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The Abolition of the Mandatory Death Penalty in the Commonwealth: Recent Developments from India and Bangladesh

Andrew Novak, American University Washington College of Law
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Andrew Novak, Esq.*

The common law mandatory death penalty for murder simplified the sentencing process in the resource-constrained legal systems of the Commonwealth, but it was a crude tool that papered over other deficiencies in the criminal justice system. By sweeping in mercy killing with sadistic killing and cold-blooded murder with heat-of-passion murder, the mandatory death penalty overpunished and shifted sentencing discretion from a trial judge to the governor general and a mercy committee that granted clemency or pardon in troublesome cases but failed to reduce all risk of arbitrariness or mistake.¹ Although British colonies did not immediately benefit from the criminal justice reforms that swept Great Britain in the 1950s, including the eventual restriction and finally abolition of the mandatory death penalty, the replacement of mandatory capital sentencing schemes with discretionary ones is the clear trend among the retentionist countries of the Commonwealth.²

Because postcolonial independence constitutions generally contained fundamental rights provisions that included due process rights and a prohibition on cruel and degrading punishment,

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* Adjunct Professor of Criminology, Law and Society at George Mason University; Adjunct Professor of African Law, American University Washington College of Law. M.Sc., African Politics, London School of Oriental and African Studies; J.D., Boston University School of Law.


they possessed uniform constitutional vulnerabilities that made collateral attacks on the death penalty possible.³ Human rights litigation against the mandatory nature of the death penalty has succeeded in the establishment of discretionary capital punishment regimes throughout the English-speaking Caribbean; in the African countries of Kenya, Malawi, and Uganda; and in India and Bangladesh.⁴ Because of similarities in the criminal justice systems that Commonwealth countries inherited from Great Britain, courts across the English-speaking world (including the United States) “share” death penalty jurisprudence, continually citing to one another and contributing to a corpus of comparative case law that has succeeded in drastically restricting the scope of the death penalty.⁵ The decisions of the Supreme Court of India in *Dalbir Singh v State of Punjab* (2012), the Bombay High Court in *Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik) v Union of India* (2011), and the Bangladesh High Court Division in *Bangladesh Legal Aid and Services Trust (on behalf of Sukur Ali) v Bangladesh* (2010) align with the global Commonwealth trend, striking down the mandatory death penalty and finding judicial sentencing discretion in capital cases to be constitutionally required.⁶ While the decisions generously cited case law from around the Commonwealth, they paid particularly close attention to regional jurisprudence on the Indian Subcontinent, a miniature version of the Commonwealth-wide sharing process in death penalty jurisprudence.

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⁴ See eg *Reyes v The Queen* [2002] 2 AC 259 (PC) (appeal taken from Belize); *The Queen v Hughes* [2002] 2 AC 259 (PC) (appeal taken from St Lucia); *Fox v The Queen* [2002] AC 284 (PC) (appeal taken from St Kitts & Nevis); *Kafantayeni v Attorney General* [2007] MWHC 1 (Malawi HC); *Attorney General v Kigula* [2009] UGSC 6 (Uganda SC); *Mutiso v Republic* Crim App No 17 of 2008 (30 July 2010) (Kenya CA).
⁶ *Dalbir Singh v State of Punjab*, A.I.R. 2012 S.C. 1040; *Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik) v Union of India*, Crim Writ Petition No 1784 of 2010 (11 June 2010) (Bombay HC); *Bangladesh Legal Aid and Services Trust v Bangladesh* 2010 (30) BLD 194 (HCD).
Constitutional Law and the Death Penalty in India and Bangladesh

The death penalty regimes of India and Bangladesh align with the rough parameters of other Commonwealth nations, but do not fit the template precisely. As an initial matter, the death penalty for ordinary murder was never truly mandatory, unlike the British colonies of the Caribbean, Southeast Asia, and Sub-Saharan Africa. Under the Indian Penal Code of 1860, which applied to a unified British India, a judge possessed discretion to substitute a sentence of life imprisonment, though after 1898 he or she was required to provide written reasons as to why a lesser sentence was chosen.7 However, both India and Bangladesh inherited the mandatory death sentence for life-term prisoners who commit murder while incarcerated, a provision originally installed to deter attacks on corrections officials (typically Englishmen) in the colonial period.8 The second unusual quality is that India’s independence came before the European Convention on Human Rights applied to the colonies after September 1953, and consequently the constitution lacked a specific prohibition on cruel, inhuman, and degrading punishment and a due process of law clause, though the 1972 Constitution of Bangladesh contains both on the Commonwealth model.9 Finally, both India and Bangladesh possess the mandatory death penalty for a handful of specific-intent crimes involving terrorist-related activities and narcotics trafficking, which differs from British colonies elsewhere.10

