



H.E. Mr. K. Shanmugam
Minister for Law and Minister for Home Affairs
Ministry of Law and Ministry of Home Affairs
Singapore
k_shanmugam@mlaw.gov.sg

BY EMAIL¹

27 October 2022

Dear Minister K. Shanmugam,

1. We write to you on behalf of the International Bar Association’s Human Rights Institute (“IBAHRI”) and the International Commission of Jurists (“ICJ”), in reference to the response from the Ministry of Law (“MinLaw”) and Ministry of Home Affairs (“MHA”) to our statements on the death penalty and use of punitive cost orders in Singapore.²
2. We thank MinLaw and MHA for their response, to which we have given careful consideration. We would like to address certain points raised by MinLaw and MHA and clarify our organizations’ positions on these issues. We would also like to provide greater clarity on international human rights law and standards relevant to these issues.

About IBAHRI and ICJ

3. The International Bar Association, established in 1947, is the world’s leading organisation of international legal practitioners, bar associations and law societies. It has a membership of over 80,000 individual lawyers, and 190 bar associations and law societies, spanning over 170 countries. The IBAHRI, an autonomous and financially independent entity of the IBA, works with the global legal community to promote and protect human rights and the independence of the legal profession worldwide. The IBAHRI opposes the death penalty in all circumstances.
4. Composed of 60 eminent judges and lawyers from all regions of the world, the ICJ promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard

¹ Please note that this is a public letter and will be published on our respective websites.

² Ministry of Law, “Statement by MinLaw & MHA on the IBAHRI Statement Calling for Singapore to Establish a Moratorium on Executions” (“MinLaw and MHA Statement to IBAHRI”), 8 September 2022, available at: <https://www.mlaw.gov.sg/news/replies/2022-09-08-minlaw-mha-statement-on-ibahri-statement/>; Ministry of Law, “Statement by MinLaw & MHA on ICJ Statement Calling for Singapore to Establish a Moratorium on Executions & Cease the Use of Punitive Cost Orders Against Lawyers” (“MinLaw and MHA Statement to ICJ”), 8 September 2022, available at: <https://www.mlaw.gov.sg/news/replies/2022-09-08-minlaw-mha-statement-on-icj-statement/>.

the separation of powers; and guarantee the independence of the judiciary and legal profession. The ICJ similarly opposes the death penalty under any circumstances.

“Most serious crimes” threshold under international law

5. We respectfully refute the MinLaw and MHA position that there is no basis to assert that the imposition of capital punishment for drug offences is a breach of international law.³ We consider that this assertion is plainly wrong. First, as the United Nations Human Rights Office has affirmed, the use of the death penalty, in general, as opposed to its use with respect to drug-related offences, “is not consistent with the right to life and the right to live free from torture or cruel, inhuman or degrading treatment or punishment. There is a growing consensus for universal abolition of the death penalty. Some 170 States have abolished or introduced a moratorium on the death penalty either in law or in practice.”⁴
6. In that regard, the UN General Assembly, by overwhelmingly majorities, has, in eight separate Resolutions going back to 2007 and most recently in Resolution 75/183 of 28 December 2020, “called upon States that still maintain the death penalty to establish a moratorium on executions with a view to abolishing it”.⁵
7. Under international law, where the death penalty is still practiced, it may only be imposed for “the most serious crimes”.⁶ Various UN human rights Charter and treaty-based mechanisms have consistently held that this term must be read restrictively, relating only to crimes of extreme gravity involving intentional killing, and that crimes that do not result directly and intentionally in death, such as drug offences, while serious in nature, cannot serve as the basis for the death penalty.⁷
8. For example, in its 2021 study on “Arbitrary detention relating to drug policies”, the UN Working Group on Arbitrary Detention recalled that “[i]mposing the death penalty for drug-related offences is incompatible with international standards on the use of the death penalty”.⁸ Furthermore, the 2019 International Guidelines on Human Rights and Drug Policy state that “[d]rug offences do not meet the internationally recognised threshold of ‘most serious crimes’ for which the death penalty - where it exists - may be imposed”.⁹ Consequently and in accordance with the right to life, States shall “[t]ake immediate action to halt executions, commute death sentences, and abolish the death penalty for drug offences.”¹⁰

³ MinLaw and MHA Statement to IBAHRI, para. 12; MinLaw and MHA Statement to ICJ, para. 14.

