

Malaysia's Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women in Relation to the Death Penalty

Submitted by:

The Anti-Death Penalty Asia Network

for the

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**ANTI
DEATH
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ASIA
NETWORK**

The Anti-Death Penalty Asia Network (ADPAN) is the peak regional body for organisations committed to the abolition of the death penalty across Asia-Pacific, with members from 20 countries within the region. As such, ADPAN maintains that the death penalty violates the right to life, that it is the ultimate form of cruel, inhuman, and degrading punishment and that the death penalty should be entirely abolished internationally.

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1. Introduction

1. This report follows on from ADPAN's submission to the Committee on the Elimination of Discrimination Against Women (CEDAW) Committee in January 2023.¹
2. On 6 March 2023, CEDAW released their List of issues and questions.
3. In relation to the death penalty, at s22(d) CEDAW requested the following information:

“Women facing the death penalty: policies and procedures in place to ensure that women facing the death penalty are provided with access to competent and independent legal assistance of their choice from the moment of arrest to appeals and other recourse procedures, and plans to continue to observe the moratorium on all executions first established in July 2018, until the death penalty is fully abolished, and all death sentences are reviewed and commuted”².

4. On 1 November 2023, CEDAW released the Replies of Malaysia to the list of issues and questions in relation to its sixth periodic report, provided by the Government of Malaysia on 25 October 2023.
5. In reply to CEDAW’s request, they advised that:

“On 16 June 2023, the Abolition of the Mandatory Death Penalty Act 2023 was gazetted and came into force on 1 July 2023. The death penalty will no longer be a mandatory sentence and judges can decide on the appropriate sentence after considering the circumstances of the case. Although the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of The Federal Court) Act 2023 was also gazetted on 16 July 2023, it has yet to come into force. Nevertheless, there is a moratorium on all executions of the death penalty imposed before the passing of the Act. This is to ensure that the convicts are given the opportunity to get their death sentences revised under the newly enacted act.”³

¹ Anti-Death Penalty Asia Network (ADPAN), in collaboration with the Capital Punishment Justice Project, ECPM - Together Against the Death Penalty, Reprieve, Harm Reduction International, the World Coalition Against the Death Penalty, the Cornell Center on the Death Penalty Worldwide, and The Advocates for Human Rights, *Malaysia’s Compliance with the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 January 2023, <https://www.theadvocatesforhumanrights.org/Res/CEDAW%20Malaysia-ADPAN.pdf>.

² Convention on the Elimination of All Forms of Discrimination Against Women. List of Issues and questions related to the sixth periodic report of Malaysia (March 6, 2023) U.N. Doc. CEDAW/C/MYS/Q/6, p8.

³ Convention on the Elimination of All Forms of Discrimination Against Women. Replies of Malaysia to the list of issues and questions related to the sixth periodic report of Malaysia (November 1, 2023) U.N. Doc. CEDAW/C/MYS/RQ/6, p17:107.

6. The Natural Life (Temporary Jurisdiction of The Federal Court) Act 2023 came into force on 12 September 2023⁴.

Policies and procedures in place to ensure women facing the death penalty have access to counsel.

7. CEDAW has requested more information regarding “policies and procedures in place to ensure that women facing the death penalty are provided with access to competent and independent legal assistance of their choice from the moment of arrest to appeals and other recourse procedures”⁵.
8. Article 5(3) of the Federal Constitution of Malaysia⁶ and s.28(A)(4) of the Criminal Procedure Code⁷ provide the legal basis for an accused to have access to counsel of their choice.
9. All women charged with capital offences will have access to lawyers funded through the state funded Assigned Counsel Scheme, however the effectiveness of counsel is limited by the level of funding available. A 2020 report by Monash University and ADPAN, supported by Harm Reduction International, interviewed capital defence lawyers who reported that the funding available was approximately RM 6000, from the first trial to the final appeal - this quantum was described as a ‘pittance’, sufficient to cover disbursements rather than the lawyers’ work on the case⁸.
10. Further, the Assigned Counsel Scheme is not provided for all the stages of the criminal justice process, particularly the initial detention and pre-trial preparation phase⁹. The initial detention is critical for the accused persons given that they require legal advice as to formulate defence in their statements to the authorities. Good legal aid and representation can arrest serious injustices with long term consequences that may take place at this stage. Further, the right to an interpreter is only entrenched at the trial stage which means at the initial arrest phase, women who don’t speak the local language or who may have speech and

