



MALAYSIA: ACTION NEEDED TO MAKE DEATH PENALTY BILL MEANINGFUL OPPORTUNITY FOR CHANGE

Malaysia is among the minority of countries – 23 in 2016 – that still execute people.¹ Malaysia is also one of the only seven countries in the world where people were executed for drug-related offences last year, according to available information.² While figures on the country's resort to the ultimate cruel, inhuman and degrading punishment are not publicly available on a regular basis, on 23 March 2017 Minister in the Prime Minister's Department and de facto Law Minister Azalina Othman Said indicated in response to a parliamentary question that 799 out of 1,122 people on death row had been convicted of and sentenced to the mandatory death penalty for drug trafficking, including 416 foreign nationals. International law and standards require countries that are yet to abolish the death penalty not to use it for drug-related offences and to end its mandatory imposition for all offences.

Amnesty International is deeply concerned at the proposed amendments to the Dangerous Drugs Act, 1952, which the Government of Malaysia introduced in Parliament on 23 November 2017.³ We are alarmed not only at the fact that these fail to address the violations of international law and standards in the existing laws governing the application of the death penalty in the country, but also at the fact that they introduce new troubling features in Malaysia's administration of justice. The proposed amendments appear to closely follow the reforms enacted in Singapore in 2013, the impact of which Amnesty International assessed in its recent report "[Cooperate or Die – Singapore's flawed reforms to the mandatory death penalty](#)".⁴

We have long been waiting for reforms to Malaysia's death penalty laws, which the Government first announced in October 2012. We believe that the proposed amendments to Section 39(B) of the Dangerous Drug Act, 1952, could – if significantly altered from the current proposal – constitute a meaningful opportunity for positive human rights change, pending full abolition of the death penalty. The Malaysian authorities should amend the proposed measures to ensure the concerns outlined below are promptly addressed as a matter of urgency.

Amnesty International opposes the death penalty unconditionally in all circumstances and campaigns for the establishment of a moratorium on executions and commutation of death sentences as first steps towards full abolition of the death penalty.

SUMMARY OF OUR CALLS :

- Pending full abolition of the death penalty, we urge the Malaysian authorities to ensure that new legislative amendments on the death penalty abolish the mandatory death penalty for all crimes, allowing judges to consider the circumstances of the offence and of the defendants at sentencing.
- Pending full abolition, Malaysian authorities should remove provisions that allow for the issuing of "certificates of assistance" as a prerequisite for judicial sentencing discretion from the proposed amendments.

¹ Amnesty International, "Death sentences and executions in 2016" (ACT 50/5740/2017), April 2017.

² The other countries are China, Indonesia, Iran, Saudi Arabia, Singapore and Viet Nam. Amnesty International, "Death sentences and executions in 2016" (ACT 50/5740/2017), April 2017.

³ Introduced on 23 November 2017.

⁴ Amnesty International, "[Cooperate or Die – Singapore's flawed reforms to the mandatory death penalty](https://www.amnesty.org/en/documents/act50/7158/2017/en/)" (ACT 50/7158/2017), 11 October 2017, available at <https://www.amnesty.org/en/documents/act50/7158/2017/en/>

- Pending full abolition of the death penalty, Sections 36 and 37 of the Dangerous Drugs Act, 1952 – which mandate that defendants found with specified amounts of certain drugs, or even simply in possession or in control of objects or premises in which prohibited substances are found, are guilty of drug trafficking – should be repealed as part of the reforms.
- Amnesty International renews its calls on the Malaysian authorities to immediately stop using corporal punishment and repeal all legal provisions allowing its use.

As currently proposed, amendments to Section 39(B) of the Dangerous Drug Act, 1952 would introduce sentencing discretion only for the very narrow circumstances of carrying, sending or delivering prohibited substances in cases where the public prosecution certifies that the individual has assisted an enforcement agency in disrupting drug trafficking activities. The mandatory death penalty is retained for all other instances.

The mandatory imposition of the death sentence is prohibited under international law.⁵ The UN Human Rights Committee has stated that “the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life [...] in circumstances where the death penalty is imposed without any possibility of taking into account the defendant’s personal circumstances or the circumstances of the particular offence”.⁶ In addition, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that “[the] mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances, is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment”.⁷

The impact of the mandatory death penalty on Malaysia’s administration of justice has been documented in drug-related cases as well as murder cases. Two recent cases Amnesty International has been campaigning on are emblematic of the importance of giving sentencing discretion to judges so that they can consider the circumstances of the crime or of the defendants as mitigating factors before imposing the ultimate sentence of death.