⁴ See, Death penalty, UN Human Rights Office, <https://www.ohchr.org/en/topic/death-penalty>.

⁵ UN General Assembly, “75/183. Moratorium on the use of the death penalty” (28 December 2020), UN Doc. A/RES/75/183.

⁶ “In countries which have not abolished the death penalty, capital punishment may be imposed only *for the most serious crimes*, it being understood that their scope should not go beyond *intentional crimes with lethal or other extremely grave consequences*”, Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by Economic and Social Council resolution 1984/50 of 25 May 1984; Article 6(2), International Covenant on Civil and Political Rights, para.1, (emphasis added).

⁷ See, e.g., UN Human Rights Council, “Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston” (29 January 2007) UN Doc A/HRC/4/20, paras. 39 - 53; UN Human Rights Committee, “General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life” (30 October 2018) UN Doc CCPR/C/GC/36 (“UN Human Rights Committee, General Comment No. 36”), para 35. See also: UN Human Rights Council, “Question of the death penalty: Report of the Secretary-General” (26 July 2022) UN Doc A/HRC/51/7, para. 64.

⁸ UN Working Group on Arbitrary Detention, “Arbitrary detention relating to drug policies” (18 May 2021) UN Doc A/HRC/47/40, para. 41.

⁹ International Guidelines on Human Rights and Drug Policy (March 2019) Guideline 5. Available at: https://www.humanrights-drugpolicy.org/site/assets/files/1640/hrdp_guidelines_2020_english.pdf

¹⁰ *Ibid.*, Guideline 5(i).

9. In this regard, and in relation to the MinLaw and MHA statement that capital punishment in Singapore is only applied to the most serious crimes that cause grave harm to others and to society, including drug trafficking,¹¹ we respectfully recall recent communications from UN Special Procedures to the Government of Singapore that underscore that the continued use of capital punishment for drug-related offences runs contrary to international law and constitutes a per se violation thereof.¹²
10. We welcome that in 2021 Singapore supported recommendations under the third cycle of the Universal Periodic Review to review the use of the death penalty and the type of crimes to which it is applied, as well as to ensure strict compliance in all death penalty cases with international fair trial standards.¹³
11. Pursuant to such review, we respectfully call on the Government of Singapore to review the scope of the death penalty without delay to ensure that its imposition and implementation are strictly limited to the confines of international law, including the non-applicability to drug-related crimes as set out above, and to repeal the use of the death penalty for such offences accordingly.

Cost sanctions and access to justice

12. We welcome the confirmation by MinLaw and MHA that all persons facing capital punishment will be offered legal counsel free of charge, regardless of nationality, under the Legal Assistance Scheme for Capital Offences, and that access to justice is guaranteed to all.
13. Under international law, procedural guarantees for the imposition of the death penalty include effective representation during all stages of the criminal proceedings and an effective right of appeal.¹⁴ This right to effective legal representation extends to late-stage applications by death row inmates seeking to reopen their cases and challenge their sentences. It is particularly important in cases involving the death penalty that there is

¹¹ MinLaw and MHA Statement to IBAHRI, para. 14; MinLaw and MHA Statement to ICJ, para. 16.

¹² See, e.g., Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Working Group on Arbitrary Detention; the Special Rapporteur on the independence of judges and lawyers; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on minority issues and the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, “Joint Urgent Appeal to the Government of Singapore” (3 August 2022) UN Doc UA SGP 9/2022, pg. 1; Mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions; the Working Group on Arbitrary Detention; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; the Special Rapporteur on minority issues; the Independent Expert on the enjoyment of all human rights by older persons and the Special Rapporteur on extreme poverty and human rights, “Joint Urgent Appeal to the Government of Singapore” (20 July 2022) UN Doc UA SGP 8/2022, pgs. 4 and 6.

¹³ UN Human Rights Council, “Report of the Working Group on the Universal Periodic Review - Singapore - Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review” (10 September 2021) UN Doc A/HRC/48/16/Add.1 [28], in relation to: UN Human Rights Council, “Report of the Working Group on the Universal Periodic Review - Singapore” (22 July 2021) UN Doc A/HRC/48/16: Recommendation 59.126: Continue to review the use of the death penalty (Timor-Leste); Recommendation 59.127: Ensure strict compliance in all death penalty cases with international fair trial standards and provide the necessary psychological and other support to children whose parents have been sentenced to death (Croatia); Recommendation 59.129: Continue to review the use of the death penalty and the type of crimes to which it is applied (Mexico).

