

MALAYSIA HUMAN RIGHTS REPORT 2023

CIVIL AND POLITICAL RIGHTS



REFORM OR REGRESS?



MALAYSIA HUMAN RIGHTS REPORT 2023



Suara Inisiatif Sdn Bhd (562530-P)

B-G-15, 8 Avenue Business Centre
Jalan Sungai Jernih 8/1
46050 Petaling Jaya
Selangor Malaysia

Tel: +603 7954 5724 / +603 7954 5726

Fax: + 603 7954 5725

Email : suaram@suaram.net
Website : www.suaram.net
Facebook : fb.com/suararakyatmalaysia
Instagram : instagram.com/insta_suaram
Twitter : twitter.com/suaramtweets
Linkedin : my.linkedin.com/company/suaram

Cover design by Amin Landak

Typesetting by Siaw Vui Yung

Printer: Fussian Advertising & Printing Sdn. Bhd. (1042715-T)

ISBN: 2682-8154

SUARAM © 2024

All rights reserved. No part of this publication may be produced, stored in a retrieval system, or transmitted in any form, or by any means, electronic, mechanical, photocopy, recording or otherwise, without prior permission of the publisher.



THE ABOLITION OF
THE MANDATORY
DEATH PENALTY
– THE PATH
AND WAY FORWARD

THE ABOLITION OF THE MANDATORY DEATH PENALTY – THE PATH AND WAY FORWARD

Author: Ngeow Chow Ying

Peer Reviewer: Sara Kowal

Introduction – Latest Amendments to the Law

On 3 April 2023, Malaysia's Dewan Rakyat (Parliament's House of Representatives) passed two Bills, the *Abolition of Mandatory Death Penalty Bill 2023 (DR7)* and the *Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023 (DR8)*. These Bills were subsequently passed in the Dewan Negara (Senate), received the Royal Assent and became effective on 4 July 2023 and 12 September 2023 respectively.

This is significant for Malaysia towards the abolition of the death penalty. According to the Death Penalty Information Centre, the abolition of the death penalty is increasingly a global trend in recent decades⁵³⁵, as many countries have either abolished it or discontinued using it. Amnesty International's Death Sentences and Executions 2022 Global Report shows that as of December 2022⁵³⁶, almost three quarters of the countries in the world have abolished the death penalty in law or in practice (144 countries), with only 55 countries retaining capital punishment. Of the 144 countries, 112 countries abolished the death penalty for all crimes, 9 countries abolished it for ordinary crimes and 23 countries retained it, but have not carried out executions for at least the past 10 years⁵³⁷.

Malaysia's Progress Acknowledged

Malaysia received international applause for this progress. Human Rights Watch called it "an important step towards aligning with international human rights norms and global opposition to capital punishment"⁵³⁸. United Nations Human Rights experts "hailed a decision by the Malaysia parliament to revoke the country's mandatory death penalty, a decision that could potentially spare the lives of 1300 prisoners"⁵³⁹.

Domestically, the news was widely reported. Momentum towards abolition of the mandatory death penalty has been building up since the previous government, where substantive consultations and advocacy helped in gaining consensus that the mandatory

535 More information is available at: <https://deathpenaltyinfo.org/policy-issues/international>

536 Death Sentences and Executions 2022 (Amnesty International, 16 May 2023) <

<https://www.amnesty.org/en/documents/act50/6548/2023/en/>> accessed 16 February 2024

537 Ibid

538 'Malaysia Repeals Mandatory Death Penalty: Meaningful Move Should Pave Way to Full Abolition' (Human Rights Watch, 11 April 2023) < <https://www.hrw.org/news/2023/04/11/malaysia-repeals-mandatory-death-penalty>> accessed 16 February 2024

539 'Malaysia: UN experts hail parliamentary decision to end mandatory death penalty' (United Nations Human Rights Office of the High Commissioner, 11 April 2023) <<https://www.ohchr.org/en/press-releases/2023/04/malaysia-un-experts-hail-parliamentary-decision-end-mandatory-death-penalty>> accessed 16 February 2024

death penalty should be abolished, and the courts be given the discretion to deliver the appropriate sentence. Thus, the Bills were passed with no strong objection or pushback.

