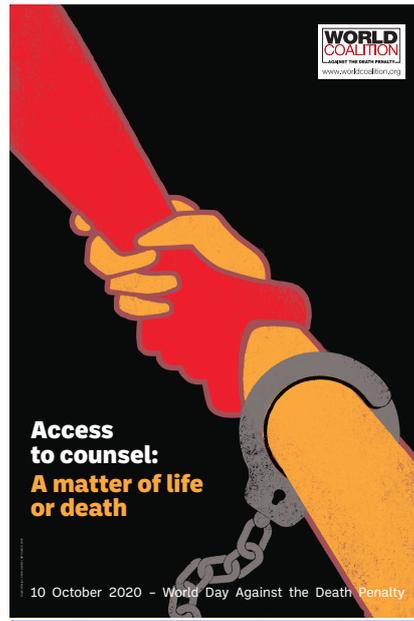


ANTI DEATH PENALTY ASIA NETWORK



ON 10 OCTOBER 2020, THE 18th WORLD DAY AGAINST THE DEATH PENALTY, ADPAN CALLS FOR THE RIGHT TO LEGAL COUNSEL TO BE PROVIDED TO ALL INDIVIDUALS FACING CAPITAL OFFENCES CHARGES AND INDIVIDUALS SENTENCED TO DEATH

In our World Day Against the Death Penalty: Access to Counsel newsletter, we take a closer look at many of the countries in the ADPAN network: [Afghanistan](#), [Bangladesh](#), [Brunei](#), [China](#), [India](#), [Indonesia](#), [Japan](#), [Malaysia](#), [Pakistan](#), [Singapore](#), [Taiwan](#), [Thailand](#) & [Vietnam](#)

International Legal Framework

The right to counsel is intrinsically linked with the right to a fair trial. The right to a fair trial is one of the most universally applicable rights afforded to all persons under the Universal Declaration of Human Rights.¹ This right is legally binding on all states as part of **customary international law** and must therefore be adhered to, even if states have not ratified the International Covenant on Civil and Political Rights ('ICCPR').² The right to effective

¹ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) Art. 10. ('UDHR')

² 'The Death Penalty for Drug Offences: Global Overview 2019', *Harm Reduction International* (Report, March 2020) 13 <<https://www.hri.global/death-penalty-2019>>; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').

counsel is also set out in the Death Penalty Safeguards, United Nations Principles and Guidelines on Access to Legal Aid and the ASEAN Human Rights Declaration.³

Article 14 of the ICCPR sets out a list of rights that underpin the right to a fair trial, one of which is the right to be represented by the counsel of an accused's choice.⁴ If the accused does not have a counsel of choice or cannot afford one, they must be provided legal counsel by the state.⁵ Legal aid is also a critical component of a 'fair, humane and efficient criminal justice system.'⁶ Legal aid is hence an essential safeguard to ensure fairness and trust in the criminal justice system.⁷

In death penalty cases, it is unquestionable that effective legal counsel be available to the accused at all stages of the legal proceedings.⁸ This right to legal counsel extends to all stages of a trial, including the detention and appeal stages.⁹ The level of counsel's assistance expected for capital cases is to be 'above and beyond the protection afforded in non-capital cases.'¹⁰ A violation of the fair trial procedures within Article 14 in death penalty trials can amount to a breach of the right to life protected in Article 6.¹¹

Access to Counsel in Retentionist countries in the Asia-Pacific Region

Terms

Signatory	State makes preliminary endorsement of the treaty but does not create legally binding obligation
Ratification	State first signs and then ratifies the treaty. State bound by terms of treaty under international law.
Accession	Same legal effect as ratification but process is not preceded by act of signature.

Afghanistan

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Acceded

³ *Safeguards guaranteeing protection of the rights of those facing the death penalty*, ESC Res 50, UN Doc S/RES/50 (25 May 1984) [5]. ('Death Penalty Safeguards'); *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, GA Res 67/187, UN Doc A/67/458, Principle 3 ('Principles on Legal Aid'); Association of Southeast Asian Nations, *ASEAN Human Rights Declaration*, 18 November 2012.

⁴ ICCPR, n 2, art. 14(3)(d); Human Rights Committee, *General Comment No 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007), 11 [37]. ('General Comment No 32')

⁵ General Comment No 32, n 4, 12 [38]; Principles on Legal Aid, n 3, 3 [3].

