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MALAYSIA: FIRST SIX MONTHS OF SENTENCING DISCRETION UNDERSCORE URGENT NEED FOR INDEFINITE EXTENSION OF MORATORIUM ON EXECUTIONS

Amnesty International's monitoring of judicial decisions in capital cases in Malaysia since the repeal of the mandatory death penalty demonstrates the urgent need for the authorities to indefinitely extend the 2018 official moratorium on executions.

Figures recorded by the organization during the first six months since Malaysian courts were granted full sentencing discretion depict a significant decrease in the number of death sentences imposed or upheld by the courts. However, the cases identified during this period also gave rise to concerns that systemic flaws and violations of international human rights law and standards continued to be present in Malaysia's use of the death penalty, as well as its alternatives, under the amended laws.

As the third session of the 15th Parliament begins on 26 February 2024, Amnesty International renews its call on the Government and Members of Parliament of Malaysia to, as a critical next step, indefinitely extend the official moratorium on executions, until the death penalty is fully abolished and all death sentences commuted.

Amnesty International opposes the death penalty unconditionally, for all cases and under any circumstances, as a violation of the right to life and as the ultimate cruel, inhuman and degrading punishment.

FIRST SIX MONTHS OF SENTENCING DISCRETION: OVERALL DECREASE IN USE OF THE DEATH PENALTY

The assessment of the outcomes in capital cases that Amnesty International has been able to record between 4 July 2023 and 4 January 2024 pointed to a significant reduction in the overall use of the death penalty by Malaysian courts.

On 4 July 2023, the Abolition of Mandatory Death Penalty Act 2023 (Act 846) came into effect, repealing the mandatory death penalty and introducing sentencing discretion for all offences for which it was applicable.¹ Since then, defendants convicted by High Courts of capital offences have had the possibility of being sentenced to death or to the alternative punishment of terms of imprisonment between 30 and 40 years and whipping;² or of having their existing death sentence commuted as part of their ordinary appeals before the Court of Appeal or Federal Court.

In addition to this, the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of The Federal Court) Act 2023 (Act 847), which came into effect on 12 September 2023, gave special jurisdiction to the Federal Court to resentence 1,020 individuals under the sentence of death or imprisonment for natural life who had already exhausted their ordinary judicial proceedings. According to figures released by Datuk Seri Azalina Othman Said, Minister in the Prime Minister's Department (Law and Institutional Reform), all 1,020 eligible individuals had applied for resentencing by 17 November 2023.³

Since 4 July 2024, Amnesty International has monitored decisions by the High Courts, Court of Appeal and Federal Court (ordinary and temporary jurisdiction) of Malaysia. The organization assessed judicial decisions published on the website of the judiciary and reports in national media;⁴ its representatives also observed resentencing hearings before the Federal

¹ Act 846 also repealed sentences to imprisonment for natural life.

² Under section 289 of the Criminal Procedure Code, men above the age of 50 and women are exempted from whipping.

³ The Star, "1,020 applications to review death penalty and life imprisonment cases filed", 17 November 2023, thestar.com.my/news/nation/2023/11/17/1020-applications-to-review-death-penalty-and-life-imprisonment-cases-filed-says-ramkarpal

⁴ As the date of written grounds is frequently different from the date of when the judicial decision was taken, Amnesty International has made a determination in each case based on available information to ensure that the sentencing took place after the coming into force of the legislative

Court under its temporary jurisdiction in 18 death penalty cases on 16 November and 6 December 2023. Additionally, Amnesty International requested official figures for 2023 from the court registrars, several members of the Cabinet of Malaysia and the Commissioner of Prisons. By the publication date of this statement, information was received only from the Registrar of the High Courts of Sabah and Sarawak.

Amnesty International reviewed decisions related to cases involving 139 individuals, which it could record between 4 July 2023 and 4 January 2024. Of this total, 42 people (28%) had their charges amended to a lesser offence or were acquitted, in the High Court or on appeal. In the remaining 97 cases, where defendants were convicted of a capital crime, **26 cases (27%) resulted in the death penalty** being imposed or upheld and a remarkable **71 cases (73%) in the alternative punishment** to the death penalty being imposed at the High Court or through commutation on appeal.⁵

The figures show that through the ordinary court process, the death penalty remained the preferred sentence for 26 out of 70 cases (37%). Discretion appeared to be embraced in favour of non-death penalty sentences proportionally more by appellate courts. The death penalty was imposed in **an alarming 44% of recorded cases before the High Courts, whereas this percentage reduced to 21% and 25% before the Court of Appeal and Federal Court (ordinary jurisdiction)**, respectively. Significantly, the offence of **murder** correlated to a higher number of cases where the death penalty was imposed or upheld – **18 out of 26 cases (69%)**.