In a nutshell, the Acts:

1. abolish the mandatory death penalty for 12 offences⁵⁴⁰ and replace it with life imprisonment of 30-40 years and 12 strokes of the cane;
2. abolish the death penalty for seven offences⁵⁴¹ and replace it with life imprisonment of 30 - 40 years and 12 strokes of the cane;
3. abolish natural life imprisonment and replace it with life imprisonment of 30-40 years;
4. introduce transitional measures to ensure that the amended punishment is applicable to those who are already undergoing trials or have been convicted;
5. introduce a revision mechanism by granting the Federal Court a temporary jurisdiction to review the death sentence and natural life imprisonment for those who have already exhausted legal remedies; and
6. repeal the conditions in Section 39B(2A) and (2B) of the Dangerous Drugs Act 1952, to make it a full discretion of the Court in deciding whether death penalty or the alternative punishment of life imprisonment (30-40 years) and 12 strokes of the cane, is suitable for a drug trafficking case.

The Acts have effectively reduced the number of crimes punishable with death; removed the mandatory nature of the death penalty for all crimes, thus giving the Court the discretion in sentencing; taken away imprisonment by natural life; and provided a resentencing process for people who have been sentenced to death mandatorily and are on death row to have mitigation factors reconsidered.

The Prime Minister's Department's (*Jabatan Perdana Menteri*, JPM) Legal Affairs Division (*Bahagian Hal Ehwal Dan Undang-Undang*, BHEUU) issued a press statement outlining the policy decision⁵⁴² on this commendable reform. The statement shows that the government seems to have taken into consideration that the death penalty should not be imposed for offences that do not result in the death of a victim. For example, for Sections 3 and 3A of the Firearms (Increased Penalties) Act 1971, relating to discharge or accomplices to discharge of firearms with intent to cause death or hurt when committing or attempting to commit an offense, the death penalty is completely removed and replaced with 30-40 years of imprisonment and whipping.

Many view this as a "baby step" towards the total abolition of the death penalty, by first removing the mandatory death penalty, and by reducing the number of offences punishable with death. However, it still falls short of the international standard, as the

540 Penal Code: 121A, 130C, 130I, 130N, 130O, 130QA, 130ZB, 302, 374A, Firearms Act: 3, 3A, Dangerous Drugs Act: 39B

541 Penal Code: 307(2), 364; Firearms Act: 3, 3A, 7, 14; Kidnapping Act: 3(1)

542 'Kenyataan Media RUU Pemansuhan Hukuman Mati Mandatori 2023 dan RUU Semakan Hukuman Mati dan Pemenjaraan Sepanjang Hayat (Bidang Kuasa Sementara Mahkamah Persekutuan) 2023' (Bahagian Hal Ehwal Undang-Undang Jabatan Perdana Menteri, 27 March 2023) <<https://www.bheuu.gov.my/index.php/media/kenyataan-media/2657-kenyataan-media-ruu-pemansuhan-hukuman-mati-mandatori-2023-dan-ruu-semakan-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-bidang-kuasa-semantara-mahkamah-persekutuan-2023>> accessed 16 February 2024

death penalty remains applicable for offences that do not meet the threshold of the “most serious crime” under international law⁵⁴³, most notably drug trafficking.

It is also concerning that the sentence of mandatory whipping is maintained, together with 30- 40 years of imprisonment, as an alternative to the death penalty for certain offences that did carry whipping before the amendments. Corporal punishment constitutes a cruel, inhumane, and degrading treatment, and is prohibited under international law. Prior to this legislative change, whipping consisted of 15 strokes of the cane - it has now been reduced to 12 strokes of the cane, which is perhaps an acknowledgment - albeit a grossly inadequate concession - of the abhorrent nature of this practice.

Path to Abolition

The death penalty in Malaysia is a British colonial legacy. It was first used during the Malayan Emergency (1948-1960) for insurgent offences, largely for unlawful possession of arms and ammunition, and was extended to anyone convicted of extorting food and money on behalf of the insurgents. In 1957, the Federation of Malaya declared independence, and a Federal Constitution was enacted. When the Federation of Malaysia was formed in 1963, the Federal Constitution was amended to include Sabah, Sarawak and Singapore (which left the Federation in 1965). The fundamental right to life is enshrined in Article 5 of the Federal Constitution.

Though the Federal Constitution guarantees the right to life, it also provides for the legality of the death penalty: “*No person may be deprived of life or personal liberty except in accordance with law*”. Existing laws that impose the death penalty remain in force and constitutional.

In the 1970s and 1980s, the increased use of drugs became a national problem. In combating this, the government introduced various legislative reforms, including the presumption of guilt to establish the elements of drug trafficking (in 1977) and the mandatory death penalty (in 1983) under Section 39B of the Dangerous Drugs Act 1952.

