

THE FUTURE DIRECTION OF DEATH PENALTY IN MALAYSIA AND TURKIYE

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ABSTRACT

The world is moving towards abolishing the death penalty. Many countries have moved towards abolishing the death penalty and opt for alternative punishment such as life imprisonment. According to Amnesty International, as many as 108 countries have become abolitionist and already removed it from the law, 144 countries have removed it from the law and practice, while 55 countries are retentionist. The continued existence of the death penalty has created pressures on the retentionist countries including Malaysia to consider alternative penalty or total abolition. It was only recently that the government made the decision to abolish the mandatory without eliminating the death penalty. In Türkiye, the death penalty was abolished in 2014 and no prisoners have been executed since October 1984. However, according to public poll conducted in 2011, about 65% of people wanted it to be reinstated for certain crimes. In 2022, it was also reported that Türkiye will reconsider a 2014 decision to abolish death penalty, after tougher justice is needed to combat certain crimes in the country that happened in the country recently. The question that will be discussed by this paper is whether both countries are prepared to either becoming abolitionist or retentionist and if yes, to what extent are the readiness in the context of the legal amendment made so far. What are pro-active steps taken by both countries. Challenges from pro-abolition and human rights groups in both countries will also be addressed.

Keywords: Türkiye, death penalty, human rights

Introduction

Death penalty has long been a contentious issue worldwide, with differing viewpoints on its ethical, moral, and legal implications. Many countries have moved towards abolishing the death penalty and opt for alternative punishment such as life imprisonment (Snellenburg, 1987). According to Amnesty International, as many as 108 countries have become abolitionist and already removed it from the law, 144 countries have removed it from the law and practice, while 55 countries are retentionist (Amnesty International,2021).

The continued existence of the death penalty has created pressures on the retentionist countries including Malaysia to consider alternative penalty or total abolition. It was only recently that the government made the decision to abolish the mandatory without totally eliminating the death penalty. In Turkiye, the death penalty was abolished in 2014 and no prisoners have been executed since October 1984. However, according to public poll conducted in 2011, about 65% of people wanted it to be reinstated for certain crimes. In 2022, it was also reported that Turkiye will reconsider a 2014 decision to abolish death penalty in order to combat certain crimes that happened in the country recently.

The aim of this paper is to look into the current trend of the death penalty in Malaysia and Turkiye and comprehend its relationship with the human rights principles. It aims to provide an overview of the death penalty, examining its history, current status, and the broader discourse surrounding its existence. The questions that will be discussed in this paper are: what is the current position and direction of Malaysia and Turkiye and whether both countries are prepared to either becoming total abolitionist or retentionist. If yes, to what extent are the readiness in the political and legal contexts. Challenges from pro-abolition and human rights groups in both countries are also not something that are unheard of.

Why Abolishing Death Penalty?

Generally the provision of death penalty situates at the intersection between justice, human rights, Islamic law and international human rights treaties. The most common arguments by anti-death groups against the death penalty are:

- a. Risk of wrongful execution
- b. Irreversibility of the conviction
- c. Ineffective as a deterrent
- d. Ethical and moral concerns
- e. Racial and socio-economic disparities
- f. Financial costs
- g. International human rights norms.

Many countries oppose the death penalty on human rights grounds. Organizations like Amnesty International advocate for the universal abolition of the death penalty, arguing that it not only violates the right to life but also is cruel, inhuman and degrading punishment. Universal Declaration of Human Rights 1948 (UDHR) was endorsed by United Nation in Paris on 10 December 1948. Under Article 3, it states :

“Everyone has the right to life, liberty and security of person.”

However, now the execution of death penalty has become a significant issue that is seen as going against the universal human rights declared under the various treaties like International Covenant of Civil and Political Rights (ICCPR), International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), United Nation Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (UNCAT) and so on. Rigorous campaigns were also carried out by international non-governmental organisations including Amnesty International demanding the abolition of death penalty in every member states under the pretext that death penalty is a deprivation to the rights to life (Malay Mail, 2018).

