

CONFERENCE PROCEEDINGS

1ST INTERNATIONAL CONFERENCE

UNIVERSAL PERIODIC REVIEW IN SOUTHEAST ASIA

15-17 SEPTEMBER 2016
BANGKOK THAILAND



TAIWAN FOUNDATION
for DEMOCRACY

財團法人臺灣民主基金會



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Preface

The Universal Periodic Review (UPR) is a mechanism under the Human Rights Council that reviews the human rights situation in all 193 UN Member States once every four and a half years. By 2016 all ASEAN member states have undergone two reviews of their respective human rights situations under the process. However, systemic problems remain with regards to its engagement with civil society stakeholders, the implementation of recommendations by the respective ASEAN governments, the efficacy of follow up processes and the UPR's ability to address hard political issues.

Asia Centre's 1st International Conference titled "Universal Periodic Review in Southeast Asia: A Regional Assessment" was convened to appraise these issues. The event was held on 15-17 September 2016 in Bangkok, Thailand. Over the course of three days, the conference hosted thirteen presenters and upwards of fifty participants from diverse backgrounds including academia, civil society organisations, national human rights institutions, the United Nations, as well as undergraduates and postgraduates. All of them came together to discuss the role of the UPR in Southeast Asia.

The papers in this conference proceeding examined the effectiveness of UPR in improving the human rights standard in the region. They identified trends and patterns of engagement with the UPR over the two cycles and provided a critical analysis of the UPR's achievement in Southeast Asia. They also assessed the process of UPR, the involvement of stakeholders and the effects of UPR on issues of human rights in the region. All papers in this conference proceedings have been formatted and presented here as received by the editors. The authors are responsible for the accuracy of facts, quotation, data, statements and the quality of the English language in their work. The papers are organised in the way it appeared in the conference program.

The papers received and compiled in this conference proceedings are only a selection of all presentations at the conference. However participants of this conference and new contributors went on to contribute chapters to Asia Centre's publication: "The Universal Periodic Review Of Southeast Asia: Civil Society Perspective" in 2018. This book reviews Southeast Asia's civil society engagement with the Universal Periodic Review (UPR) of the United Nations Human Rights Council during the first (2008-2011) and second (2012-2016) cycle. It is the first regional appraisal of the UPR in Southeast Asia.

For more information about Asia Centre's publication "The Universal Periodic Review Of Southeast Asia: Civil Society Perspective" click the link [here](#).

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Universal Periodic Review and the Abolition of the Death Penalty in Singapore, Malaysia, Brunei and Myanmar: The Arduous March Forward

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Abstract

South East Asia comprises a region often associated in the media with the liberal use of the death penalty, particularly for drug related offences. In recent years, however, trends suggest a move towards abolishment, through moratoriums and legal reform.⁷ This is especially the case in former British colonies. In 2012, Singapore amended its laws on the death penalty, making it no longer mandatory for those convicted of drug trafficking or murder to receive death sentences.⁸ In Malaysia, while the death penalty is still handed down for drugs and trafficking, the reluctance to carry out these penalties has been noticeable.⁹ In Brunei Darussalam and Myanmar a de facto Moratorium is in place, where executions have not taken place since 1957 in Brunei and all death sentences were commuted in Myanmar in 2014.¹⁰ At the same time, UN Member States throughout the region are on the precipice of a third cycle of Universal Periodic Review (UPR), set to begin in 2017. Judging by the emphasis on the death penalty in the previous two UPRs, it is likely that the topic will again be a focus of attention at the third review and these member states will be urged to step further towards abolishment. Previous reviews included emphasis by other member states and human rights groups on the use of the death penalty for drug related offences and the imperative to move beyond moratorium and establish an outright abolishment. In the lead up to the 3rd UPR cycle of the UN Human Rights Council, this paper will provide a comparison of four UN Member States, Singapore, Malaysia, Brunei Darussalam and Myanmar, and the prominence their 1st and 2nd cycle UPR gave to each of their respective death penalty regimes. In doing so, it will analyse and compare four primary UPR sources: national reports, submissions from UN Special Procedures and treaty bodies, summary of stakeholder information (including submissions by Non-Governmental Organizations (NGOs)), as well as the final outcome reports. The paper is divided into 6 sections: 1. Introduction; 2. Review of Singapore; 3. Review of Malaysia; 4. Review of Brunei; 5. Review of Myanmar; 6. Broad Comparisons Between Member States; 7. Looking towards the 3rd UPR Cycle and Concluding Remarks.

⁷Moving Away from the Death Penalty Lessons in South East Asia, 2013, UNOHCR, <http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf>

⁸ Evidenced from the Misuse of Drugs (Amendment) Act 2012 and Penal Code (Amendment) Act 2012 on 14 November 2012 and changes to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

⁹ Yingyos Leechaianan and Dennis R. Longmire, 2013, The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis, *Laws*, 115-149, 115.

¹⁰ Cornell Law School Death Penalty Database: Brunei, <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>; UN Rights Office Praises Myanmar for Commuting all Death Sentences, 2014, UN News Centre: <http://www.un.org/apps/news/story.asp?NewsID=46904#.V6q9UiN962x>

Introduction

South East Asia comprises a region often associated in the media with the liberal use of the death penalty, particularly for drug related offences. In recent years, however, trends suggest a move towards abolishment, through moratoriums and legal reform.¹¹ This is especially the case in former British colonies. In 2012, Singapore amended its laws on the death penalty, giving judges more discretion by partially lifting the mandatory requirement in some limited cases.¹² In Malaysia, while the death penalty is still handed down for drugs and trafficking, the reluctance to carry out these penalties has been noticeable.¹³ In Brunei Darussalam and Myanmar a de facto Moratorium is in place, where executions have not taken place since 1957 in Brunei and all death sentences were commuted in Myanmar in 2014.¹⁴ At the same time, UN Member States throughout the region are on the precipice of a third cycle of Universal Periodic Review (UPR), set to begin in 2017. Judging by the emphasis on the death penalty in the previous two UPRs, it is likely that the topic will again be a focus of attention at the third review and these member states will be urged to step further towards abolishment. Previous reviews included emphasis by other member states and human rights groups on the use of the death penalty for drug related offences and the imperative to move beyond moratorium and establish an outright abolishment.

