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## The Abolition of the Mandatory Death Penalty in India and Bangladesh: A Comparative Commonwealth Perspective

Andrew Novak\*

Across the Commonwealth, the mandatory death penalty is in decline in favor of a capital sentencing regime that delegates sentencing discretion to a trial judge. The common law mandatory death penalty for murder simplified the sentencing process in resource-constrained legal systems, 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 over-punished and led to bloated death rows even as the number of executions declined across the world.<sup>1</sup> Although an executive or mercy committee could grant clemency or pardon in troublesome cases, this failed to reduce all risk of arbitrariness or mistake.<sup>2</sup> India and Bangladesh are no exception to this Commonwealth-wide trend. Following the decision of the United States Supreme Court in *Woodson v. North Carolina*, abolishing the mandatory death penalty for murder in 1976, which led to a system of guided sentencing discretion in capital cases, the Supreme Court of India did likewise in *Mithu v. State of Punjab* in 1983.<sup>3</sup> Despite the Court's broad-based rationale in *Mithu*, the legislature continued to pass mandatory capital sentencing regimes for specific-intent offenses related to terrorism, drug trafficking, and caste violence.<sup>4</sup> Two recent decisions of Indian courts, analyzed

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1. For more on the decline in the number of executions worldwide, see Saeed Kamali Dehghan, *Amnesty International Report Claims Death Penalty is Declining Worldwide*, *GUARDIAN* (Apr. 10, 2013, 3:42 EDT), <http://www.theguardian.com/world/2013/apr/10/death-penalty-declining-worldwide-amnesty>.

2. Rob Turrell, "It's a Mystery": *The Royal Prerogative of Mercy in England, Canada, and South Africa*, 4 *CRIME, HIST. & SOCIETIES* 83, 84-88 (2000).

3. *Woodson v. North Carolina*, 428 U.S. 280 (1976). Justice Stewart memorably wrote for the Court that the mandatory death penalty "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* at 304. See also *Mithu v. State of Punjab*, (1983) 2 S.C.R. 690. This article cites to the following print reporters in India: All India Reports (A.I.R.), Supreme Court Reports (S.C.R.), and Supreme Court Cases (S.C.C.). In Bangladesh, the following print reporters are used: Bangladesh Law Chronicles (B.L.C.), Bangladesh Legal Decisions (B.L.D.), and Dhaka Law Reports (D.L.R.). Where no print reporter citation is possible, citation will be made to a case or docket number including the full date and any other identifying information.

4. See, e.g., Narcotic Drugs and Psychotropic Substances Act, 1985, § 31A Acts of Parliament, 1985 (India); Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, § 2(i), Acts of Parliament, 1989; Terrorism and Disruptive Activities (Prevention) Act, 1987, No. 28, § 3(2)(i), Acts of

below, have invoked *Mithu* and determined that the mandatory death penalty under these laws is constitutionally inoperable.<sup>5</sup> In 2010, the High Court Division of Bangladesh also invalidated the mandatory death penalty by relying on the reasoning in *Mithu*.<sup>6</sup>

Because most postcolonial Commonwealth constitutions contain fundamental rights provisions that include due process rights and a prohibition on cruel and degrading punishment, they possess uniform constitutional vulnerabilities that make collateral attacks on the death penalty possible.<sup>7</sup> In addition to India and Bangladesh, 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 and in the African countries of Kenya, Malawi, and Uganda.<sup>8</sup> National courts across the English-speaking world share death penalty jurisprudence, citing to one another and contributing to a corpus of comparative case law, which has succeeded in drastically restricting the scope of the death penalty and has created new international norms of death penalty due process.<sup>9</sup> The most recent contributions to this body of transnational jurisprudence include the decisions of the Supreme Court of India in *Dalbir Singh v. State of Punjab*, the Bombay High Court in *Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik) v. Union of India*, and the Bangladesh High Court Division in *Bangladesh Legal Aid and Services Trust (on behalf of Sukur Ali) v. Bangladesh*.<sup>10</sup> These cases align with the global Commonwealth trend finding judicial sentencing discretion in capital cases to be constitutionally required. While these decisions generously cited case law from around the Commonwealth, they paid particularly close attention to jurisprudence on the Indian Subcontinent in a regional sharing process that mimics the global one.

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Parliament, 1987 (repealed but not retroactive); Prevention of Terrorism Act, 2002, No. 15, § 3(2)(a), Acts of Parliament, 2002 (repealed but not retroactive); Unlawful Activities Prevention (Amendment) Act, 2004, No. 29, § 6(b)(i), Acts of Parliament, 2004.

5. *Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik) v. Union of India*, Crim. Writ Petition No. 1784 of 2010 (June 11, 2010) (Bombay H.C.); *State of Punjab v. Dalbir Singh*, A.I.R. 2012 S.C. 1040 (India).

6. *Bangladesh Legal Aid and Services Trust (on behalf of Sukur Ali) v. Bangladesh*, (2010) 30 B.L.D. 194 (H.C.D.).

7. WILLIAM A. SCHABAS, *THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE: CAPITAL PUNISHMENT CHALLENGED IN THE WORLD'S COURTS* 3-4 (1996).