⁴ Bernama, ‘Apex Court to hear first batch of review applications by death row prisoners today’, New Straits Times, November 14 2023, <https://www.nst.com.my/news/crime-courts/2023/11/978059/apex-court-hear-first-batch-review-applications-death-row-prisoners>.

⁵ Convention on the Elimination of All Forms of Discrimination Against Women. List of Issues and questions related to the sixth periodic report of Malaysia (March 6, 2023) U.N. Doc. CEDAW/C/MYS/Q/6, p8.

⁶ Federal Constitution of Malaysia, https://www.jac.gov.my/spk/images/stories/10_akta/perlembagaan_persekutuan/federal_constitution.pdf.

⁷ Criminal Procedure Code [Act 593] 2012, Malaysia, p39, [https://ccid.rmp.gov.my/Laws/Act_593_-_Criminal_Procedure_Code_\(CPC\).pdf](https://ccid.rmp.gov.my/Laws/Act_593_-_Criminal_Procedure_Code_(CPC).pdf).

⁸ Antolak-Saper, N., Kowal, S., Lindsey S., Ngeow, C.Y. & Kananatu, T. (2020) Drug Offences and the Death Penalty in Malaysia: Fair Trial Rights and Ramifications, Clayton, Victoria: Monash University, p20, https://www.monash.edu/_data/assets/pdf_file/0016/2220622/MU_ADPAN_report_v7.pdf.

⁹ Ibid.

language difficulties may not understand that they have a right to a lawyer even if they can't pay for a lawyer:

"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."¹⁰

11. Additionally, the Assigned Counsel Scheme is available up to the Federal Court of Appeal, resulting in persons on death row being unrepresented at the clemency stage of proceedings¹¹.

12. The result of not having effective access to lawyers and interpreters at an early stage - or on an application for clemency - has had a particular effect on women, and more so on women who are foreign nationals, particularly under the former mandatory death sentence regime. In 2019, Amnesty International reported that 95% of the women sentenced to death in Malaysia were convicted of drug offences¹² and 90% of these women were foreign nationals¹³. This proportion of women accused of drug offences is significantly higher than their male counterparts (70%)¹⁴. In August 2023, the World Coalition Against the Death Penalty identified Malaysia as ranking sixth in the list of the countries with the highest proportion of women on death row (where data was available), at 9.65% in 2022¹⁵.

13. Ensuring access to counsel is an essential component of fair trial rights in Malaysia; however, for this to be meaningful, funding for expert reports is needed. A capital defence lawyer interviewed in the 2020 report referred to above, expanded on this point:

"When you say defending them to the best of my abilities, I can't do that simply because we don't have a budget for it. It's really down to how much I am willing to put on my own money and feeling like this is worthwhile. But it's difficult because for example we don't get specialist evidence, we can't hire an expert. Expert[s] cost at least a grand a day to come and give

¹⁰ *Together Against the Death Penalty (ECPM)*, Harm Reduction International (HRI), Anti-Death Penalty Asia Network (ADPAN), The Advocates for Human Rights & World Coalition Against the Death Penalty (WCADP), *Death Penalty in Malaysia: Joint Stakeholder Report for the 31st session of the Working Group on the Universal Periodic Review* (Report, March 2018), p4, https://www.hri.global/files/2018/11/06/Joint_report_UPR31_-_Death_penalty_in_Malaysia.pdf.

