



# MALAYSIA

31<sup>ST</sup> SESSION OF THE WORKING GROUP  
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DEATH PENALTY

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ANTI  
DEATH  
PENALTY  
ASIA  
NETWORK



Malaysians  
Against Death Penalty and Torture  
(MADPET)



## REPORT WRITTEN BY

- **Anti-Death Penalty Asia Network (ADPAN)** is an independent inter-regional network committed to working to end the death penalty in the Asia-Pacific region. ADPAN is made up of NGOs, organisations, groups from civil society, lawyers and individual members. It is not linked to any political party, religion or government.
- **ECPM (Together Against the Death Penalty)** is a French non-governmental organisation that fights against the death penalty worldwide and in all circumstances by uniting and rallying abolitionist forces across the world. The organisation advocates with international bodies and encourages universal abolition through education, information, local partnerships and public awareness campaigns. ECPM earned its legitimacy as a unifying group of the abolitionist movement because of its strong sense of ethics and values. ECPM is the organiser of the World Congresses Against the Death Penalty and a founding member of the World Coalition Against the Death Penalty. In 2016, ECPM was granted consultative status with ECOSOC.
- Founded in 1983, **The Advocates for Human Rights** is a volunteer-based non-governmental organization committed to the impartial promotion and protection of international human rights standards and the rule of law. In 1991, The Advocates adopted a formal commitment to oppose the death penalty worldwide and organized a Death Penalty Project to provide *pro bono* assistance on post-conviction appeals, as well as education and advocacy to end capital punishment.
- **Harm Reduction International (HRI)** is a leading non-governmental organisation working to reduce the negative health, social and human rights impacts of drug use and drug policy by promoting evidence-based public health policies and practices, and human rights based approaches to drugs.
- The **World Coalition against the Death Penalty (WCADP)** is composed of more than 150 NGOs, bar associations, local authorities and unions. It aims to strengthen the international dimension of the fight against the death penalty. The World Coalition provides a global dimension to the action taken by its members in the field, who are sometimes isolated. Its work complements their initiatives while respecting their independence.

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## I INTRODUCTION

This joint stakeholder report aims to provide up-to-date and useful information to understand the reality of the death penalty in Malaysia, in view of the next review of Malaysia by the Working Group on the Universal Periodic Review (UPR) in November 2018. The substantive information was gathered by ADPAN and its Malaysian members from news, reports and testimonies of lawyers, NGO members, etc.; it was then complemented by The Advocates for Human Rights, the WCADP, HRI and ECPM, which co-drafted the final report.

In order to comprehend some aspects of the use of the death penalty in Malaysia, it is important to understand its basic political system. Malaysia is a federal constitutional monarchy, composed of 13 states and 3 federal territories. The 13 states are governed by a titular hereditary head of state or a King-appointed governor, as well as an executive Chief Minister. The federal territories are ruled directly by the King and paramount ruler of Malaysia.

Malaysia is one of the leading death-sentencing and executing states in the world. Despite some timid steps towards more transparency and abolition (such as abolishing the mandatory death penalty for drug trafficking), Malaysia's use of capital punishment is still shrouded in secrecy and no further progress towards abolition can be observed.

## II LEGAL FRAMEWORK REGARDING THE APPLICATION OF THE DEATH PENALTY IN MALAYSIA

### II.1 NATIONAL LEGAL FRAMEWORK

As one of the world's top executing countries, Malaysia makes provision in its legislation for the death penalty for numerous crimes. Although the Federal Constitution acknowledges the right to life of every human, it also recognizes the possibility of the death penalty.<sup>1</sup> Capital punishment is provided for in six laws for more than 20 offenses. It is also mandatory for nine offenses, making Malaysia one of the few countries where the sentencing authority does not always have discretion in capital cases.

The law sets hanging as the method of execution.<sup>2</sup> It also prohibits the execution of pregnant women, whose death sentence is to be commuted to life sentence once their pregnancy is proven.<sup>3</sup>

#### CRIMES PUNISHABLE BY DEATH

##### **Crimes punishable by death are not limited to the "most serious" crimes**

Not all of the crimes subject to the death penalty include an element of intentional killing. The Penal Code<sup>4</sup> is the legislation containing most death penalty provisions. It can be carried out for common law crimes (e.g. homicide; kidnapping, gang-robbery, rape or hostage-taking followed by death), as well as political and military offenses (crimes against the ruler of the state, terrorism or mutiny). Capital punishment is mandatory for, most notably, murder, terrorism and offense against the rulers.