8. *See, e.g., Reyes v. Queen*, [2002] 2 A.C. 259 (P.C.) (appeal taken from Belize); *Queen v. Hughes*, [2002] 2 A.C. 259 (P.C.) (appeal taken from St. Lucia); *Fox v. Queen*, [2002] A.C. 284 (P.C.) (appeal taken from St. Kitts & Nevis); *Kafantayeni v. A.G.*, [2007] M.W.H.C. 1 (Malawi H.C.); *A.G. v. Kigula*, [2009] 2 E.A.L.R. 1 (Uganda S.C.); *Mutiso v. Republic*, [2011] 1 E.A.L.R. 342 (Kenya C.A.).

9. Paolo Carozza, *"My Friend is a Stranger": The Death Penalty and the Global Jus Commune of Human Rights*, 81 TEX. L. REV. 1031, 1036 (2002).

10. *Singh*, A.I.R. 2012 S.C. at 1040; *Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik)*, Crim Writ Petition No. 1784 of 2010; *Bangladesh Legal Aid and Services Trust (on behalf of Sukur Ali)*, 30 B.L.D. at 194.

This article will place these three recent decisions in comparative context and trace the Indian and Bangladeshi jurisprudence back to the Indian Supreme Court's decision in *Mithu*, emphasizing the turbulent rise of judicial capital sentencing discretion in post-mandatory death penalty regimes. Although *Mithu* confirmed that judicial sentencing discretion was required in murder cases—murder being a general-intent crime, encompassing a wide range of moral culpability—populist legislation continued to enact mandatory death penalties for aggravated specific-intent offenses.<sup>11</sup> In India, these offenses included caste violence, drug trafficking, and death by arms of war, and in Bangladesh, murder of a woman or child by explosives or acid, dowry murder, and rape-murder.<sup>12</sup> By extending *Mithu*'s reasoning to these specific-intent offenses, the courts of India and Bangladesh have closed the door on mandatory capital punishment and ensured that judicial sentencing discretion in all capital cases is constitutionally required.<sup>13</sup>

#### I. THE DECLINE OF THE MANDATORY DEATH PENALTY IN THE COMMONWEALTH

The mandatory death penalty is in world-historical decline and has yielded to capital sentencing regimes in most of the English-speaking world that allow a judge to pass a lesser sentence based on the circumstances of the offense and the offender.<sup>14</sup> The abolition of mandatory capital punishment, which has had the consequence of greatly shrinking the size of death rows and reducing an overreliance on executive clemency mechanisms, was the deliberate intention of a handful of London-based human rights lawyers.<sup>15</sup> This network of lawyers

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11. See *Mithu v. State of Punjab*, (1983) 2 S.C.R. 690; see also *supra*, note 4 and accompanying text.

12. See, e.g., Narcotic Drugs and Psychotropic Substances Act, 1985, § 31A, Acts of Parliament (India); Arms Act, 1959, No. 54, as amended by Arms (Amendment) Act, 1988, No. 42, § 6(3), Acts of Parliament, 1988 (India); Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, § 2(i), Acts of Parliament (India); Oppression of Women and Children (Special Enactment) Act, No. 18 §§4, 6(2), and 10(1) (1995) (Bangl.).

13. By contrast, consider the ruling of the Judicial Committee of the Privy Council in *Ong Ah Chuan v. Public Prosecutor*, in which the Privy Council upheld the mandatory death penalty for drug trafficking. In dicta, the Privy Council appeared to distinguish drug trafficking from murder, noting that some crimes permitted “considerable variation in moral blameworthiness, despite the similarity in legal guilt of offenders upon whom the same mandatory death penalty must be passed.” For murder, often committed in the heat of passion, “the likelihood of this is very real; it is perhaps more theoretical than real in the case of large scale trafficking in drugs, a crime of which the motive is cold calculated greed.” *Ong Ah Chuan v. Public Prosecutor*, [1981] A.C. 648, 673-74 (P.C. 1980) (appeal taken from Sing.). As stated below, however, the decision is no longer good law in the Commonwealth, having been reversed by the Privy Council in a series of challenges arising from the Caribbean.

14. See ANDREW NOVAK, *THE GLOBAL DECLINE OF THE MANDATORY DEATH PENALTY: CONSTITUTIONAL JURISPRUDENCE AND LEGISLATIVE REFORM IN AFRICA, ASIA, AND THE CARIBBEAN* 6-7 (2014).

15. This strategy is driven in large part by the Death Penalty Project UK and its executive directors Saul Lehrfreund and Parvais Jabbar, as well as UK-based pro bono attorneys and partners on the ground. Rick Lines, *Litigating Against the Death Penalty for Drug Offences: An Interview with Saul Lehrfreund and Parvais Jabbar*, 1 INT'L J. HUM. RTS. & DRUG POL'Y 53, 54-5 (2010).

helped defend death row inmates in the Caribbean before the Judicial Committee of the Privy Council, the highest court for most English-speaking countries in the Caribbean basin.<sup>16</sup> Bringing challenges before the United Nations Human Rights Committee and the Inter-American Commission on Human Rights, this network of lawyers, led by the Death Penalty Project and its partners, clarified the obligations of countries that were party to the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights, both of which restrict the death penalty to the most serious crimes.<sup>17</sup> The jurisprudence from these human rights tribunals was persuasive to the Privy Council, which extinguished the mandatory death penalty as unconstitutional in most of the Commonwealth Caribbean.<sup>18</sup>