In the lead up to the 3rd UPR cycle of the UN Human Rights Council, this paper will provide a comparison of four UN Member States, Singapore, Malaysia, Brunei Darussalam and Myanmar, and the prominence their 1st and 2nd cycle UPR gave to each of their respective death penalty regimes. In doing so, it will ultimately show that while there are glimmers of hope, the road ahead for abolishing the death penalty in these countries will be long and arduous. The paper analyses and compares four primary UPR sources: national reports, submissions from UN Special Procedures and treaty bodies, summary of stakeholder information (including submissions by Non-Governmental Organizations (NGOs)), as well as the final outcome reports. It is divided into 3 primary sections: 1. The Universal Periodic Review; 2. A Cross Country Analysis of CSO Recommendations at the UPR; 3. Brief consideration of the laws in Brunei, Malaysia, Myanmar and Singapore carrying the death penalty, followed by concluding remarks.

1) The Universal Periodic Review

1.1) The Universal Periodic Review – A Brief Overview

¹¹Moving Away from the Death Penalty Lessons in South East Asia, 2013, UNOHCHR,

<http://bangkok.ohchr.org/files/Moving%20away%20from%20the%20Death%20Penalty-English%20for%20Website.pdf>

¹² Evidenced from the Misuse of Drugs (Amendment) Act 2012 and Penal Code (Amendment) Act 2012 on 14 November 2012 and changes to the Criminal Procedure Code (Cap 68, 2012 Rev Ed). These limited situations may include those where murder is not intentional and drug possession within certain (low) thresholds.

¹³ Yingyos Leechaianan and Dennis R. Longmire, 2013, The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis, Laws, 115-149, 115.

¹⁴ Cornell Law School Death Penalty Database: Brunei,

<http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>; UN Rights Office Praises Myanmar for Commuting all Death Sentences, 2014, UN News Centre:

<http://www.un.org/apps/news/story.asp?NewsID=46904#.V6q9UiN962x>

The Universal Periodic Review (UPR) is a mechanism of the United Nations Human Rights Council (UNHCR), which reviews the human rights record of every member state on a periodic basis. As a state-driven process, the UPR ensures the equal treatment of each Member State in the assessment of human rights.¹⁵ Core to its functioning is the cooperative, constructive, non-confrontational and non-politicized nature of the process.¹⁶ Established in 2006 through UN General Assembly resolution 60/251, the process is without parallel in the world, making it an important means by which countries can cooperate in highlighting and respecting the importance of human rights. Within the process, a number of key documents are prepared for each country as part of a peer review: 1. Information from the State concerned; 2. Information from reports of treaty bodies, special procedures and other relevant UN documents compiled by the Office of the High Commissioner for Human Rights (OHCHR); 3. Information provided by relevant stakeholders, including research institutes, non-governmental organizations (NGOs) and civil society organizations (CSOs).¹⁷ At the conclusion of a Member State's review, a national report is finally prepared and published. At the time of writing, the UPR mechanism is concluding its second cycle, with the third set to begin in 2017.¹⁸ Various analysis of the first cycle generally found cautious optimism. Some suggested that, although an imperfect process, the UPR enables dialogue and cooperation between member states and with stakeholders.¹⁹ Challenges, however, echo current reflections on the second cycle. In particular, the fundamental test of recommendation implementation. Cycles can come and go, but ultimately human rights law practitioners and supporters value practical outcomes. At the precipice of the third cycle of review, this element of implementation will be closely watched. At its conclusion, a decade and a half of experience will clarify trends in this respect.

The UPR process has been met with universal participation from Member States.²⁰ Commentators have highlighted the value that the UPR process brings to increasing dialogue between governments and non-state actors, while creating a baseline of valuable documentation for reference.²¹ Furthermore, it has facilitated a self-evaluation process for States, creating a norm, which, although arguably generating lip-service, has nevertheless heightened the awareness of human rights at a universal level. Generally, the UPR has cemented its role as an important element of the application of human rights law internationally; creating a vital system for valuing human rights, relied upon by governments and stakeholders alike. Some have hailed the UPR as a paradigm shift in the way CSOs and governments interact, facilitating cooperative rather than adversarial communication.²²

¹⁵ Universal Periodic Review, *Office of the High Commissioner for Human Rights*, United Nations, 2016, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

¹⁶ UNGA Resolution 60/251

¹⁷ UPR Documentation, *Office of the High Commissioner for Human Rights*, United Nations, 2016, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx>

¹⁸ UPR Sessions, *Office of the High Commissioner for Human Rights*, United Nations, 2016: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRSessions.aspx>

¹⁹ Alex Conte, 'Reflections and Challenges: Entering into the Second Cycle of the Universal Periodic Review Mechanism', 2011, *New Zealand Yearbook of International Law* 9:187.

²⁰ Participation by All Crucial for Successful Universal Periodic Review of National Records, Third Committee Told, *GA/SHC/4089*. 13 November 2013.

²¹ Edward R. McMahon, The Universal Periodic Review: A Work in Progress: An Evaluation of the First Cycle of the New UPR Mechanism of the United Nations Human Rights Council, September 2012, *Dialogue on Globalization*, 9.