However, the use of the death penalty remains a constant debate amongst rights activists and lawyers. Legal attempts were made to challenge the constitutionality of the death penalty, notably by the late Karpal Singh s/o Ram Singh, who argued that the imposition of the death penalty was unconstitutional in the case of *Public Prosecutor v Lau Kee Hoo*⁵⁴⁴. Though unsuccessful, the case remains a leading authority on the issue. The Malaysian Bar Council in its Annual General Meeting in 1986 declared its anti-death penalty stance for the first time and since then, similar resolutions were adopted regularly and became more and more visible and publicly known. In 2009, Malaysia's National Human Rights Commission, SUHAKAM, recommended the abolition of the death penalty.

Until the ‘*SaveVuiKong*’ campaign in 2010, discourse on the abolition of the death penalty remained largely elitist. Yong Vui Kong, a Malaysian citizen sentenced to death when he

543 The ‘most serious crime’ is interpreted to be ‘crimes of extreme gravity, involving intentional killing’. See Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights (the right to life): https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/GCArticle6/GCArticle6_EN.pdf

544 [1983] 1 MLJ 157

was 19 years old for drug trafficking in Singapore, drew overwhelming support from Malaysians from all walks of life. The case highlighted how the laws on drugs and the mandatory death penalty unfairly target vulnerable communities. Members of the public and lawmakers questioned the injustice that was dispensed on innocent drug mules and vulnerable groups from poor social-economic backgrounds. The campaign also focused on the importance of a 'second chance', emphasizing rehabilitation and making amends⁵⁴⁵. The campaign collected more than 100,000 signatures in Malaysia which were presented to Singapore's President by Vui Kong's family and activists. The news was widely reported nationally and internationally. Pictures of Vui Kong's mother and sisters in front of Singapore's Palace were on the front page of many major newspapers.

Since then, the abolition movement has become more visible and structured.

In 2013, in association with the Bar Council, the Death Penalty Project launched a research study conducted by the late Professor Roger Hood, Oxford University, on Malaysian citizens' attitudes and opinions towards the use of the death penalty. The report 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"*⁵⁴⁶ In the survey questionnaires, participants were given detailed scenarios and backgrounds to the crime committed and asked if they would support the use of the death penalty in those circumstances. The report clearly showed that to many people who supported in principle the use of the death penalty, it need not be the ultimate punishment, if circumstances convinced them otherwise. Thus, the claim that the broad use of the death penalty has the overwhelming support of the public is a fallacy.

The report is a real shot in the arm for the abolition movement. Incidentally, in 2012, Singapore amended its drug laws and allowed a limited discretion for the Court to impose imprisonment terms instead of death for drug trafficking, which resulted in Yong Vui Kong's death sentence being commuted in November 2013 to life imprisonment and 15 strokes of the cane.

The abolition movement picked up momentum when it was joined by national, regional and international actors. There was intense advocacy and lobbying with the de facto Law Minister, parliamentarians and policymakers, and other stakeholders. Many local and international organisations joined forces in organising roundtable discussions and consultations, regional congresses, and bringing together experts on various thematic issues relating to the death penalty. Abolition activists also stepped up engagement with the general public by organising talks, forums, art exhibitions, creative competitions, interviews, mini lectures, movie screenings, and many more events.

545 Lee Way Loon and Joseph Sipalan 'Wanted: 100,000 signatures to save Vui Kong' (Malaysiakini, 21 July 2010)

<<https://www.malaysiakini.com/news/137961>> accessed 16 February 2024

546 The report can be accessed here: <https://deathpenaltyproject.org/knowledge/the-death-penalty-in-malaysia/>

Meanwhile, a number of reports and studies were published, and short documentary films⁵⁴⁷ produced, all illustrating the many flaws in the administration of the death penalty in Malaysia and prompting the government to reconsider the use of the death penalty.

In 2013, the Malaysia government demonstrated a change in attitude towards the death penalty during the United Nations Universal Periodic Review and reported that a study had been undertaken by the Attorney-General's Chambers to reform criminal justice, including the death penalty.

In 2017, the Dangerous Drugs Act 1959 (DDA) was amended to abolish, under very limited conditions, the mandatory death sentence for drug trafficking. The initial Bill copied substantially from the 2012 amendments in Singapore's drugs law where the Court can only replace the death penalty with imprisonment when the conditions (as listed in the amendments) are met, including the issuance of a Certificate of Substantive Assistance⁵⁴⁸ by the Prosecution. This is problematic in many ways, most notably when the issuance of such certificates is done arbitrarily and, in some cases, discriminatory and showing double standards⁵⁴⁹. Many abolition activists and opposition leaders lobbied the government then to not follow the amendments in Singapore but to give full discretion to the Court in handing out drug trafficking convictions, reverting to the pre-1983 amendments the DDA.