These lawyers relied on two types of challenges. First, because the mandatory death penalty treated all murders the same, it could be too harsh for a crime and therefore, cruel and degrading punishment. The seminal Privy Council decision in *Reyes v. Queen* from Belize emphasized this aspect.<sup>19</sup> Second, because the mandatory death penalty did not offer a defendant a sentencing hearing, the penalty violated the right to a fair trial, a holding recognized by the Inter-American Commission on Human Rights in *Edwards v. Bahamas* and other cases.<sup>20</sup> Following the abolition of the mandatory death penalty in most of the Commonwealth Caribbean, the London-based network of human rights lawyers worked with allies on the ground to bring successful challenges to the mandatory

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16. See generally Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1865-7 (2002) (noting the increasingly robust human rights role played by the Privy Council and the eventual backlash from Caribbean nations). As a result of this death penalty litigation, Barbados and Belize have adopted the Caribbean Court of Justice as their highest court of final appeal, and other Caribbean states may do likewise. See Margaret A. Burnham, *Indigenous Constitutionalism and the Death Penalty: The Case of the Commonwealth Caribbean*, 3 INT'L J. CON. L. 582, 584-5 (2005).

17. See International Covenant on Civil and Political Rights (hereinafter, ICCPR) art. 6(2), *opened for signature* December 19, 1966, 999 U.N.T.S. 85 (entered into force March 23, 1976) (restricting the death penalty to “the most serious crimes in accordance with the law in force at the time of the commission of the crime” and “pursuant to a final judgment rendered by a competent court”); American Convention on Human Rights art. 4(2), *opened for signature* November 22, 1969, 1144 U.N.T.S., O.A.S.T.S. No. 36 (restricting the death penalty to “the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment”).

18. See, e.g., *Thompson v. St. Vincent & Grenadines*, U.N. Human Rights. Comm., Communication no. 806/1998, U.N. Doc. CCPR/C/70/D/806/1998 (2000); *Chan v. Guyana*, U.N. Human Rights. Comm., Communication no. 913/2000, U.N. Doc. CCPR/C/85/D/913/2000 (2006); *Baptiste v. Grenada*, Case 11.743, Inter-Am. Comm'n H.R., Report No. 38/00, OEA/Ser.L.V.II.106 doc. 3 (1999); *McKenzie v. Jamaica*, Case 12.023, Inter-Am. Comm'n H.R., Report No. 41/00, OEA/Ser.L.V/II.106 doc. 3 (2000). The Inter-American Court of Human Rights also has jurisdiction for cases arising from Barbados and Trinidad and Tobago, and has found the mandatory death penalty in these countries out of compliance with the American Convention on Human Rights. See *Hilare, Constantine & Benjamin v. Trinidad & Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 94 (June 21, 2002); *Boyce v. Barbados*, Preliminary Objection, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 169 (Nov. 20, 2007).

19. *Reyes v. Queen*, [2002] 2 A.C. 259, [15] (P.C.) (appeal taken from Belize).

20. *Edwards v. Bahamas*, Case 12.067, Inter-Am. Comm'n H.R., Report No. 48/01, OEA/Ser.L.V/II.111, doc. 20 (2000).

death penalty before the Constitutional Court of Malawi, the Supreme Court of Uganda, and the Court of Appeal of Kenya, each of which established discretionary death penalty regimes and ordered the resentencing of all prisoners on death row.<sup>21</sup> While implementation of these decisions has been slow, they were significant victories of human rights litigation that spurred criminal justice reforms, such as the adoption of new sentencing guidelines in Uganda.<sup>22</sup> However, similar challenges failed before the Supreme Court of Ghana and the Singapore Court of Appeal. While Singapore (and Malaysia) have constitutions that differ from the Commonwealth model—lacking a prohibition on cruel, inhuman, and degrading punishment and a protection of the right to a fair trial—the poorly-reasoned Ghana case rejected the emerging Commonwealth consensus out of hand as judicially activist in a decision repudiated by the UN Human Rights Committee as out of compliance with Ghana’s obligations under the ICCPR.<sup>23</sup> But even Ghana and Singapore are not immune from this emerging trans-Commonwealth norm: in 2012, Singapore initiated a drastic curtailment of its mandatory death penalty, including the controversial drug trafficking provisions. Similarly, in Ghana, a death penalty moratorium is in place and the current government has committed to abolition.<sup>24</sup>

These “second-generation” challenges to the mandatory death penalty are not new; the defects inherent in a mandatory death regime, including the risk of jury nullification, where a jury refuses to convict a guilty defendant in order to avoid a death sentence, have been widely known for decades.<sup>25</sup> The Privy Council had previously rejected challenges to the mandatory death penalty in cases arising from Rhodesia and Singapore, as did the Supreme Court of Canada in a 1977

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21. *Kafantayeni*, [2007] MW.H.C. 1 at 6-7; *Kigula v. A.G.*, [2009] 2 E.A.L.R. 1, 17 (Uganda S.C.); *Mutiso*, [2011] 1 E.A.L.R. at 342 (Kenya S.C.).

22. For the difficulties in implementing these decisions see Sandra Babcock & Ellen Wight McLaughlin, *Reconciling Human Rights and the Application of the Death Penalty in Malawi: The Unfulfilled Promise of Kafantayeni v. Attorney General*, in *CAPITAL PUNISHMENT: NEW PERSPECTIVES* 181, 195-7 (Peter Hodgkinson ed., 2013); Graeme L. Hill, *Successful Capital Litigation in Uganda: A Counterintuitive Approach?*, in *CAPITAL PUNISHMENT: NEW PERSPECTIVES* 297, 308-9 (Peter Hodgkinson ed., 2013). For the Ugandan sentencing guidelines, see *The Constitution (Sentencing Guidelines for Courts of Judicature) (Practice) Directions of 2013* (April 26, 2013), available at [http://www.jlos.go.ug/index.php/document-centre/document-centre/doc\\_download/264-sentencing-guidelines](http://www.jlos.go.ug/index.php/document-centre/document-centre/doc_download/264-sentencing-guidelines).