Nonetheless, the constitutional evolution of both the Indian constitution (despite its textual limitations) and the more modern Bangladeshi constitution accords with the global trend

7 Indian Penal Code Act 45 of 1860, section 302; Code of Criminal Procedure Act 5 of 1898, sec. 367(5) (India).
8 Indian Penal Code Act 45 of 1860, section 303.
10 But see Dangerous Drugs Act of 1952 Act 234, § 39B (Malaysia); Misuse of Drugs Act 5 of 1973, as amended by Misuse of Drugs (Amendment) Act 49 of 1975 (Singapore), which introduce the mandatory death penalty for drug trafficking.
toward restricting the death penalty to the “rarest of the rare” crimes.\textsuperscript{11} According to Article 21 of the Constitution of India, “No person shall be deprived of his life or personal liberty except according to procedure established by law.”\textsuperscript{12} And not just any procedure: according to the Indian Supreme Court in \textit{Maneka Gandhi v Union of India}, the procedure prescribed by law had to be fair, just, and reasonable, which imported principles of due process of law into the Indian constitution.\textsuperscript{13} A later case, \textit{Sunil Batra v Delhi Administration}, imported a prohibition on cruel and degrading punishment into India’s constitution, finding that unjust punishment was a violation of equal protection and due process of law.\textsuperscript{14} In line with \textit{Maneka Gandhi}, the Supreme Court has held that public executions and unduly long delay in execution of a death sentence to be unconstitutional, as these were not reasonable as to procedure and substance, though the Court has upheld hanging as a method of execution.\textsuperscript{15} Similarly, the Court has also determined that the process of clemency is subject to judicial review as the grant of mercy or pardon may not be arbitrary or discriminatory under Article 21.\textsuperscript{16}

The case defining the constitutionality of the death penalty in India was \textit{Bachan Singh v State of Punjab} in 1980.\textsuperscript{17} Although the Court upheld the death penalty per se as constitutional under Article 21, it gave content to the “rarest of the rare” doctrine for the first time, requiring the presence of aggravating circumstances in order to merit the special punishment of death. Three years later, in \textit{Macchi Singh v State of Punjab}, the Court defined the aggravating and mitigating factors that were to be weighed by the sentencing judge, as well as the manner for

\textsuperscript{11} See International Covenant on Civil and Political Rights UN Doc A/6316 (1966), 999 UNTS 171 (23 Mar 1976), art 6(2) (restricting death penalty to the “most serious crimes”).
\textsuperscript{12} Constitution of India art. 21.
\textsuperscript{13} \textit{Maneka Gandhi v Union of India} 1978 (2) SCR 621.
\textsuperscript{14} \textit{Sunil Batra v Delhi Administration} 1980 AIR 1579 (SC).
\textsuperscript{15} \textit{Triveniben v State of Gujurat} 1989 AIR 142 (SC); \textit{Attorney General v Devi} 1986 AIR 467 (SC); \textit{Deena v Union of India} 1983 AIR 1155 (SC).
\textsuperscript{16} \textit{Maru Ram v Union of India} 1981 (1) SCC 107.
\textsuperscript{17} \textit{Bachan Singh v State of Punjab} 1980 (2) SCC 684.
doing so, determining that the death sentence was only appropriate where the circumstances were unusually heinous such that a sentence of life imprisonment was inadequate.\textsuperscript{18} Undoubtedly, the regime established by \textit{Bachan Singh} has succeeded in restricting executions in India to barely a trickle. With only one execution in the ten years between 1998 and 2007, India is exceptional in Asia: “No retentionist nation in the world executes at a lower rate than India,” Johnson and Zimring write, “and the only way India’s own rate could go any lower is if it falls out of the retentionist category altogether.”\textsuperscript{19} The level of discretion provided to the trial judge came at some cost, however, as the death penalty became so rare that death sentences and executions followed no discernible pattern.\textsuperscript{20} A paradigm shift was needed, and in 2009 it came. In \textit{Santosh Bariyar v State of Maharashtra}, the Supreme Court introduced a narrower and more concrete test: the prosecution must prove by leading evidence that there was no possibility of rehabilitation of the accused and that life imprisonment would serve no purpose in order to justify imposition of the death penalty.\textsuperscript{21}