Malaysian Experience

Article 5(1) under the Federal Constitution Perlembagaan Persekutuan di bawah Bahagian 2, kebebasan asasi, Perkara 5(1) :

No person shall be deprived of his life or personal liberty save in accordance with law.

Generally the provision of death penalty situates at the intersection between justice, human rights, Islam and international human rights treaties. Campaigns and suggestions to abolish death penalty in Malaysia has been carried out since the last decade. Researches by Bar Council (2013), Amnesty International, SUHAKAM, the Prime Minister’s Department (BHEUU) are just a handful of those studies that show inclination towards abolishing the mandatory status of death penalty particularly for drug trafficking offences and those related to firearms. Where death is not the result of the crime it should be abolished.

The problem with death penalty in Malaysia lies in the way death row inmates are being treated. Justice for the death row inmates are seldom discussed once they are sent to the gallows. The waiting time, the mental health issue, the sufferings, the appeal that take longer than expected, all built up to certain amount of miscarriage of justice. This issue was repeatedly raised in the case of *Michael Philip Spears v Ketua Pengarah Penjara Kajang* ([2017] 1 MLJ 472). It took more than 14 years to finally see the court decided that the death sentence upon the prisoner be quashed because he was suffering from mental illness and schizophrenia. The question as to why the waiting time for the execution was extremely long has been raised as a matter of infringement of the prisoner's rights. The issue of mental health among the death row prisoners in general are something that cannot be swept under the carpet.

During the 3rd Cycle of Universal Periodic Review Process in 2018, Malaysia as one of the states under review had received many recommendations to improve the human right status in the country. Among the recommendations given by the member states is to abolish death penalty, female genital mutilation and child marriage from our legal system. At the same time, Malaysia is also keen on ratifying international human rights treaties and this is part of the international obligations under the National Human Rights Action Plan (NHRAP 2018) coined by the previous government. The idea of death penalty has been challenged by the notion of rights to life within the framework of human rights. This has led countries to either abolish or retain such punishment within their legislation.

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Abolition of the Mandatory Death Sentence in Malaysia

Mandatory means a punishment that is compulsory, must be obeyed and in this case, if found guilty, the death penalty must be imposed. With the abolition, options in sentencing will give the judge a discretion in meting out the appropriate punishment by taking into account the background of the offender as well as other mitigating factors on a case-by-case basis.

Malaysia belongs to the group of retentionist and now, has decided to abolish the mandatory death penalty without totally eliminating it. Since 2018, the Malaysian Government had announced that the death penalty would be abolished. In the same year, Malaysia also imposed a moratorium on the implementation of the death penalty, followed by a support to a motion to abolish the death penalty at the United Nations General Assembly in New York (Amnesty International, 2019). This step was taken considering that Malaysia wants to improve the human rights status in this country. Supporters of the abolition of this punishment consider that the death penalty is cruel, irreversible and has no effect in preventing serious crime (FMT,2022). Some opposition movements and victim's families expressed strong dissatisfaction, calling for public demonstrations against abolition (The Star, 2019).

After four years, in July 2022, the then Minister in the Prime Minister's Department, Wan Junaidi Tuanku Jaafar issued a press statement that the mandatory death penalty will be abolished and alternative punishments, including the Islamic compensation of *diyat* will be considered in the amendment of the law (Utusan Malaysia,2022). In December 2022, the new Minister in the Prime Minister's Department (Law and Institutional Reform), Azalina Othman Said said that the Government will table a bill on abolishing mandatory death sentence in the next Parliament sitting in February 2023. Finally, in April 2023, the Parliament passed two bills namely:

- i. Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of Federal Court) Bill 2023. The Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of Federal Court) Bill 2023 is introduced to incorporate matters for the Federal Court to be conferred jurisdiction to review the status of 840

death row prisoners, including 25 whose appeal was rejected by the Pardon Board.