All confirmed death sentences considered by the Federal Court under its temporary jurisdiction during the period under consideration were commuted.

Additionally, between 4 January 2024 and 10 February 2024, the Court of Appeal upheld three death sentences for murder, while the Federal Court under its temporary jurisprudence upheld four death sentences for murder, bringing the number of death sentences confirmed by the highest court to six – all for murder.

DRUG RELATED DEATH SENTENCES IN VIOLATION OF INTERNATIONAL LAW AND STANDARDS

Malaysia remains among the minority of countries that still imposes the death penalty for drug related offences.⁶ Among other restrictions, international human rights law provides that, in countries where the death penalty has not yet been abolished, its imposition must be restricted to the “most serious crimes”.⁷ The UN Human Rights Committee has stated that “Crimes not resulting directly and intentionally in death, such as [...] drug and sexual offences, although serious in nature, can never serve as the basis, within the framework of article 6, for the imposition of the death penalty”.⁸

Although it is encouraging that sentencing discretion has resulted in fewer death sentences, it remains greatly concerning that the death penalty continued to be imposed for drug trafficking, in violation of international law and standards. Amnesty International recorded that a **deeply worrying 31% of all cases** in which the death penalty was imposed or upheld (8 out of 26) between 4 July 2023 and 4 January 2024 related to this offence. Noticeably, the majority of the recorded drug-related death sentences (6 out of 8) were imposed by High Courts.

Additionally concerning is the retention of legal presumptions of guilt which have rendered trials unfair, as these contravene the right to be presumed innocent. These statutory presumptions, when invoked, allow the prosecution to automatically infer guilt when drugs are found in objects or premises that the defendants were responsible for or owned; or that a defendant had knowledge of the drugs when found in possession of them; or that a defendant intended to traffic the drugs when the amounts in their possession went beyond statutory minimums. When these legal presumptions are

amendments to repeal the mandatory death penalty on 4 July 2023. For the limited number of judgments for which it was not possible to determine the date of sentencing, Amnesty International resolved to exclude those with written grounds dated between 4 July and 4 October 2023. Four judicial decisions with undetermined sentencing date and written grounds dated between 5 October 2023 and 4 January 2024 have been included as part of this assessment.

⁵ Commutation is the process by which a death sentence is exchanged for a less severe sentence as prescribed by law, by the judiciary on appeal.

⁶ Amnesty International, “Unlawful and discriminatory – The death penalty for drug-related offences” (ACT 50/7213/2023), October 2023, [amnesty.org/en/documents/act50/7213/2023/en/](https://www.amnesty.org/en/documents/act50/7213/2023/en/)

⁷ Article 6(2) of the International Covenant on Civil and Political Rights; UN Safeguards guaranteeing protection of the rights of those facing the death penalty, UN Economic and Social Council resolution 1984/50.

⁸ Human Rights Committee, General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, UN Doc. CCPR/C/GC/36, para.35.

invoked, the burden of proof is shifted onto the defendant to be rebutted to the higher legal standard of “on a balance of probabilities”, with the effect of lowering the threshold of evidence needed to secure a conviction in capital cases.

Amnesty International calls on the government of Malaysia to introduce further legislative amendments to the Dangerous Drugs Act 1952 to bring it in line with international human rights law and standards, including by repealing the death penalty and legal presumptions of guilt. Pending this, the organization calls on the prosecution to immediately end using the death penalty.

UNFAIR TRIALS CONCERNS INCREASE RISK OF ARBITRARY USE OF DEATH PENALTY

As documented by Amnesty International in the first six months since sentencing discretion was introduced, the treatment of cases potentially subject to the death penalty pointed to systemic flaws that undermine the right to a fair trial at various stages of the proceedings.

International standards for a fair trial guarantee all persons arrested or detained on a criminal charge the right to competent and effective legal counsel from the start of a criminal investigation and as soon as they are deprived of their liberty.⁹ This enables defendants to protect their rights and prepare their defence, and serves as an important safeguard against torture and other ill-treatment, and against coerced “confessions” or other self-incriminating statements.¹⁰

During the period under consideration, Amnesty International noted media reports relating to 50 people – Malaysian and foreign nationals – who appeared before magistrates’ courts to be charged of capital crimes. Of these, **28 people (56%) were reported as represented, and a significant 20 individuals (40%) as unrepresented** (this information was unconfirmed for two other people), despite existing legal aid schemes established across Malaysia to support defendants of less advantaged socio-economic backgrounds.

