



THE 23RD COMMONWEALTH LAW CONFERENCE
GOA, INDIA

ABOLISHING THE **DEATH PENALTY
IN THE COMMONWEALTH –
HOW SUCCESSFUL HAVE WE BEEN?**

A Malaysian Perspective

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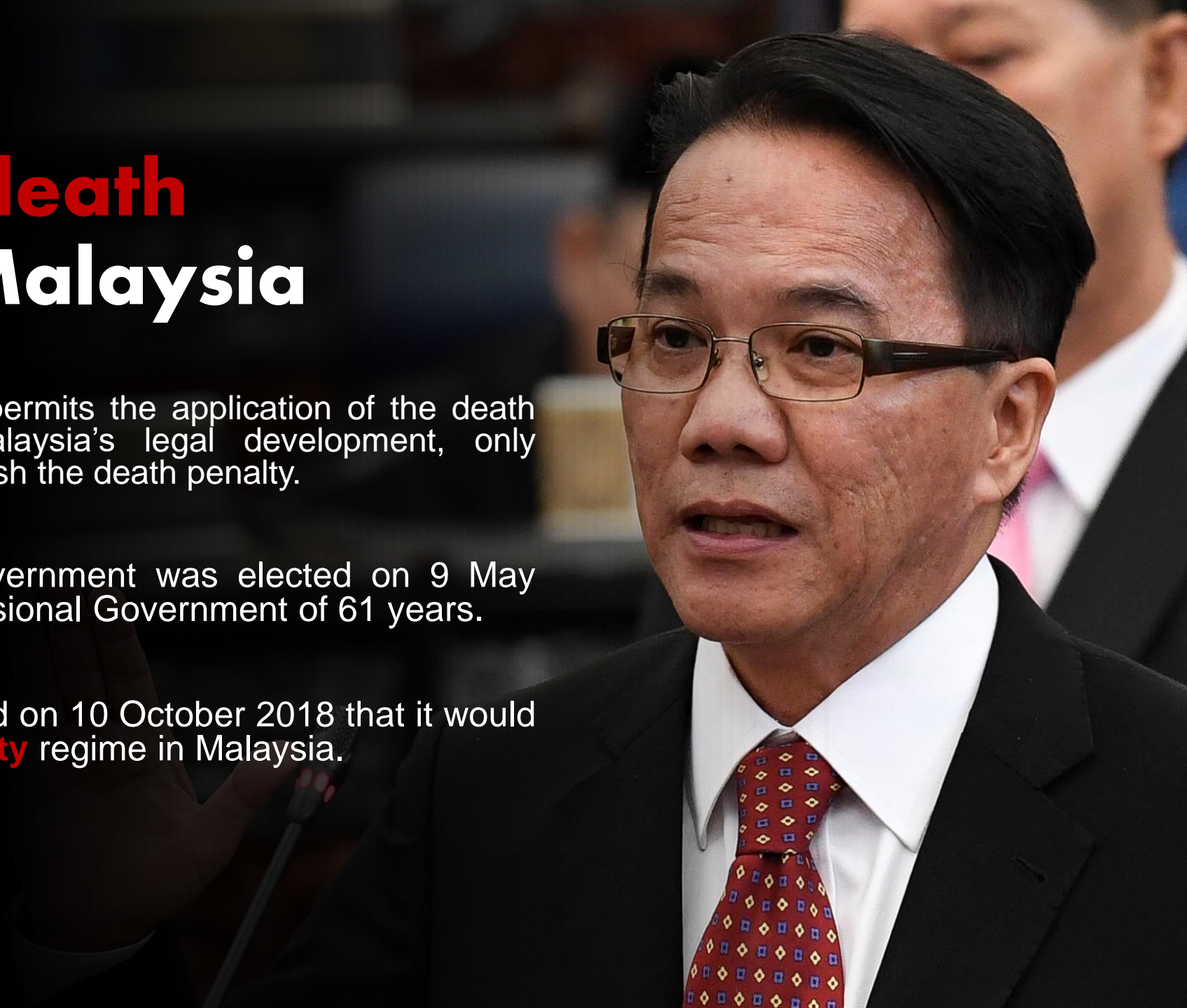