- In December 2016 the Sultan of Selangor granted the pardon request of **Shahrul Izani bin Suparman**, commuting his death sentence to life imprisonment. He had been convicted and sentenced to the mandatory death penalty on 8 December 2009, having been found guilty of drug trafficking after he was caught in possession of 622 grams of cannabis –his first offence– six years earlier, when he was 19 years old.
- **Hoo Yew Wah** is currently on death row at Bentong prison, Pahang state. He left school at the age of 11 and later moved to Kuala Lumpur, where he worked in a street restaurant as cook. In March 2005, at the age of 20, he was found in possession of methamphetamine, automatically presumed to be trafficking drugs and later convicted and sentenced to the mandatory death penalty. He is now 32 years old and has fully repented for his offence. He was convicted of drug trafficking on the basis of a statement he made at the time of arrest in Mandarin, without a lawyer present. He contested the content of the statement as written up by the police at trial and on appeal. He also held that on the day after his arrest on 1 April 2005, during his detention at the District Police Headquarter in Johore, the police broke his finger and threatened to beat his girlfriend to make him sign this statement. While these concerns were raised before the courts, the judges dismissed them and upheld his conviction and death sentence. International law absolutely prohibits the use of torture or other ill-treatment, as well as the use of coerced, self-incriminating statements as evidence in trials.

In its report [Cooperate or Die](#), Amnesty International found that in Singapore the mandatory death penalty continues to be extensively imposed, even after the enactment of legislative reforms in 2013 that introduced some sentencing discretion. According to figures gathered by the organization, of the 66 death sentences imposed in Singapore since between January 2013 and September 2017 for drug trafficking, more than half were mandatory death sentences.

Pending full abolition of the death penalty, we urge the Malaysian authorities to ensure that new legislative amendments abolish the mandatory death penalty for all crimes, allowing judges to consider the circumstance of the offence and of defendants at sentencing.

⁵ Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, UN doc. A/HRC/14/24, 20 May 2010, para.51.

⁶ Human Rights Committee, *Pagdayawon Rolando v Philippines*, Communication No. 1110/2002, UN document CCPR/C/82/D/1110/2002, 8 December 2004, para. 5.2.

⁷ Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, UN doc. E/CN.4/2005/7, 22 December 2004, para. 80.

REMOVE THE REQUIREMENT TO OBTAIN A “CERTIFICATE OF ASSISTANCE” AND GRANT JUDGES FULL SENTENCING DISCRETION

The proposed amendments to Malaysia’s Dangerous Drugs Act, 1952, would introduce the requirement of a certificate that those convicted of transporting drugs have assisted law enforcement agencies in disrupting drug trafficking activities in order for judges to have discretion in meting out their punishment. The decision to issue the certificate of assistance would be at the sole discretion of the public prosecution and could only be appealed on the ground that it was not made in good faith. This is problematic on a number of levels.

1. Most importantly, the introduction of the certificate of assistance requirement would mean that the ultimate decision on sentencing lies not in the hands of the court but with the prosecutor – if s/he does not provide a certificate of assistance, the court is deprived of any discretionary powers and must sentence the accused to death. This not only narrows the court’s discretionary powers considerably, it also violates the right to a fair trial as it places life and death decisions in the hands of an official who is neither a judge nor a neutral party in the trial and who should not have such powers. This provision breaks down the clear separation that must exist between prosecution and court. The principle of “equality of arms,” namely the equal powers of prosecution and defence before the courts, is abandoned.⁸
2. The right of those facing the death penalty to appeal to a higher court against their conviction and sentence is guaranteed under international law and the limitation of grounds of appeals against the decision on the certificate of assistance to malicious prosecution significantly impairs this right.
3. As proposed, the process around the decision to issue a certificate of assistance and the reasoning for it does not appear to be subject to any scrutiny. This in turn would not allow prisoners and their legal representative to access any information that could enable them to appeal against the decision, even on the only ground available to them. This is all the more concerning in a country where lawyers are not always present from the time of arrest – the time when most statements are taken by the police from defendants, statements that are often used as evidence at trial to convict – and where the use of the death penalty is far from transparent.

In the report *Cooperate or Die*, Amnesty International highlights how in Singapore, where similar legislative reforms were enacted in 2013, lawyers and judges are only informed of the outcome of the decision on the certificate of assistance and are not given information as to how the assistance was tendered. The individual circumstances of the defendant or of the criminal conduct are not considered relevant for the decision on whether he or she has “substantively assisted” law enforcement. In death penalty cases, the consideration of these individual circumstantial factors constitutes an essential safeguard against the arbitrary deprivation of life.⁹

In addition, Amnesty International noted that those among the “couriers” who are lowest in the drug trafficking hierarchy and tend to be from poor and marginalised communities, are the least likely to be capable of providing meaningful “assistance” to the law enforcement, therefore more likely to face execution. One High Court Justice eloquently expressed the life and death implications of the law in a judgement delivered in 2016: *“He is not given a certificate of substantive assistance by the CNB. We do not know why. He might not have much assistance to give. He might have declined to assist, in which event, we do not know if his depressive illness had any connection to that attitude. [...] The language of the law here is precise and simple. Life, on the other hand, is not so.”*¹⁰

Pending full abolition, we urge the Malaysian authorities to remove from the proposed amendments provisions that specify that certificates of assistance are required as a prerequisite for judicial sentencing discretion.

