsular Malaysia			East Malaysia		
Kajang	243	34	Kota Kinabalu	36	3
Tapah	71	50	Puncak Borneo	28	4
Simpang Renggam	100	0	Sandakan	30	0
Pokok Sena	71	22	Limbang	12	0
Kluang	86	0	Sibu	10	1
Seberang Perai	72	11	Miri	8	0
Sungai Buloh	56	0	Tawau	7	0
Pengkalan Chepa	48	7	Labuan	3	0
Bentong	50	0			
Taiping	48	0			
Sungai Udang	36	9			
Perlis	34	0			
Marang	29	0			
Alor Setar	27	0			
Johor Bahru	23	0			
Pulau Pinang	12	0			

DETAINEES ON DEATH ROW, ABSENT FROM PRISON REFORM

The conditions of detention of prisoners – both death row convicts and common prisoners – are widely regarded as harsh in Malaysia.²¹⁷ In the SUHAKAM 2018 annual report, Chairman Tan Sri Razali Ismail wrote: “Conditions of detention should not be an added punishment, and I lament the deplorable state of some of our prisons and detention centres that are in breach of a number of United Nations standards.”²¹⁸ Prison overcrowding has been widely reported, particularly near major cities: 20 of the

216 *Ibid.*, Annex 2.

217 United States Department of State – Bureau of Democracy, Human Rights and Labor, *op. cit.*, 2019.

218 SUHAKAM, *Annual report 2018 – Human Rights Commission of Malaysia*, 2019, p. ix.

37 prisons are reported overcrowded by the government.²¹⁹ The prison population tripled between 2002 and 2019, mainly as a result of anti-drug policy.²²⁰ According to the government, 56% of the total prison population is imprisoned for drug-related offences.²²¹ As of December 2019, the overall prison occupancy rate was 142%: while the official capacity of the prison system is 52,000, the total prison population is 74,000.²²²

The detention of a person is very expensive for the Malaysian State: the daily cost for a prisoner ranges from 38 to 41 ringgit (equivalent of 8.46 to 9.13 euros), including the cost for amenities and the salary of prison officers.²²³ Lacking sufficient financial resources, the State cannot meet the needs of prisoners. The situation of overcrowding is thus a major problem to be solved, as it has repercussions on all other aspects of prison life, such as infrastructure, hygiene, quality and quantity of food, or access to health care. According to SUHAKAM, more than 800 persons died in prison between 2015 and 2017: 319 persons died in prison in 2017, 269 in 2016 and 252 in 2015.²²⁴ In 2017, a petition was filed by prisoners held in Sungai Buloh prison, complaining about contaminated food and water, widespread disease and lack of medical care.²²⁵ This prison houses more than 50 people sentenced to death.²²⁶

The authorities are very well aware of these difficulties and have initiated a reform in 2019 aimed at improving the situation in prisons.

219 United States Department of State – Bureau of Democracy, Human Rights and Labor, *op. cit.*, 2019.

220 According to Prison Studies, 28,804 people were detained in prison in 2002, versus 74,000 in December 2019. Prison Studies, World Prison Brief: Malaysia, 2019, available at: <https://www.prisonstudies.org/country/malaysia> (last visited January 23, 2020).

221 *Malay Mail*, “Minister: Putrajaya Aims to Reduce Prison Population, not Build more Jails”, 2019, available at: <https://www.malaymail.com/news/malaysia/2019/03/09/minister-putrajaya-aims-to-reduce-prison-population-not-build-more-jails/1730804> (last visited January 24, 2020). UN Human Rights Council, *Summary of Stakeholders’ submissions on Malaysia, Report of the Office of the United Nations High Commissioner for Human Rights [A/HRC/WG.6/31/MYS/3]*, 2018, para. 50.

222 *Malay Mail*, “Profit-Driven Private Prisons not the Solution to Overcrowding in Malaysian Prisons, Say Rights Groups and MPs”, 2019, available at: <https://www.malaymail.com/news/malaysia/2019/12/10/profit-driven-private-prisons-not-the-solution-to-overcrowding-in-malaysian/1817673> (last visited January 23, 2020).

223 *Ibid.*

224 SUHAKAM, *Annual report 2017 – Human Rights Commission of Malaysia*, 2018, p. 81.

225 United States Department of State – Bureau of Democracy, Human Rights and Labor, *op. cit.*, 2019.

226 As of February 2019, Sungai Buloh prison housed 56 people sentenced to death. Amnesty International, *op. cit.*, 2019, p. 18.

However, the main priority of the reform is to reduce overcrowding.²²⁷ Persons sentenced to death are therefore not considered a priority group in the reform, since they live in individual cells.²²⁸ While the reform aims at improving certain aspects of the living conditions of all detainees, including those on death row (nutrition, access to medicine, medical resources, etc.), the reform does not include any specific provisions to make the conditions of death row prisoners more bearable. Men and women on death row are classified as high-risk prisoners on the basis of their death sentence. They are held in identical conditions of detention, irrespective of their personality, behaviour, age or mental state. For the Prison Department, men and women sentenced to death are considered as a homogenous group. Thus, persons who have attempted suicide, those who behave violently towards other prisoners or officers, those who have attempted to escape from prison, persons aged 21 or 60: all are treated equally until their sentences are cancelled, pardoned or executed. This issue was raised at the September 2019 prison reform workshop with civil society. However, to date, it does not seem to have been taken into consideration by authorities.

THE USE OF SOLITARY CONFINEMENT FOR DEATH ROW PRISONERS

“There is no real human contact here. It is just so difficult”
— Michelle, sentenced to death in 2015

The Prisons Regulations 2000 provide for very strict treatment of death row prisoners, including limited access to outside visitors and recreational activities.

227 In December 2019, the Deputy Minister of Home Affairs for instance instructed the Prison Department to begin a feasibility study to introduce profit-minded prisons for minor offences in the country. This initiative raised serious concerns from CSOs and Parliamentarians. *Malay Mail*, “Profit-Driven Private Prisons not the Solution to Overcrowding in Malaysian Prisons, Say Rights Groups and MPs”, 2019, available at: <https://www.malaymail.com/news/malaysia/2019/12/10/profit-driven-private-prisons-not-the-solution-to-overcrowding-in-malaysian/1817673> (last visited January 23, 2020).

228 According to SUHAKAM, three main groups are to be targeted by the reform: remand prisoners who cannot pay bail; drug users; and people detained for immigration offences. Interview with SUHAKAM representatives, February 2020. See *infra*, Sub-Section “The use of solitary confinement for death row prisoners”.