¹⁴ UN Human Rights Committee, General Comment No. 36, para. 41; UN Human Rights Committee, “General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial” (23 August 2007) UN Doc. CCPR/C/GC/32, para. 38.

“scrupulous respect of the guarantees of fair trial”, which if not respected would constitute a violation of the right to life.¹⁵

14. We underscore, however, that serious obstacles have been placed on the capacity of lawyers representing death row prisoners to carry out their professional functions. These include the imposition of personal cost orders against counsel under sections 356, 357 and 409 of the Criminal Procedure Code 2010, whereby lawyers who file applications that are “frivolous or vexatious or otherwise an abuse of the process of the court” may have cost sanctions imposed on them.¹⁶ We regret the reports that the imposition of cost sanctions has, in practice, obstructed the right of death row inmates to effective legal representation and access to justice. As previously noted, the 24 death-row inmates who filed a lawsuit on 1 August 2022 were unable to secure legal representation despite approaching several lawyers, as the lawyers were allegedly afraid of adverse cost orders.¹⁷ We would be grateful if MinLaw and MHA could clarify whether and to what extent effective legal assistance was offered to these 24 death-row inmates who had to represent themselves *pro se*, as well as to other death row inmates filing late-stage applications challenging their sentences.
15. We also respectfully refute the claim by MinLaw and MHA that IBAHRI and ICJ are “suggesting that [we want] abuses of court processes to go unpunished”.¹⁸ While the Court of Appeal has held that a high threshold must be met before adverse cost orders may be imposed,¹⁹ there have also been troubling instances where the courts appear to have adopted an overly expansive and impermissible interpretation of what constitutes “lack of merit” or “abuse of process” to impose adverse cost sanctions on lawyers representing death row inmates. In our opinion, this includes the case of *Syed Suhail bin Syed Zin and others v Attorney-General (“Syed”)*,²⁰ involving the application filed by 17 death row inmates who alleged that, as ethnic minorities, they were more likely to be investigated, prosecuted and sentenced to capital punishment for drug offences, as will be discussed further below at [21] - [23].

Disproportionate representation of ethnic minorities among death row inmates

16. We welcome the assurances by MinLaw and MHA that ethnicity and socio-economic status play no part in the professional discharge of duties by law enforcement agencies in Singapore, in the prosecutorial decisions of the Public Prosecutor, and in the decisions of the Courts. We also welcome the assurances that all persons are treated equally and accorded due process under Singapore’s laws.²¹
17. Under international law, discrimination can take the form of direct discrimination (i.e. differential treatment based on a protected characteristic), and also indirect discrimination (i.e. where an action or policy “has an unjustifiable disparate impact upon a group” based

¹⁵ UN Human Rights Committee, “General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial” (23 August 2007) UN Doc. CCPR/C/GC/32, para. 59.

¹⁶ Section 409, Criminal Procedure Code 2010.

¹⁷ Today, “24 death-row inmates’ lawsuit against AG: Apex court rejects appeal and last-ditch stay of execution for prisoner” (5 August 2022) available at: <https://www.todayonline.com/singapore/24-death-row-inmates-lawsuit-apex-court-rejects-stay-execution-appeal-1961666>.

¹⁸ MinLaw and MHA Statement to IBAHRI, para. 5; MinLaw and MHA Statement to ICJ, para. 5.

¹⁹ *Iskandar bin Rahmat and others v Attorney-General and another* [2022] SGCA 58, at [36], [40].

²⁰ *Syed Suhail bin Syed Zin and others v Attorney-General* [2021] SGHC 274.

²¹ MinLaw and MHA Statement to IBAHRI, para. 10; MinLaw and MHA Statement to ICJ, para. 12 - 13.

on a protected characteristic).²² In *Syed*, the High Court found that Article 12(1) of the Singapore Constitution is “broad enough to prohibit both direct and indirect discrimination”.²³ This understanding of the concept of discrimination was also confirmed by the UN Committee on the Elimination of Racial Discrimination as it reviewed compliance by Singapore with its obligations under the Convention on the Elimination of Racial Discrimination and Singapore’s State report to the UN Committee on the Elimination of Racial Discrimination in January 2019.²⁴