REMOVE DEATH PENALTY FOR DRUG-RELATED OFFENCES

The proposed legislative reform retains the death penalty as either mandatory or discretionary punishment for drug-related offences. This is very concerning, as international law states that, in countries where it has not yet been abolished, the imposition of the death penalty must be restricted to “the most serious crimes”.¹¹ This restriction has been interpreted as referring to lethal crimes or other crimes with extremely grave consequences. The UN Human Rights Committee has stated that “[T]he expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.”¹² Most recently, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that the term ‘most serious crimes’ is restricted to

⁸ On equality of arms as a component of the right to a fair trial see for instance Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para.8.

⁹ See for instance Report of the Special Rapporteur on Extrajudicial, summary or arbitrary executions, UN doc. E/CN.4/2005/7, 22 December 2004, para.80.

¹⁰ *Phua Han Chuan Jeffery v Public Prosecutor*, [2016] SGHC 73.

¹¹ Article 6(2) of the International Covenant on Civil and Political Rights; Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted by the UN Economic and Social Council in resolution 1984/50 of 25 May 1984.

¹² Human Rights Committee, General Comment No. 6: The Right to Life, 27 July 1982, para. 6.

cases of intentional killing.¹³ In particular he has specifically underscored that “The death penalty may not be imposed for drug-related offences unless they meet this requirement.”¹⁴ [emphasis added]

Furthermore, research has to date failed to show that the death penalty has a unique deterrent effect against crime.¹⁵ Statistics from countries that have abolished the death penalty show that the removal of the death penalty has not resulted in an increase in the crimes previously subject to capital punishment.¹⁶ With regard to drug related crime, evidence instead shows that punitive policies have little influence on the prevalence of drug use.¹⁷ Research has found that countries that have enacted harsh laws and implemented widespread arrests and imprisonment of people who use drugs, even imposing death sentences, did not show lower levels of drug use and related problems than countries with more tolerant approaches.¹⁸ As the annual world drug reports published by the UN Office on Drugs and Crimes (UNODC) show, the number of people who use drugs globally has overall remained stable, while harsh punishments have not eliminated or reduced either drug trafficking or drug use.¹⁹ Use of illicit drugs in Asia, as suggested by UNODC, is at levels similar to or below the global average.²⁰ By contrast, even though the criminalization of drug-related conducts is intended to deter the use, possession and trafficking of drugs, evidence has shown that such policies encourage and perpetuate high-risk drug use behaviours.²¹ Moreover, these policies have promoted a stigmatized approach towards people who use drugs, usually considered to be ill or criminals, which has segregated and further marginalized this sector of the population.²²

In its report *Cooperate or Die*, Amnesty International’s analysis shows that, in cases where information is available, the burden of the death penalty appears to fall on those with less advantaged socio-economic backgrounds. In drug trafficking cases, a significant proportion of the prisoners are foreign nationals (23%), who might not speak the language fluently, and who are primarily dependent on the efforts of their embassies to advocate on their behalf. Most of those involved in drug trafficking cases were unemployed or unskilled workers. Several told courts they had financial troubles and said they had agreed to carry drugs as a way to overcome these struggles. The majority of those who were sentenced to death for drug trafficking since 2013 had been convicted of importing relatively small amounts of controlled substances – suggesting that they may only have held only low-ranking positions in drug trafficking rings.

Pending full abolition of the death penalty, we urge the Malaysian authorities to remove the death penalty as a sentencing option under the Dangerous Drugs Act of Malaysia 1952 in the context of the present reforms.

REMOVE PRESUMPTIONS OF DRUG POSSESSION AND TRAFFICKING

An issue of further concern for Amnesty International is the retention of the presumptions, under Section 37 of the Dangerous Drugs Act 1952, that defendants found with specified amounts of certain drugs, or even simply in possession or in control of objects or premises in which prohibited substances are found, are ‘automatically’ guilty of drug trafficking. In those circumstances, the burden of proof is shifted onto the defendant (Section 36), in violation of the presumption of innocence and other fair trial rights. Safeguard no.5 of the UN Safeguards guaranteeing protection of the rights of those facing the death penalty²³ state that “Capital punishment may only be carried out pursuant to a final judgement rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, *at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights*” (emphasis added). The imposition of the death penalty after violation of the right to a fair trial constitutes a violation of the right to life.²⁴

¹³ Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, UN doc. A/67/275, 9 August 2012, para. 35.