Detention in individual cells 23 hours per day

In all prisons, death row prisoners are housed in quarters separated from other prisoners. The cell must be locked at all times, in accordance with Prison Regulation 176(4): *“The cell or room shall not be unlocked except under supervision of prison officers and it shall be thoroughly examined and searched daily while occupied by a condemned prisoner.”*

Their cells are under constant supervision, as provided for in Prisons Regulations 176(2): *“A prisoner condemned to death shall be confined in a separate cell and be kept apart from all other prisoners and be under the constant supervision of a prison officer both by day and by night.”* This lack of privacy applies to the entire cell, including the sanitary facilities. Toilets are located in the cells and are placed so as to be visible from outside the cell, allowing no privacy for prisoners.²²⁹

According to the persons sentenced to death and SUHAKAM, death row convicts spend 23 hours per day in their individual locked cells. There, men and women sentenced to death have almost nothing to do, all day, every day. Ali, who has been on death row for 12 years, indicated: *“For 23 hours, we are in our own cell and we do our activities. We can read, pray, exercise or listen to music.”* Indeed, unlike prisoners who are not sentenced to death, prisoners on death row are generally allowed to keep books, an MP3 player and/or prayer material.

However, those sentenced to death are prohibited from working *“Except for keeping [their] person and dress in proper state and the place [they are] confined in clean”*.²³⁰ In addition, they do not have access to the education or rehabilitation programs. It should be remembered that many of them are young: 397 of those sentenced to death are between 21 and 30 years of age. These young people, as well as older people, spend their days without any activity to kill time or release the stress of being locked up in cells awaiting execution.

Many religious counsellors have expressed doubts about the purpose of these detentions. As one religious counsellor said: *“I think the ultimate goal of rehabilitation is to make prisoners understand their wrongdoing, to feel remorse and to be good again. There is no rehabilitation program for those on death row. Is it because they are supposed to die anyway? Why does the government not give them a chance to learn and be useful again? Some of them have been staying in prison for more than 10 years.”* It should be remembered

229 SUHAKAM, *The Right to Health in Prison. Results of a Nationwide Survey and Report*, 2017, p. 75.

230 Prisons Regulations 2000, Regulation 181.

that the rehabilitation and the reintegration of all prisoners is at the heart of the mission of the Prison Department in Malaysia.²³¹ The indefinite detention of death row prisoners under such conditions is clearly not an adequate response to the rehabilitation and potential reintegration of these persons into society – persons who might one day be released, either because of a successful appeal or application for clemency²³² or because of less severe criminal legislation.

A normal day in the life of Michelle, sentenced to death in 2015 and currently detained:

“I usually wake up at about 5am, do some stretching in the cell, brush my teeth, freshen up and go to prayer. Around 7am, the warden will do the counting round and then I will have breakfast. Breakfast consists of two pieces of bread and milo, sometimes a biscuit. Some Mondays, the Buddhism religion teacher comes to visit us, and we are allowed to sit in the hallway to listen to the teaching. But they do not come every week. They come every two weeks. Otherwise, I am just staying in the cell. Sometimes I write. I cannot go to the library, but there are not many books there anyway. I asked my cousin to bring me an MP3 with music and family photos, but I have not received it yet. I also asked my lawyer to bring me some books and outdated magazines. I have some in my cell and I read them over and over again. There is not much to do really. Most of the time, I am daydreaming and thinking about my life and my family. During the day, I am allowed to leave the cell for a period of time, sometimes 45 minutes, sometimes more than that. But we will still be in the building, in the main hall. I just walk around. Sometimes I talk to other people. The warden does a recount in the evening, before dinner.”

231 The mission of the Prison Department is *“To nurture productive individuals through effective rehabilitation, a conducive environment and strategic integration.”* It has five objectives, among which: *“Rehabilitation: To ensure all categories of prisoner/inmate/detainee undergo appropriate and effective rehabilitation programmes; reintegration: To ensure the implementation of an effective social reintegration programme for the prisoners/inmates/detainees.”* Prison Department website, available at: http://www.prison.gov.my/portal/page/portal/english/visi_en (last visited February 20, 2020).

232 As mentioned above, the clemency rate is above 55%. See supra, Sub-Section “Lack on information on the clemency process”.

Restricted human interactions

Death prisoners spend most of their time alone in their cells, unlike other prisoners. In addition, people sentenced to death may not be visited by outside visitors, with the exception of family members, their lawyers and religious counsellors. Visiting conditions are strictly limited. All discussions, including with religious counsellors, must take place in the “*sight and hearing*” of prison guards.²³³ The duration of relatives’ visit may not exceed 45 minutes per week. Writing a letter replaces a visit from relatives.²³⁴

Families of men and women sentenced to death indicate that they generally have no difficulty in visiting their relatives. They have a pocket-sized logbook that they must bring with them on every visit. Permissions to visits are granted, except when there are many visitors at the same time. This happened once to Chan, the mother of a man sentenced to death, who was then unable to meet her son. Communication with prisoners takes place in a room through a telephone booth with a transparent glass window, in the presence of an officer. Mohamed, the brother of a person sentenced to death, explained that this limits the conversation topics. He said: “*Since there are officers who hear the conversation, we only talk about what is necessary. We do not talk about politics or anything outside.*” All families indicated that they have relatively good relationship with Prisons guards.

Although some prisoners receive a visit every week, the majority of those sentenced to death do not have family living close to the prison. Nayla, the sister of a death row prisoner, explained that the economic situation of the families of death row prisoners is an obstacle to prison visits. She indicated that her brother had asked her to contact the family of another prisoner who was feeling very isolated and miserable. She said: “*When I contacted them and asked them why they were not visiting their relative, they told me they did not have the money. So, I gave them the money to visit the prison.*” Lawyers interviewed also indicated they have no difficulty meeting people on death row. Lawyers only need to announce their visit 2 days in advance to be allowed to meet with their clients. Lawyers indicated that there are generally no time restrictions when talking to their clients. The level of security depends on the prison: clients may

²³³ Prisons Regulations 2000, Regulation 177(2).