Under the Dangerous Drugs Act 1952, drug trafficking may be punishable by death.<sup>5</sup> Drug trafficking is the main offense for which death sentences are handed out in Malaysia. A high number of foreign nationals are convicted under the Dangerous Drugs Act.

<sup>1</sup> 'Federal Constitution of Malaysia', incorporating all amendments up to P.U. (A) 164/2009 (1957), art. 5.

<sup>2</sup> 'Criminal Procedure Code of Malaysia', A593 as amended by Act A1431 of 2012 (1935), sec. 277.

<sup>3</sup> *Ibid.*, sec. 275.

<sup>4</sup> 'Penal Code of Malaysia', Act 574 as amended by Act A1536 of 2017 (1936), secs 121, 122, 130C, 132, 302, 305, 307(2), 364, 374a, 376, 396.

<sup>5</sup> 'Dangerous Drugs Act of Malaysia', Act 234 (1952), sec. 39B.

Capital punishment is also available as a penalty in the Kidnapping Act<sup>6</sup> (kidnapping for ransom), the Internal Security Act (armed offenses in security areas) and the Armed Forces Act (various civil offenses perpetrated during service, such as murder and various military offenses (e.g. communicating with the enemy).

The Economic and Social Council of the United Nations (ECOSOC) endorsed a resolution in 1984 upholding nine safeguards on the application of the death penalty which affirmed that capital punishment should only be used for the “most serious crimes”.<sup>7</sup> This threshold was specified to mean crimes that were limited to those “with lethal or other extremely grave consequences”<sup>8</sup>, and was endorsed by the UN General Assembly.<sup>9</sup> This threshold is not being met by Malaysia.

#### Recommendation

**Amend the Penal Code, the Dangerous Drugs Act, the Kidnapping Act, the Internal Security Act, the Firearms (Increased Penalties) Act and the Armed Forces Act to eliminate the death penalty for all crimes, especially those that do not result in death.**

#### SOME OFFENSES ARE SUBJECT TO A MANDATORY DEATH PENALTY

The Parliament limited the mandatory application of the death penalty to drug trafficking offences via reforms to the Dangerous Drugs Act in November 2017. This is outlined in detail below.

The Firearms (Increased Penalties) Act<sup>10</sup> provides for a mandatory death penalty in the case of a scheduled crime (or complicity to commit such a crime) committed with a firearm discharge, irrespective of whether any harm is caused.

#### Recommendation

**Abolish the mandatory death penalty for all offences and restrict the scope of the death penalty to the “most serious crimes”.**

#### THE PARDONING PROCESS

Persons sentenced to death have the possibility to petition for pardon on their own initiative<sup>11</sup>. Their application is then reviewed by the State Board of Pardons, which advises the Ruler of the State. The ruler has the ultimate power of clemency.

As described in greater detail in paragraph 31 below, even though the Ruler of the State has the power of pardon, there are no clear rules governing the process (who can petition for pardon, how to do it, how long it takes, etc.). As a result of this lack of transparency, there is no way to assess whether the pardoning authorities are using their discretion in a discriminatory manner.

## II.2 INTERNATIONAL LEGAL FRAMEWORK

Malaysia has ratified only 5 of the 18 international human rights treaties. It is not party to the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol (OP2), the only binding instrument on the abolition of death penalty. The same applies to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatments or Punishments (CAT) and its optional protocol (OPCAT). Malaysia did however ratify the Convention on the Rights of the Child, thus prohibiting death sentencing and execution of children and child offenders.

<sup>6</sup> 'Kidnapping Act', Act 365 as amended by Act A910 of 1995 (1961), sec. 3(1).

<sup>7</sup> ECOSOC. Implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty Resolution 1984/50. 25 May 1984.

<sup>8</sup> *Ibid.*

<sup>9</sup> UN General Assembly. Human rights in the administration of Justice. Resolution A/RES/39/118. 14 December 1984.

<sup>10</sup> 'Firearms (Increased Penalties) Act', Act 37 (1971), secs 3, 3A, 7.

<sup>11</sup> Federal Constitution of Malaysia, art. 42.

Finally, the Malaysian State has continuously voted against the United Nations resolution for a universal moratorium on executions, since its first occurrence in 2007, always also signing the *note verbale* of dissociation to reassert its formal opposition to the text.