18. We note that the assurances by MinLaw and MHA use the language of direct discrimination and differential treatment, without any mention of the possible disparate impacts of Singapore’s laws and policies on the death penalty on racial or other groups that may not be the subject of discrimination based on status, including, among others, nationality and ethnicity. This omission is conspicuous given reports that although “Malay persons make up just 13.5% of the resident population (as of June 2020), they comprise 77% of Singaporean residents sentenced to death for drug offences from 2010 to 2021.”²⁵
19. With respect, the High Court’s characterization of the 17 plaintiffs’ claim as one premised on direct discrimination, instead of indirect discrimination, is inconsistent with international law and standards.²⁶ The significant over-representation of the Malay population among those executed for drug trafficking is a strong factual indicator of a *prime facie* case of indirect discrimination and disparate impact of the imposition of the death penalty for drug trafficking offences, strongly suggesting structural racial and nationality biases in the criminal enforcement process.²⁷ Since the plaintiffs have made out a *prima facie* case of disparate impact and indirect discrimination based on the significantly skewed statistics, the plaintiffs should not have to bear the burden of proving a causal link between the Attorney-General’s decision to prosecute Malay suspects and their ethnicity.²⁸ This is especially true given the asymmetry of information possessed by the plaintiffs and the Attorney-General on prosecutorial and law enforcement decisions.²⁹
20. We regret that MinLaw and MHA have claimed that IBAHRI and ICJ are suggesting that “justice be dependent on the individual’s ethnicity and socio-economic status”.³⁰ Neither IBAHRI nor ICJ have made any suggestions to this effect, as it is based on an incorrect understanding of how to address structural and indirect discrimination under international law. Rather, we echo the recommendations issued by the UN Committee on the Elimination of Racial Discrimination for Singapore to take concrete and effective steps to

²² Committee on the Elimination of Racial Discrimination, “General recommendation XIV on article 1, paragraph 1, of the Convention” (1993) para. 2.

²³ *Syed*, at [61].

²⁴ Committee on the Elimination of Racial Discrimination, “Initial report submitted by Singapore under article 9 of the Convention, due in 2018” (30 January 2019) UN Doc. CERD/C/SGP/1, para. 6.3.

²⁵ *Syed*, at [26]. These figures were refuted by the Attorney-General (see *Syed*, at [33]), but we note that the government has not released data on the racial distribution of criminals that received the death penalty; see, OHCHR, “Experts of the Committee on the Elimination of Racial Discrimination congratulate Singapore on initial report, and ask about the death penalty and about protection against discrimination for migrant workers” (19 November 2021) available at: <https://www.ohchr.org/en/press-releases/2021/12/experts-committee-elimination-racial-discrimination-congratulate-singapore>.

²⁶ *Syed*, at [62].

²⁷ Committee on the Elimination of Racial Discrimination, “General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system” (2005), para. 1(d) and (f); Human Rights Committee, “General comment No. 36: Article 6, right to life” (3 September 2019) UN Doc. CCPR/C/GC/36, para. 44.

²⁸ *Syed*, at [63].

²⁹ *Essop and others (Appellants) v Home Office (UK Border Agency) (Respondent); Naeem (Appellant) v Secretary of State for Justice (Respondent)* [2017] UKSC 27, at [25], [28]. The High Court in *Syed* relied on *Essop* in conceptualizing what constitutes indirect discrimination.

³⁰ MinLaw and MHA Statement to IBAHRI, para. 10; MinLaw and MHA Statement to ICJ, para. 12.

examine its criminal justice system and eliminate racial disparities, including by “[r]eviewing and amending laws and policies leading to racially disparate impacts in the criminal justice system and implementing effective national strategies or plans of action aimed at eliminating structural discrimination”, in order to meet its treaty obligations under the Convention.³¹

21. Regardless of the High Court’s holding in *Syed* of whether the plaintiffs had been discriminated against, we respectfully disagree that the plaintiffs’ case was an abuse of process.³² Properly understood, the plaintiffs had made out a *prima facie* case of indirect discrimination based on the statistical evidence they had provided, which warrants a judgment on the merits from the Court as part of the death row inmates’ right to access to justice and effective remedies, right to a fair trial, freedom from cruel, inhuman or degrading punishment and, ultimately, their right to life.
22. Furthermore, we note that *Syed* is the first case in Singapore to develop the concept of indirect discrimination, as the High Court acknowledged.³³ Given that this is a matter of public interest and constitutional importance, we regret that the High Court characterized the plaintiffs’ application as a “diversion of valuable public resources away from the deserving litigants whom the court exists to serve”.³⁴
23. For these two reasons, IBAHRI and ICJ submit that the High Court’s judgment in *Syed* is one example of an overbroad interpretation of what constitutes “lack of merit” or “abuse of process”, which violates the rule of law and international standards on the independence of lawyers, such as the UN Basic Principles on the Role of Lawyers. Principle 16 affirms that “Governments shall ensure that lawyers...(c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”.