²² Roland Chauville, 4 June 2016, 'Between the Cycles: The UPR's Achievements and Opportunities', *International Service for Human Rights*: <https://www.ishr.ch/news/between-cycles-uprs-achievements-and-opportunities>

The UPR has also been met with criticism that it does not go far enough to include NGO involvement.²³ This is a delicate topic in a system that is organized and carried out by the UN Member States themselves, where some less democratic States may wish to suppress the voice of human rights NGOs critical of their record. NGOs and CSOs often bring critical detail and practical examples to the process that shed light on human rights abuses that may otherwise go unnoticed. From the perspective of NGOs, the efficacy of the UPR lies in its ability to achieve the objective of ‘improving the situation of human rights on the ground.’²⁴ Early NGO assessments of the UPR underscored the need for the mechanism to pressure States to uphold their international commitments to human rights, asserting that time would tell of the usefulness of the UPR.²⁵ Later analysis found that there is difficulty in evaluating the implementation of Recommendations arising from the UPR and that the Recommendations themselves are often imprecise in nature, confounding the challenge of implementation.²⁶ In 2013, Hickey noted that in the 12 sessions of the first cycle, 75% of all recommendations were accepted.²⁷ However, the gulf between accepting recommendations and implementing them remains a challenge.

1.2) The Universal Periodic Review and the Death Penalty

In each review, fundamental sources of international human rights law are called upon to hold each Member State to account. These include, broadly, the Universal Declaration of Human Rights, the Charter of the United Nations, pledges and commitments made by a State and the various human rights instruments to which a state is a party.²⁸ Within these sources of law are a wide range of human rights standards which Member States can choose to accept, and some that can be considered a part of international custom. Among all the topics highlighted from this framework during UPR cycles for review, the death penalty is consistently among the issues that are reiterated yet go unimplemented by countries with capital punishment laws.²⁹

Among the recommendations made by States during the UPR are those to abolish the death penalty, impose a moratorium on implementing the death penalty and ratifying the Second Optional Protocol of the International Covenant on Civil and Political Rights to abolish the death penalty.³⁰ Other recommendations on the subject are myriad and reflect a spectrum of abolitionist views, from upholding moratoriums to increasing education and awareness around the denial of human rights constituting the death penalty.

As most countries in South East Asia retain the death penalty in domestic law, the region is no stranger to recommendations against the death penalty during the Universal Periodic Review. A closely associated aspect of these recommendations is the fact that a significant

²³ Human Rights Monitor Quarterly 2.2012 [http:// www.ishr.ch/document-stuff/browse-documents/doc_download/1440-universal-periodic-review-hrmq2-2012-](http://www.ishr.ch/document-stuff/browse-documents/doc_download/1440-universal-periodic-review-hrmq2-2012-)

²⁴ Council Resolution 5/1, 18 June 2007, A/HRC/RES/5/1 at para. 4(a)

²⁵ Gareth Sweeney and Yuri Saito, NGO Assessment of the New Mechanisms of the UN Human Rights Council, *Human Rights Law Review* 9:2, March 2009, 218.

²⁶ Emma Hickey, ‘The UN’s Universal Periodic Review, Is it Adding Value and Improving the Human Rights Situation on the Ground?’ *ICL Journal*, Vol 7, 2013, 24

²⁷ Emma Hickey, ‘The UN’s Universal Periodic Review, Is it Adding Value and Improving the Human Rights Situation on the Ground?’ *ICL Journal*, Vol 7, 2013, 23

²⁸ United Nations Human Rights Council, *Institution-building of the United Nations Human Rights Council*, 2007, Annex to Resolution 5/1, 1.2

²⁹ UPR-Info, 2014, ‘Beyond Promises: The Impact of the UPR on the ground’, 31.

³⁰ John Morrison Liam Riordan, 2015, ‘The Implacable Ritual: A study examining the inertia of death penalty abolition within the Universal Periodic Review, despite tacit support and global trends’, Master’s Thesis in Public International Law, Universiteit Leiden.

proportion of Member States in the region have not ratified the ICCPR.³¹ Stemming from that international legal instrument is Article 6, which states that, '[e]very human being has the inherent right to life.'³² Which very limited exception, this article is a cornerstone of criticism for the death penalty. Clause 6 of the article states, 'nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.'³³ Viewed through this lens, Member States that have ratified the ICCPR often recommend Member States within South East Asia to take steps to align with the Covenant. The corresponding Optional Protocol 2 is also a foundation stone for abolitionist countries to make recommendations against the death penalty during UPR.

Beyond the central position against the death penalty arising from the ICCPR are related corollary recommendations. These include, the use of the death penalty on 'protected persons',³⁴ and beyond 'most serious crimes',³⁵ such as is cases of drug use and trafficking, provisions for fair trial in death penalty cases, the urging of use of moratoriums, and the methods by which the death penalty is carried out which can be considered cruel and inhumane.³⁶ Altogether, taking into consideration both UPR cycles to date, a total of 157 recommendations were made regarding the death penalty to the Member States comprising ASEAN and 69 to the countries highlighted in this paper particularly.³⁷ The top 5 Member States making these recommendations were France, Spain, Italy, Australia and Belgium—all abolitionist States.³⁸

The UPR, then, presents an apparent opportunity for abolitionist Member States to recommend moves away from the death penalty to countries that still maintain capital punishment, on the global stage. These recommendations are an important part of the peer review process of the UPR that ensures equal human rights record scrutiny for every Member State. Issues raised in relation to the 4 countries the subject of this paper ranged in the two cycles from urges to ratify the ICCPR to specific comments regarding Sharia law, to abolishing the death penalty for drug crimes, to unequivocally urging the abolishment of the death penalty altogether. In response, these Member States replies ranged from 'nothing' to accepting in limited circumstances³⁹, yet avoiding any voluntary pledges. Malaysia accepted Egypt and Sudan's recommendation to maintain national sovereignty in carrying out the death penalty and 'maintain a good example' in observing legal safeguards around the death penalty. At the same time, Singapore accepted France's recommendation to modify legislation and shift the burden of proof of person facing death penalty to the prosecution. Singapore also accepted Finland's recommendation to make available statistics and facts on the use of the death penalty in Singapore.⁴⁰ Overall, however, Singapore has rejected almost half of all total recommendations it received.⁴¹

³¹ Moving Away from the Death Penalty: Lessons in South-East Asia, 2012, *Office of the High Commissioner for Human Rights Regional Office for South-East Asia*, 21.