There are also very few international safeguards surrounding the application of the death penalty in Malaysia.

#### Recommendations

**Ratify the International Covenant on Civil and Political Rights and its Second Optional Protocol.**

**Ratify the Convention against Torture and its Optional Protocol.**

**Abstain in the vote on the UN resolution on a universal moratorium on executions.**

## II.3 THE UPR IN 2013

The last review of Malaysia by the Working Group on the UPR took place in 2013. In its national report before the session, the Malaysian government stated that the death penalty was applied only for the most serious crimes, in line with Article 6 of the ICCPR, even though Malaysia is not party to the treaty.

In total, 22 recommendations on the death penalty were made to Malaysia during the 2013 UPR session. It was the fourth most addressed topic, representing 9% of all recommendations made to the country.<sup>12</sup> Most of the death penalty recommendations addressed the issues of the mandatory death penalty (calling for its abolition) and the implementation of a moratorium. Malaysia rejected all those recommendations except for one: “maintaining its good example in observing the legal safeguards surrounding the application of death penalty”. This recommendation is vague and fails to clarify what those legal safeguards are. In fact, as this report indicates below, Malaysia has not met the international legal safeguards on death penalty, especially regarding the right of the accused to a fair trial free from corruption and intimidation.

During the interactive dialogue, the Malaysian government acknowledged the debate on the issue of the death penalty in civil society which, with the decrease in death sentences and executions between 2009 and 2013, showed a “trend against the implementation of death penalty”.<sup>13</sup> Responding to this trend, the State announced that it would initiate a study on the administration of criminal justice, with a view to comprehensive reforms, including on capital punishment.<sup>14</sup> The government reports that it has completed its study of the criminal justice system, but no results have been disclosed, even following pressure from civil society.

Official government statistics from 2016 indicate 829 death sentences were handed down since 2010, undermining the government’s claim there is a trend against the implementation of the death penalty.

<sup>12</sup> 'UPR Statistics on Malaysia', *UPR Info*, accessed 1 March 2018, [https://www.upr-info.org/database/statistics/index\\_sur.php?action\\_type=104&cycle=2](https://www.upr-info.org/database/statistics/index_sur.php?action_type=104&cycle=2).

<sup>13</sup> Government of Malaysia, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21' (Geneva: United Nations Human Rights Council, Working Group on the Universal Periodic Review, August 2013), 8, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/161/32/PDF/G1316132.pdf?OpenElement>.

<sup>14</sup> *Ibid.*



### III THE APPLICATION OF THE DEATH PENALTY IN MALAYSIA

One of the most challenging issues surrounding the use of capital punishment in Malaysia is the lack of transparency. It is hence very difficult to provide detailed information on the death penalty in the country.

#### III.1 DATA

Based on Amnesty International's record, in 2016 alone, at least 36 people were sentenced to death, nine people were executed, and the total number of death row inmates (as of April 2016) stands at 1042. These figures are higher than previous years, making Malaysia the 10<sup>th</sup> leading executioner in the world in 2016.<sup>15</sup>

##### Recommendation

**Establish a moratorium on executions.**

In March 2017, in response to a parliamentary question, the government reported that, as of this date, at least 1 122 people remained on death row; an increase of 80 death row prisoners from April 2016 to March 2017.

These figures demonstrated that the application of the death penalty was far more widespread than previously thought. The government also revealed some disaggregated data, most notably the high number of foreign nationals (including migrant workers) on death row (413), as well as the crimes for which death sentences are most commonly pronounced (murder, drug trafficking, firearms trafficking, and kidnapping).<sup>16</sup>

The data obtained by Amnesty International and the figures stated above are not up-to-date as there is no official annual release of data and information relating to the use of death penalty by the Malaysia government. The prison authorities repeatedly refuse to release information when requested by civil society or non-governmental organisations. There is no other way to obtain data, except from newspaper reports and when a Member of Parliament takes the initiative to ask such a question during parliamentary session. This lack of information has resulted in difficulties in monitoring accountability and violations.