²³⁴ *Ibid.*, Regulation 179(4): “*Such prisoner shall receive a visit from his relatives of forty-five minutes duration every week or to write one letter in lieu.*”

or may not be handcuffed; in some cases, a warden stays outside the room, with the door open, and cannot hear the conversation, while in others, a warden stays in the room. The constant presence of guards is contrary to international detention standards, which provide that consultations with legal advisers may be within sight but not within hearing of prison staff.²³⁵

The key role of religious organisations

For prisoners on death row, a light of hope is the visit of religious organisations that come to pray and provide counselling to prisoners. Religious counsellors interviewed indicated that they have the right to enter the prison halls. They hold groups sessions of about 20 to 30 people, every week or every two weeks, for one to two hours, depending on the prison. They explained that they teach prisoners about religious concepts. For example, a Buddhist religious group would help them to study the Dharma and the concept of causality, in order to increase self-reflection and promote empathy and compassion. They are usually allowed to give out a few photocopies of religious texts. The religious teaching goes beyond religious studies: people talk about their emotional distress, their poor living condition, ask for a way to contact their families, seek lawyers or need help in writing a clemency application. One religious counsellor explained: “*Sometimes when they talk, they will break down and cry.*”

Religious groups working in prison indicated that most people have indeed reflected about their lives and would like to behave differently if they were given another chance. Most religious counsellors interviewed question the lack of humanity of the situation of those sentenced to death, which leaves very little room for rehabilitation. As one counsellor indicated: “*What really gets a person back on the right path is a conceptual change. Prolonged confinement, disconnecting a person from society and affecting intimacy will lead to social problems.*”

²³⁵ Nelson Mandela Rules, Rule 61(1).

The situation of foreigners, which account for 43% of those sentenced to death, is particularly worrying. According to the available data, most of them come from other Asian countries (Indonesia, Iran, India, Philippines, Thailand, etc.) or from Africa (mainly Nigeria)²³⁶ – most of them do not speak Bahasa Malaysia. Due to this situation, they are unable to communicate with the guards or even the medical staff. They also cannot participate in religious group sessions. Some prisons, however, allow short individual discussions between religious counsellor and death row prisoners if they are able to understand each other. For instance, if both speak the Chinese language, some prisons authorize 30-minute individual discussions between them. However, these are only rare cases and many foreign convicts, such as those from Nigeria, Iran or India, simply have no one to communicate with. For foreigners, visits to prisons by their relatives are very rare. Michelle's family lives in China. She said: *"My family does not visit me often. In the last 5 years, my mother has visited me twice. She is old, it is difficult for her to travel."* Although Michelle buys phone cards to call her mother and son every week, she explains that her isolation is extreme and causes unbearable suffering: *"As a foreigner, I have no one here. Being so far away from home and from my family hurts me. I feel lonely and hopeless. There is nothing here to help me through this difficult time. Thinking about my mother and my son makes me feel better. I have a picture of them, I look at it all the time."*

In addition, other restrictions apply to foreigners. It should be noted that all books must be filtered before they reach the convicted men and women: as prison staff cannot understand the contents of books written in another language, death row prisoners may not receive books in their own language, even if this is theoretically allowed. Furthermore, while Malaysian law provides for the right to inform an embassy or consulate when a foreign national is arrested or detained, in order to assist prisoners in their legal proceedings, religious counsellors reported that some prisoners told them that they have many difficulties in contacting their consulate.²³⁷ This may be partially explained by mistakes with the identification and attribution of nationality.²³⁸

²³⁶ Amnesty International, *op. cit.*, (2019), p. 19.

²³⁷ Article 36(1)(c) of the Vienna Convention on Consular Relations provides: *"Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation."* This convention was ratified by Malaysia by the Consular Relations (Vienna Convention) Act 1999.

²³⁸ Amnesty International reported such difficulties. See Amnesty International, *op. cit.*, 2019, note 47, p. 19.

Indefinite isolation

The situation of men and women on death row amounts to indefinite solitary confinement, which is defined as an indefinite confinement for more than 22 hours a day without meaningful human contact. This practice is strictly prohibited by international human rights standards. Rule 43 of the Nelson Mandela Rules provides: *"In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited: (a) Indefinite solitary confinement..."*²³⁹ In addition, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has repeatedly stressed that the use of solitary confinement should be absolutely prohibited for prisoners on death row by virtue of their sentence.²⁴⁰ In 2012, the Special rapporteur further stated: *"Solitary confinement used on death row is by definition prolonged and indefinite and thus constitutes cruel, inhuman or degrading treatment or punishment or even torture."*²⁴¹

When SUHAKAM voiced its concerns about this practice to the authorities, they responded by denying the use of solitary confinement: *"Solitary confinement does not exist in Malaysian Prisons. Single cells provided for death row prisoners is not solitary confinement but is a single occupancy cell as stipulated in the Prison Rules for security reason; for the safety and security of the prisoner and other prisoners"*.²⁴²

²³⁹ Nelson Mandela Rules, Rule 43.

²⁴⁰ In 2013, the Special Rapporteur on Torture reported: *"No prisoner, including those serving life sentence and prisoners on death row, shall be held in solitary confinement merely because of the gravity of the crime."* Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment* [A/68/295], 2013, para. 61. Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [A/63/175], 2008, p. 25.

²⁴¹ Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [A/67/279], 2012, para. 48.

²⁴² SUHAKAM, *op. cit.*, 2017, pp. 73-74.

POOR QUALITY INFRASTRUCTURE

Although men and women sentenced to death are locked in cells for most of the day, access to light and ventilation is very poor in the cells of some prisons. In 2017, SUHAKAM published a report after visiting several prisons and death row quarters. SUHAKAM noted that, in the cells of the people sentenced to death, *“The windows [are] not large enough to enable the prisoners to read or work by natural light, and [are] not constructed to allow the entrance of fresh air”*, unlike other prisoners who are not on death row.²⁴³ In its 2017 Annual Report, SUHAKAM noted that, in Tapah Prison, death row prisoners were not allowed to exercise under direct sunlight due to security reasons: they thus never had direct access to fresh air.²⁴⁴ Discussions revealed that the situation has not changed. Poor ventilation in the cells was also highlighted by SUHAKAM in 2017 in Alor Setar prison.²⁴⁵ This situation was also pointed out by Ali, a prisoner in Pokok Sena prison: he explained that he sometimes had to undress in his cell because of the heat. Since prisoners on death row are not allowed to leave their cell, they stay 23 hours a day in a room where their toilet is also located, with no fresh air. Moreover, the artificial light in the rooms do not allow prisoners to read without damaging their eyesight.²⁴⁶ These conditions are in direct contradiction with Rule 14(a) of the Nelson Mandela Rules, which provides that, in all places where people are required to live, *“The windows shall be large enough to enable the prisoners to read or work by natural light and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation.”*

THE NEED FOR MONEY

“Everything needs money” – Michelle, sentenced to death in 2015

According to Regulation 180 of the Prisons Regulations, *“A prisoner under sentence of death shall be provided with clothing, food and*

²⁴³ SUHAKAM, *op. cit.*, 2017, p. 74 and p. 89.

²⁴⁴ SUHAKAM, *op. cit.*, 2018, p. 86.