³² International Covenant on Civil and Political Rights, Article 6.

³³ International Covenant on Civil and Political Rights, Article 6.6; Note also the Second Optional Protocol GA Resolution 44/128 of December 1989.

³⁴ ICCPR, Art. 6(5).

³⁵ ICCPR Art. 6(2).

³⁶ UN General Assembly, *Interim report of the Special Rapporteur on torture*, 2012, A/67/279, 33.

³⁷ UPR-Info, 2016, Database of UPR Recommendations.

³⁸ UPR-Info, 2016, Database of UPR Recommendations.

³⁹ UPR-Info, 2016, Database of UPR Recommendations.

⁴⁰ UPR-Info, 2016, Database of UPR Recommendations.

⁴¹ Oral Statement Delivered on behalf of (FORUM-ASIA) at the 24th June 2016 Universal Periodic Review plenary on Singapore, <http://www.thinkcentre.org/article.php?id=3265>.

In any case, the engagement of these countries in a dialogue about the death penalty over the course of a decade now, can be seen as an important accomplishment and a testament to the efficacy of the UPR as a mechanism for highlighting the use of the death penalty. Equally important is the contribution that NGOs and CSOs make within that mechanism.

2) A Cross Country Analysis of CSO Recommendations at the UPR

Throughout the first two cycles of the UPR, NGOs and other CSOs have played an important role in highlighting human rights violations in the region, where other Member States have not. Of these, Amnesty International (AI) is particularly active in its stakeholder submissions and is essentially the foremost international non-governmental organization raising death penalty issues at the UPR for Brunei Darussalam, Malaysia, Myanmar and Singapore. Other international organizations include World Coalition against the Death Penalty (WCADP), International Bar Association's Human Rights Institute and Child Rights International Network. Regional and local organizations are numerous and include Working Group for an ASEAN Human Rights Mechanism (MARUAH), Singapore Anti-Death Penalty Campaign (SADPC), the Human Rights Commission of Malaysia, as well as coalitions of Malaysian and Singaporean NGOs.

These organizations raised varied and overlapping death penalty related issues during the 1st and 2nd UPR cycles for each country. There is a noticeable increase in highlighted issues between the 1st and 2nd cycles for each country, bar Brunei Darussalam where the 2nd review made no apparently direct references to the death penalty or capital punishment. Generally, the number of organizations contributing to the UPR was higher for Singapore and Malaysia, resulting in richer emphasis for these countries. Brunei and Myanmar also have de-facto moratoriums on the death penalty, consequentially attracting minimal attention.

1st UPR Cycle

In the first cycle (2008-2011), Amnesty International was especially active. For Brunei Darussalam, it noted that the country was a de facto 'abolitionist' country as an execution has not been carried out there since 1957. Still, it highlighted the offences punishable by death including murder, drug trafficking and the unlawful possession of firearms and explosives.⁴² Furthermore, AI recommended a permanent abolishment of the death penalty by repealing relevant laws to replace the death penalty with other punishments.⁴³ AI's light touch of the death penalty issue was raised again with Myanmar in a similar manner. It commented that Myanmar was abolitionist in practice, however a number of crimes including murder and drug trafficking maintained capital punishment.⁴⁴

⁴² SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15 (C) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1, 2009, A/HRC/WG.6/6/BRN/3, 3.

⁴³ Ibid.

⁴⁴ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/10/MMR/3, 4-6.

In the review of Singapore and Malaysia, AI made a number of other recommendations. For both, it mentioned that details of inmates on death row or those who have been executed are not made public, creating suspicion that more are executed than reported in the media.⁴⁵ In the case of Malaysia, it highlighted that the timing of executions is often not made public. It also noted that for certain crimes, such as drug trafficking, a mandatory death penalty remains in place.⁴⁶ This was particularly so for Singapore, where AI highlighted that any possession of drugs over a certain weight draws the mandatory death sentence.⁴⁷ As with Brunei Darussalam and Myanmar, AI invoked the 18 December 2007 General Assembly resolution 62/149.39, calling for complete abolition of the death penalty. Accordingly, AI recommended a moratorium on the death penalty come into effect with the ultimate aim of complete abolition.⁴⁸ It also put forward that the imposition of mandatory death sentences violated the human right to life, recommending that all laws carrying the death sentence be rewritten to use a different form of punishment.

Contributions from local organizations were less numerous in the 1st cycle. The Working Group for an ASEAN Human Rights Mechanism based in Singapore (MARUAH) recommended that the death penalty be reviewed and imposed only for the most serious crimes.⁴⁹ It also recommended that capital punishment not be used on accessories in group crimes and highlighted the need for ‘rigorous’ pre-trial and trial processes where legal counsel is immediately available to the accused after arrest. MARUAH also went on to recommend that Singapore publish persuasive and objective evidence of the deterrent effect of the death penalty, presumably relying on the fact that there is little, if any, evidence to demonstrate the deterrent effect of the death penalty.⁵⁰ The Singapore Anti-Death Penalty Campaign (SADPC) also contributed to this cycle. It argued that the death penalty was not consistent with absolute necessity and proportionality requirements in the case of drug-related offences. SADPC went on to recommend an independent clemency appeals board so case-by-case reviews could be conducted.