##### Recommendations

**Annually publish official detailed information on the use of the death penalty in Malaysia (including, but not limited to the number of people sentenced to death and executed; information about the nature of offenses and the reasons why they were convicted; the implementation and the identity of executed prisoners; the number of overturned death sentences on appeal; the number of pardoned convicts; information on the extent to which the above guarantees are incorporated into national legislation).**

**Facilitate access to death penalty statistics for institutions and civil society organisations.**

#### III.2 PROCEDURAL RIGHTS OF PEOPLE FACING THE DEATH PENALTY

In Malaysia, people in conflict with the law do not always see their procedural rights respected, especially people accused of capital crimes. These violations of rights occur at all stages of the legal procedure, hence the distinction made in this report between the moments before (arrest and police custody), during (from the first court hearing to the final verdict) and after the process (between the final verdict and the execution or pardon).

##### BEFORE THE PROCESS

Violations of human rights happen as soon as a suspect is arrested and taken into police custody. Lawyers regularly report police brutality (at least five deaths in custody were

reported last year<sup>17</sup>), acts of corruption, and violations of basic rights to interpretation or legal representation, which often lead to coerced and false confessions. There are very few domestic legal safeguards surrounding arrest and police custody, making such human rights violations difficult to monitor and prosecute.

Many foreign nationals are arrested for drug-related crimes and can suffer from the lack of respect of basic human rights. They are not necessarily provided with immediate and professional interpretation during the crucial hour of police investigation and interrogation, rendering confession based on misrepresentation and/or induced by the investigating officer. Foreign nationals are also particularly prone to lack of legal representation due to the difficult circumstances in which they are living. According to the NGO Iran Human Rights, in Malaysia there are more than 80 Iranians are currently on death row for drug charges in solitary confinement.<sup>18</sup> They were not provided with Farsi interpreters during their interrogations or trials and were not given fair due legal process.<sup>19</sup>

##### Recommendations

**Set up an Independent Police Complaint and Misconduct Commission (IPCMC) to investigate corruption and police brutality.**

**Ensure that, prior to their questioning, foreign nationals involved in a case which might lead to the death penalty are informed of their rights to adequate interpretation.**

**Ensure that all persons at risk of the death penalty are questioned in the presence of a lawyer or legal counsel, and an interpreter when needed.**

##### DURING THE PROCESS

Capital crimes are prosecuted at the High Court. When an accused is charged for a capital offence, they must be legally represented. The court will assign a defence attorney if they cannot afford one. The assignment is voluntarily, usually from a pool of defence attorneys who are willing to take up capital cases. These attorneys are often overworked with briefs that generate income as well as with cases on a pro-bono basis. Besides experience and expertise, defending a capital case requires the upmost attention and resources of an attorney, which are sometimes simply not available to them. At times, defence attorneys also face obstacles and challenges in gathering evidence due to the lack of monetary and human resources. This situation has a negative impact on accused persons coming from vulnerable groups, especially foreign nationals. Equipped with little understanding of the local legal system, foreign nationals also frequently face financial and/or language barriers. If they are unable to secure effective legal representation at the outset, it becomes very difficult – if not impossible – to ensure a fair trial and the services of a competent lawyer. This can make the difference between arrest and charge, conviction and acquittal, and in cases of the death penalty, the difference between life and death.

In addition, there are concerns about corruption, including but not limited to the integrity of prosecution, witnesses and evidence; of lack of sufficient time for the defence attorney in preparation of the trial where crucial evidence is given at the last minute; of the lack of independent professional witnesses such as forensic and mental health experts. For example, a South Korean student charged under Section 39B of the Dangerous Drugs Act which carries the mandatory death penalty, was recently acquitted and discharged by the Court after the key witness admitted that he had lied in his testimony after the defence team produced CCTV evidence directly contradicting his evidence given under oath.<sup>20</sup>

##### Recommendations

**Take concrete measures to ensure the integrity of the prosecution, witnesses and evidence.**

**Ensure that defence attorneys of persons facing the death penalty have sufficient time and access to evidence to prepare the trial consequently.**

<sup>15</sup> Amnesty International, 'Death Sentences and Executions 2016' (London, 2017), 42.

<sup>16</sup> Amnesty International, 'Death Sentences and Executions 2016', 29–30.

<sup>17</sup> Amnesty International, 'Report 2017/18. The State of the World's Human Rights' (London, 2018), 250.

<sup>18</sup> Iran Human Rights. Special Report: 80 Iranian Death Row Prisoners in Malaysia. 10 October 2017. <https://iranhr.net/en/articles/3089/>

<sup>19</sup> Iran Human Rights. Special Report: 80 Iranian Death Row Prisoners in Malaysia. 10 October 2017. <https://iranhr.net/en/articles/3089/>

<sup>20</sup> Sarban Singh, 'S. Korean Student Freed of Drug Charge', *The Star (Online)*, 5 October 2017, <https://www.thestar.com.my/news/nation/2017/10/05/s-korean-student-freed-of-drug-charge-judge-acquits-20yearold-after-police-officer-admits-he-lied-in/>.