Death penalty has no deterrent effect

24. At the UN High Level Panel Discussion on the question of the death penalty during the 46th session of the UN Human Rights Council, the UN High Commissioner for Human Rights stressed that there is no evidence that capital punishment deters crime more effectively than any other form of serious punishment, highlighting that studies have shown that it is the certainty of punishment, not its severity, that deters criminals.³⁵
25. For example, we note the paper by Franklin E. Zimring, Jeffrey Fagan, and David T. Johnson, published in the *Journal of Empirical Legal Studies* in 2010, which finds that homicide levels and trends were remarkably similar in Hong Kong and Singapore over the

³¹ Committee on the Elimination of Racial Discrimination, “Concluding observations on the initial report of Singapore” (2 February 2022) UN Doc. CERD/C/SGP/CO/1, para 22.

³² *Syed*, at [100] - [106].

³³ *Syed*, at [61].

³⁴ *Syed*, at [105].

³⁵ 46th session of the Human Rights Council Biennial high-level panel discussion on the question of the death penalty. Theme: Human rights violations related to the use of the death penalty, in particular with respect to whether the use of the death penalty has a deterrent effect on crime rate, “Statement by United Nations High Commissioner for Human Rights, Michelle Bachelet” (23 February 2021) available at: <https://www.ohchr.org/en/2021/02/46th-session-human-rights-councilbiennial-high-level-panel-discussion-question-death>.

35 years after 1973, with neither the surge in executions in Singapore between 1994 - 1996 nor the later reduction producing any differential impact on homicide rates.³⁶

26. Regarding drug-related offences, the UN Secretary-General has noted that the “[i]ntroduction or reintroduction of the death penalty for drug offences is disproportionate to the aim of deterring drug-related crime, as there is no evidence that the death penalty in fact deters drug-related or other crime more than other methods of punishment.”³⁷

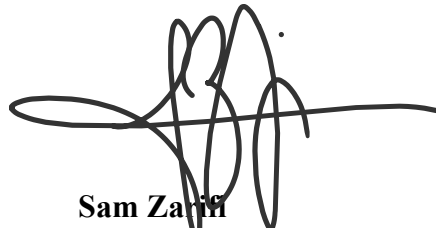
Concluding remarks

27. To date, some 170 States have abolished or introduced a moratorium against the death penalty in law or practice.³⁸ The international community has moved decisively away from capital punishment as a legitimate means of administering justice. We urge Singapore to join the worldwide trajectory towards abolition of the death penalty, starting with an immediate introduction of a moratorium on all sentences and executions with a view to abolition.
28. We remain available for constructive dialogue and engagement with all relevant stakeholders, such as representatives of MinLaw and MHA, with the aim of contributing to Singapore aligning its laws, policies, and practices with international human rights law and standards with regards to its use of the death penalty.

Yours Sincerely,



Anne Ramberg Dr Jur hc
Co-Chair
International Bar Association’s
Human Rights Institute



Sam Zarifi
Secretary General
International Commission of Jurists



Mark Stephens CBE
Co-Chair
International Bar Association’s
Human Rights Institute

³⁶ Franklin E. Zimring, Jeffrey Fagan, and David T. Johnson, “Executions, Deterrence, and Homicide: A Tale of Two Cities” (2010) 7(1) *Journal of Empirical Legal Studies* 1 - 29.

³⁷ UN Human Rights Council, “Capital punishment and the implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty: Yearly supplement of the Secretary-General to his quinquennial report on capital punishment” (28 August 2019) UN Doc A/HRC/42/28, para. 10.

³⁸ OHCHR, “Comment by Acting UN High Commissioner for Human Rights Nada Al-Nashif after Equatorial Guinea abolishes death penalty” (20 September 2022) available at: <https://www.ohchr.org/en/press-releases/2022/09/comment-acting-un-high-commissioner-human-rights-nada-al-nashif-after>