Malaysia’s review had contributions from local organizations in the form of the Human Rights Commission of Malaysia (SUHAKAM) and coalition of Malaysian NGOS that submitted jointly to the UPR review (COMANGO).⁵¹ SUHAKAM recommended that the

⁴⁵ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/11/SGP/3, 4.

⁴⁶ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/10/MMR/3, 4-6.

⁴⁷ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/11/SGP/3, 4.

⁴⁸ SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15 (C) OF THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1, 2008, HRC/WG.6/4/MYS/3, 4.

⁴⁹ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/11/SGP/3, 4.

⁵⁰ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1, 2011, HRC/WG.6/11/SGP/3, 4.

⁵¹ These NGOs included 56 NGOs: All PJ Residents’ Association Coalition (APAC) (a coalition of 9 residents’ associations), All Women’s Action Society (AWAM), Centre for Independent Journalism (CIJ), Centre for Orang Asli Concerns (COAC), Centre for Public Policy Studies (CPPS), Civil Rights Committee of the Kuala Lumpur and Selangor Chinese Assembly Hall, Community Action Network (CAN), Education and Research Association for Consumers, Malaysia (ERA Consumer), Health Equity Initiative, Human Rights Committee of the Malaysian Medical Association, Independent Living and Training Centre (ILTC), Indigenous and Peasant Movement Sarawak (Panggau), International Association for Peace (IAP), Indian Malaysian Active

Pardons Boards review death row cases and COMANGO lamented that no public information existed on the number of prisoners on death row.⁵²

2nd Cycle

The number of recommendations from NGOs and CSOs, both local and international, increased significantly in the 2nd cycle (2012-2016), highlighting a range of important human rights issues related to the death penalty. This with the exception of Brunei Darussalam, where a de facto moratorium remains in place, where the most significant concern was with its new Shariah Penal Code set to introduce the death penalty for a wide array of offences.⁵³

In the second cycle, AI was again an active participant in making recommendations to Malaysia (2013) and Singapore (2015) related to the death penalty. It noted Government reports that 930 prisoners were on death row and that drug offences under certain circumstances would avoid mandatory the death penalty.⁵⁴ Both the reporting and the consideration of reforming the mandatory sentence showed a marked improvement from the first cycle. AI also raised the ‘most serious crimes’ threshold for the death penalty, perhaps pushing for an incremental approach to eventual abolition. A joint submission from JS8 highlighted the use of the mandatory death penalty for drug trafficking and recommended that Malaysia limit the use of the death penalty to the most ‘serious crimes’, highlighting a similar issue to AI.⁵⁵ In other words, avoiding the death penalty for drug related offences. AI did, however, note the positive step Singapore took to maintain a moratorium while the Misuse of Drugs Act 2012 and the Penal Code Act 2012 was reviewed (the moratorium ending in 2014). AI was concerned that while reform allowed judges to use more discretion in deciding whether to impose the death penalty (such as for group crimes), the laws still don’t go far enough to align with international human rights law and standards.⁵⁶ It also noted

Generation (IMAGE), Knowledge and Rights with Young People through Safer Spaces (KRYSS), Malaysian Animal-Assisted Therapy for the Disabled and Elderly Association (Pet Positive), Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST) (a coalition of 9 religious organisations), Malaysian Trade Union Congress (MTUC), Malaysian Youth and Students Democratic Movement (DEMA), Myanmar Ethnic Rohingya Human Rights Organisation Malaysia (MEHROM), Persatuan Sahabat Wanita Selangor (PSWS), Persatuan Masyarakat Selangor and Wilayah Persekutuan (PERMAS), Persatuan Guru-guru Tadika (PGGT), Positive Malaysian Treatment Access & Advocacy Group (MTAAG+), Protect and Save the Children (PS the Children), PT Foundation, Pusat Jagaan Nur Salam, Pusat Komunikasi Masyarakat (KOMAS), Research for Social Advancement (REFSA), Sarawak Dayak Iban Association (SADIA), Sisters in Islam (SIS), Tenaganita, United Dayak Islamic Brotherhood, Sarawak, Women’s Aid Organisation (WAO), Women’s Centre for Change, Penang (WCC), Writers’ Alliance for Media Independence (WAMI), Youth for Change (Y4C), Youth Section of the Kuala Lumpur and Selangor Chinese Assembly Hall

⁵² SUMMARY PREPARED BY THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, IN ACCORDANCE WITH PARAGRAPH 15 (C) OF

THE ANNEX TO HUMAN RIGHTS COUNCIL RESOLUTION 5/1, 2008, HRC/WG.6/4/MYS/3, 4.

⁵³ Report of the Working Group on the Universal Periodic Review of Brunei Darussalam (A/HRC/27/11), p. 8, at para 49, p. 10, at para 69, p. 11, at para 85, p. 12, at para 99, 103

⁵⁴ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2013, HRC/WG.6/17/MYS/3, 2.

⁵⁵ Summary prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2013, HRC/WG.6/17/MYS/3, 2.

⁵⁶ Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2015, HRC/WG.6/24/SGP/3, 3.

that families with members on death row are not notified far enough in advance of execution dates.