⁶ Principles on Legal Aid, n 3, 5.

⁷ *Ibid*, 5.

⁸ General Comment No 32, n 4, 12 [38].

⁹ Death Penalty Safeguards, n 3, [5]; ICCPR, n 2, art. 14(3)(d).

¹⁰ See also General Comment No 32, n 4, 3 [10]; Human Rights Committee, *Concluding Observations of the Human Rights Committee: Trinidad & Tobago*, 70th sess, UN Doc CCPR/CO/70/TTO (10 November 2000) [7 (c)].

¹¹ ICCPR, n 2, art 6; Human Rights Committee, *CCPR General Comment No. 6: Article 6 (Right to Life)*, 16th sess, UN Doc CCPR/C (30 April 1982) [7].

Bangladesh

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Acceded

Brunei

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Not signed Not ratified

China

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Signed Not ratified

Case Study: Leng Guoquan

Leng Guoquan was sentenced to death for drug smuggling and trafficking in China in 2009.¹² Initially, he was recorded on the prison register under a false name, preventing his lawyer and family from locating him.¹³ In the absence of any legal assistance, Leng was subjected to torture and other ill-treatments whilst being interrogated by a special police unit.¹⁴

Leng's family hired four different defence counsels to represent Leng. The first lawyer was forced by judicial authorities to resign after he took pictures of Leng's scars and argued that Leng suffered torture.¹⁵ The second and third lawyers were denied access to Leng.¹⁶ The fourth lawyer filed a complaint that claimed that Leng was subject to torture, but the Provincial Procuratorate rejected such allegations.¹⁷ At trial, Leng's lawyer was also unable to cross-examine key witnesses.¹⁸

Leng's story evidences the Chinese government's heavy pressure on defence lawyers, preventing the provision of effective legal counsel in death penalty cases.¹⁹

Please find more details of this case at adpan.org/china-case-study-leng-guoquan/

¹² 'China Case Study: Leng Guoquan', *Anti-death Penalty Asia Network*, <<https://adpan.org/china-case-study-leng-guoquan/>>. ('Leng Guoquan')

¹³ Ibid.

¹⁴ Ibid; Na Jiang, 'China's Justice Practice: Towards the Adversarial Process' (2014) 2(5) *Journal of Intellectual Property Rights* 1, 3.

¹⁵ Leng Guoquan, n 12.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ 'The Death Penalty for Drug Crimes in Asia', World Coalition Against the Death Penalty (Report, October 2015) 23 <https://www.fidh.org/IMG/pdf/asia_death_penalty_drug_crimes_fidh_wcadp_report_oct_2015_pdf.pdf>.

India

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Acceded

Article 22 of the Indian Constitution provides all accused with the right to counsel of their choice.²⁰ An indigent accused is to be provided with a defence lawyer at the expense of the state.²¹ The right to defence has been defined as 'effective and meaningful' defence by the Supreme Court.²² A study on death penalty prisoners found that 80% of prisoners in the study admitted to having suffered custodial torture.²³ The same study found that 97% of the prisoners interviewed did not have a lawyer present during interrogation and, of these prisoners, 80% were also economically vulnerable.²⁴ Additionally, 89.4% of the prisoners interviewed were not represented by a lawyer when they first appeared before the Magistrate.²⁵ Even those who had access to a lawyer did not have meaningful interactions with their lawyer, with 70.2% of the prisoners interviewed revealing that their lawyers did not discuss the case details with them.²⁶ Despite the protections guaranteed under Article 22, and also procedures within the *Legal Services Authorities Act 1987*, enacted to enable eligible accused to receive legal aid,²⁷ India fails to adhere to the accused's right to have legal counsel. Statistics show that this is particularly significant to death penalty prisoners.²⁸

Case study: Devender Pal Singh

Devender Pal Singh (Davinder Pal Singh Bhullar) was arrested at New Delhi airport in 1995 for travelling on false documents.²⁹ Police claimed, that following his arrest, Singh made a statement in which he confessed to being involved in a 1993 bomb attack in Delhi that killed nine people.³⁰ Singh's statement was made when he was first detained and he had no access to a lawyer.³¹ Singh later retracted his statement, claiming that he was tortured, threatened and forced to sign blank papers.³² Singh filed a petition with the Supreme Court, referring to the 'coercion and torture' used to extract his 'confession'.³³ He was later tried under the now repealed *Terrorist and Disruptive Activities (Prevention) Act 1987* (India) ('TADA').³⁴ The only evidence against Singh was his retracted statement containing his confession, which was admissible under the TADA.³⁵ In 2001, Singh was subsequently convicted and

²⁰ *Constitution of India* (India) art 22.