¹¹ Antolak-Saper, N., Kowal, S., Lindsey S., Ngeow, C.Y. & Kananatu, T. op cit, p20

¹² Amnesty International, *Fatally Flawed: Why Malaysia Must Abolish the Death Penalty*, Report, 2019, p20, <https://www.amnesty.org/en/documents/act50/1078/2019/en/>

¹³ Ibid.

¹⁴ Harry, L., 'Rethinking the relationship between women, crime and economic factors: The case study of women sentenced to death for drug trafficking in Malaysia. *Laws* 10(1) 2021, p9, <https://www.mdpi.com/2075-471X/10/1/9>.

¹⁵ 'Mapping of Women on Death Row', Report, World Coalition Against the Death Penalty, August 2023, p16, https://worldcoalition.org/wp-content/uploads/2023/08/ENG_Country-Mapping-report_Women-on-Death-Row.pdf

evidence, never mind their report. Never mind the time they spent preparing that report. So, you know we're looking to at least easily 5 to 10 thousand to come up with a specialist report."¹⁶

14. It is anticipated that the welcome steps taken by the Government of Malaysia to abolish the mandatory death penalty from its sentencing regime through the Abolition of the Mandatory Death Penalty Act 2023 and the Natural Life (Temporary Jurisdiction of The Federal Court) Act 2023, will significantly reduce the number of women sentenced to death and remaining on death row in Malaysia.
15. Under this law, the Federal Court is given temporary jurisdiction to review the death sentence and natural life imprisonment sentence of those convicted and sentenced under the mandatory regime and replace it with alternative sentences.
16. On 17 November 2023, it was reported that the Malaysian Prisons Department had completed filing all 1020 review applications under the Natural Life (Temporary Jurisdiction of The Federal Court) Act 2023.¹⁷
17. On 14 February 2024, the Home Minister of Malaysia in reply to a parliamentary question revealed that based on the Prisons Department's record, there were 1078 people eligible to apply for resentencing under the new law; 975 men (90.4%) and 103 women (9.6%)¹⁸. No other gender categories were provided.
18. Since the resentencing process began, it is preliminarily observed that the Federal Court has, in relation to drug trafficking conviction under s.39B of the Dangerous Drugs Act 1957 (DDA), shown a tendency to replace the death sentence with imprisonment and caning, other than in a few instances. Given that most women on death row, who are now eligible for resentencing, were convicted under s.39B DDA, this legislative change and judicial tendency may likely have an advantageous effect for the 103 women with the possibility of their death sentence reversed. It should be noted that the criminal law in Malaysia does not allow for caning on women.
19. On 11 September 2023, the Government of Malaysia set out their policy in relation to access to counsel for the resentencing process, in a media statement of the Legal Affairs Division of the Prime Minister's Department

¹⁶ Antolak-Saper, N., Kowal, S., Lindsey S., Ngeow, C.Y. & Kananatu, T. op cit, p20.

¹⁷ '1,020 applications to review death penalty and life imprisonment cases filed, says Ramkarpal', The Star (Newspaper, Malaysia), November 17, 2023, <https://www.thestar.com.my/news/nation/2023/11/17/1020-applications-to-review-death-penalty-and-life-imprisonment-cases-filed-says-ramkarpal#close>.

¹⁸ First meeting, Third Term, Fifteenth Parliament, Parliament of Malaysia, 26 February to 27 March 2024, Question 557 (document on file with authors).

- Bahagian Hal Ehwal Dan Undang-Undang (BHEUU)¹⁹. The statement confirmed that all persons eligible to apply for resentencing will be legally represented, "either through private engagement, a court-assigned lawyer, or the legal aid organisation, Yayasan Bantuan Guaman Kebangsaan (YBGK). Factors to be considered on the resentencing hearing include age and health of the inmates, number of years already served, and other circumstances"²⁰.

20. The Federal Court of Malaysia commenced hearing resentencing applications on 13 November 2023²¹. This process is ongoing.