## AFTER THE PROCESS

Even though a person sentenced to death has the right to petition for pardon, the process is neither transparent nor fair. The right to clemency is not automatic and the process has no established or clear rules. The Board of Pardons rarely meets and does so without a fixed frequency. As a result, petitioners do not have the opportunity to present their case before the Board and the Board is not required to disclose the explanation for its decision, suggesting that the decision itself may be obscure and arbitrary. Moreover, there is no procedure to stay an execution while a petition for pardon is pending. Of the four known executions 2017, two were carried out while the petitioners' clemency requests were pending.

**Recommendations**

- **Establish precise and transparent rules governing the pardon process and the functioning of the Boards of Pardons, specifically by setting a regular meeting frequency and an obligation to publish its findings.**
- **Take concrete measures to inform those facing the death penalty of their right to petition for pardon.**
- **Ensure that, if a death row prisoner is petitioning for pardon, their death sentence is suspended throughout the entire pardoning process.**

One of the most meaningful manifestations of the lack of transparency on the issue of the death penalty in Malaysia is the secrecy around the execution process. Executions are carried out in secret with no established procedure to notify the person sentenced to death or their family<sup>21</sup>. Very short notice (two days at most) is the norm.<sup>22</sup> In 2016, the families of three death row inmates were given notice two days before their execution, while the inmates received notice only the day before their execution.<sup>23</sup>

**Recommendation**

- **Establish precise and transparent rules governing the execution process, especially on the notice of execution given to the death row inmate, their lawyers and their family.**

**III.3 LIVING CONDITIONS ON DEATH ROW**

Very little is known about the status and living conditions of death row inmates in Malaysia. They are usually kept in solitary confinement once their sentence has been imposed.<sup>24</sup> Once in solitary confinement, prisoners often lack access to proper drinking water or facilities necessary to maintain hygiene standards for long periods of time, creating conditions in which disease and ill health can thrive. According to official statistics, 259 prisoners have died in Malaysian prisons since 2000.<sup>25</sup>

No one is allowed to meet with death row inmates, with the exception of family members, lawyers, and occasionally religious counselling groups who must be pre-registered and approved. Thus far, there has not been any known visit by a Member of Parliament or civil society of death row prisoners to ascertain their living conditions and whether their rights have been violated.

**Recommendation**

- **Facilitate visits of death rows and reports on detention conditions by civil society organisations and parliamentarians.**

21 Amnesty International, 'Report 2017/18. The State of the World's Human Rights', 250.

22 Suara Rakyat Malaysia (SUARAM), 'Human Rights Report 2017: Malaysia', 2017, 55.

23 International Federation for Human Rights (FIDH), 'Going Backwards: The Death Penalty in Southeast Asia' (Paris, 2016), 10.

24 Amnesty International Malaysia. Malaysia: Death Penalty Reforms must be an Opportunity for Positive Human Rights Change. 2 November 2017. <http://aimalaysia.org/content/malaysia-death-penalty-reforms-must-be-opportunity-positive-human-rights-change>; Iran Human Rights. Special Report: 80 Iranian Death Row Prisoners in Malaysia. 10 October 2017. <https://iranhr.net/en/articles/3089/>

25 Iran Human Rights. Special Report: 80 Iranian Death Row Prisoners in Malaysia. 10 October 2017. <https://iranhr.net/en/articles/3089/>

**IV RECENT DEVELOPMENTS RELATED TO THE DEATH PENALTY****IV.1 TRANSPARENCY AND PUBLIC OPINION**

## THE GOVERNMENT'S RECENT EFFORTS AT TRANSPARENCY HAVE NOT BECOME SYSTEMATIC

In 2016, the government responded to a formal request by Parliament and disclosed figures on the use of capital punishment in Malaysia in recent years. This progress towards more transparency is yet to be qualified, since it has not become a regular practice by the authorities and obtaining data is still a challenge.