Asia **and** the Death Penalty

- Unprecedented rate of abolition in the 1990s with a concentration of countries that have abolished the death penalty situated in Western Europe, Latin America, and Africa.
- The worldwide trend in abolition took place at a time marked by the explosion of attention to human rights.
- The imposition of the death penalty is viewed as a violation of human rights.
- **Johnson and Zimring (2009)** predicted that Asia Pacific was going to be the next frontier for global death penalty abolition.
- Only Fiji and Papua New Guinea had abolished the death penalty in Asia Pacific in 2009.
- More countries beyond the Asia Pacific abolished the death penalty such as Gabon, Latvia, Bolivia, Republic of Congo, Madagascar, Suriname, Benin, Nauru, Guinea, Burkina Faso, Chad, Kazakhstan, and Sierra Leone.
- **Asia**, in fact, is currently the source of approximately **80-95%** of the **world's executions**, principally for drug offences.

Ending the **death penalty** in Malaysia

- As the Malaysian Constitution permits the application of the death penalty, at this stage of Malaysia's legal development, only Parliament can pass law to abolish the death penalty.
- A new Pakatan Harapan Government was elected on 9 May 2018 replacing the Barisan Nasional Government of 61 years.
- The Minister of Law announced on 10 October 2018 that it would be the **end of the death penalty** regime in Malaysia.



The movement to abolish the death penalty in Malaysia

- Malaysia's trajectory towards the abolition of the death penalty laws did not start suddenly in 2018.
- The abolitionist politicians, individuals, Bar Council and NGOs have been campaigning for the abolition of the death penalty in Malaysia long before the pronouncement in 2018.
- Legal challenges have been mounted since the 70's testing the limits of the death penalty laws.
- As early as 2000, the then Minister of Law Nazri Aziz openly said that it was time for Malaysia to think about abolishing the death penalty.
- The case of Yong Vui Kong involved the first Malaysian on Singapore death row where lawyers and civil society organisations in Malaysia and Singapore campaigned for his life to be spared.
- Malaysia had already undertaken various studies to reform the death penalty laws. But the reform process moved slowly.
- In 2013, Roger Hood in a public opinion survey found that there was minimal opposition to the abolition of the death penalty especially for drug offences.

Opposing the abolition of the death penalty in Malaysia

- Soon after the announcement, opposition to the abolition of the death penalty arose.
- There were parties vehemently opposing the plan for abolition from Islamic non-governmental organisations, Malaysian Chinese politicians non-governmental organisations and individuals and the families of murder victims
- Resistance was vehement, prompting a call for a referendum to decide whether abolition should even be undertaken.
- Political, cultural, and religious factors have thus shaped the abolition process to date in Malaysia.





Politics **and** the death penalty in Malaysia

- On **13 March 2019**, the Government announced that it was only going to abolish the mandatory death penalty.
- The anticipated abolition of the mandatory death sentence did not take place after the Special Committee on Alternative Sentencing submitted its recommendations to the government in early 2020.
- The collapse of the PH Government, the frequent changes in Prime Ministers and the Covid 19 pandemic stalled the reform process. Even challenges in Court did not materialise.
- On **8 June 2022**, the Cabinet unexpectedly approved the abolition of the mandatory death sentence.
- **7 bills** tabled in Parliament on **6 October 2022** seeking to amend laws to remove the mandatory death sentence for several criminal offences.
- These bills stopped at the first reading as Parliament was dissolved on **10 October 2022**, paving the way for the 15th General Election.



Post 2022 Malaysian General Elections (GE-15)

- No one party won an outright majority of the 222 parliamentary seats contested, leading to several opposing political parties forming a **unity government**.
- With a fragmented political scene, Malaysia's path to abolition is not likely to progress in a straight line and will certainly be slow.
- The **political uncertainties** prior to the 15th General Election hindered the first steps towards abolition, namely the removal of the mandatory death sentences from existing legislation.
- With no single dominant political party to push for abolition, Malaysia's path towards abolition will require **co-operation between opposing political parties** in the government as well as in the opposition camp to agree to a **way forward**.