21. The procedure was also set out in the statement released by BHEUU²². The 90-day time frame commenced from 12 September 2023, the date the Act came into force. For logistical purposes and in the interest of time, the responsibility to prepare the Notice of Application and Supporting Affidavit fell on the respective prison personnel where the applicant is held, and with the assistance of the court clerk, to file it accordingly. Once the Notice of Application is filed, the Court will list the case and ascertain if the applicant has a privately engaged lawyer to represent them and if not, the court will do the needful through an assigned lawyer or YBGK. The lawyer will then be informed of the case management date.²³

22. At the case management hearing, the court will direct a timetable for the filing of additional affidavits and/or other mitigatory evidence. The Deputy Public Prosecutor is given an opportunity to respond. Then a hearing date is set by the Court²⁴. Based on the information shared by some of the lawyers involved in the resentencing process, the first case management date, where the court directs the timetable for filing of additional affidavit, to the hearing of the Notice of Application, is about 1.5 - 2 months. During this timeframe, the lawyers will conduct the necessary investigations, collect documents, interview the client and/or family members, draft the affidavit(s), meet the client in prison to get it affirmed, and file the additional affidavit in court.

¹⁹ Media statement: 'Media release - Enforcement of Death Sentences and Life Imprisonment (Provisional Jurisdiction of Federal Courts) Act 2023 [Act 847]'; <https://www.bheuu.gov.my/index.php/media/kenyataan-media3/2960-kenyataan-media-penkuatkuasaan-akta-semakan-hukuman-mati-dan-pemenjaraan-sepanjang-hayat-bidang-kuasa-sementara-mahkamah-persekutuan-2023-akta-8471>.

²⁰ Ngeow, C.Y., 'Chapter 12: The Abolition of the Mandatory Death Penalty – The Path and Way Forward', Suaram Malaysia Human Rights Report 2023, SUARAM 2024, p190, https://www.suaram.net/files/uqd/359d16_ab54282901d049e1bd30ce834f143354.pdf.

²¹ Bernama, 'Apex Court to hear first batch of review applications by death row prisoners today', New Straits Times, November 14 2023, <https://www.nst.com.my/news/crime-courts/2023/11/978059/apex-court-hear-first-batch-review-applications-death-row-prisoners>.

²² Ngeow, C.Y., op cit, p190.

²³ Ibid.

²⁴ Ibid.

23. Whilst applicants are afforded legal representation in the resentencing process, there has been significant concern regarding the short timeframes and scant resources (as explained above) for the lawyers to gather evidence. This problem is even more acute when the applicant is a foreigner and getting in touch with the family is a challenge. Given the high proportion of women on death row are foreign nationals, the accelerated timeframes have a particularly detrimental effect on this sub-group.
24. The then-Deputy Law Minister Ramkarpal Singh who introduced the legislative instruments for the resentencing process, envisaged the entire process for the Federal Court to hear all eligible applicants to take between 6-12 months²⁵. Civil Society Organisations (CSOs) have expressed concern regarding the lack of opportunity to adduce mitigation evidence in respect of applicants who have indicators that mental health may have been a relevant consideration in their offending or arising after lengthy periods of imprisonment on death row²⁶.
25. The short timeframe poses significant challenges for lawyers in engaging forensic psychiatrists or psychologists, particularly forensic psychiatrists, to assess the applicant and prepare a report for the Court²⁷. Some lawyers reported that they did not have and were not provided with a copy of the Record of Appeal and Notes of Proceeding of the trial at first instance and the subsequent conviction appeals, though some of the cases were decided 30 years ago and records may not be available anymore. Some lawyers also specifically request for medical and/or mental health assessment to be conducted by the prison in advance of the resentencing hearing but to no, or very little, avail.
26. In 2021, Project 39A at the National Law University in Delhi released a study on the mental health of persons on death row by interviewing 88 persons on death row and their families. They found that 62.2% of the 82 prisoners referred to for clinical assessment, were diagnosed with at least one mental illness²⁸. Further, almost 11% of the prisoners interviewed were diagnosed with an intellectual disability²⁹; a rate significantly higher than found in the community population. It would be expected that an analysis of the mental health of those on death row in Malaysia would also reveal an increased occurrence of mental illness and

²⁵ Chew, D., 'A new chapter: Malaysia's journey toward abolition', Blog Post, Eleos Justice, May 12 2023, <https://www.monash.edu/law/research/eleos/blog/eleos-justice-blog-posts/a-new-chapter-malaysias-journey-toward-abolition>.