²⁴⁵ *Ibid.*, p. 86.

²⁴⁶ SUHAKAM, *op. cit.*, 2017, p. 75.

bedding and such other articles as may be approved by the Director General.” In practice, the prison does provide food and a mattress, but this is restricted, and the rest of the goods provided are scarce. Interviews revealed that the food provided by the Prison administration is not good in terms of quality and quantity, and is sometimes prepared in poor hygienic conditions. According to an NGO interviewed, the amount allocated for food for detainees is low: 14 ringgit for three meals, or about 3.02 euros per day. The food is sometimes enriched with farm products from the agricultural programmes implemented by other prisoners.²⁴⁷ To prevent suicide attempts, prisoners sentenced to death are served boneless food. As Ali explained, *“Food is usually tasteless.”* Consequently, he has to pay more for better food. Families reported that people detained in Kajang and Pokok Sena prisons are not allowed to receive food from the outside. Prisoners can buy products sold inside the prison by the administration, but this requires money.

In addition, hygienic supplies (soap, shampoo, toothbrush, and toothpaste), some bedding material (pillows) and phone cards have to be paid by the prisoners themselves at the kiosk located in the prison. Prisoners on death row revealed that only one big cup (in Malay: *kole*) is provided to them, which is to be used for drinking, cleaning and toilet use. Moreover, while the prison administration provides sanitary pads for women, their number is insufficient to cover their needs. As Michelle explained: *“We are given two, sometimes three sanitary pads per month. If we need anything extra, we need to buy it.”* Payment for goods is a challenge, as prisoners on death row are not allowed to work.

LIMITATION OF ACCESS TO LIGHT AND FOOD AS DISCIPLINARY MEASURES

Prisoners interviewed indicated that additional disciplinary measures are taken when a prisoner causes problems. According to one prisoner interviewed, the problem may be a person who is too noisy, or on the contrary a “rebellious” person, who refuses to eat or do anything – in short, a person experiencing mental distress.

In such cases, prisoners on death row are sent to special cells called *Bilik Gelap* (the dark room), in which they have absolutely

²⁴⁷ As mentioned above, regulations forbid the work of prisoners in death row.

no access to daylight and access to food is limited. Indeed, Prisons Regulations provide that, in such cases, outdoor exercise is permitted only if *“The Medical Officer certifies it is absolutely necessary for health.”*²⁴⁸ Confinement on a restricted diet may not exceed 21 days.²⁴⁹ Regulation 129 provides: *“Confinement in the punishment cells shall not exceed an aggregate of 90 days in a year for any one prisoner.”*²⁵⁰

INADEQUATE ACCESS TO HEALTH CARE

According to SUHAKAM, almost all prisons have clinics on their premises, with a doctor assisted by one or more medical assistants, and death row prisoners have unrestricted access to these clinics. However, interviews revealed that the clinics are under-budgeted, and have very limited resources, in terms of medicine, human resources, or medical supplies. This situation has an impact on the men and women sentenced to death. They indicated that access to medicine is very limited and that they only receive paracetamol, regardless of the disease. Religious counsellors confirmed that very little is done to give them access to quality medicines. They reported several examples to the ADPAN team: *“Once, a prisoner approached me. He told me he was having gastric problems. He asked me to pray for him because he could not get the medicine.”* Another said: *“One of the prisoners came to talk to me. He had asthma. Even when he was breathing, you can hear it. But the wardens do not care about that. There is no agency to come and check their health.”*

It should also be noted that there is no access to gender-specific health care services, such as access to a gynaecologist, to take care of the women’s specific needs. This is contrary to the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, also known as the Bangkok Rules.²⁵¹

248 Prisons Regulations 2000, Regulation 130.

249 *Ibid.*, Regulation 126.

250 *Ibid.*, Regulation 129.

251 Rule 10(1) of the Bangkok Rules for instance provides: *“Gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners.”*

DEATH ROW SYNDROME: EXTREME PSYCHOLOGICAL DISTRESS OF PEOPLE SENTENCED TO DEATH

“Prolonged detention of individuals sentenced to death is inhumane and is detrimental to their mental health”

— Dr Suarn Singh, former Head of Psychiatric Services of the Ministry of Health Malaysia and psychiatry expert before Malaysian criminal courts

Men and women sentenced to death live in very harsh conditions: protracted solitary confinement, airless cells, limited lighting, lack of occupation, lack of hope for the future, limited contact with outside visitors, etc. Scientific studies have reported that the conditions of detention of persons awaiting execution, particularly solitary confinement, produce a higher rate of psychiatric and psychological health problems than “normal” imprisonment. These problems may include paranoia, visual and auditory hallucinations, self-mutilation, suicidal thoughts,²⁵² debilitating depression,²⁵³ anger, bitterness, boredom, stress, loss of a sense of reality and impaired concentration.²⁵⁴ These psychological illnesses are known as the *“death row syndrome”*.²⁵⁵ At the international level, while detention on death row for more than 10 years does not in itself constitute an act of torture or a cruel, inhuman or degrading treatment or punishment, the prolonged detention aggravated by harsh conditions of detention is a violation of the prohibition of torture.²⁵⁶

252 Haney C., “Mental Health Issues in Long-Term Solitary and ‘Supermax’ Confinement”, *Crime and Delinquency*, 49: 124, 2003.

253 Abramson L., Seligman M., Teasdale J., “Learned Helplessness in Humans: Critique and Reformulation”, *Journal of Abnormal Psychology*, 87: 49, 1978.

254 Scharff-Smith P., “The Effects of Solitary Confinement on Prison Inmates. A Brief History and Review of the Literature”, *Crime and Justice*, Vol 34, No. 1. The University of Chicago Press, 2006, p. 476 and p. 488.

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256 Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *op. cit.*, 2012, para. 78: *“The anxiety created by the threat of death and the other circumstances surrounding an execution, inflicts great psychological pressure and trauma on persons sentenced to death. A prolonged stay on death row, along with the accompanying conditions, constitutes a violation of the prohibition of torture itself.”*

Religious counsellors working in prison reported several cases of people having hallucinations, seeing ghosts. Suicide attempts by people sentenced to death have been reported by prisoners interviewed. Ali, who has been on death row for 12 years, has tried to hang himself twice. He indicated that other prisoners have also attempted suicide. This phenomenon was also highlighted in SUHAKAM's 2017 report: *"During a particular visit, the Commission observed a female death row prisoner who repeatedly hit her head against the cell door."*²⁵⁷ Ali reported that detainees develop different kinds of psychiatric disorders. He gave an example: *"One person puts his faeces on the wall. I do not know why."* According to the prisoners interviewed, access to mental health treatment and psychiatric care is non-existent, although Regulation 241(1) of the Prisons Regulations provides that the Medical Officer shall carefully observe the mental state of prisoners condemned to death. The only support they receive is religion counselling.