Eventually, the amendments were passed, repealing the words "*shall be punishable with death*" for a conviction of drug trafficking, and replacing it with the allowance that the court may impose imprisonment for life if four conditions are satisfied: (1) no evidence of buying and selling at the time of arrest; (2) no involvement of agent provocateur; (3) is a courier and (4) assisted an enforcement agency in disruption drug trafficking activities within or outside of Malaysia⁵⁵⁰.

A study done by the Anti-Death Penalty Asia Network (ADPAN)⁵⁵¹ after the amendments found that the implementation by the Court was inconsistent, and the conditions are difficult to be met. Between March 2018 and October 2020, there were 38 cases where individuals were convicted of drug trafficking. Of these 38 cases, Section 39B(2A) of the Dangerous Drugs Act 1952 was considered in 11 cases, among which the Court accepted the discretion argument in 4 cases and rejected it in 7 cases. Some critics commented that with such conditions, the death penalty remains mandatory in practice as the Court is

547 *Menunggu Masa* directed by Sherie Razak Dali and Seira Scaha Abu Bakar; *Ayahku Dr G* directed by Loh Jo Yee, Hidayah Hisham and Dominique Teoh

548 *Explainer: What is the Certificate of Substantive Assistance?* (Transformative Justice Collective, 29 May 2021) <<https://transformativejusticecollective.org/2021/05/29/explainer-what-is-the-certificate-of-substantive-assistance/>> accessed 16 February 2024

549 'Another Msian in death row in Singapore fails in his appeal' (New Straits Times, 27 November 2021) <<https://www.nst.com.my/news/nation/2021/11/749329/another-msian-death-row-singapore-fails-his-appeal>> accessed 16 February 2024

550 Section 39B(2A) Dangerous Drugs Act 1952 (repealed 2023)

551 Sara Kowal, Dobby Chew and Mai Sato, 'Discretion in law but not in practice: Malaysia's Dangerous Drugs Act' (Monash University, 19 July 2021) <<https://www.monash.edu/law/research/eleos/blog/eleos-justice-blog-posts/discretion-in-law-but-not-in-practice-malysias-dangerous-drugs-act>> accessed 16 February 2024

bound to only consider the 4 conditions, and no other mitigating circumstances that may be presented in a particular case.

Then came the 2018 General Election. For the first time since independence, Malaysia experienced a change of federal government. The people elected a government that promised, amongst others, the abolition of oppressive laws including the death penalty. In August 2018, the new government announced the Executive's Order of moratorium on executions. On 10 October 2018, the de facto Law Minister, the late Datuk Liew Vui Keong⁵⁵² announced that the government pledged to abolish the death penalty for all crimes. In December 2018, Malaysia voted for the first time in favour of a UN Resolution on the moratorium on the use of the death penalty⁵⁵³.

While these announcements were warmly welcomed by some segments, some others, especially murders victim families, came out strongly against them. They organised signature campaigns and demonstrations against abolition⁵⁵⁴, on the grounds of justice for murder victims and the deterrence effect of the death penalty, and called for the government to be 'tough on crime'. Public opinion was again polarised on this issue, which eventually led to a policy change with the government backing down on full abolition, as it announced in March 2019 that it only planned to abolish the mandatory death penalty, for which purpose a Special Committee to Review Alternative Punishments to the Mandatory Death Penalty was set up.

The committee members included the former Chief Justice of the Federal Court, a former Court of Appeal judge, a former government official, academics, the former Chief Judge of Malaya, the former solicitor general, a legal practitioner and a criminologist, all appointed for a duration of 3 months (September - December 2019). The Committee took a holistic consultative approach to the study by conducting townhall meetings and focus group discussions nationwide, obtaining expert opinions and meeting with murders' victim families, death row inmate's families and persons on death row themselves.

This policy stays despite the various changes of government since February 2020. In the meantime, the government carried out the moratorium on execution, while the court continued to sentence people to death.

Based on statistics by Amnesty International Malaysia, 469 executions have been carried out in Malaysia since independence⁵⁵⁵.