23. See *Yong Vui Kong v. Public Prosecutor*, [2010] 3 S.L.R. 491 (Sing. C.A.); *Dexter Johnson v. Republic*, [2011] S.C.G.L.R. 601 (Ghana); *Johnson v. Ghana*, U.N. Human Rights Comm., Communication no. 2177/2012, UN Doc. CCPR/C/110/D/2177/2012 (March 27, 2014) (U.N.H.R.C.).

24. For Singapore, see *Penal Code (Amendment) Act, 2012, No. 33; Criminal Procedure (Amendment) Act, 2012, No. 34, §§ 12-13; Misuse of Drugs (Amendment) Act, 2012, No. 27*. For Ghana, see Republic of Ghana, *White Paper on the Report of the Constitution Review Commission of Inquiry*, W.P. No. 1/2012, June 2012, at 44.

25. See, e.g., WALTER BERNS, FOR CAPITAL PUNISHMENT: CRIME AND THE MORALITY OF THE DEATH PENALTY 181 (1979)(on jury nullification); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L.REV. 1690, 1712-3, 1715 (1974) (on the transfer of sentencing discretion from the judge to prosecutors and mercy committees, increasing the risk of arbitrariness).

challenge.<sup>26</sup> The United States Supreme Court, however, famously ruled that a mandatory death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>27</sup> Justice Stewart elegantly stated that the punishment treated all persons convicted of murder “not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”<sup>28</sup> After striking down the common law mandatory death penalty, the Court subsequently struck down the narrower mandatory death regimes for first-degree murder, murder of a law enforcement officer, and finally, murder committed by a prisoner already under a sentence of life imprisonment.<sup>29</sup>

Like the United States, India’s constitutional abolition of the mandatory death penalty preceded the new “second generation” challenges, invalidating the mandatory death sentence in 1983, in *Mithu v. State of Punjab*, citing *Woodson* and other cases.<sup>30</sup> As a doctrinal matter, the three decisions explored below descend from *Mithu*’s holding that judicial sentencing discretion in capital cases is constitutionally required, rather than evolving directly from the “second generation” challenges elsewhere in Africa, the Commonwealth Caribbean, and Southeast Asia. However, the holdings of the below-discussed cases coincide with the Commonwealth-wide trend to move away from the common law mandatory death penalty. Despite their doctrinal reliance on *Mithu*, these three decisions broadly cited and followed recent precedent from around the Commonwealth, including the Caribbean and Africa, helping to harmonize criminal justice regimes across borders and ensuring that the emerging human rights norm that judicial discretion is required in capital cases is adopted in domestic law.<sup>31</sup>

## II. CONSTITUTIONAL LAW AND THE DEATH PENALTY IN INDIA

No country in the world that professes to maintain a commitment to legal capital punishment executes at a lower rate than India, about once every ten years

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26. *Queen v. Runyowa*, [1967] R.L.R. 42 (P.C.)(appeal taken from Rhodesia & Nyasaland); *Ong Ah Chuan*, A.C. at 648 (appeal taken from Sing.). While Singapore’s constitution did not have a prohibition on cruel, inhuman, and degrading punishment, Rhodesia’s did. For Canada, see *Miller v. Queen*, [1977] 2 S.C.R. 680 (Can.). In *Miller*, the Court refused to follow *Woodson v. North Carolina* by upholding the mandatory death penalty for the murder of a law enforcement officer, even though the legislature abolished the death penalty the prior year. Also note that Supreme Court Reports (S.C.R.) in this footnote refers to the Canadian series and not to the Indian series.

27. *Woodson*, 428 U.S. at 280.

28. *Id.* at 304.

29. *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976) (for first-degree murder); *Harry Roberts v. Louisiana*, 431 U.S. 633 (1977) (for intentional murder of a police officer); *Sumner v. Shuman*, 438 U.S. 66 (1987) (for a life-term prisoner who commits murder).

30. *Mithu v. State of Punjab*, (1983) 2 S.C.R. 690 (India).

31. NOVAK, *supra* note 14, at 7.

for an annual execution rate of one in more than ten billion per year.<sup>32</sup> The death penalty is publicly marginal, even though it is regularly imposed, which is the result of an embattled criminal justice system that suffers from long delays and cumbersome procedures.<sup>33</sup> This is true despite India's high homicide rate, which is six times higher than Japan's, three times higher than Singapore's, and twice as high as China's. These are three countries with historically more active death penalties than India.<sup>34</sup> Currently, the death penalty is available under the Indian Penal Code for murder, attempted murder by a life convict, abetting any capital offense, waging war against the government, abetting mutiny, fabricating false evidence in a capital trial, abetting the suicide of a child or insane person, kidnapping for ransom, gang robbery involving murder, repeat conviction for sexual assault, and criminal conspiracy to commit a capital crime.<sup>35</sup> In addition, a handful of organized crime and terrorism-related statutes as well as the criminal codes of the armed forces authorize the death penalty.<sup>36</sup> If anything, the rareness of actual executions contributes to the underlying arbitrariness of India's criminal justice system. The system is "lawless in the sense that nothing about the nation's capital jurisprudence can explain who gets sentenced to death or hanged when hundreds of equally or more culpable offenders escape the death penalty altogether."<sup>37</sup> The two most recent executions were of Pakistani militant Mohammed Ajmal Kasab in November 2012, the only surviving perpetrator of the 2008 Mumbai terrorist attack, and Mohammed Afzal Guru in February 2013,