Summary of conditions of detention of death row prisoners

- Confinement 23 hours per day in individual cells;
- Limited human contact;
- Low access to fresh air and natural light;
- Lack of privacy;
- Poor access to medicine;
- Exclusion from rehabilitation or training programmes;
- Discussions with religious organisations for those who speak Bahasa;
- No psychological support or psychiatric care;
- Inhumane disciplinary measures for persons in distress
- For foreigners: no access to books in foreign languages, limited visits and phone calls;
- Blanket categorisation of death row prisoners, regardless of their age, gender, health situation, type of offence, behaviour.

²⁵⁷ SUHAKAM, *op. cit.*, 2017, p. 74.

**FAMILIES OF PEOPLE
SENTENCED TO DEATH:
THE STRUGGLE**



"I have no tears left to cry"

— Anna, wife of a man sentenced to death

Criminal trials and prolonged detention have serious consequences for the families of those sentenced to death. On a financial level, some have had to borrow money, sometime illegally, to pay for the lawyers' fees. Many have been left with no resources. During detention, those who remain "outside" must also obtain resources to take care of their family alone. Anna, whose husband has been on death row for 10 years, explained: *"I have to fight on my own to raise my children. I suddenly became the sole breadwinner, to give my children a good education."* Chan's son was only 19 when he was arrested, 10 years ago: *"I only had my son, as the sole source of income of the family. I was so devastated when he was arrested at 19. Now I go back and forth to the prison, and I survive without him."* Travel to and from prison is quite expensive, as families do not necessarily live close to the prison. Fatimah, the mother of a man who has been sentenced to death 12 years ago, stated: *"I have nothing else but him. I work every day as a maid in other people's house. When I go from my house to the prison, it takes almost 2 hours."* Separation is not just a question of distance between the prison and the family home. The transparent glass window in the visiting room that separates prisoners from their families also creates a lack of body contact. For Chan, it's one of the hardest things to live through. She said: *"I just wish I could hug my son. It has been so long since I have hugged him."*

Many people find it difficult to accept befriending a person who has a relative under a death sentence. In some families, relatives do not want to hear about the convicted person. A woman whose brother was sentenced to death over 13 years ago reported that it took her 2 years to visit him for the first time. She said, *"My family does not accept this situation. My husband doesn't like to talk about [my brother], my child either."* For some, it is as if the family was tainted by the conviction of one of its members, and this also falls on the children. Anna explained that many people do not treat them as they used to: *"Some people treat us like we are not from a good family. I know that my children are struggling in school after their father has been behind bars."* Nayla, the sister of a man sentenced to death in 2005, said she feared that the people in her office were aware of her situation. She does not want to talk about it at work, although her anxiety sometimes affects her performances.

A lot of parents give up. Mohamed is the brother of a man on death row for 20 years. He explained that his mother told him: *"There is no need to fight, because it's been a long time and there was nothing we could do."* Fatiah, whose son was sentenced to death in 2003, confirmed: *"My family is so emotionally affected. My health is not good at all. However, since I met this [woman working in this NGO], I have been slowly struggling with emotions. She advised me to fight for my son. She told me that few Malaysians want to fight for their family, especially those on death row."*

After so many years in prison, the families are still hoping. Some hope for an answer to the clemency application. Fatiah, desperate for information regarding her son's clemency application, said: *"He has been detained since 2003. I am old and I do not have much time to live. I would just like some information about the progress of our request for clemency."* Others wish for abolition by the government, whose statements initially gave rise to new hope. With the government's backtracking, this hope has turned into a new anxiety. All are waiting to find out whether their relative will have a new chance to live and rehabilitate themselves. Fatimah stated: *"My son has been behind bars long enough, almost 12 years. I believe he has changed, and he no longer wants to do anything that is related to crime. My wish is that he can get out and start a new life."*

RUSHED AND SECRETIVE EXECUTIONS



“... he be hanged by the neck till he is dead...”
— Criminal Procedure Code, Article 277

The Criminal Procedure Code provides that the execution is by hanging.²⁵⁸ Other provisions related to executions are included in Regulation 182 of the Prisons Regulations, but this regulation does not provide much detail. It provides that the persons in charge of the executions “*Shall make themselves familiar with the instructions*”²⁵⁹ and must ensure that executions are “*Carried out with efficiency and despatch, in accordance with the instructions*”, and that the gallows and all appliances “*Are maintained in good condition and order.*”²⁶⁰ Moreover, Regulation 182(4) provides that only a limited number of persons shall attend the executions: the officer-in-charge, the medical officer and other prison officers and staff.

There is no specific prison where all executions take place in the country. The last executions before the official moratorium took place on 24 May 2017 at 5.30am in Sungai Buloh prison. Two people were hanged: one person whose identity was not known, and Yong Kar Mun, a 48-year-old man, a former mineral water vendor, convicted of discharging a firearm during a robbery, an offence carrying the mandatory death penalty. Yong Kar Mun had been on death row since March 2009. Prior to this, Rames and Suthar Batumalai, two brothers convicted of murder in 2010 – an offence which also carries the mandatory death penalty – were hanged in Kajang prison, despite a clemency appeal pending before the Negri Sembilan Pardons Board. Executions while legal action and clemency procedures are ongoing are prohibited by international standards, including by UN Death Penalty Safeguards No. 8, according to which the death penalty cannot be carried out “*Pending any appeal or other recourse procedure or proceeding relating to pardon or commutation of the sentence.*”

In those three most recent cases, families were provided either partial or false information about the day of the execution. While executions usually take place on Friday at dawn,²⁶¹ the Batumalai family was first informed that the brothers would be executed on 17 March (a Friday), before finally being informed less than 24 hours before that

258 Criminal Procedure Code, Article 277.

259 Prisons Regulations 2000, Regulation 182(1).

260 *Ibid.*, Regulation 182(2).

261 SUARAM, *op. cit.*, 2019, p. 133.

the men would be hanged on 14 March 2017 (a Tuesday).²⁶² Yong Kar Mun was executed 2 days after his family received a letter from the authorities informing them that the death sentence would be carried out “*soon*”, without a specific date.²⁶³ The practice of “last-minute” notification was already denounced in 2016, when the families of three men were warned to visit their relatives only 2 days before their execution.²⁶⁴ The failure to inform death row prisoners in a timely manner of the date of their execution has been identified by the Human Rights Committee as a form of ill-treatment, which renders the subsequent execution contrary to the prohibition of torture and cruel, inhuman or degrading treatment or punishment.²⁶⁵ International and national human rights institutions and NGOs have constantly denounced the secret manner in which executions are carried out in Malaysia.²⁶⁶

262 UN Human Rights Office, “UN Human Rights Office Condemns Secretive Executions of Two Brothers in Malaysia”, 2017, available at: <https://bangkok.ohchr.org/news/press/Malaybrothers.aspx> (last visited on February 13, 2020).