²¹ *Code of Criminal Procedure 1973* (India) s 304.

²² *Kishore Chand v. State of Himachal Pradesh AIR* (1999) SC 2140.

²³ 'Death Penalty India Report: Summary', National Law University Delhi (National Law University Delhi Press, February 2016) <<https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/5b4ced7b1ae6cfe4db494040/1531768280079/Death+Penalty+India+Report+Summary.pdf>> ('Death Penalty India Report').

²⁴ *Ibid* 32.

²⁵ *Ibid* 33.

²⁶ *Ibid* 28.

²⁷ *Legal Services Authorities Act 1987* (India) s 12.

²⁸ *Death Penalty India Report*, n 23.

²⁹ 'When Justice Fails: Thousands Executed in Asia After Unfair Trials,' Anti-Death Penalty Asia Network (Amnesty International, 2011), 17 <<https://adpan.org/wp-content/uploads/2020/04/adpan-unfair-trials-asa-010232100-final-pdf.pdf>>.

³⁰ *Ibid*.

³¹ *Ibid*

³² *Ibid*

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ *Ibid*.

sentenced to death.³⁶ Singh's sentence was commuted to life imprisonment in March 2014 on the grounds of mental illness and the delay in the disposal of Singh's mercy petition.³⁷

Indonesia

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Acceded

Case study: Yusman Telaumbanua

Yusman Telaumbanua was arrested and detained on 14 September 2012 for the murder of three men by the District Police in Indonesia.³⁸ Throughout the police interrogation, Yusman was not provided with any legal assistance.³⁹ At the time of interrogation Yusman was unable to read or write.⁴⁰ The police interrogated Yusman in Bahasa Indonesia, a language that he did not understand.⁴¹ Yusman claimed that he was beaten by the police every day while he was held in custody.⁴²

Yusman was appointed a lawyer on 29 January 2013, more than four months after his arrest.⁴³ When delivering the indictment, the prosecutor sought life imprisonment, however Yusman's lawyer requested the court to sentence him to death.⁴⁴ Yusman's lawyer requested this despite Yusman having begged leniency from the court.⁴⁵ In the first instance, Yusman was sentenced to death by the District Court based on his lawyer's request.⁴⁶

Yusman's lawyer also failed to inform him of his right to appeal his conviction and sentence. Consequently, Yusman did not appeal the decision to a higher court.⁴⁷ However, in 2017 the Supreme Court of Indonesia commuted Yusman's sentence of the death penalty to five-years imprisonment, on the basis that Yusman was a minor when he committed the crime.⁴⁸

A report by Amnesty International examines a further twelve cases which all involved a lack of access to legal representation in Indonesia.

For more details, please visit

<https://www.amnesty.org/download/Documents/ASA2124342015ENGLISH.PDF>

³⁶ Ibid.

³⁷ 'India: Commutation of Another Death Sentence Must Spur Rethink on Death Penalty,' Amnesty International (Press Release, 31 March 2014) <<https://www.amnesty.org/en/press-releases/2014/03/india-commutation-another-death-sentence-must-spur-rethink-death-penalty/>>.

³⁸ ³⁸ 'Flawed Justice - Unfair Trials and the Death Penalty in Indonesia', *Amnesty International* (15 October 2015), 29 <<https://www.amnesty.org/download/Documents/ASA2124342015ENGLISH.PDF>>.

³⁹ Ibid, 29.

⁴⁰ Ibid, 46.

⁴¹ Ibid.

⁴² Ibid, 37.

⁴³ Ibid, 35.

⁴⁴ Ibid, 29.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ 'Good news: Yusman Telaumbanua released from death row in Indonesia', *Amnesty International* (17 August 2017) <<https://www.amnesty.org.au/good-news-yusman-telaumbanua-released-from-death-row-in-indonesia/#:~:text=Yusman%20Telaumbanua%20was%20released%20from%20prison%20on%2017%20August%202017.>>>.