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32. DAVID T. JOHNSON & FRANKLIN E. ZIMRING, *THE NEXT FRONTIER: NATIONAL DEVELOPMENT, POLITICAL CHANGE, AND THE DEATH PENALTY IN ASIA* 438-40 (2009); for more statistics on executions in India, see *Death Penalty Worldwide: India*, CORNELL UNIV. LAW SCHOOL (Mar. 4, 2014), <http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=India>.

33. Julia Eckert, *Death and the Nation: State Killing in India*, in *THE CULTURAL LIVES OF CAPITAL PUNISHMENT: COMPARATIVE PERSPECTIVES 195, 196-7* (Austin Sarat & Christian Boulanger eds., 2005).

34. David T. Johnson, *The Death Penalty in India*, in *CRIME AND JUSTICE IN INDIA* 365, 371-72 (N. Prabha Unnithan ed., 2013).

35. Indian Penal Code Act No. 45 of 1860, §§ 109, 120B(1), 121, 132, 194, 302, 303, 305, 307, 364A, and 396, PEN. CODE(1860).

36. Army Act, 1950, No. 46, Acts of Parliament, 1950 §§ 34, 37, 38, 66 (India); Air Force Act, 1950, No. 45, Acts of Parliament, 1950 § 34, 37, 38, 68 (India); Navy Act, 1957, No. 62, Acts of Parliament, 1957 §§ 34, 35, 36, 37, 38, 39, 43, 44, 49, 56, 59, 76 (India). The death penalty is also available for prescribed offenses under the Indo-Tibetan Border Police Force Act, 1992, No. 35, Acts of Parliament, 1992 (India); Commission of Sati (Prevention) Act, 1987, No. 3, Acts of Parliament, 1988 (India); Narcotic Drugs and Psychotropic Substances (Prevention) Act, 1985, No. 61, Acts of Parliament, 1985, *as amended* 1988 (India); Terrorist and Disruptive Activities (Prevention) Act, 1987, No. 28, Acts of Parliament, 1987 (India); Prevention of Terrorism Act, 2002, No. 15, Acts of Parliament, 2002 (India); Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, No. 33, Acts of Parliament, 1989 (India); Explosive Substances Act, 1908, No. 6, Acts of the Imperial Legislative Council, 1908 (India); and Unlawful Activities Prevention Act, 1967, No. 37, Acts of Parliament, 1967, *as amended* 2004. See, Bikramjeet Batra, *A Knotty Tale: Understanding the Death Penalty in India*, in *CAPITAL PUNISHMENT: A HAZARD TO A SUSTAINABLE CRIMINAL JUSTICE SYSTEM?* 214 n.6 (Lill Scherdin ed., 2014). *Sati* refers to the ancient Hindu practice of burning or burying a widow.

37. JOHNSON & ZIMRING, *supra* note 32, at 438.



convicted of the 2001 attack on the Indian Parliament.<sup>38</sup> Prior to this, the most recent execution was of Dhananjay Chatterjee in 2004, the only execution between 1997 and Kasab's in 2012<sup>39</sup> in a country where 30,000 murders take place per year.<sup>40</sup>

The Indian Penal Code of 1860 was drafted in tandem with the widespread criminal justice reform then taking place in England, including revision of the notorious Bloody Code, and the replacement of punishments of the body and transportation to a penal colony with imprisonment.<sup>41</sup> Having benefited from this reform, India and Bangladesh (as part of a unified British India) inherited a capital sentencing regime that allowed a judge to consider the circumstances of a crime and select a death sentence or a sentence of life imprisonment, though death was the rule and life imprisonment the exception.<sup>42</sup> This system was revised in 1898 to require a judge to articulate why a sentence of life imprisonment was chosen, if it was.<sup>43</sup> The revision of the Criminal Procedure Code in 1973 reversed this presumption, requiring a judge to provide "special reasons" for selecting a death sentence.<sup>44</sup> However, in limited situations, the mandatory death penalty survived. India and Bangladesh, both of which operated under the Indian Penal Code of 1860, inherited a mandatory death sentence for life-term prisoners who committed murder while incarcerated, a provision originally intended to deter attacks on corrections officials (typically Englishmen) in the colonial period.<sup>45</sup> For this crime, no lesser sentence of imprisonment was possible.<sup>46</sup> As India's independence in 1947 predated the European Convention on Human Rights, which applied to Britain's colonies upon its entry into force in September 1953 and formed the template for the drafting of a number of independence constitutions, India's Constitution lacked both a specific prohibition on cruel,

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38. Amit Bindal & C. Raj Kumar, *Abolition of the Death Penalty in India: Legal, Constitutional, and Human Rights Dimensions*, in *CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND PUBLIC OPINION* 135-36 (Roger Hood & Surya Deva eds., 2013).

39. *See*, Batra, *supra* note 36, at 213.

40. *Id.*; *see also* JOHNSON & ZIMRING, *supra* note 32, at 438.