During this period, public discussion on the death penalty started to gain traction again as a result of the imminent execution of Nagaenthran K Dharmalingam, a Malaysian citizen sentenced to death in Singapore for drug trafficking. Similar to that of Yong Vui Kong's,

552 'Death penalty to be abolished' (New Straits Times, 10 October 2018)

<<https://www.nst.com.my/news/nation/2018/10/419931/death-penalty-be-abolished>> accessed 16 February 2024

553 The said UN Resolution can be accessed here: <https://icomdp.org/unga/#2018>

554 'MCA Youth campaign against the abolition of the death penalty' (Malaysian Chinese Association, 21 November 2018)

<http://www.mca.org.my/2/Content/SinglePage?_param1=16-082020-167286-08-202016&_param2=TS> accessed 16 February 2024

555 Statistics and other information by Amnesty International about the death penalty landscape in Malaysia can be accessed here:

<https://www.amnesty.my/abolish-death-penalty/>

this case sparked international uproar that gave rise to a massive by local and international NGOs for Nagaenthran who was found to have borderline intellectual functioning, attention deficit hyperactivity disorder (ADHD) and an IQ of 69⁵⁵⁶. Government officials and the Yang di-Pertuan Agong Sultan Abdullah Ahmad Shah, the King of Malaysia⁵⁵⁷, came together to plead for clemency and halting the execution. Though it was not successful - Nagaenthran was executed on 27 April 2022 - calls for the abolition of the death penalty in Malaysia grew louder, while each execution deepened the public discourse on the use of the death penalty and its value.

On 8 June 2022, the cabinet under Prime Minister Ismail Sabri Yaakob agreed to abolish the mandatory death penalty. From July to September of the same year, the de facto Law Minister Datuk Seri Wan Junaidi Tunku Jaffar held consultations with various stakeholders including the Attorney-General's Chambers (AGC), the Ministry of Home Affairs, and the Prison Department to discuss the abolition bill with a view to reaching a consensus.

On 6 October 2022, the then government took the first step by tabling, for the first reading⁵⁵⁸, the amendments to seven separate laws⁵⁵⁹ that carried the mandatory death penalty. The second reading was supposed to be tabled within the same sitting.

While the amendments were anything but ideal, the abolition movement was nonetheless elated by the news for their being tabled in Parliament at last. Two major concerns of the draft Bill were, first, the alternative punishment was one of natural life imprisonment (which was equally inhumane and degrading), and secondly, the amendments were not retrospective, meaning those who had been sentenced to death under the mandatory death penalty and exhausted their legal appeals, would not have the benefit of the new law. This was extremely concerning for lawyers acting for the death row inmates.

And just four days after the first reading, the 14th Parliament was dissolved on 10 October 2022. There was no second reading of the seven draft Bills.

Not only did the progress towards abolition of the mandatory death penalty not halt under the newly elected coalition government led by Pakatan Harapan (PH), it even gathered pace and became better managed. From January to March 2023, the Ministry and BHEUU held many consultations with various government agencies as well as the Conference of Rulers, and eventually made a cabinet decision to abolish the mandatory death penalty.

556 Paras 71 and 77 of the judgment can be found here: https://www.elitigation.sg/gd/s/2017_SGHC_222

557 Jason Thomas, 'Nagaenthran's appeal postponed' (Free Malaysia Today, 26 January 2022)

<<https://www.freemalaysiatoday.com/category/nation/2022/01/26/nagaenthrans-appeal-postponed/>> accessed 16 February 2024

558 '[UPDATED] Govt tables amendments to abolish mandatory death penalty for first reading' (The Vibes, 6 October 2022)

<<https://www.thevibes.com/articles/news/73417/govt-tables-amendments-to-abolish-mandatory-death-penalty-for-first-reading>> accessed 16 February 2024

559 The Dangerous Drugs Act 1952, Kidnapping Act 1961, Criminal Justice Act 1953, Arms Act 1960, Penal Code, Criminal Procedure Code, and Firearms Act 1960

The first reading of the two Bills was tabled at the Dewan Rakyat on 27 March 2023 and passed, followed by the second reading on 3 April 2023, which was also passed. The two Bills were then tabled at the Dewan Negara on 11 April 2023 and passed.

In anticipation of potential backlash from the public, BHEUU released press statements, Frequently Asked Questions (FAQs) and infographics to explain the differences between the mandatory death penalty and the discretionary death penalty. The Deputy Minister YB Ramkarpal went on national television to clarify that these amendments were introduced to abolish the mandatory death penalty only, and Malaysia still has in place the discretionary death penalty in that judges still retain discretion to impose capital punishment. All these efforts cushioned the possible pushback from the public like what happened before. And the Bills were passed and received Royal Assent without much incident.