Another international organization, Child Rights International Network (CRIM) commented that the death penalty was lawful for children under 18 years of age and recommended reform in both the Malaysia and Singapore reviews.⁵⁷ Other legal reform recommendations came from JS1, a joint submission from 54 organizations.⁵⁸ It recommended that parliamentarian, judges and judicial officers be trained to have greater awareness of human rights issues, including the right to life. AI also recommended to Singapore that the presumption of innocence be maintained in death penalty cases and the burden of proof be placed on the prosecution. It also stated that Singapore should ensure the right to fair trial and the presumption of innocence in its cases.⁵⁹

In Singapore's review, the local anti-death penalty NGO, Second Chances, raised the issue of the legality of execution of persons who are mentally ill, where there was no legal requirement to consider clemency. It also echoed the first cycle recommendations in that public information was lacking in Singapore related to the death penalty and very little notice given to families.⁶⁰ These points were also reiterated by AI.

A further point of recommendation came from MARUAH expressing concern that in Singapore accused persons facing death penalty crimes can be denied access to legal counsel for a period of time after arrest to allow police to conduct investigations. It also noted that in Singapore a conviction can be made on confession recorded during police investigation. Both of these issues raise significant challenges to the right to fair trial and presumption of innocence that should be afforded as human rights.

⁵⁷ Ibid.

⁵⁸ Joint submission No. 1 by 54 organizations: [Pusat Kesedaran Komuniti Selangor (EMPOWER), Suara Rakyat Malaysia (SUARAM), Education and Research Association for Consumers, Malaysia (ERA Consumer), All Petaling Jaya, Selangor Residents' Association (APAC), All Women's Action Society (AWAM), Amnesty International, Malaysia, ASEAN Institute for Early Childhood Development, Association of Women's Lawyers (AWL), Association of Women with Disabilities Malaysia, Coalition to Abolish Modern Day Slavery in Asia (CAMSA), Centre for Independent Journalism (CIJ), Childline Malaysia, Christian Federation Malaysia, Community Action Network (CAN), Centre for Rights of Indigenous Peoples of Sarawak (CRIPS), Dignity International, Foreign Spouses Support Group, Good Shepherd Welfare Centre, Health Equity Initiatives, Jaringan Kampung Orang Asli Semenanjung Malaysia (JKOASM), Jaringan Rakyat Tertindas (JERIT), Justice For Sisters, Pusat Komunikasi Selangor (KOMAS), Knowledge and Rights with Young people through Safer Spaces (KRYSS), KLSCAH Civil Rights Committee, Land Empowerment Animals People (LEAP), Malaysians Against Death Penalty and Torture (MADPET), Malaysian Child Resource Institute (MCRI), Malaysian Physicians for Social Responsibility, Malaysia Youth & Student Democratic Movement (DEMA), Migration Working Group (MWG), PANGGAU, Persatuan Masyarakat Selangor dan Kuala Lumpur (PERMAS), PS The Children, PT Foundation, People's Service Organisation (PSO), Seksualiti Merdeka, Perak Women for 13 Women Society, Persatuan Guru-Guru Tadika Semenanjung Malaysia (PGGT), Persatuan Komuniti Prihatin Selangor dan Kuala Lumpur, Persatuan Sahabat Wanita Selangor, Rainbow Genders Society, Sabah Women's Action-Resource Group (SAWO), Southeast Asian Centre for e-Media (SEACem), Sinui Pai Nanek Sengik (SPNS), SIS Forum (Malaysia) Bhd (SIS), Tenaganita, Voice of the Children (VOC), Writers' Alliance for Media Independence (WAMI), Women's Aid Organisation (WAO), Women's Centre for Change, Penang (WCC), Yayasan Chow Kit, Young Buddhist Association, Youth Section, Kuala Lumpur and Selangor Chinese Assembly Hall, Youth Section];

⁵⁹ Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2015, HRC/WG.6/24/SGP/3, 3.

⁶⁰ Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2015, HRC/WG.6/24/SGP/3, 3.

Myanmar's review (2015) had brief recommendations related to the death penalty in the 2nd cycle. AI and a joint submission from global NGOs commented that the death penalty remained a part of Myanmar law and death penalties were still handed down, although a moratorium is technically in place. They urged Myanmar to go the step further to move towards abolition.⁶¹

3) A brief consideration of the laws in Brunei, Malaysia, Myanmar and Singapore carrying the death penalty

Brunei Darussalam

i. General laws: ending the death penalty vs gradual elimination

Since 2014, Brunei Darussalam has maintained a new Shariah Penal Code that carries the death penalty for certain offences. As part of this new Code, a third phase of implementation focuses on offences carrying the death penalty to be enforced from 2018. The types of offences that will attract this law include rape, extramarital sexual relations for Muslims, insulting the verses of the Quran or Hadith, blasphemy, declaring oneself a prophet or non-Muslim, and murder. This list will also include death by stoning for sodomy and adultery.⁶² This is a concerning development, as currently Brunei maintains the death penalty as a punishment, in theory only, for offences that are more serious in nature, such as terrorism and murder. However, the penalty still remains in place for drug trafficking, possession, arson and treason.⁶³ In practice, a de-facto moratorium has been in place since the last reported execution in 1957. This is a promising sign towards gradual elimination of the death penalty. However, the Shariah Penal Code, which lies on the horizon, poses a serious challenge to progressive elimination. Ending the death penalty still appears to be a distant possibility.

ii. Moratorium on the death penalty

Brunei has maintained a de-facto moratorium since 1957, though this does not amount to a denouncement of the death penalty. In fact, the death penalty is still handed down and there are thought to be 4 known prisoners technically on death row.⁶⁴ While the moratorium is a positive step, it is quite possible that the country will engage in executing prisoners again when the totality of the new Shariah Penal Code is implemented.

Malaysia

i. General laws: ending the death penalty vs gradual elimination

⁶¹ Summary prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (c) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2015, HRC/WG.6/23/MMR/3, 4.