41. PETER KING, *CRIME, JUSTICE, AND DISCRETION IN ENGLAND, 1740-1820*, at 263 (2000); David Skuy, *Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to the Indian Legal System in the Nineteenth Century*, 32 *MOD. ASIAN STUD.* 513, 527-30 (1998).

42. Indian Penal Code Act, No 45 of 1860, PEN. CODE (1860).

43. Code of Criminal Procedure Act, No. 5 of 1898 § 367(5) CODE CRIM. PROC. (1898) (India).

44. Code of Criminal Procedure Act, No. 2 of 1973 § 354(3) CODE CRIM. PROC. (1974) (India). This provision states: "When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such a sentence." *Id.*

45. Indian Penal Code Act of 1860 §303.

46. *Id.*

inhuman, and degrading punishment and a clause upholding the due process of law, including the right to a fair trial.<sup>47</sup>

Although the Constitution of India does not precisely fit the Commonwealth template, its evolution has accorded with the global trend toward restricting the death penalty to the most serious crimes.<sup>48</sup> 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.”<sup>49</sup> As Bindal and Kumar write, the drafters of the Indian Constitution were acutely aware of the interpretive difficulties of the “due process of law” in the American constitutional context, and chose a minimalist formulation after extensive debates in the Constituent Assembly.<sup>50</sup> According to the Indian Supreme Court in *Maneka Gandhi v. Union of India*, the procedure prescribed by law under Article 21 had to be “fair, just, and reasonable, not fanciful, oppressive or arbitrary,” which imported due process principles into the Indian constitution despite the absence of a specific clause as such.<sup>51</sup> A later case, *Sunil Batra v. Delhi Administration*, found that a fair, just, and reasonable procedure precluded cruel and degrading punishment, again aligning India with an emerging norm of international law even absent an explicit constitutional provision.<sup>52</sup>

In line with *Maneka Gandhi*, the Indian Supreme Court has held that public executions are unconstitutional, as they are not reasonable as to procedure and substance, though the Court has upheld hanging as a method of execution.<sup>53</sup> The Indian Supreme Court has recognized the “death row syndrome,” referring to the mental anguish and suffering caused by undue delay in the execution of a death sentence, and has commuted a number of death sentences where the executive delayed in the disposal of mercy or clemency petitions. In 1983, the Court ruled that where a prisoner had been under sentence of death for eight years, the delay in executing the death sentence was unconstitutionally inhuman and degrading.<sup>54</sup>

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47. On the impact of the European Convention of Human Rights in the colonies, see JENNIFER A WIDNER, *BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* 161 (2001).

48. See ICCPR, *supra* note 17, at art. 6(2), (restricting death penalty to the “most serious crimes”).

49. INDIA CONST. art. 21.

50. Bindal & Kumar, *supra* note 38, at 125.

51. *Maneka Gandhi v. Union of India*, (1978) 2 S.C.R. 621, 658 [21].

52. *Sunil Batra v. Delhi Administration*, (1980) 2 S.C.R. 577, 584 (1979) (India).

53. *Attorney General v. Devi*, (1986) S.C. 467 (1985) (India) (on public executions); *Deena v. Union of India*, (1984) S.C.R. 1 (1983) (India) (on the method of execution).

54. *Vatheeswaran v. State of Tamil Nadu*, (1983) 2 S.C.R. 348 (India). The Court walked the decision back slightly in *Sher Singh v. State of Punjab*, (1983) 2 S.C.R. 582 (India), in which it overruled *Vatheeswaran* to the extent that the former decision set a strict two-year deadline and found the cause of the delay (even when it was the fault of the prisoner) irrelevant. *Sher Singh* requires that the Court consider the totality of the circumstances, including the frivolousness of appeals. *Id.* The seminal case on the death row phenomenon in India is *Triveniben v. State of Gujarat*, (1989) S.C.R. 509, which holds that the Court may consider the cause of extensive delay after a sentence was finally confirmed by the judicial process in order to determine whether the case warrants a commutation.

Although the Court has resisted imposing a strict time limit and closely parsed the reasons for the delay to ensure that the delay was not solely the fault of the prisoner, the Court's decisions on the death row phenomenon align with an overwhelming international consensus that undue delay or conditions of death row can render an otherwise constitutional sentence cruel, inhuman, or degrading.<sup>55</sup> This holding has been accepted internationally by the United Nations Human Rights Committee, the European Court of Human Rights, the Judicial Committee of the Privy Council, and the highest courts of Canada, Uganda, and Zimbabwe, and at least two justices of the United States Supreme Court.<sup>56</sup>

Similarly, the Court has also determined that the process of clemency is subject to judicial review, finding that a grant of mercy or pardon may not be arbitrary or discriminatory under Article 21 and *Maneka Gandhi*.<sup>57</sup> Executive clemency is provided for in Article 72(1) of the Constitution of India, which protects the right of all convicted criminals to submit mercy petitions.<sup>58</sup> In India, the mercy process is more bureaucratic than in other Commonwealth countries, where an executive has broad discretion. Mercy petitions are first examined by the Ministry of Home Affairs, where the Minister makes recommendations on the mercy petitions and sends them to the President. "The President must either accept the recommendation or return the file once for reconsideration. If the file resent with the same recommendation, the President must approve the decision . . . ."<sup>59</sup> Perhaps because of this limitation on executive power, several of India's presidents have left mercy petitions pending when they questioned the safety of the verdict, leading to considerable delays that eventually resulted in the Supreme Court's commutation of the death sentences. For instance, in February 2014, the Supreme Court commuted the death sentences of the assassins of