- ii. Abolition of Mandatory Death Penalty Bill 2023. The Bill introduces several policies as follow:
 - a. If resulting in death (for section 130C, 130I, 130N, 130O, 130QA, 130ZB, 302, and 374A Penal Code) the Court has the discretion to impose death sentence or a term of imprisonment not less than 30 years and can be extended to 40 years and a minimum of 12 strokes.
 - b. If not resulting in death (for section 3 and 3A, Firearms Act (Heavier Penalty) 1971, Court can only impose punishment for a term of imprisonment of not less than 30 years which may extend to 40 years and whipping of a minimum of 12 strokes. However, this policy will not be applied for section 121A of Penal Code where even though such offence does not result in death, the death sentence will be retained and it is the discretion of the court to impose death sentence of life imprisonment for a term of imprisonment of not less than 30 years which may extend to 40 years and whipping of a minimum of 12 strokes.
 - c. The term "imprisonment for life" will be erased.

While restricting the penalty or refraining from executing certain people, the international human rights laws make it a requirement that States that retain the death penalty are required to observe a number of restrictions on its practice. These restrictions have been set out in a number of international treaties and documents, most notably in the International Covenant of Civil and Political Rights (ICCPR), the Committee on the Rights of the Child (CRC), the 1984 Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty and the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

Since then, no more mandatory element of death sentence. All are discretionary, based on evidence adduced and accepted by Court.

Death Penalty in Turkiye

Turkiye, a country with a rich history and diverse culture, is no exception to this debate. Over the years, Turkiye has witnessed significant changes in its stance on the death penalty, reflecting evolving societal values, international pressures, and legal reforms.

The death penalty has been a part of Turkiye's legal system for centuries, inherited from the Ottoman Empire (Aslan,2009). During the transition from an empire to a republic in the early 20th century, Turkiye retained the death penalty. Capital punishment was primarily used for political offenses and was a tool to suppress opposition. Notably, the execution of the former Ottoman Grand Vizier, Mahmud Şevket Pasha, in 1913 marked a significant historical event that highlighted the use of the death penalty for political purposes. In addition, the-then Prime Minister, Adnan Menderes was hanged in 1961 following a coup. Since the year 1984 however, there have been no executions in the nation (Elhamaideh & Mohamed Alawabdeh, 2013:76)

Modern changes

Turkiye underwent substantial legal reforms in the 2000s as part of its bid to join the European Union (EU). The EU demanded the abolition of the death penalty as a condition for accession, prompting Turkiye to take significant steps towards its abolition. In 2002, the Turkish parliament amended the Constitution to abolish the death penalty by statute 4771 of August 2002 for during times of peace (Elhamaideh & Mohamed Alawabdeh, 2013:76), a significant milestone in aligning with European standards or values. Execution of Sentences Article 9 of Law 5275 creates aggravated life imprisonment in place of the death sentence.

This marked a shift in Turkiye's approach to capital punishment. However, the death penalty remained on the books for crimes committed during times of war or terror. This exception became a focal point of controversy, especially during periods of heightened political tension and conflict. Calls to reinstate the death penalty often emerged in response to acts of terrorism or coup attempts. For this reason, Turkiye's regard for civil rights in counter-terrorism measures is particularly intertwined with the potential for human rights violations related to the reinstatement of capital punishment.

Turkiye also asserted that “the offence of creating propaganda for terrorist organizations had been redefined and amended to reflect more concrete criteria for conviction (Alarabiya, 2019).

Turkiye abolished the death penalty in 2004. The abolition was made through Law No.5170 following a long period of a struggle removing it altogether from its legislation including Articles 17 and 38 of the Constitution (FIDH,. As an alternative, the country replaced the punishment with not only life imprisonment but also with massive prison sentence. This was what happened to Faruk Fatih Ozer, who was sentenced to 11,196 years in jail after being found guilty of money laundering, fraud, and establishing a criminal organization (New Straits Times,2023).