¹⁴ UN doc. A/67/275, para.122.

¹⁵ A comprehensive survey of research findings carried out by the UN on the relationship between the death penalty and homicide rates concluded: “[R]esearch has failed to provide scientific proof that executions have a greater deterrent effect than life imprisonment. The evidence as a whole still gives no positive support to the deterrent hypothesis”. Roger Hood, “The question of the death penalty and the new contributions of the criminal sciences to the matter: a report to the United Nations Committee on Crime Prevention and Control”, UN Doc. E/AC.57/1988/CRP.7, 1988. The survey was last reviewed and published commercially as Roger Hood and Carolyn Hoyle, “The Death Penalty: A Worldwide Perspective”, Oxford, Clarendon Press, Fourth edition, 2015. See also Franklin E. Zimring, Jeffrey Fagan, David T. Johnson, “Executions, deterrence and homicide: a tale of two cities”, 31 August 2009.

¹⁶ Franklin E. Zimring, Jeffrey Fagan, David T. Johnson, “Executions, deterrence and homicide: a tale of two cities”, 31 August 2009.

¹⁷ Degenhardt L, Chiu W-T, Sampson N, Kessler RC, Anthony JC, et al. “Toward a global view of alcohol, tobacco, cannabis, and cocaine use: Findings from the WHO World Mental Health Surveys.” *PLoS Med* 5(7) (2008), available at <http://journals.plos.org/plosmedicine/article?id=10.1371%2Fjournal.pmed.0050141>

¹⁸ Global Commission on Drug Policy. War on Drugs. June 2011, available at http://www.globalcommissionondrugs.org/wp-content/themes/gcdp_v1/pdf/Global_Commission_Report_English.pdf

¹⁹ For more information, see annual World Drug Reports produced by UNODC, available at <http://www.unodc.org/wdr2015/>

²⁰ United Nations Office on Drugs and Crime, “World Drug Report 2015”, May 2015, pp. 15

²¹ Joanne Csete et. al., “Public Health and international drug policy” in *The Lancet*. April, 2016

²² Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Mission to Viet Nam, 4 June 2012, UN Doc. A/HRC/20/15/Add.2, para. 45.

²³ Adopted by Economic and Social Council resolution 1984/50 of 25 May 1984.

²⁴ Human Rights Committee, General Comment No. 32-Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para.59; see also, *Shukurova v. Tajikistan*, Communications No. 1044/2002, views adopted 17 March 2006, UN Doc. CCPR/C/86/D/1044/2002, para. 8.5 (violation of art. 14 para. 1 and 3 (b), (d) and (g)); *Ruzmetov v. Uzbekistan*, Communication No. 915/2000, views adopted 30 March 2006, UN Doc. CCPR/C/86/D/915/2000, paras.7.3-

Pending full abolition of the death penalty, Amnesty International calls on the Malaysian authorities to repeal Sections 36 and 37 of the Dangerous Drugs Act of Malaysia 1952 as part of the proposed reforms and establish a moratorium on all executions as first steps towards abolition.

REMOVE WHIPPING AS ALTERNATIVE PUNISHMENT

As proposed, the amendments to Malaysia's Dangerous Drugs Act, 1952, would introduce life imprisonment and not less than 15 strokes of the whip as alternative punishment to the death penalty, in the limited circumstances where sentencing discretion is available. Whipping and other forms of corporal punishment constitute cruel, inhuman or degrading punishment, and often torture, which are prohibited under international law.²⁵

Amnesty International renews its calls on the Malaysian authorities to immediately stop using this vicious measure and repeal all laws allowing its use.

7.6 (violation of art. 14, para. 1, 2 and 3 (b), (d), (e) and (g)); *Chan v. Guyana*, Communication No. 913/2000, views adopted 31 October 2005, UN Doc CCPR/C/85/D/913/2000, para. 5.4 (violation of art. 14 para. 3 (b) and (d)); *Rayos v. Philippines*, Communication No. 1167/2003, views adopted 27 July 2004, UN Doc. CCPR/C/81/D/1167/2003, para. 7.3 (violation of art. 14 para. 3(b)).

²⁵ See Amnesty International, *Combating torture and other ill-treatment: A manual for action*, 2016, pp. 84-8, available at www.amnesty.org/ctm; and Amnesty International, "Malaysia: A blow to humanity: Torture by judicial Caning in Malaysia" (ASA 28/013/2010), 2010, available at: <https://www.amnesty.org/en/documents/ASA28/013/2010/en/>