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55. Some inconsistency in the Court's decisions is evident. Dhanajoy Chatterjee, for instance, was executed in 2004 after spending 10 years on death row and 14 years in prison, with much of the delay the fault of state authorities. See *Dhanajoy Chatterjee v. State of West Bengal*, (2004) 1 S.C.R. 37 (India). Bikramjeet Batra outlines a number of cases in which the Court appears to inconsistently apply *Triveniben* in death row "syndrome" or "phenomenon" challenges. Bikramjeet Batra, *Don't Be Cruel: The 'Death Row Phenomenon' and India's 'Delay' Jurisprudence*, in *CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND PUBLIC OPINION* 287, 301-3 (Roger Hood & Surya Deva eds., 2013).

56. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. 439 (1989) (establishing undue delay as cruel inhuman and degrading in the European Court of Human Rights); *Catholic Comm'r for Justice & Peace in Zim. v. Att'y Gen. of Zim.*, (1993) 2 L.R.C. 277 (establishing undue delay as cruel inhuman and degrading in Zimbabwe); *U.S. v. Burns*, [2001] 1 S.C.R. 283 (Can.) (establishing the death row phenomenon as a factor when considering extradition to a country that practices capital punishment in Canada); *Pratt and Morgan v. Att'y Gen.*, [1993] U.K.P.C. 1 (Jam.). For the more conservative jurisprudence of the U.N. Human Rights Committee, see, e.g., *Communication No. 271/1988, Barrett and Sutcliffe v. Jamaica*, U.N. GAOR, 47th Sess., Supp. No. 40, U.N. Doc. CCPR/C/44/D/271/1988 (1992). See also Batra, *supra* note 36, at 291-7. In the United States, death penalty appeals based on delay are known as *Lackey* claims after *Lackey v. Texas*. See *Lackey v. Texas*, 514 U.S. 1045, 1045-46 (1995) (Stevens, J., dissenting to denial of certiorari); see also, *Elledge v. Florida*, 525 U.S. 944, 944-946 (1998) (Breyer, J., dissenting to the denial of certiorari).

57. *Maru Ram v. Union of India*, (1981) 1 S.C.R. 1196, 1240 (1980).

58. INDIA CONST., art. 72(1).

59. Batra, *supra* note 36, at 221.

former Prime Minister Rajiv Gandhi, as eleven years had lapsed on their mercy petitions.<sup>60</sup> In *Maru Ram v. Union of India*, the Supreme Court ruled that a grant of mercy or pardon that was “wholly irrelevant, irrational, discriminatory or *mala fide*” was unconstitutional.<sup>61</sup> In a subsequent case, *Kehar Singh v. Union of India*, the Court made clear that only the decision-making process and not the ultimate grant or denial of clemency was justiciable.<sup>62</sup> Nonetheless, opening the clemency process to judicial review helps prevent arbitrariness in executive decision-making and accords with a growing trend in the Commonwealth toward subjecting mercy petitions to judicial oversight.<sup>63</sup>

In 1973, the Supreme Court broadly upheld the death penalty as constitutional in the case of *Jagmohan Singh v. State of Uttar Pradesh*, a decision that sought to avoid the backlash triggered in the United States by the suspension of the death penalty in *Furman v. Georgia* a year earlier.<sup>64</sup> However, the Court came breathtakingly close to abolishing the death penalty in *Rajenda Prasad v. State of Uttar Pradesh* in 1979, only permitting the death penalty to be imposed where the accused literally “poses a grave peril to societal survival.”<sup>65</sup> Despite this sweeping holding, however, the Court walked its jurisprudence back to equilibrium in the seminal case on the constitutionality of the death penalty in India. In *Bachan Singh v. State of Punjab*, in 1980, the Court crystallized what became known as the “rarest of the rare” doctrine, restricting the death penalty to only the most heinous crimes.<sup>66</sup> Although the Court upheld the death penalty per se as constitutional under Article 21, it required the presence of aggravating circumstances in order to merit the special punishment of death. *Bachan Singh* also included a strongly articulated dissent by Justice P.N. Bhagwati, who argued that the death penalty violated the Constitution. The arbitrariness of judicial capital discretion, Justice Bhagwati wrote, violated the constitutional guarantee of equal protection under Article 14, and any deterrent rationale underlying the punishment did not justify the cruelty of a delayed execution.<sup>67</sup>

Three years later, in *Macchi Singh v. State of Punjab*, the Court defined the aggravating and mitigating factors that were to be weighed by the sentencing judge, determining that a death sentence was only appropriate where the circumstances were unusually heinous such that a sentence of life imprisonment

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60. Sriharan v. Union of India, (2014) 4 S.C.C. 242.

61. *Maru Ram*, (1981) 1 S.C.R. at 1248.

62. *Kehar Singh v. Union of India*, (1989) 3 S.C.R. 1102, 1103.

63. See, e.g., *Lewis v. Att’y Gen. of Jam.*, [2000] 3 W.L.R. 1785, 1805-6 (Jam.) (finding that a prisoner had the right to make representations to a mercy committee, to see all material considered by the committee, and even to have an oral hearing).

64. *Jagmohan Singh v. State of Uttar Pradesh*, (1973) 2 S.C.R. 541 (1972)(India); *Furman v. Georgia*, 408 U.S. 238 (1972).