⁶² Brunei-Update on Shariah Penal Code, 2016, Anti Death Penalty Asia Network: <https://adpan.org/2016/06/09/brunei-update-on-shariah-penal-code-and-death-penalty/>.

⁶³ Brunei Crimes and Offenders Punishable by Death, 2015, Death Penalty Worldwide: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>.

⁶⁴ Brunei Crimes and Offenders Punishable by Death, 2015, Death Penalty Worldwide: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Brunei>.

Malaysia imposes the death penalty for a wide range of offences including arguably less serious crimes such as drug trafficking, and in certain circumstances, robbery, resisting arrest with a firearm, kidnapping and burglary.⁶⁵ Mandatory death sentencing is imposed for drug trafficking.⁶⁶ The Penal Code of Malaysia and the Dangerous Drugs Act of Malaysia set out most of these offences.⁶⁷ In total, the death penalty is mandatory for 12 of 20 total offences in Malaysia.⁶⁸ Although death sentences are carried out yearly, there is a potential change on the horizon for Malaysia. A recent government backed report on the death penalty is nearing publication as highlighted recently by Nancy Shukri, Minister in the Department of the Prime Minister.⁶⁹ At the 6th World Congress Against the Death Penalty, the Minister commented that based on this report, Malaysia was on a path to change in death penalty laws. What this means in practice remains to be seen.

ii. Moratorium on the death penalty

Malaysia does not currently maintain any moratorium on the death penalty. At least 3 executions were carried out in 2016.⁷⁰

Myanmar

i. General laws: ending the death penalty vs gradual elimination

The Burma Penal Code maintains the death penalty for a number of offences including murder, terrorism and treason.⁷¹ The Myanmar Narcotic Drug and Psychotropic Substances Law imposes a mandatory death penalty for drug possession and trafficking.⁷² In 2014, Myanmar took a widely lauded step to commute all death sentences.⁷³ Signs of gradual elimination are only conceivable in steps like these and the fact that no death sentence has been carried out since 1988.⁷⁴

ii. Moratorium on the death penalty

Myanmar maintains a de-facto moratorium on the death penalty. The last execution in the country was carried out in 1988.⁷⁵ The Special Rapporteur on the Situation of Human

⁶⁵ Penal Code of Malaysia, art. 307(2), 396, 194 and 305, 1936, as amended by Act 574 of 2006.; Firearms (Increased Penalties) Act of Malaysia, art. 3(A), 1971

⁶⁶ Dangerous Drugs Act of Malaysia, art. 39(B), 1952, revised 1980

⁶⁷ Penal Code of Malaysia, 1936, as amended by Act 574 of 2006; Dangerous Drugs Act of Malaysia, art. 39(B), 1952, revised 1980

⁶⁸ Nancy: Malaysia One Step Closer to Amending Death Penalty, 2016, The Star Newspaper: <http://www.thestar.com.my/news/nation/2016/06/22/nancy-malaysia-one-step-closer-to-abolishing-death-penalty/>.

⁶⁹ Nancy: Malaysia One Step Closer to Amending Death Penalty, 2016, The Star Newspaper: <http://www.thestar.com.my/news/nation/2016/06/22/nancy-malaysia-one-step-closer-to-abolishing-death-penalty/>.

⁷⁰ The Guardian, Malaysia hangs three men for murder in 'secretive' execution, <http://www.theguardian.com/world/2016/mar/25/malaysia-hangs-three-men-for-in-secretive-execution>, Mar. 25, 2016.

⁷¹ Burma Penal Code, art. 302, No. 45 of 1860, May 1, 1861.

⁷² Myanmar Narcotic Drug and Psychotropic Substances Law, arts. 20, 22-23, No. 1 of 1993.
; Myanmar Narcotic Drug and Psychotropic Substances Law, arts. 20, 22-23, 26, No. 1 of 1993..

⁷³ UN Office Praises Myanmar for Commuting all Death Sentences, 2014, <http://www.un.org/apps/news/story.asp?NewsID=46904#.V8rGDCN962x>.

⁷⁴ Death Penalty Worldwide, Cornell Law School, 2015, Myanmar: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Myanmar>.

⁷⁵ Death Penalty Worldwide, Cornell Law School, 2015, Myanmar: <https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Myanmar>.

Rights in Myanmar commended the Government for this effective moratorium, however noted that lower courts still hand down death sentences.⁷⁶ The fact that the Member State voted against a UN moratorium resolution in 2012⁷⁷ suggests that it is still unclear whether progress towards abolition is occurring.

Singapore

i. General laws: ending the death penalty vs gradual elimination

As a starting point, Singapore's constitution says that the state may not deprive someone of his or her life, 'save in accordance with law'.⁷⁸ (Singapore is not the only state to have such a constitution.⁷⁹) The first legal issue, then, concerns the presumption of innocence absent from the law relating to drugs.⁸⁰ Singapore upholds the death penalty in cases of trafficking or manufacturing drugs. In such cases, a presumption of innocence is not granted to the accused. The Misuse of Drugs Act empowers courts to presume a defendant in possession of a low requisite quantity of drugs is a drug trafficker. At every point, the burden is on the defendant to prove those presumptions incorrect, effectively creating a presumption of guilt in Singapore.⁸¹ This is significant especially because there has been historically a large number of executions in Singapore for drug convictions.⁸²

Another legal issue is the broad interpretation in Singapore of what amounts to a 'serious crime' attracting the death penalty. Singapore claims it only uses the death penalty for the 'most serious crimes'. But this is a controversial question in many jurisdictions around the world and Singapore's highest court has not had to decide this issue directly.⁸³ It is also significant that Singapore is not a signatory to the ICCPR or any international legal instruments that would place limitations of Singapore's use of the death penalty. This creates a limited international recourse, although some commentators have discussed that there may be an argument for appealing to international custom.⁸⁴

While Singapore amended its laws in 2012 on the death penalty, making it no longer mandatory for those convicted of drug trafficking or murder to receive death sentences, this is a far cry from eliminating the death penalty.⁸⁵ While some may view it as a gradual step

⁷⁶ Report of the Working Group on the Universal Periodic Review of Myanmar (A/HRC/17/9), p. 18, at para 106.9

⁷⁷ World Coalition Against the Death Penalty, 2016, Myanmar: <http://www.worldcoalition.org/Myanmar>

⁷⁸ Constitution of the Republic of Singapore (1999 Rev. Ed.), Art. 9(1).