Japan

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Ratified

Japan is bound by international human rights law, which guarantees the accused a right to communicate with counsel of their own choosing.⁴⁹

Applications for arrests and detentions are readily granted by judges, with little to no reason given for their requests.⁵⁰ As a result, only 2% of the police's requests for arrests are ever denied.⁵¹ Once arrested, the accused is not permitted to apply for bail. Further, as the country's *Criminal Procedure Code* ('PCC') does not require a lawyer to be present during questioning, the accused can be questioned repeatedly without the presence of a lawyer.⁵² The PCC also allows the police to detain an accused for up to 23 days, and authorities can strategically add new charges or split up consolidated crimes to detain the accused repeatedly for additional periods.⁵³ As such, Japan's criminal justice system is littered with coerced confessions, and has been described as belonging to the Middle Ages.⁵⁴

Case Study: Iwao Hakamada⁵⁵

Japan's lack of access to counsel is exemplified in the story of Iwao Hakamada. Hakamada was falsely accused of arson, burglary and the quadruple murder of his employer and family.⁵⁶ Police detained him for three weeks, during which time he was interrogated for over 240 hours, beaten and threatened, and ultimately confessed.⁵⁷ Hakamada later retracted his confession in court, stating that he was coerced into confessing.⁵⁸ He was convicted of murder and subsequently sentenced to death.⁵⁹ Ultimately, Hakamada became the longest serving death row inmate in the world, having been in solitary confinement on death row since 1968.⁶⁰ As a result, Hakamada now suffers from death row syndrome.⁶¹

In 2014 the Shizuoka District Court granted Hakamada a re-trial, based on new DNA evidence and the questionable reliability of other evidence presented at trial.⁶² As a result, Hakamada was temporarily released from prison.⁶³ However, in 2018, Hakamada's retrial was denied by the High Court.⁶⁴ An appeal was lodged by his legal team, and they are waiting the judgement of the Supreme Court.⁶⁵

⁴⁹ Brad Adams, 'Japan's Hostage Justice System', *The Diplomat* (Online, 10 July 2019) <<https://thediplomat.com/2019/01/japans-hostage-justice-system/>>.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

⁵⁵ Hiroka Shoji, 'Japan: Longest-serving death row inmate deserves retrial despite court ruling', *Amnesty International* (Web Page, 11 June 2018) <<https://www.amnesty.org/en/latest/news/2018/06/japan-longest-serving-death-row-inmate-deserves-retrial/>>.

⁵⁶ Emiko Jozuka and Yoko Wakatsuki, 'This Japanese man spent almost five decades on death row. He could go back', *CNN* (online, March 22, 2020) <<https://edition.cnn.com/2020/03/21/asia/japan-death-penalty-hakamada-hnk-intl/index.html>>.

⁵⁷ Ibid.

⁵⁸ Hiroka Shoji, n 56.

⁵⁹ Emiko Jozuka and Yoko Wakatsuki, n 57.

⁶⁰ Hiroka Shoji, n 56.

⁶¹ Ibid.

⁶² Ibid; Emiko Jozuka and Yoko Wakatsuki, n 57.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Emiko Jozuka and Yoko Wakatsuki, n 57.

Malaysia

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Not signed Not ratified

The Malaysian constitution allows for an accused person to be defended by legal counsel of their choice.⁶⁶ Accused people have a right to communicate with their counsel upon arrest.⁶⁷ Police officers must facilitate this right by allowing a reasonable amount of time for consultation.⁶⁸ Police must provide reasonable facilities for the communication to take place, without cost to the accused.⁶⁹ However, there are exceptions where police officers do not have to comply.⁷⁰

The funding of legal aid is also a prominent issue affecting the right to counsel in Malaysia. There is insufficient funding available to those facing capital offences at each requisite stage of the legal proceedings (preliminary stages of proceedings, detention, pre-trial preparation, trial, appeal). Additionally, a significant proportion of those on death row in Malaysia are foreign nationals, who lacked access to legal aid at the time of their arrest - this is also a major cause of concern.⁷¹ The lack of legal aid available to individuals charged with capital offences in Malaysia, therefore, does not adhere to the protections afforded by the Malaysian constitution and international frameworks.⁷²