In 1983, the Supreme Court of India invalidated the mandatory death sentence for life-term prisoners who commit murder while incarcerated under Section 303 of the Penal Code in \textit{Mithu v State of Punjab}, finding that a mandatory death sentence was not a just and reasonable procedure under Article 21 and \textit{Maneka Gandhi}.\textsuperscript{22} According to the Court, the mere fact that a person was under a life sentence did not minimize the importance of other mitigating factors that were relevant at sentencing such as age, provocation, emotional disturbance, or minimal participation in a prison riot. “A provision of law which deprives the court of the use of its wise

\textsuperscript{18} Macchi Singh v State of Punjab 1983 (3) SCC 470.
\textsuperscript{21} Santosh Bariyar v State of Maharashtra 2009 (6) SCC 498.
\textsuperscript{22} Mithu v State of Punjab 1983 SCR (2) 690.
and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair,” wrote Chief Justice Yeshwant Vishnu Chandrachud.23 Although the Indian Parliament passed several mandatory death sentences in the years following the *Mithu* decision, including for drug trafficking under the Narcotic and Psychotropic Drugs Act of 1985 and for terrorist arms possession under a 1988 amendment to the Arms Act of 1959, the Court avoided a direct ruling confirming *Mithu* for nearly thirty years.

Bangladesh has long wrestled with its own version of the “rarest of the rare” doctrine. In *Sarder v State*, the Appellate Division reduced a death sentence based on the “bitter matrimonial relationship” between the appellants’ family and the deceased, noting that the murder provision of the Penal Code did “not specify in which case the death sentence should be given” but rather left “the matter to the discretion of the court” and required that “[e]very case…be considered in the facts and circumstances of that case only.”24 In a later appeal, where the defendant helped plan but did not participate in the actual murder, the Court found that “some extenuating circumstances [have] visibly appeared as would permit us to take a lenient view in the matter of sentence,” and chose a sentence of life imprisonment over a death sentence.25 In 2009, the Appellate Division reversed a death sentence for ordinary murder without premeditation, finding that “this is not [among] the rarest of the rare cases” and the “ends of justice will be met if the sentence of death of accused…is converted into one of imprisonment for life.”26 In ordinary murder cases, the Appellate Division requires trial courts to weigh aggravating and mitigating

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23 Ibid at 692.
24 *Sarder v State* 1987 (7) BLD 324 (AD) 328.
25 *Abdul Awal v State* 1998 (18) BLD 605 (HCD) 610.
26 *State v Pinto* 2009 (29) BLD 73 (AD).
factors and determine whether a death sentence is appropriate, a similar approach to that of the Indian Supreme Court.

**High Court Division of Bangladesh: Bangladesh Legal Aid and Services Trust (on behalf of Sukur Ali) v Bangladesh (2010)**

In the postcolonial period, Bangladesh maintained the mandatory death sentence for murder and attempted murder by a life-term prisoner, though it also possessed a mandatory death sentence from 1995 to 2000 under the Oppression of Women and Children (Special Enactment) Act for three crimes: first, the murder of a woman or child using explosives, corrosive substances, or poison; second, dowry murder, in which a woman is killed by her husband or his family after suffering harassment or torture to extort a higher dowry; and third, murder following rape. In 1995, a 14-year-old boy was given a mandatory death sentence for the rape and murder of a 7-year-old girl, which was upheld by the High Court Division on the basis that “[n]o alternative punishment has been provided for the offence that the condemned prisoner has been charged and we are left with no other discretion but to maintain the sentence if we believe that the prosecution has been able to prove the charge beyond reasonable doubt.” The High Court Division refused to defy the language of the statute that provided for the mandatory death penalty for anyone guilty of the offense, even a juvenile, a decision later upheld by the Appellate Division.