In addition, Turkiye ratified Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms on the Death Penalty on November 12, 2003, after signing it on January 15, 2003. Following the submission of the protocol ratification document to the General Secretariat of the Council of Europe, it became effective on December 1, 2003. The death penalty is prohibited under all circumstances, including for crimes committed during times of war and the imminent threat of war, according to Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, to which Turkey is a party. This Protocol allows no exceptions or reservations. Turkiye approved the treaty on February 20, 2006, after having signed it on January 9, 2004, and it went into force on 1 June 2006 (fidh.org,2023).

The Second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), which seeks to abolish the death penalty and was adopted and proclaimed by the UN General Assembly resolution 44/128 of 15 December 1989, was also signed by Turkiye on 3 February 2004 in addition to the aforementioned protocols. Turkiye's implementation of the protocol began on October 24, 2006. An international human rights NGO opines that to violate these standards would entail leaving the human rights system and setting a bad example on the global stage for a government that had ratified the core agreements of the United Nations and Council of Europe human rights systems. An essential tenet of international law is the phrase "*pacta sunt servanda*" (agreements must be upheld) and there will be no exceptions

can be made to this rule (Lukashuk,1989).

The change in the position of Turkish leadership on the death penalty can be seen during the 2007 election campaign. It was stated that capital punishment will be replaced by aggravated life imprisonment. Three years later, the Prime Minister spoke against capital punishment again on another constitutional referendum campaign and invoked the executions of Erdal Eren, Necdet Adali and Mustafa Pehlivanoglu following the 1980 military coup (European Stability Initiative,2017).

Recent Development

In recent years, Turkiye's stance on the death penalty has come under renewed scrutiny. Following the 2016 failed coup attempt, there were widespread calls from the nationalist, right-wing groups as well as the Turkish population to reinstate capital punishment for those involved. President Recep Tayyip Erdogan expressed support for the idea, leading to concerns among Turkiye's allies and human rights organizations. However, it is said that such a move would likely have strained Turkiye's relations with the EU and other international partners, as it would be seen as a violation of human rights laws and commitments. The Prime Minister stated in a rally that it is an offense to feed individuals who are serving life sentences for killing the Turkiye's residents, police officers, and soldiers on the night of July 15, 2016, while they are incarcerated and serving life sentences. The Prime Minister once again reiterated his desire in March 2019 to reinstate the death penalty following a femicide case that shocked Turkiye.

The reinstatement of the death penalty will face certain obstacles namely from the political, diplomatic as well as legal aspects. From the political aspect, although members of conservative and right-wing parties that support the death penalty make up the majority of the current National Assembly in Turkiye, it is not enough to easily enact a constitutional revision. To successfully modify the law and reinstall the death sentence, a national referendum would need to be held and win the approval of the majority of voters. Meanwhile, on an international level, the reinstatement of the death penalty in Turkiye would signify a true break from European values and end all its prospects. Subsequently, the Second Optional Protocol to the ICCPR and the European Court of Human Rights, among other international human rights

organizations, would also be breached by Turkiye. The international community will probably strongly criticize this. The concentration of power in the hands of the executive and the lack of a robust political opposition pose a significant risk, even though this is preventing the return of the death penalty in Turkiye (World Coalition Against the Death Penalty). As of 2023, Turkiye had not reinstated the death penalty, but the situation was fluid. Depends on the political climate of the day.

Conclusion

Both countries are still struggling in their position regarding the death penalty. The challenge and the political will and consideration play a significant factor in deciding whether to abolish or not. While Malaysia has succeeded in the abolition of mandatory death sentence, the country cannot ignore the external pressure to totally abolish the death penalty. During the 3rd UPR Cycle in 2018, member states under the Human Rights Council recommended Malaysia to abolish the death penalty, but the total abolition has yet to be seen. While Turkiye has made significant strides towards abolishing the death penalty, the prospect of its reinstatement continues to generate debate and controversy. The evolving nature of this issue underscores the importance of ongoing dialogue within Turkiye and with the international community to address questions of justice, human rights, and the rule of law. With foreign pressures as well as human rights defenders campaign, it will not happen anytime soon.

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