263 Amnesty International, “Two Men Hanged in Secretive Executions”, Urgent Action, [ASA 28/6343/2017], 2017.

264 SUARAM, *op. cit.*, 2017, p. 55.

265 Human Rights Committee, *op. cit.*, 2018, para. 40.

266 UN Human Rights Office, *op. cit.*, 2017.

CONCLUSION

The objective of this report was to inform policy makers and criminal justice system actors about the situation of men and women sentenced to death in Malaysia. This report has shown that, historically, since the British colonisation, the use of the death penalty in Malaysia has been linked to the application of special legislations. Excluding the situation of persons sentenced to death for murder, almost all persons executed have been convicted of security offences (Emergency Regulations from 1948 to 1960 under British colonisation, then under ISA and ESCAR from 1976 to 1993) or for drug trafficking (Dangerous Drugs Act since 1975). Similarly, the presumption of guilt in death penalty cases and the imposition of the mandatory penalty date back to the British rule and the Malayan Emergency, a particularly trying period in the country's history. Yet these violations of the fundamental principle of the right to a fair trial are still applied today in trials with sometimes irrevocable consequences.

Although the authorities recognised the ineffectiveness of the death penalty in the fight against drug offences as early as the late 1990s, 72% of the 190 death sentences handed down by Malaysian courts in 2018 are related to drug offences. At the time of writing in March 2020, 1,280 women and men are held on death row following their conviction in trials that fail to meet international standards. 1,280 women and men who are confined in extreme isolation, with no activities day and night other than thinking about their lack of hope. 1,280 men and women who have been left out of the prison reform being developed. Some have been on death row for over 20 years. Apart from the visit of some religious organisations, no psychological support is given to them, even though the detainees on death row have specific pathologies, including depression or hallucinations, and many have attempted suicide. It must be recalled that every death sentence affects parents, spouses, sisters, brothers, and children. For prisoners and families, the uncertainty and the duration of the clemency process are unbearable.

In 2018, the Pakatan Harapan party was elected on the basis of promises to repeal repressive laws and abolish the mandatory death penalty. However, the party partially retracted its position, finally

considering only the withdrawal of certain provisions providing for the mandatory death penalty. In March 2020, at the time of writing this report, the appointment of a new Prime Minister supported by UMNO created great uncertainty about the reforms undertaken by the previous government, particularly with regard to the conditions for abolition.

In view of its knowledge of the ineffectiveness of death sentences in combating crime, the very high risk of miscarriages of justice in criminal proceedings, and the atrocious detention conditions of those sentenced to death, Malaysia must take a firm stand in favour of the total abolition of the death penalty.

AFTERWORD

Roger Hood and Saul Lehrfreund²⁶⁷

This important study comes at a time when Malaysia appears to be ready to end years of indecision and dispute over whether or not to abolish the death penalty completely, or at least to introduce significant reforms that would substantially reduce its legal scope, the imposition of death sentences and executions, and the number of people subject to captivity on “death row”.

A bold decision to abolish capital punishment altogether in all circumstances and for all crimes would send a powerful signal to other countries in Asia.

Although executions had been regularly carried out in Malaysia in the 1980s and 1990s (an average of 17 a year between 1980 and 1999), the 21st century began with a substantial decline in their frequency, which this report associates with Malaysia’s economic development and greater involvement in international affairs which sparked an awakening of concern for human rights and democratic values. Yet, Malaysia remains one of the few nations not to have ratified the International Covenant on Civil and Political Rights (ICCPR), even though its government has claimed that its use of the death penalty complies with international human right law, in particular with Article 6 of the ICCPR. Yet an appraisal of the standards enshrined in the ICCPR reveals that this is far from being the case. Malaysian law retains the death penalty for 32 offences, and it is still the mandatory punishment for 12 of them: it is imposed almost exclusively for murder; for trafficking in narcotics in various amounts depending on the drugs concerned (with a recently introduced exception); and for intentionally discharging a firearm while committing various crimes, whether or not any physical harm is caused.

Only 22 executions were carried out in the first decade of the 21st century, including four in 2006 for waging war against the King. Indeed, there were several years in which no one was put to death. For instance, there were no executions between 2003 and 2005 and in 2007. Although 108 people were sentenced to

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death in 2011 – about two-thirds for drug-related offences – no one was executed that year. Between 2005 and 2017, only three of the persons executed had been convicted of a drug trafficking offence. In these circumstances, the number of prisoners on death row steadily increased: according to this report, from 245 persons in 1996 to 1,280 in 2019.

It is now 14 years since, in 2006, the Malaysian Bar Council unanimously called for complete abolition of the death penalty, which was welcomed and endorsed by the then Minister of Justice, the Human Rights Commission of Malaysia (SUHAKAM, which had been established in 2000), and many other sympathetic NGOs, such as HAKAM, and subsequently ADPAN. This internal pressure for change was reflected at the international level, when Malaysia's representative to the UN Human Rights Council announced in 2009 that his country was considering replacing the death penalty with life imprisonment. In 2013, The Death Penalty Project, with the support of the Bar Council and the Human Rights Commission, published a study of public opinion aimed to assess the level of support for the death penalty and, in particular, for the mandatory death penalty.

In 2014, one of us (Roger Hood) was invited by the Attorney General to act as a consultant on a review of death penalty laws and practices in Malaysia, commissioned by the Cabinet, entitled *The Death Penalty in Malaysia: the Way Forward*. It was carried out by The International Centre for Law and Legal Studies (known as I-CeLLs), a body set up within the Attorney General's Chambers. Although its completion was announced by the Minister of Justice, Nancy Sukri, as a "positive sign" at the opening session of the 2016 World Congress Against the Death Penalty in Oslo, it has never been published so as to be available for public discussion.