Another matter of concern observed in several cases was the limited scope of sentencing mitigation considered by the judiciary, as well as the speed at which the resentencing hearings were conducted by the Federal Court under its temporary jurisdiction. The ability to prepare effective legal defense and make representations are cornerstones of the right to a fair trial.¹¹ These concerns are exacerbated by the lack of possibility to appeal the decision of the Federal Court, which makes these hearings involving life and death decisions even more critical.

Mitigating factors, as reported in judicial decisions by the High Courts reviewed by Amnesty International, appeared to mainly refer to only a few established facts, such as the age of the defendant, the time spent on death row, family relations, criminal record of the defendant and some elements of the offence.

Other observers have expressed similar concerns. The National Human Rights Commission of Malaysia (SUHAKAM) in a statement on 16 November 2023 urged the Government “to review procedure and the timeline of filing the cause papers to give ample time for lawyers and applicants to prepare their case to ensure procedural fairness and due process for all parties involved. SUHAKAM calls for the review process to provide justice not only substantively to the applicant but also procedurally.”¹² The Anti-Death Penalty Asia Network and other NGOs highlighted that “hearings are resolved rapidly with limited avenues for lawyers to conduct in-depth mitigation investigations that are necessary in order to adduce detailed mitigating evidence that is required to assist applicants seeking a review of their death sentences.”¹³

⁹ See Amnesty International, Fair Trial Manual, Chapter 3. The UN Human Rights Committee has stated that the “assistance of counsel should be ensured, through legal aid as necessary, immediately on arrest and throughout all subsequent proceedings to persons accused of serious crimes, in particular in cases of offences carrying the death penalty”. Human Rights Committee, Concluding observations of the Human Rights Committee: Trinidad and Tobago, UN Doc. CCPR/CO/70/TTO, para.7.

¹⁰ Principle 1 of the UN Basic Principles on the Role of Lawyers, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

¹¹ See Amnesty International, Fair Trial Manual, Chapter 28.6.1.

¹² SUHAKAM, “Press Statement No. 43-2023_Death Penalty- SUHAKAM Applauds Government’s Commitment to Restorative Justice, Urges Further Reforms for Procedural Fairness”, 16 November 2023, https://suhakam.org.my/2023/11/press-statement-no-43-2023_death-penalty-suhakam-applauds-governments-commitment-to-restorative-justice-urges-further-reforms-for-procedural-fairness/

¹³ Capital Punishment Justice Project, “Malaysia: Foreign national’s death sentence upheld in a first for resentencing process” (joint statement), 19 January 2024, cpjp.org.au/news/joint-statement-resentencing-process-malaysia

Pending the full abolition of the death penalty, Amnesty International calls on the authorities of Malaysia to ensure that international standards for a fair trial are fully met at all stages of the proceedings, from the moment of arrest and when defendants first face criminal charges, all the way through to appeals and other recourse procedures.

CRUEL PUNISHMENT OF WHIPPING OFTEN IMPOSED AS PART OF ALTERNATIVE SENTENCE

Under the 2023 legislative amendments, whipping was retained or introduced for several offences as the mandatory alternative punishment to the death penalty for men below the age of 50, together with terms of 30 to 40 years of imprisonment.

Based on Amnesty International's monitoring of media reports and judicial decisions, during the first six months since the legislative reforms to repeal the mandatory death penalty came into force, **40 men out of 71 people (56%)** recorded to have escaped the death penalty were instead sentenced to terms of imprisonment and **mandatory whipping**. Most of these men (36) were sentenced to receive 12 strikes of the whip, three 15 strikes and one 18 strikes. The remaining 31 people – women or men above 50 years of age – only received sentences to terms of imprisonment.