In an original writ filed by the Bangladesh Legal Aid and Services Trust (BLAST) on behalf of Sukur Ali, the High Court Division invalidated the mandatory death penalty for all

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27 Oppression of Women and Children (Special Enactment) Act 18 of 1995, sections 4, 6(2), and 10(1).
28 State v Sukur Ali 2004 (9) BLC 238 (HCD).
29 The statute itself defines “child” but does not define any limits on the person of the offender. Oppression of Women and Children (Special Enactment) Act 18 of 1995, section 2 et seq (noting “whoever” commits the capital crimes shall be punished with death).
crimes in March 2010. The Court cited to the Privy Council’s decision in *Reyes v The Queen* (appeal taken from Belize) for the proposition that a mandatory sentence of death may be too harsh for a crime and consequently cruel, inhuman, and degrading. According to the Appellate Division, when the legislature prescribed a mandatory punishment, “the hands of the court are tied” and the “court becomes a simple rubberstamp of the legislature” in violation of the “duty of the court to take into account [an accused’s] character and antecedents in order to come to a just and proper decision.” The Court ensured that its decision was far reaching by specifically addressing not only the repealed provision of dowry murder but also the mandatory sentence of death for life-term prisoners who kill: “any mandatory provision of law that takes away the discretion of the court and precludes the court from coming to a decision which is based on the assessment of all the facts and circumstances surrounding any given offence…is not permissible under the Constitution.” Though acknowledging that abolition of the death penalty was a decision better left to the legislature, the Court declared Section 6(2) of the Oppression of Women and Children (Special Enactment) Act unconstitutional, and declared that courts must always have “the discretion to determine what punishment a transgressor deserves and to fix the appropriate sentence for the crime he is alleged to have committed.” Additionally, the decision’s reasoning almost certainly encompasses the mandatory death sentence for prisoners under a sentence of life imprisonment who commit murder.

The High Court Division’s decision in *BLAST v Bangladesh* may be criticized because it did not fully resolve the situation of petitioner Sukur Ali, a juvenile sentenced to death based on a now-repealed law more than a decade ago. Instead of reversing his death sentence the Court

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30 *Bangladesh Legal Aid and Services Trust v Bangladesh* 2010 (30) BLD 194 (HCD).
31 Ibid 208-209.
33 Ibid.
hid behind a false guise of judicial restraint, leaving it to the Appellate Division to overturn it. Nonetheless, the decision makes Sukur Ali’s resentencing likely, and the Court’s sweeping holding aligns Bangladesh with the clear emerging consensus in the Commonwealth that not all murders are equally heinous and deserving of death and that a trial judge is best placed to consider the circumstances of the offense and of the offender in determining an appropriate sentence.

**Bombay High Court: Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik) v Union of India (2011)**

In June 2011, the Bombay High Court found the mandatory death penalty under Section 31A of the Narcotic and Psychotropic Drugs Act of 1985 unconstitutional in *Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik) v Union of India*, the first Commonwealth court to find the mandatory death penalty for drug trafficking unconstitutional. The Attorney General attempted to distinguish murder by life-term prisoners from narcotics trafficking offenses, noting that India’s provision for an automatic sentence of death only for repeat offenses was narrower than similar laws in countries such as Malaysia and Singapore, as those prescribed the mandatory death sentence for first-time offenders. “There is no reason to doubt that the offences relating to narcotics drug[s] or psychotropic substances are more heinous than culpable homicide,” the Court found, noting the societal and economic devastation of the drug trade. Nonetheless, the judges were unconvinced by the attempt to distinguish *Mithu*: Section 31A of the Act “completely takes away the judicial discretion, nay, abridges the entire

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34 Ridwanul Hoque, ‘Constitutionalism and the Judiciary in Bangladesh’ in Sunil Khilani, Vikram Raghavan and Arun Thiruvengadam (eds.) *Comparative Constitutionalism in South Asia* 303 (OUP 2013) 325.