With the Bills passed and coming into effect, the government, the Court and the lawyers now have to deal with the resentencing process, no doubt a huge task. Based on Amnesty International Malaysia, 840 death row inmates⁵⁶⁰, and 117 inmates with natural life imprisonment, were eligible to apply to the Federal Court for resentencing as of March 2023.

Sentencing Under Abolition of Mandatory Death Penalty Bill 2023 (DR7)

The Abolition of Mandatory Death Penalty Act 2023 came into force on 4 July 2023. Under the Act, the court has the discretion to impose the death penalty or, as an alternative, imprisonment of life (30-40 years) with 12 strokes of the cane.

This means that every person sentenced to death or natural life under the mandatory sentencing regime would now have a mitigation hearing where evidence in relation to their individual circumstances can be considered by the court. While it is still too early to see how jurisprudence will develop in sentencing, it is however expected to be significant given that under the mandatory regime, judges had no option but to hand out the death sentence to the convicted.

The first case in which the new law was applied came to the court on 28 July 2023, involving two foreigners⁵⁶¹ who were sentenced to death by the High Court after they were found guilty of murdering a Grab driver. The Court meted out the death penalty, instead of the alternative punishment as argued by the defence counsels. It is unclear how the court came to this decision. Based on the news report, the Deputy Public Prosecutor cited the severity of the crime and deterrence as the basis for the death penalty.

560 'Reforms of mandatory death penalty in Malaysia: What do the Bills say?' (Amnesty International, 29 March 2023)

<https://www.amnesty.my/wp-content/uploads/2023/03/Amnesty-International_Analysis-of-the-Bills-to-Abolish-The-Mandatory-Death-Penalty-in-Malaysia_March-2023-3.pdf> accessed 16 February 2024

561 '2 foreigners to hang for strangling Grab driver' (Free Malaysia Today, 28 July 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/07/28/2-foreigners-to-hang-for-strangling-grab-driver/>> accessed 16 February 2024

Subsequent cases include:

- On 2 August 2023, the Court of Appeal upheld the death sentence of a convict on drug trafficking⁵⁶²;
- On 19 September 2023, the Federal Court upheld the conviction and death sentence of an unemployed man for killing three of his foster relatives⁵⁶³;
- On 26 September 2023, the Federal Court set aside the death sentence for a man convicted for murdering his girlfriend, and sentenced him to a maximum 40 years of imprisonment and 12 strokes of the cane⁵⁶⁴; and
- On 27 October 2023, the Court of Appeal allowed another appeal by an accused to reduce the charge and replace the death sentence with imprisonment and caning for causing death to the victim⁵⁶⁵.

In many jurisdictions, the court has a bifurcated trial, where there is separate sentencing hearing after the accused pleads guilty or is convicted, but this is not in practice in Malaysia. Hence, it is high time to look at the setting up of a sentencing council and sentencing guidelines, akin to the United Kingdom's Sentencing Council⁵⁶⁶, to promote consistency in sentencing while maintaining judicial independence. Justice is better served when all factors are considered and an appropriate and proportionate sentence given.

To that end, BHEUU announced that it is in the midst of studying the possibility of establishing a sentencing council to review all criminal sentences⁵⁶⁷.

Resentencing Process: Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023 (DR8)

The Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Act 2023 came into force on 12 September 2023.

562 'Appeals Court upholds death sentence on businessman for drug trafficking' (New Straits Times, 2 August 2023)

<<https://www.nst.com.my/news/crime-courts/2023/08/937940/appeals-court-upholds-death-sentence-businessman-drug-trafficking>> accessed 16 February 2024

563 'Death sentence confirmed for man who murdered 3 foster relatives' (Free Malaysia Today, 19 September 2023)

<<https://www.freemalaysiatoday.com/category/nation/2023/09/19/death-sentence-confirmed-for-man-who-murdered-3-foster-relatives/>> accessed 16 February 2024

564 'Federal Court commutes death sentence on former bus driver for murdering girlfriend to 40 years imprisonment, 12 whipping'

(The Malaysian Reserve, 26 September 2023) <<https://themalaysianreserve.com/2023/09/26/federal-court-commutes-death-sentence-on-former-bus-driver-for-murdering-girlfriend-to-40-years-imprisonment-12-whipping/>> accessed 16 February 2024

565 'Bunuh: Mahkamah rayuan ganti hukuman mati terhadap tiga lelaki dengan penjara' (Astro Awani, 27 October 2023)

<<https://www.astroawani.com/berita-malaysia/bunuh-mahkamah-rayuan-ganti-hukuman-mati-terhadap-tiga-lelaki-dengan-penjara-443577>> accessed 16 February 2024