## THE GOVERNMENT IS DOING LITTLE TO SHAPE PUBLIC OPINION AGAINST THE DEATH PENALTY

A 2012 study by Roger Hood for the Death Penalty Project, in association with the Bar Council Malaysia<sup>26</sup>, showed that even though the public did not question the death penalty in general, there was an absence of consensus on its mandatory provisions. In 2018, the debate on the death penalty in Malaysia still revolves almost exclusively around the mandatory death penalty, especially amongst politicians, to the point where people tend to confuse death penalty in general with the mandatory application of the death penalty for certain crimes. Civil society in Malaysia and around the world has, for the past 10 years, relentlessly campaigned and lobbied for its total abolition or for at least the abolishment of the mandatory death penalty. These efforts have attracted significant attention from the Government, resulting in the Attorney General's Office conducting an in-depth study on the death penalty, as well as public announcements by the Minister in the Prime Minister's Department in charge of law supporting the abolition of the mandatory death penalty on numerous occasions.

**IV.2 THE 2017 AMENDMENT TO THE DANGEROUS DRUG ACT**

## THE DEATH PENALTY FOR SPECIFIC DRUG OFFENCES

Malaysia is one of only 33 countries that currently retain the death penalty for drug offences in law. While the secrecy around the use of the death penalty was lifted to a limited extent in 2016, data on death sentences for drug offences remain opaque, with estimates on sentences and executions generally compiled by non-governmental organisations.<sup>27</sup> According to HRI research there have been no known executions for drug-related offences since 2013, but of the estimated 1124 people on death row in 2017, at least 675 – or over 60% – were charged with drug-related offences.<sup>28</sup>

Until very recently, Malaysia was also one of 10 countries that retained the mandatory death penalty for drug trafficking. On 30 November 2017, Parliament amended the Dangerous Drugs Act to abolish the mandatory death penalty for drug trafficking.<sup>29</sup> This reform came into force on 15 March 2018 and allows judges to use their discretion – under specific conditions – in sentencing drug trafficking offences where capital punishment was previously applied automatically. Specifically, if a judge is satisfied that the accused has 'assisted an enforcement agency in disrupting drug trafficking activities', and has met one of the three conditions set out in Section 39B(2A) of the Dangerous Drugs Act; the judge may reduce a death sentence to life imprisonment and at least 15 strokes of caning. If the judge concludes that those conditions are not satisfied, the judge must impose the death penalty.

26 Roger Hood, 'The Death Penalty in Malaysia: Public Opinion on the Mandatory Death Penalty for Drug Trafficking, Murder and Firearms Offences' (London: The Death Penalty Project, 2013).

27 Amnesty International. Death sentences and executions, 2017.

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

29 'Dangerous Drugs (Amendment) Act 2017', Dangerous Drugs Act 1952 (2017).



While welcoming this reduction in scope of the application of the death penalty, the alternative punishment proposed is a concern, as are the application and implementation of these reforms.<sup>30</sup>

#### ALTERNATIVE PUNISHMENT

The alternate sentence is mandatory life imprisonment with no less than 15 strokes of caning. Caning is an inhuman and degrading punishment that violates international law. Mandatory life imprisonment is disproportionate to the offences in consideration.

#### IMPLEMENTATION OF REFORMS

There are significant limitations in respect of the effect and implementation of these reforms:

- Judicial discretion allows judges to consider only four matters, as set out in Section 39B(2A). Jurisprudence on sentencing, such as other mitigating factors or proportionality, is not applicable.
- Being compelled to cooperate with authorities, in order to simply avoid the death penalty at the court of first instance, will certainly impact the right of appeal to the higher courts; thus leading to a violation of the right to a fair trial.
- The burden of proof lies with the accused. In reality, the double presumption law in the Dangerous Drug Act (i.e. presumed to have knowledge and presumed to be trafficking) places the accused person in a disadvantageous position.

Finally, it is of significant concern that the amendments to the Dangerous Drugs Act will not apply retrospectively. There are two categories of people on death row directly affected by this:

- Firstly, in 2018, between the parliamentary amendment of the Dangerous Drugs Act and its coming into force, at least 10 people were sentenced to the death penalty for drug trafficking<sup>31</sup>, five of those being foreign nationals from India and Nigeria.
- Secondly, there are currently 675 persons on death row who were sentenced to death for drug trafficking prior to the November 2017 reforms. The new law does not provide previously convicted persons with a legal avenue for review or resentencing.