²⁶ Anti-Death Penalty Asia Network and Ors., 'Malaysia: Foreign national's death sentence upheld in a first for resentencing process', Joint Statement, January 19 2024, <https://adpan.org/wp-content/uploads/2024/04/Draft-Statement-Junaidi.docx.pdf>.

²⁷ Ngeow, C.Y., op cit, p190.

²⁸ Maitreyi Misra et al, 'Deathworthy: A mental health perspective of the death penalty', Report, Project 39A, October 2021, p91, https://static1.squarespace.com/static/5a843a9a9f07f5ccd61685f3/t/616fd7988256c93ab9735618/1634719720928/Deathworthy_MainReport_19Oct_2021.pdf

²⁹ Maitreyi Misra et al, op cit, p5.

intellectual disability, both important considerations in determining culpability and sentence. As persons on death row were previously sentenced under a mandatory sentencing regime, such evidence was not gathered at the time of trial and sentencing. This means that those applying for resentencing now may never have had their mental health experience considered at any point during their interactions with the criminal justice system.

27. Additionally, there is no government funding for independent psychiatric assessments and there are not many forensic psychiatrists or psychologists available to conduct such assessments³⁰. As a result, lawyers are unable to present mental health assessments as mitigating evidence, both at the time of the offence or during any review/appellate application.
28. For ongoing and future trials, s.183 of the Criminal Procedure Code directs the Court to pass sentence upon conviction³¹, and in view of the Abolition of the Mandatory Death Penalty Act 2023, the Court now has the discretion to determine whether to hand down a death sentence or the alternative sentence of imprisonment and caning.
29. The resentencing process provides an opportunity to develop mitigation jurisprudence particularly in relation to highlighting underlying gender-based issues. A 2023 joint report of Eleos Justice, Monash University and the Cornell Center on the Death Penalty Worldwide noted that “While capital drug laws do not necessarily discriminate against women on paper, their application is often blind to the unique vulnerabilities faced by women which may lead them to drug crime”³². Women are often engaged in drug offending as a result of economic insecurity, coercion and intimidation, and deception³³. Developing a gendered lens of mitigation evidence, allows judges to look beyond the crime and into the full context of the individual while deciding the sentence.
30. It is important for the Government of Malaysia to consider the practice of bifurcated trials, where a sentencing hearing is conducted separately from and subsequent to a criminal trial or plea hearing³⁴. In the separate trials for sentencing, the Court will consider all the circumstances, including aggravating and mitigating circumstances and determine an appropriate and proportionate sentence. On a practical level, having the opportunity to adjourn a trial hearing to a sentencing hearing, allows for

³⁰ Ngeow, C.Y., op cit, p190.

³¹ Criminal Procedure Code [Act 593] 2012 Malaysia, p124, [https://ccid.rmp.gov.my/Laws/Act_593_-_Criminal_Procedure_Code_\(CPC\).pdf](https://ccid.rmp.gov.my/Laws/Act_593_-_Criminal_Procedure_Code_(CPC).pdf)

³² Alexander, C., ‘Gendered Nature of the Death Penalty: in Law and Practice’ in Sato. M., and Babcock, S. (eds.), *Silently Silenced: State-Sanctioned Killing of Women*, Eleos Justice, Monash University and Cornell Center on the Death Penalty Worldwide, 2023, p21, https://bridges.monash.edu/articles/report/Silently_Silenced_State-Sanctioned_Killing_of_Women/22357627.

³³ Alexander, C., op cit, p22.

³⁴ Ngeow, C.Y., op cit, p189.

meaningful mitigation evidence to be obtained such as mental health assessments.