It clearly had no immediate impact on the government, for in 2016, nine people were executed (the highest number in this century) and at least four more were put to death in 2017. However, in that year, the Malaysian Parliament approved an amendment to the Dangerous Drugs Act 1952 to remove the necessity of imposing a mandatory death penalty for drug trafficking in circumstances where a person convicted of transporting, sending or delivering a prohibited substance had cooperated with law enforcement to disrupt drug trafficking activities. This came into effect in March 2018, but appears to have had little impact on the total number of death sentences imposed by the courts. The report on *Death Sentences and Executions in 2018*, prepared by Amnesty International, revealed

that 190 people had been sentenced to death and that 136 of them (72%) had been convicted of a narcotic-related offence. Altogether the proportion of those under sentence of death in Malaysian prisons who had been sentenced for drug trafficking was virtually the same (72%) in 2018 as in 2012.

The case for abolishing the death penalty completely for drug trafficking offences, in line with international standards, is now overwhelming, especially given the findings of the Malaysian survey of public opinion mentioned above. It would cut death row by almost three-quarters and end for such prisoners the inhumane and painful uncertainties, the deplorable conditions of segregation, the lack of individualised treatment, work or education, and other injustices highlighted in this report and in Amnesty International's recent report, *Fatally Flawed: why Malaysia Must Abolish the Death Penalty*. The number of persons sentenced to death has apparently increased over this 20-year period, although the actual figures for some years are unknown. The number of 190 death sentences imposed in 2018 in a population of 32 million (5.9 per million) was almost twice as high as in Singapore (3.0 per million) in the same year. In fact, the number of death sentences in Malaysia was the sixth highest of all 55 countries in the world that imposed a death sentence in 2018. And because it has continued to impose death sentences at such a rate, while drastically curbing the number of executions, the number of death row prisoners in Malaysia is now the fourth highest (equal to Sri Lanka) among the 21 death-sentencing nations of the Asia-Pacific region.

The disjunction between law and practice was evident to the new coalition government that came to power in May 2018. Almost immediately, on 2 July 2018, it established a moratorium on executions; and on 10 October 2018 – marking World Day Against the Death Penalty – the new Minister of Law, Datuk Liew Vui Keong, announced that the death penalty was to be abolished and replaced by a maximum sentence of 30 years' imprisonment. Furthermore, the Malaysian government for the first time voted in favour of the resolution brought before the UN General Assembly in December 2018 to establish a universal moratorium on death sentences and executions. In contrast with the past, it also withdrew its signature from the *Note Verbale* sent to the Secretary-General dissociating itself from the resolution.

Regrettably, the government was unable to agree with the Minister that the time was ripe for total abolition, arguing that it was faced

with strong objections and threats of demonstrations from various bodies, including victims' organisations, which claimed that complete abolition would undermine law and order and weaken the deterrent effect of the death penalty. This report from ECPM mentions that "several surveys [...] were carried out by media, with percentages of people opposed to abolition [...] varying from 45% to 82%." This is surely an indication of the unreliability and lack of sophistication of most opinion surveys on this subject, especially when such data give no indication of how *strongly* people would either support or reject abolition of capital punishment. In fact, some public backlash, often fuelled by the media, is inevitable when any Government declares its intention to abolish the death penalty, although there is no example known to us where it has led to a major social crisis. On the contrary, wherever abolition of the death penalty has been achieved, it has come to be accepted in time by the general population, and certainly by new generations, as a further step by enlightened government to protect all its citizens from excessive and cruel punishment.

A Special Committee for Alternative Sentencing was set up to try to find a solution by introducing a discretionary death sentencing system for all capital crimes that are currently punishable only by a mandatory death sentence. This system would presumably aim to ensure that judges use their discretion to ensure that only those guilty of the most egregious crimes are sentenced to death. After a four-month inquiry the Committee reported on 11 February 2020. Of course, we recognise that the introduction of judicial discretion in place of mandatory sentences would be preferable to the *status quo* in, so far as it should reduce the number of death sentences imposed and subsequent executions. However, this solution goes not nearly far enough to meet international human rights standards, which make it clear that *pending* the complete abolition of capital punishment, the death penalty can only be retained and imposed as an exceptional measure for the most serious offence of culpable homicide. The death penalty should therefore be immediately abolished for all other crimes.

But even the introduction of a discretionary system of death sentencing will, in our opinion, inevitably lead to arbitrariness and discrimination in decisions about who, and in what circumstances, "deserves death", especially given the fact that mental abnormality or incapacity is frequently associated with the crimes that arouse great public alarm and condemnation. Such an attempt to reform death penalty legislation was undertaken in the United Kingdom

in 1957, defining a class of "capital murder" subject to capital punishment. Once implemented, it proved so arbitrary and unpopular and brought the criminal justice system into such disrepute that it was abandoned when capital punishment for murder was completely abolished in 1965. The creation of a defined class of capital murder in states of the USA has been under fierce attack on similar grounds and, along with concerns about wrongful convictions, has led the legislatures of 10 states to abolish the death penalty since 2004. Attempts by the Supreme Court of India to define murders as falling into the category of the "worst of the worst", in which the offender is no longer "worthy" of the right to life, have led to such a degree of arbitrariness and dispute that it has been described as a "lethal lottery". It was rejected by the Indian Law Commission, which recommended in 2015 that the death penalty be abolished for all ordinary crimes. There is no principled method for removing such arbitrariness and discrimination from capital sentencing and even the most constrained capital sentencing systems have shown that they have not been able to overcome the fatal flaw of arbitrariness. An element of subjectivity is inevitable in the decision-making of prosecuting authorities in deciding when the death penalty should be applied and in the judge's decision as to whether the sentence should be imposed.

We live in hope that Malaysians who recognise the inhumanity, cruelty, inevitable arbitrariness and injustices of a merciless punishment will be able to persuade political leaders to acknowledge that attempts to construct legal definitions of who deserves to die have always led to discriminatory injustices and human rights abuses. The death penalty will eventually be abolished. Why procrastinate any longer? Why not now?

RECOMMENDATIONS

The recommendations of this study are based on the interviews and the research carried out.