Case study: Hoo Yew Wah

Hoo Yew Wah is a Malaysian national of Chinese ethnicity.⁷³ In March 2005, at the age of 20, Yeh Wah was found in possession of 188.35g of methamphetamine.⁷⁴ He was charged with trafficking drugs and convicted under the *Dangerous Drugs Act 1952*.⁷⁵ After exhausting all appeal options, Yeh Wah was sentenced to the mandatory death penalty in May 2011.⁷⁶ Yeh Wah was convicted on the basis of a statement he made in Mandarin (Yeh Wah's mother tongue) at the time of his arrest, without a lawyer present.⁷⁷ Yeh Wah alleged that police broke his finger and threatened to harm his girlfriend during the police investigation to coerce him to sign a statement.⁷⁸ Accordingly, he contested the content of this statement at trial and on appeal, but these concerns were dismissed by the judge without ordering an investigation.⁷⁹

More information on Hoo Yeh Wah's death sentence can be found here: <https://action.amnesty.org.au/act-now/hoo-yew-wah-death-sentence>.

⁶⁶ *Constitution of Malaysia* (Malaysia), art 5(3).

⁶⁷ *Criminal Procedure Code* (Malaysia), s 28A.

⁶⁸ *Ibid.*

⁶⁹ *Ibid* s 28A (5)-(7).

⁷⁰ *Ibid* s 28A (8).

⁷¹ 'Fatally Flawed: Why Malaysia Must Abolish the Death Penalty,' (Amnesty International, 2019), 27.

<<https://www.amnesty.org/download/Documents/ACT5010782019ENGLISH.pdf>>. ('Fatally Flawed: Malaysia')

⁷² *Constitution of Malaysia* (Malaysia), art 5; *ICCPR*, art 14; *Death Penalty Safeguards*.

⁷³ *Fatally Flawed: Malaysia*, n 72, 31.

⁷⁴ *Ibid.*

⁷⁵ *Ibid*; *Dangerous Drugs Act 1952* (Malaysia), s 39(b).

⁷⁶ *Fatally Flawed: Malaysia*, n 72, 31.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

Pakistan

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Ratified

Case Study: Sohail Yafat ⁸⁰

Pakistan's lack of access to counsel is highlighted through the story of Sohail Yafat, who was arrested in May 2001.⁸¹ He was not told why he was being arrested.⁸² He was blindfolded and beaten during the ride to the police station.⁸³ Over a period of seven days he was subjected to third-degree torture in order to get a confession from him.⁸⁴ Yafat had no recourse except for a state-appointed lawyer and was eventually convicted of murder.⁸⁵ It took the state 10 years before Yafat was exonerated due to a lack of evidence.⁸⁶

More information of Sohail's story can be found here:

- <https://www.youtube.com/watch?v=4U0OPbirgWc>.
- https://www.youtube.com/watch?v=QbGcx_uW7OU

Singapore

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Not signed Not ratified

Taiwan

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Not applicable ⁸⁷

Thailand

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Acceded

⁸⁰ News Desk, 'How a failed judiciary robbed Sohail Yafat of 10 years of his life', *Propergaanda* (Online, 13 July 2020) <<https://www.propergaanda.com/how-a-failed-judiciary-robbed-sohail-yafat-of-10-years-of-his-life/>> ('Propergaanda')

⁸¹ 'Arrested', 18 and imprisoned for life (Chapter 1, ProperGaanda, 9 July 2020) 0.07.00–0.07.50, <https://www.youtube.com/watch?v=4U0OPbirgWc>.

⁸² *Ibid.*, 0.07.51-0.08.26.

⁸³ 'On Trial', 18 and imprisoned for life (Chapter 2, ProperGaanda, 10 July 2020) 0.00.51–0.01.07, https://www.youtube.com/watch?v=QbGcx_uW7OU.

⁸⁴ *Ibid.*, 0.0126-0.02.20.

⁸⁵ Propergaanda, n 87.

⁸⁶ *Ibid.*

⁸⁷ ICCPR was signed by Taiwan and ratified in 2009 when Taiwan was a member of the UN. However as Taiwan is no longer a member of the UN, it is no longer a state party to the ICCPR: Cornell Center on the Death Penalty Worldwide, 'Taiwan', *Death Penalty Database* (Web Page) <<https://dpw.pointjupiter.co/country-search-post.cfm?country=Taiwan#f2-4>>.

Vietnam

	ICCPR Art. 14(3)(d)
Right to choose legal assistance, and if unable to select legal assistance, the right to State-provided legal assistance	Acceded

For more information about the 18th World Day Against the Death Penalty: Access to Counsel and what you can do to support this important campaign, go to <http://www.worldcoalition.org/worldday.html>