31. This can only enhance the development of mitigation jurisprudence for capital offences, through a gender sensitive lens that:

“...would take into account the socio-economic factors that precipitate women’s involvement in drug trafficking, such as any history of gender-based violence, if they were coerced or influenced, possible drug dependence and/or mental illness, and whether they engaged in drug trafficking to fulfil their responsibilities as a sole breadwinner.”³⁵.

Moving towards abolition of the death penalty

32. CEDAW has requested more information regarding the Government of Malaysia’s “plans to continue to observe the moratorium on all executions first established in July 2018, until the death penalty is fully abolished, and all death sentences are reviewed and commuted”.³⁶

33. Whilst the resentencing process has been seen as a ‘baby-step’ towards abolition of the death penalty,³⁷ the death penalty remains a sentencing option in Malaysia. It has been reaffirmed in a number of cases including a case where no psychiatric examination of the applicant was conducted despite clear indications that the applicant’s mental health at the time of offending may have impacted his culpability³⁸.

34. It remains to be seen how the Court exercises the discretion, as it is still at an early stage. Until the death penalty is fully abolished, the exercise of discretion by the Court becomes crucial to ensure the minimal use of the death penalty. However, contrary to the requirements of a meaningful exercise of discretion, at the moment, there is no separate hearing for sentencing, and because of the short timeframes and lack of expert evidence, judges are likely to have deficient information. These aspects must be urgently looked into.

³⁵ Harry, L., ‘Comment - Foreign women bear the brunt of harsh drug laws’, Malaysiakini, September 1 2022, <https://www.malaysiakini.com/columns/634204>.

³⁶ Convention on the Elimination of All Forms of Discrimination Against Women. List of Issues and questions related to the sixth periodic report of Malaysia (March 6, 2023) U.N. Doc. CEDAW/C/MYS/Q/6, p8.

³⁷ Ngeow, C.Y., op cit, p182.

³⁸ Anti-Death Penalty Asia Network and Ors., ‘Malaysia: Foreign national’s death sentence upheld in a first for resentencing process’, Joint Statement, January 19 2024, <https://www.cjpa.org.au/news/joint-statement-resentencing-process-malaysia>

Recommendations: -

The Government of Malaysia should be encouraged to:

1. Provide adequate funding for lawyers at every stage of criminal proceedings, including police investigations and interviews and matters arising post-conviction such as clemency applications.
2. Provide adequate funding for interpreters at every stage of criminal proceedings, including police investigations and interviews.
3. Provide adequate funding for expert witnesses such as psychiatrists and psychologists, to perform assessments and prepare reports to inform the Court.
4. Provide access to all relevant legal documents and/or reports and/or records by the police, the prison department, social welfare, hospitals, home ministry, immigration and Court. Noting this may take longer to provide in cases where the initial court proceedings took place decades earlier, appropriate timeframes must be set to accommodate this.
5. Set realistic time frames to enable the gathering of relevant, meaningful and crucial mitigation evidence in respect of current resentencing cases. Where the applicant is a foreign national, additional time must be provided so that proper mitigating evidence can be obtained from their country of origin.
6. Consider adopting a model of bifurcated trials, where separate sentencing hearings are conducted to consider mitigation evidence.
7. Deliver gender-sensitivity training to judges, police, lawyers and all those working in the criminal justice sector, focused on the particular issues experienced by women charged with capital offences.
8. Provide transparency and disaggregation of information/data on women and trans persons on death row in general. Additionally, information/data on those applying for resentencing should be made available, so that the public can monitor the implementation of the new law.
9. Work with other governments to ensure that foreign nationals on death row are adequately assisted in engaging with the resentencing process, including access to interpreters.
10. Reach out, cooperate, and provide platforms for engagement with CSOs, non-government organizations, and other groups working on Women and Gender issues, especially those providing free legal assistance and psycho-social services to bridge the gap in resources, which could assist in optimizing the benefits of the new laws.