RECOMMENDATIONS TO MALAYSIA

Commit to the abolition of the death penalty

- Ratify the ICCPR and its Second Optional Protocol aiming at the total abolition of the death penalty
- Commute the sentences of all people sentenced to death to terms of imprisonment
- Call on judges to stop issuing the death penalty

Immediately bring all national laws and regulations in line with international standards

- Remove from the scope of the death penalty all offences that are not the “most serious crimes”, including drug trafficking, with a view of eliminating the death penalty from all domestic laws and regulations
- Immediately remove the presumption of guilt from the Dangerous Drugs Act and the Firearms (Increased Penalties) Act
- Amend the legislation so that the more lenient laws are applied retroactively
- Review all cases where the laws failed to meet international standards

Prevent torture and ill-treatment during police investigation

- Ratify the Convention Against Torture and its Optional Protocol
- Define torture in the national legal framework and ensure that its definition complies with the Convention Against Torture
- Train police forces on the absolute prohibition of torture and ill-treatment
- Amend the legislation to ensure that all persons accused are brought promptly before a judge

Improve the rights of all Malaysian communities and of foreign nationals during the criminal process

- Guarantee the presence of an interpreter for all people who do not understand Bahasa Malaysia, during the investigation phase and throughout the criminal process
- Ensure that persons sentenced to death can effectively contact their diplomatic representatives, as early as the investigation phase, if they wish to do so

Ensure transparency on the clemency processes

- Take measures to ensure that the clemency process is known by all death row convicts and their families
- Publish the criteria used for the review of clemency applications
- Establish precise rules on the functioning of the Pardons Boards, including regular meetings and an obligation to publish their findings
- Acknowledge receipt of clemency applications as soon as possible
- Inform death row prisoners, their families or legal counsel of the estimated length of time it will take to process their clemency requests

Specifically address the death row population in prison reform and amend the Prisons Regulations to comply with international standards

- Amend the Prisons Regulations to prohibit solitary confinement in all cases, including as disciplinary measures, and limit disciplinary sanctions to sanctions which comply with international standards on the treatment of detainees
- Ensure that all prisoners, including death row prisoners, are allowed to leave their cells for several hours a day
- Allow access to social, cultural, education and recreational activities for all prisoners sentenced to death
- Stop the practice of blanket categorisation of death row detainees: treat death row prisoners according to their individual situations (behaviour, type of offence, mental state, age, etc.)
- Modify the infrastructure of the cells to allow the entrance of fresh air and natural light
- Modify the structure of the cells so that it respects the privacy of prisoners
- Provide psychological support and psychiatric health care by qualified professionals to men and women on death row who need it

- Place those with psychiatric disorders in institutions appropriate to their state of health
- Increase the number and length of visits per week
- Guarantee that foreigners are able to call their families abroad and are not restricted in their access to books in their own languages
- Facilitate the access of all foreigners to their diplomatic representations
- Increase the healthcare budget to provide adequate medicine to all prisoners, including death row prisoners
- Establish a gender-specific health care framework, including, but not limited to, access to a gynaecologist and sufficient sanitary pads
- Increase the food budget to improve the quantity and quality of food provided, and allow prisoners to receive food from the outside
- Ensure that hygiene products (soap, shampoo, toothbrush, toothpaste, kole, etc.) are available in sufficient quantity to all men and women sentenced to death
- Allow unrestricted access to NGOs and humanitarian organisations to all prisons and to all prisoners, to enable them monitor prison conditions and support prisoners

Publish data on the death penalty

- Every year, publish relevant data, including but not limited to: the number of people sentenced to death, the nature of the offences for which they have been sentenced, the number of people sentenced to death being detained, their nationality, the place where they are being detained, the number of people sentenced to death who have died in prison, the reason for their death, the number of death sentences commuted or confirmed by the Federal Court, and the number of people sentenced to death who have been granted clemency

RECOMMENDATIONS TO SUHAKAM

Strengthen the monitoring of prisons

- Continue to organise regular visits to places of detention, and pay particular attention to those sentenced to death, including foreigners
- Publish yearly reports on the conditions of detention
- Continue to advocate for the ratification of international human rights instruments and the abolition of the death penalty

RECOMMENDATIONS TO THE ABOLITIONIST MOVEMENT

Increase the mobilisation of abolitionist actors

- Strengthen advocacy on conditions of detention of people sentenced to death
- Increase training and awareness raising on the conditions of detention and on the prohibition of torture and ill-treatment for several groups including prison staff, lawyers, civil society organisations, religious leaders and Parliamentarians
- Support men and women sentenced to death, particularly those more isolated such as foreign citizens, to write clemency applications

RECOMMENDATIONS TO ACTORS WORKING IN REGIONAL AND INTERNATIONAL DEVELOPMENT

Ensure high-level advocacy

- Advocate for the full abolition of the death penalty
- Advocate for the prevention of torture and ill-treatment and for the consideration of death row prisoners in the prison reform
- Advocate for the access of NGOs and humanitarian organisations in prison settings.

APPENDIX

APPENDIX 1: RATIFICATION STATUS OF HUMAN RIGHTS INSTRUMENTS (MALAYSIA)²⁶⁸

Treaty	Signature date	Ratification date, Accession date (a)
CAT – Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment		
OPCAT – Optional Protocol of the Convention Against Torture		
CCPR – International Covenant on Civil and Political Rights		
CCPR-OP2-DP – Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		
CED – Convention for the Protection of All Persons from Enforced Disappearance		
CEDAW – Convention on the Elimination of All Forms of Discrimination Against Women		5 July 1995 (a)
CERD – International Convention on the Elimination of All Forms of Racial Discrimination		
CESCR – International Covenant on Economic, Social and Cultural Rights		
CMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		
CRC – Convention on the Rights of the Child		17 Feb. 1995 (a)
CRC-OP-AC – Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict		12 April 2012 (a)
CRC-OP-SC – Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography		12 April 2012 (a)
CRPD – Convention on the Rights of Persons with Disabilities	8 April 2008	19 July 2010

²⁶⁸ Source: *United Nations Human Rights - Office of the High Commissioner*, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=105&Lang=EN (last accessed: 23 December 2019).

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ISOLATION AND DESOLATION

CONDITIONS OF DETENTION OF PEOPLE SENTENCED TO DEATH

MALAYSIA

“Prolonged detention of individuals sentenced to death is inhumane and is detrimental to their mental health.” - Dr Suarn Singh, former Head of Psychiatric Services of the Ministry of Health of Malaysia and psychiatry expert before Malaysian criminal courts.

“During the day, I am allowed to leave the cell for a period of time, sometimes 45 minutes, sometimes more than that. But we will still be in the building, in the main hall. I just walk around. » - Michelle, Chinese woman sentenced to death in 2015.

This book is derived from a fact-finding mission carried out in Malaysia from July 2019 to February 2020 by ADPAN and ECPM (Together Against the Death Penalty). It was led by an ADPAN member and two lawyers from the Malaysian Bar Council, who conducted semi-directive individual interviews with death row prisoners, relatives of people sentenced to death, faith-based organisations providing religious counselling in prison, lawyers and psychiatrists in Malaysia. Carole Berrih, the author of the report, accurately uses all the accounts collected and puts them in the context of the country’s criminal and penitentiary systems.

This report is part of the “Fact-Finding mission on death row” collection which aims to make an assessment of the living conditions on death row in various countries across the world. The goal is both to report on the reality of death row and to engage public opinion.

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