Politics **and** the death penalty in Malaysia

- During this political turmoil, in 2022 several Malaysians were judicially executed in Singapore.
- One of them was Nagaenthiran Dharmalingam.
- He was a drug mule with a low IQ.
- His execution attracted considerable anger amongst the Malaysian public against the Singapore government for refusing to grant him mercy even after unprecedented interventions by Malaysia's King and Prime Minister.



A person wearing a red jumpsuit is sitting on a bench behind vertical metal prison bars. The scene is dimly lit, with light coming from the left, creating a somber and confined atmosphere.

Politics and the death penalty

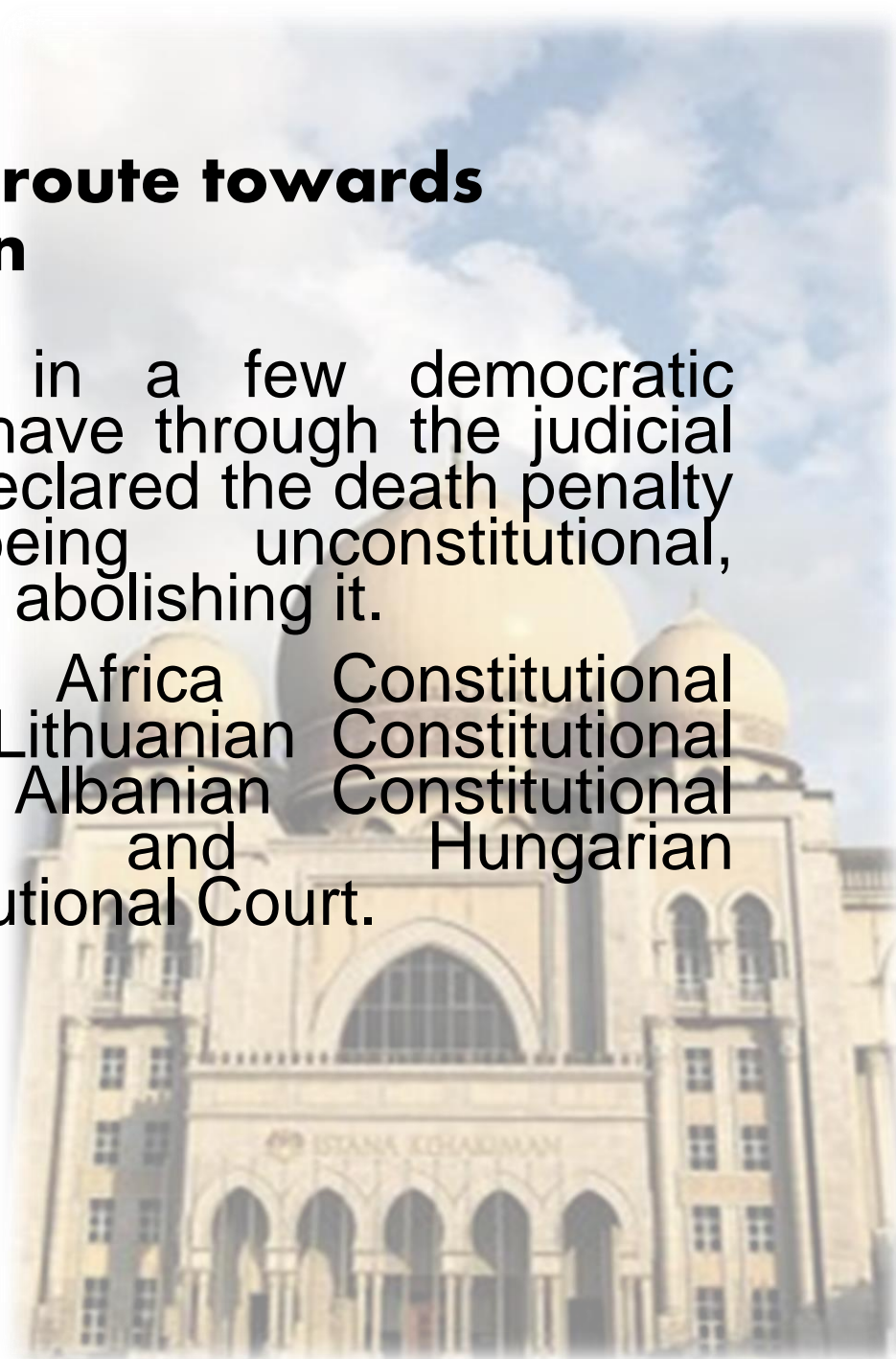
- The key to abolition in a state is effected through political decision.
- Abolition in Malaysia will be determined by **local politics**.
- The worldwide trend towards the abolition of the death penalty has been driven by democratisation and democracy.
- In the context of democratisation, the **Eastern European states' death penalty policies** were ultimately influenced by their **pragmatic political and economic considerations** to become members of the European Union rather than due to the adherence to human rights principles.