35 *Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik) v Union of India*, Crim Writ Petition No 1784 of 2010 (11 June 2010) (Bombay HC).
procedure for administration of criminal justice of weighing the aggravating and mitigating circumstances in which the offence was committed as well as that of the offender.”

Unlike the Supreme Court’s determination in Mithu that a person’s status as a life-term prisoner was irrelevant to the heinousness of a murder charge, the Bombay High Court determined in Gulam Mohammed Malik that the repeat status of an offender was not an arbitrary distinction—rather, it was based on intelligible differentia that bore a nexus to criminal culpability. As a consequence, the death penalty for drug trafficking did not necessarily violate the equal protection of law provision of Article 14 of the Constitution of India. In addition, the Court rejected the argument that the death sentence was disproportionate to drug trafficking offenses because the crime did not result in death and was thus not among the “rarest of the rare.” Instead, the Court determined that drug trafficking jeopardized the social fabric of the nation and it was within the legislative prerogative to determine which sentences were the most heinous. Rather than strike Section 31A completely, however, the Court opted to construe the mandatory sentencing provision as discretionary and replace “shall” with “may” so that a trial court retained discretion to substitute death or a lesser punishment depending on the circumstances of the case.

**Supreme Court of India: Dalbir Singh v State of Punjab (2012)**

In February 2012, the Supreme Court of India finally invalidated the mandatory death penalty under the Arms Act of 1959, an anti-terrorist law criminalizing use of heavy arms or

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36 Ibid at [63].
37 Ibid. at [89].
ammunition resulting in death. In this decision, *Dalbir Singh v State of Punjab*, the Court cited global precedent for the proposition that the mandatory death penalty violated the right to a fair trial because it precluded a sentencing hearing for a defendant convicted of murder. According to the Court, the mandatory nature of the death sentence violated constitutionally-protected judicial review of criminal sentences and undermined the statutory sentencing structure of the Indian Penal Code and Criminal Procedure Code. The Court relied on *Mithu’s* holding that the constitution required consideration of aggravating and mitigating factors in order to limit the death sentence only to the most serious or heinous offenses.

In addition to reviewing domestic precedent, the Court engaged in a searching analysis of *Woodson v North Carolina* and other American decisions, as well as the more recent cases from the Privy Council’s Caribbean jurisprudence and from the highest courts of Kenya, Malawi, and Uganda, all of which found the mandatory nature of the death sentence unconstitutional and established discretionary regimes. “It is clear from the discussion hereinabove that mandatory death penalty has been found to be constitutionally invalid in various jurisdictions where there is an independent judiciary and the rights of the citizens are protected in a Constitution,” the Court ruled. Distinguishing the jurisprudence of Malaysia and Singapore, which have constitutions that do not explicitly prohibit cruel and degrading punishment or provide due process of law protections, these clauses became part of Indian constitutional doctrine through *Maneka Gandhi* and *Sunil Batra*. The Court found that the mandatory death sentence in the Arms Act of 1959 as amended in 1988 violated both the equality provision at Article 14 and the right to life clause at Article 21.

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38 Arms Act No 54 of 1959, as amended by Arms (Amendment) Act No 42 of 1988, sec 6(3) (introducing mandatory death sentence).
40 Ibid., at 1060.
Concluding Remarks: The Future of the Mandatory Death Penalty

The mandatory sentence of death is on the rapid retreat across the Commonwealth as it conflicts with the emerging consensus that the death penalty should be reserved only for the most heinous crimes based on the particular characteristics of the offense and the offender. The decisions of the Privy Council in a series of challenges arising from the English-speaking Caribbean and the highest courts of Kenya, Malawi, and Uganda have succeeded in building a corpus of transnational jurisprudence that other Commonwealth courts draw on, follow, and distinguish as necessary. As the recent case law from India and Bangladesh suggests, these countries are not just passive recipients of foreign jurisprudence but rather active contributors to a constitutional sharing process, making their own imprint and ensuring that the decline of the death penalty across the globe is as much based on local criminal justice cultures and popular demands as on human rights norms of Western origin. The decisions of the Indian Supreme Court, the Bombay High Court, and the Bangladesh Appellate Division helped to install prevailing norms of constitutional due process and human dignity into domestic constitutional jurisprudence.