Corporal punishment constitutes cruel, inhuman and degrading treatment or punishment, and is prohibited under international law.¹⁴ The position of the Committee against Torture, the Human Rights Committee and other treaty bodies is that domestic law that provides for judicial corporal punishment is incompatible with the absolute prohibition of torture and other ill-treatment, and these bodies have called for the abolition of judicial corporal punishment.¹⁵

Amnesty International calls on the government of Malaysia to impose an immediate moratorium on whipping, and urgently introduce legislative amendments to remove this punishment for all offences for which it is retained. Amnesty International further urges the government of Malaysia to take swift steps to ratify the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

RENEWED CALL TO EXTEND MORATORIUM ON EXECUTIONS

Although capital cases recorded in the first six months since the full sentencing discretion was introduced show an early positive impact of the reforms, the significant reduction in the number of death sentences imposed is overshadowed by long-standing and emerging concerns on the use of the death penalty. Systemic flaws in Malaysia's criminal justice system and laws that are at odds with restrictions to the use of the death penalty under international law appear to intersect with, and be exacerbated by, the new processes to investigate mitigating and aggravating factors before deciding on who can escape the death penalty.

As a critical next step, the government of Malaysia must reaffirm its commitment to the moratorium on executions established in 2018 and ensure that this will be observed until the death penalty is fully abolished and all death sentences are commuted. The forthcoming Parliamentary session – one year on from the adoption of landmark legislation on the abolition of the mandatory death penalty – must not be a missed opportunity to take stock and ensure that the protection of human rights is at the center of the ongoing resentencing process.

The indefinite extension of the official moratorium on executions would be consistent with the support given from Malaysia since 2018 to repeated resolutions by the UN General Assembly, calling on states that still retain the death penalty to establish a moratorium on executions with a view to abolishing the death penalty.¹⁶ As the 10th resolution on this topic is expected to be considered by the main UN deliberative body in late 2024, Amnesty International encourages the representatives of Malaysia to continue their unwavering support for this initiative and an end to all executions.

¹⁴ Committee Against Torture, Concluding Observations of CAT: Saudi Arabia, UN Doc. CAT/C/CR/28/5 (2002), para.4.

¹⁵ UN Human Rights Committee, *Osbourne v Jamaica*, UN Doc. CCPR/C/68/D/759/1997 (2000), para.3.3; *Higginson v Jamaica*, UN Doc. CCPR/C/74/D/792/1998 (2002), para. 4.6; *Sooklal v Trinidad and Tobago*, UN Doc. CCPR/C/73/D/928/2000 (2001), para. 4.6; *Errol Pryce v Jamaica*, UN Doc. CCPR/C/80/D/793/1998 (2004), para. 6.2; UN Committee Against Torture, Concluding Observations of CAT: Saudi Arabia, UN Doc. CAT/C/CR/28/5 (2002), para.4.

¹⁶ UN General Assembly resolutions 73/175 of 17 December 2018; 75/183 of 16 December 2020; and 77/222 of 15 December 2022.

	TOTAL NUMBER OF DEFENDANTS CONVICTED (on capital charges)	NUMBER OF DEATH SENTENCES IMPOSED/UPHELD ON APPEAL	NUMBER OF SENTENCES NOT INVOLVING THE DEATH PENALTY (INCLUDING COMMUTATIONS ON APPEAL)	
			Total number of sentences to life imprisonment and, if applicable, whipping	Total number of sentences involving whipping
HIGH COURTS	43	19 (44% of the recorded total). Of these: -13 were imposed for murder (including on two women and two foreign nationals, both men); -6 were imposed for drug trafficking (including on one foreign national, a man).	24 (56% of the recorded total). Of these: -4 sentences were imposed for murder; -20 sentences were imposed for drug trafficking (including on four women, among whom a foreign national; and three foreign men).	16
COURT OF APPEAL	19	4 (21% of the recorded total) were upheld. Of these: -2 were imposed for murder; -2 were imposed for drug trafficking. 1 new death sentence was imposed for first time on appeal for murder.	14 (74% of the recorded total). Of these: -3 were for drug trafficking; -11 were for murder (including on three women and one foreign national, a man).	8
FEDERAL COURT (ORDINARY APPEAL)	8	2 (25% of the recorded total) were upheld. Both were imposed for murder.	6 (75% of the recorded total). Of these: -1 was for drug trafficking; -5 were for murder (including one on a foreign man).	6
FEDERAL COURT (TEMPORARY RESENTENCING JURISDICTION) ¹⁷	27	0	27 (100% of the recorded total) were commuted. Of these: -24 were for drug trafficking (including one woman, a foreign national; and five foreign men); -3 were for murder.	10
TOTALS	97	26 (27% of all recorded convictions)	71 (73% of all recorded convictions)	40 (56% of alternative sentences)

¹⁷ Under the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of The Federal Court) Act 2023 (Act 847).