The role of politicians and individual abolitionist

- The decision to reform death penalty laws, including abolition, is made by politicians and individual abolitionist.
- Leadership is crucial for formal abolition to take place. States have never abolished with public support but do so in spite of public opposition to abolition.

Judicial route towards abolition

- Courts in a few democratic states have through the judicial route declared the death penalty as being unconstitutional, thereby abolishing it.
- South Africa Constitutional Court, Lithuanian Constitutional Court, Albanian Constitutional Court and Hungarian Constitutional Court.



Role of international and regional institutions and organizations

Regional institutions or organizations have made a significant impact on abolition at the state level and the existence of such organisations increases the likelihood of abolition. European politics and pressures have influenced the spread of abolition in Western Europe.

Influence of Non-Governmental Organisations

Non-Governmental Organisations have played a significant role in diffusing the norm that the continued use and implementation of the death penalty is a violation of human rights, and this diffusion has influenced decision makers at state levels.

Cultural and religious factors shaping the abolition process

Cultural or religious factors shape the abolition process domestically. There is a close correlation between these factors and the support for the death penalty.



Public Opinion

- Notwithstanding there are factors that could influence the abolition of the death penalty in democratic states, the processes towards abolition are often controversial and highly emotional, and not a straight line.
- During the abolition process, various issues, controversies, debates, and dynamics emerge that could halt the process.
- Retentionists justify the continued use of capital punishment based on criminal justice, retribution, and deterrence.
- Abolitionists assert that abolition is necessary on the principles of human rights, mercy, rehabilitation, and wrongful convictions.



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- No evidence has been shown that democratic states have abolished the death penalty due to public opinion, instead, the state has abolished in spite of majority support for capital punishment.
 - The United Kingdom, Canada, France and Federal Republic of Germany abolished the death penalty though the majority of their respective populations supported its retention.
 - The public support for capital punishment continues even after abolition.

The critical question to be asked is **what is the role of the lawmakers**; are they merely to **reflect public opinion** or they are to **lead the public on important human rights issues** such as the death penalty?

- As abolition is to be achieved against majority public opinion, **strong and consistent leadership** by the abolitionist politicians and other key state authorities are **critical** not only **to lead** but also **to mould public opinion** as to why the death penalty must be abolished in a democracy that serves to protect the rights of the minority.
- There is **no supranational body** in Asia or Southeast Asia that could **exert influence** on the abolition process in Malaysia and therefore any abolition will have to be undertaken within Malaysia's political process.
- In February 2023, the **Deputy Minister of Law** confirmed that the **government will only abolish the mandatory aspect of the death penalty** by April 2023.



Post-abolition of the mandatory death penalty: Points to consider

- After the mandatory death penalty is abolished, what would be the **catalyst for the total abolition** of the death penalty in Malaysia?
- Will the **government** play a more **prominent and active rôle** in **shaping and moulding public opinion**?
- What if the government fails to take any steps towards abolition, will **the abolitionist politicians and individuals, and NGO** step up to push for abolition and to shape and mould public opinion towards full abolition?
- Will there be a **constitutional challenge** to declare the death penalty as unconstitutional?