#### Recommendations

- **Impose a stay on all executions for drug offences.**
- **Advise the King and the Rulers of the States, as well each and every Pardon Board - via the Attorney General - to review all previous convictions of drug trafficking resulting in a death sentence, including (a) persons sentenced since the amendments were adopted in November 2017 and (b) persons sentenced prior to the amendment of the Dangerous Drugs Act; with a view of recommending the full commutation of the death sentences.**

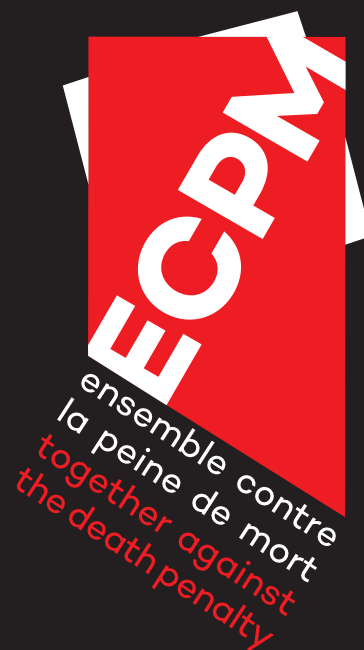
## V RECOMMENDATIONS

This report suggests the following recommendations to the Government of Malaysia:

- *Amend the Penal Code, the Dangerous Drugs Act, the Kidnapping Act, the Internal Security Act, the Firearms (Increased Penalties) Act and the Armed Forces Act to eliminate the death penalty for all crimes, especially those that do not result in death.*
- *Abolish the mandatory death penalty for all offences and restrict the scope of the death penalty to the "most serious crimes".*
- *Ratify the International Covenant on Civil and Political Rights and its Second Optional Protocol.*
- *Ratify the Convention against Torture and its Optional Protocol.*
- *Abstain in the vote on the UN resolution on a universal moratorium on executions.*
- *Establish a moratorium on executions.*
- *Annually publish official detailed information on the use of the death penalty in Malaysia (including, but not limited to the number of people sentenced to death and executed; information about the nature of offenses and the reasons why they were convicted; the implementation and the identity of executed prisoners; the number of overturned death sentences on appeal; the number of pardoned convicts; information on the extent to which the above guarantees are incorporated into national legislation).*
- *Facilitate access to death penalty statistics for institutions and civil society organisations.*
- *Set up an Independent Police Complaint and Misconduct Commission (IPCMC) to investigate corruption and police brutality.*
- *Ensure that, prior to their questioning, foreign nationals involved in a case which might lead to the death penalty are informed of their rights to adequate interpretation.*
- *Ensure that all persons at risk of the death penalty are questioned in the presence of a lawyer or legal counsel, and an interpreter when needed.*
- *Take concrete measures to ensure the integrity of the prosecution, witnesses and evidence.*
- *Ensure that defence attorneys of persons facing the death penalty have sufficient time and access to evidence to prepare the trial consequently.*
- *Establish precise and transparent rules governing the pardon process and the functioning of the Boards of Pardons, specifically by setting a regular meeting frequency and an obligation to publish its findings.*
- *Take concrete measures to inform those facing the death penalty of their right to petition for pardon.*
- *Ensure that, if a death row prisoner is petitioning for pardon, their death sentence is suspended throughout the entire pardoning process.*
- *Establish precise and transparent rules governing the execution process, especially on the notice of execution given to the death row inmate, their lawyers and their family.*
- *Facilitate visits of death rows and reports on detention conditions by civil society organisations and parliamentarians.*
- *Impose a stay on all executions for drug offences.*
- *Advise the King and the Rulers of the States, as well each and every Pardon Board - via the Attorney General - to review all previous convictions of drug trafficking resulting in a death sentence, including (a) persons sentenced since the amendments were adopted in November 2017 and (b) persons sentenced prior to the amendment of the Dangerous Drugs Act; with a view of recommending the full commutation of the death sentences.*

<sup>30</sup> Charles Hector and Ngeow Chow Ying, 'No Reason to Delay Commencement of DDAA 2017', *Malaysiakini*, 14 February 2018, <https://www.malaysiakini.com/letters/412257>; Hands Off Cain, 'Malaysia: Three Sentenced to Death for Drug Trafficking', 13 February 2018, <http://www.handsoffcain.info/notizia/malaysia-three-sentenced-to-death-for-drug-trafficking-40301596>.

<sup>31</sup> Hector and Ngeow Chow Ying, 'No Reason to Delay Commencement of DDAA 2017'; Hands Off Cain, 'Malaysia: Three Sentenced to Death for Drug Trafficking'.



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