566 Guidelines by the UK's Sentencing Council can be accessed here: <https://www.sentencingcouncil.org.uk/overarching-guides/magistrates-court/item/general-guideline-overarching-principles/>

567 'Azalina: PM Dept's Legal Affairs Division studies sentencing council' (Malay Mail, 11 July 2023)

<<https://www.malaymail.com/news/malaysia/2023/07/11/azalina-pm-depts-legal-affairs-division-studies-sentencing-council/79088>> accessed 16 February 2024

Under the Act, those who were eligible to file an application to the Federal Court to review their respective sentences shall do so within 90 days from the day the Act came into force.

The media statement issued by BHEUU⁵⁶⁸ on 11 September 2023 laid down the mechanism of the resentencing process. Principally, all eligible persons on death row will be legally represented, either through private engagement, a court-assigned lawyer, or the legal aid organisation, Yayasan Bantuan Guaman Kebangsaan (YBGK). The factors to be considered include age and health of the inmates, number of years already served, and other circumstances.

In order to expedite and manage the process, BHEUU released a flow chart to guide the public and lawyers⁵⁶⁹. In a nutshell, the respective prisons will first prepare the Notice of Application and Supporting Affidavit and file it to the Federal Court. This places the burden of filing an application within the 90-day timeframe on the prison. Once the case is listed, the lawyers (if already appointed) are informed or assigned to attend the case management hearing where the court directs the filing of further affidavits and written submissions. This is when the lawyers file additional affidavits, affirmed by the inmate himself/herself, family members or any other people, such as medical experts, in support of the mitigating circumstances. The Deputy Public Prosecutor can file an affidavit in reply and written submission to oppose the application. Once all documents are properly filed, a date will be fixed for hearing.

It is worth noting here that there has been some concern for the relatively short time frame allowed to gather relevant mitigation evidence before the hearing. Many on death row have significant medical and psychological conditions, which are relevant for mitigation purposes. International studies of persons on death row show that 62% of the 88 prisoners/prisoners' families interviewed for the study had at least one mental illness⁵⁷⁰. Many had never been assessed for the purpose of mitigation, given that the mandatory framework did not allow such evidence. There is concern in relation to the quick timeframes, funding and access to expert evidence. Many jurisdictions rely on forensic psychiatrists, psychologists and medical experts to guide them on appropriate individualised sentencing. Since Malaysia is building up its jurisprudence in this area, it is hoped that the court will allow for evidence to be obtained for those to whom it is relevant.

568 'Kenyataan media: Penguatkuasaan Akta Semakan Hukuman Mati dan Pemenjaraan Sepanjang Hayat (Bidang Kuasa Sementara Mahkamah Persekutuan) 2023 [Akta 847] (Bahagian Hal Ehwal Undang-Undang Jabatan Perdana Menteri, 11 September 2023) <<https://www.bheuu.gov.my/index.php/media/kenyataan-media3/2960-kenyataan-media-penguatkuasaan-akta-semakan-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-bidang-kuasa-sementara-mahkamah-persekutuan-2023-akta-8471>> accessed 16 February 2024

569 The flow chart can be accessed here:

<https://www.bheuu.gov.my/pdf/MEKANISME%20PENGENDALIAN%20PERMOHONAN%20SEMAKAN.pdf>

570 Project 39A National Law University Delhi, 'Submissions to the Secretary-General's Report on the question of the death penalty in India (2020-2022)' <<https://www.ohchr.org/sites/default/files/2022-06/DP-HRC51-Project-39A.pdf>> accessed 16 February 2024

The first resentencing hearing happened on 14 November 2023. The government declared this day as a historical moment⁵⁷¹. A total of 11 applications were heard, seven under the mandatory death sentence for drug trafficking, and four serving natural life imprisonment for drug trafficking and murder. All 11 of them had the death sentence commuted to life imprisonment, varying from 30 to 36 years, plus 12 strokes of the cane for those below the age of 50.

Case Study

Rajendran A/L Muthumanickam was convicted under Section 302 read together with Section 34 of the Penal Code. The crime occurred on 12 March 1998. In brief, Rajendran, together with two co-accused, were charged for murder with common intention on four individuals, while committing burglary in a jewellery shop in Ipoh. He was sentenced to death by the High Court 1 November 1999 and the final appeal was dismissed on 16 February 2009. As of 2023, he has been incarcerated for 25 years.