⁷⁹ The Constitutions of the United States, India and Malaysia, and the European Convention are similarly drafted. "The Constitutionality of the Death Penalty" (1983) 25 Mal.L.Rev. 148.

⁸⁰ Misuse of Drugs Act of Singapore, secs.15-33(A), Second Schedule, Cap. 185, 2008 Rev. Ed., amended by S 402/2007, 2007; U.S. Dept. of State, 2009 Human Rights Report: Singapore, <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/136008.htm>, Mar. 11, 2010.

⁸¹ Misuse of Drugs Act of Singapore, secs.15-33(A), Second Schedule, Cap. 185, 2008 Rev. Ed., amended by S 402/2007, 2007; U.S. Dept. of State, 2009 Human Rights Report: Singapore, <http://www.state.gov/g/drl/rls/hrrpt/2009/eap/136008.htm>, Mar. 11, 2010.

⁸² Amnesty Intl., Singapore: The Death Penalty—A Hidden Toll of Executions, p. 6, ASA 36/001/2004, Jan. 2004; Ministry of Home Affairs, The Singapore Government's Response to Amnesty International's Report Singapore: The Death Penalty—A Hidden Toll of Executions, http://www.mha.gov.sg/basic_content.aspx?pageid=74, Jul. 24, 2007.

⁸³ Michael Hor, Page 108

⁸⁴ For example Michael Hor

⁸⁵ Marked by Misuse of Drugs (Amendment) Act 2012 and Penal Code (Amendment) Act 2012 on 14 November 2012

towards this end, Singapore still adamantly maintains the death penalty for drug and other offences. A glimmer of hope in the law reforms of 2012 may prove to be a tiny step towards elimination of the penalty, but ultimately the prospect of this is hard to conceive at present.

ii. Moratorium on the death penalty

Singapore maintained a brief moratorium on the death penalty, while it reviewed the Misuse of Drugs Act 2012 and the Penal Code Act 2012. However this did not last and executions were carried out both in 2015 and 2016 after amendments were made to these laws giving judges slightly more discretion in certain cases.

3.1) Country Justifications of the Death Penalty

Historically speaking, countries maintaining the death penalty in the region have cited cultural reasoning for excusing the death penalty for offences seen as ‘lighter’ by other Member States, such as drug possession.⁸⁶ For Malaysia and Singapore, this is generally still the case.

Malaysia maintains that it imposes the death penalty for the most serious offences.⁸⁷ However, it uses similar arguments to Singapore in arguing that culturally drug possession and trafficking is a ‘most serious crime’. Singapore’s response to recommendations and comments regarding the death penalty is to rehash old arguments connecting capital punishment with drug and crime deterrence.⁸⁸ In fact, from Singapore’s independence, the death penalty was used as deterrence to drug addition and trafficking by mandating the death penalty for drug trafficking and manufacturing offenses.⁸⁹ In reality, the proof of the deterrence argument is dubious.⁹⁰ Like with Malaysia, justifications are also made on a cultural basis, arguing that drug offences are culturally considered the most serious crimes. However, the Special Rapporteur on extrajudicial, arbitrary or summary executions has stated that these types of justifications are counter to the spirit of universality of human rights law.⁹¹

4) Conclusion

The wide range of offences attracting the death penalty in these countries suggests a complicated relationship with capital punishment that goes deeper than peer review. The universality of human rights law, the socio-cultural acceptance of the death penalty and the lack of human rights law education for law makers make up just a few of the challenges that must be faced across the four countries and throughout the South East Asian region. Still, the universality of the UPR mechanism promises the emergence of internationally accepted best

and changes to the Criminal Procedure Code (Cap 68, 2012 Rev Ed).

⁸⁶ Politics and Constitutions in Southeast Asia, 2016, Routledge, Marco Bunte and Bjorn Dressel, 163.

⁸⁷ A/HRC/WG.6/17/MYS/1, op. cit., p. 8, at para 45.

⁸⁸ Ministry of Foreign Affairs, Singapore, Press Release,

https://www.mfa.gov.sg/content/mfa/media_centre/press_room/pr/2016/201601/press_20180128_01.html

⁸⁹ Then Minister for Home Affairs and Education, Chua Sian Chin said, Sing., Parliamentary Debates, vol. 37, col. 34 (27 May 1977), “unless drug trafficking and drug addiction [are] checked, they [will] threaten our national security and viability. To do this, both punitive and preventive measures must be taken. The [Misuse of Drugs] Act was thus amended to provide enhanced penalties for traffickers, including mandatory death penalty for drug trafficking and manufacturing”.

⁹⁰ Michael Hor, “Misuse of Drugs and Aberrations in the Criminal Law” (2001) 13 Sing.Ac.L.J. 54

⁹¹ Roger Hood, 2005, The Enigma of the Death Penalty

practices that may guide Member States to an eventual abolishment of the death penalty. There is no doubt that, particularly in this region, an arduous road lies ahead. This path calls for more involvement from NGOs and CSOs to march side by side in using the UPR as a vital mechanism to highlight death penalty issues across all four nations highlighted in this paper.