Rajendran was raised in a family like many of us. His father was a civil servant working in the fire department, while his mother is a housewife. He is the first born, followed by three sisters. Rajendran completed 12 years of education, and joined the police force when he was 19 years old. Life seemed promising as he married his wife the following year. The happiness was short-lived, as his father died in a car accident just one year after his marriage. Grief ensued and life changed forever for him and his family. Rajendran felt lost, and struggled with his own conscience as he was exposed to the “dark side” within the police force. At one wee morning hour, he was arrested for murder with common intention while committing burglary, and the case made headlines.

Throughout his trials and appeal, Rajendran maintained that he did not commit the crime of murder, and that all evidence against him was circumstantial. In fact, he cooperated with the police during the investigation.

On 12 June 2014, Rajendran received a letter informing him that the death sentence had been commuted by the Sultan of Perak. He is now to serve life imprisonment. While grateful, he knows prison life is dim and hopeless.

The news that the government was going to abolish the death penalty excited many of the death row inmates, and their families. However, it was uncertain for people like Rajendran who have exhausted all legal processes and have received pardon on the death sentence. He keeps asking if the abolition will help him. As far as he was concerned, he would never be a free man unless his life sentence could be further reduced to a certain number of years in prison. Only then could he look forward to the day of release.

571 'Kenyataan media: Semakan kes hukuman mati dan pemenjaraan sepanjang hayat di bawah Akta Semakan Hukuman Mati dan Pemenjaraan Sepanjang Hayat (Bidang Kuasa Sementara Mahkamah Persekutuan) 2023 [Akta 847]' (Bahagian Hal Ehwal Undang-Undang Jabatan Perdana Menteri, 14 November 2023) <<https://www.bheuu.gov.my/index.php/media/kenyataan-media3/3111-kenyataan-media-semakan-kes-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-di-bawah-akta-semakan-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-bidang-kuasa-sementara-mahkamah-persekutuan-2023-akta-847>> accessed 16 February 2024

Under the Act DR8, Rajendran is eligible for resentencing. His application was fixed for hearing with the first batch. While preparing for the relevant court papers, Rajendran's legal team interviewed him and his family, and took great effort to make written submissions, laying down all the legal principles and case precedents from jurisdictions like India and Australia.

On 14 November 2023, the court room was filled with counsels, family members and reporters. As seats were limited, one needed to pre-register to enter the courtroom. Also present were representatives from NGOs, BHEUU, and the prison department. Many were watching as the cases were called, with the decisions being read out one by one. There was a subtle sound of relief from the room when the first decision was pronounced. It looks like for drug trafficking; all death sentences were replaced with life imprisonment (30-40 years) and 12 strokes of the cane for those under the age of 50.

When Rajendran's case was called, his counsel Rashid Ismail argued for 30 years imprisonment, while the Public Prosecutor argued for the maximum of 40 years. Eventually, the court granted 36 years commencing from the date of arrest. After deducting the one-third remission, Rajendran only needed to serve 24 years, which he had already served. The prison released him on that very same day and he walked out of the prison to the warm embrace of his wife and ageing mother.

It is still a fact that Rajendran is grappling with, that he is now a free man. Life after release is another challenge as he slowly adapts to the changed world and rebuilds his life.

In the subsequent resentencing hearings, there were at least two cases⁵⁷² where the Federal Court affirmed the death sentence, both for murder.

Until the grounds of such decisions are publicly available, it is unclear how the court came to these conclusions. Some lawyers are concerned that due considerations were not given to the mitigating circumstances such as the mental condition of the death row inmates. It is also disturbing to note that in some cases, lawyers were not given a copy of the Record of Appeals and Notes of Proceeding of the trial and appeals, and/or a medical or mental health assessment report to prepare for the sentencing hearings.

Recommendations

To safeguard civil liberties, protect the fundamental values of Malaysia's democratic system, and put in place a fair resentencing process, the government should:

1. ratify the International Covenant on Civil and Political Rights and the Second Optional Protocol of the Covenant, align the national legal framework, and ultimately abolish the death penalty;

⁵⁷² See cases here: <https://www.freemalaysiatoday.com/category/nation/2024/01/04/apex-court-affirms-death-sentence-of-ex-guard-who-murdered-colleagues/>; <https://www.nst.com.my/news/crime-courts/2024/02/1010077/5-death-row-sabah-spared-gallows#>

2. establish a Sentencing Council to review sentencing practices for all offences, including capital crimes;
3. abolish corporal punishment;
4. release comprehensive and detailed statistics on the use of the death penalty in Malaysia.