65. *Rajenda Prasad v. State of Uttar Pradesh*, (1979) 3 S.C.R. 78, 112 (India).

66. *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684 (India).

67. *Bachan Singh v. State of Punjab*, (1983) 1 S.C.R. 145, 256-371 (1982) (India) (Bhagwati, J., dissenting). Note that the dissent was published much later than the majority opinion.

was inadequate.<sup>68</sup> According to the Court in *Macchi Singh*, the death penalty was only appropriate in narrow circumstances: when the murder was “extremely brutal, grotesque, diabolical, revolting, or dastardly”; when it was committed for a motive that evinced “total depravity and meanness”; when the victim was a minority, an innocent child, or a member of a scheduled caste; and when the crime consisted of bride-burning, dowry death, or a multiple, large scale, or politically-motivated murder.<sup>69</sup>

Undoubtedly, the regime established by *Bachan Singh* succeeded in restricting executions in India to a trickle. As noted, this low rate of executions came at a cost, however, as the death penalty became so rare that death sentences and executions followed no discernible pattern.<sup>70</sup> A number of times, lower courts simply cut and pasted the entirety of the legal analysis weighing aggravating and mitigating factors from other cases, and came to a rote conclusion.<sup>71</sup> Bindal and Kumar write that “it is the personal philosophy of the judges rather than any sound policy that governs judicial discretion in this area.”<sup>72</sup> They describe how the Supreme Court refused to consider among the “rarest of the rare,” a brutal murder for greed, in which an accused misused a position of trust, but found as among the “rarest of the rare” a multiple murder committed for superstitious reasons.<sup>73</sup> Deva goes even further. Looking at every death sentence reviewed by the Supreme Court between January 2000 and October 2011, he documents wild inconsistencies in the Court’s reasoning as to what cases constituted the “rarest of the rare.” For instance, the Court showed gender insensitivity by consistently failing to uphold the death penalty for murders involving the rape of a woman or girl, while coming to markedly different conclusions as to the superstitious sacrifice of children or honor killings.<sup>74</sup> Deva attributes the problem to the amorphous nature of the guidelines formulated in *Bachan Singh* and *Macchi Singh*, and the lack of any normative basis for weighing aggravating and mitigating factors.<sup>75</sup>

In 2009, the Supreme Court attempted another paradigm shift, introducing a narrower and more concrete test in *Santosh Bariyar v. State of Maharashtra*.<sup>76</sup> In

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68. *Macchi Singh v. State of Punjab*, (1983) 3 S.C.R. 413(India).

69. As summarized in A.G. NOORANI, CHALLENGES TO CIVIL RIGHTS GUARANTEES IN INDIA 122-3 (2012).

70. Eckert, *supra* note 33, at 196.

71. NOORANI, *supra* note 69, at 123.

72. Bindal & Kumar, *supra* note 38, at 129.

73. *Id.*, citing *Earabhadrapa v. State of Karnataka*, (1983) 2 S.C.R. 552 (India) (appellant was domestic servant who murdered homeowner and robbed house); *Sushil Murmu v. State of Jharkhand*, A.I.R. 2004 S.C. 394 (India) (appellant beheaded 9 year old boy in order to purportedly appease deity).

74. Surya Deva, *Death Penalty in the ‘Rarest of the Rare’ Cases: A Critique of Judicial Choice-Making*, in *CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND PUBLIC OPINION* 252-5 (Roger Hood & Surya Deva eds., 2013).

75. *Id.* at 252

76. *Santosh Bariyar v. State of Maharashtra*, (2009) 6 S.C.C. 498 (India).

this case, the Court determined that the prosecution was required to 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.<sup>77</sup> The Supreme Court followed *Bariyar* with *Rajesh Kumar v. State of Delhi* in 2012, emphasizing the reformatory potential of the criminal rather than the brutality of the crime in determining whether a murder was among the “rarest of the rare,” reversing a death sentence even where the murder itself was brutal.<sup>78</sup> The regime created by *Bariyar* and *Rajesh Kumar* requires evidence of the socioeconomic background of the accused and not simply evidence of the crime, with the burden of non-reformation of the accused on the state.<sup>79</sup> Noorani predicted that the Court would walk back from the abolitionist sentiment expressed in *Bariyar*, a prediction that seems likely to come true.<sup>80</sup> Indeed, the most recent cases from the Supreme Court suggest that it has not consistently followed the true spirit of *Bariyar* and *Rajesh Kumar*.<sup>81</sup>

### III. THE ABOLITION OF THE MANDATORY DEATH PENALTY IN INDIA

With the Supreme Court’s adoption of the “rarest of the rare” doctrine, the Court abolished the mandatory death penalty in *Mithu v State of Punjab* in 1983, a challenge to Section 303 of the Indian Penal Code, which authorized a mandatory death sentence for a life-term prisoner who committed murder while incarcerated. In *Mithu*, the Court found that a mandatory sentence of death was not a just and reasonable procedure under Article 21, as interpreted by *Maneka Gandhi* and *Sunil Batra*.<sup>82</sup> Calling the mandatory death penalty “harsh, unjust, and unfair,” Chief Justice Yeshwant Vishnu Chandrachud memorably wrote:

The legislature cannot make relevant circumstances irrelevant, deprive the courts of their legitimate jurisdiction to exercise their discretion not to impose the death sentence in appropriate cases, compel them to shut their eyes to mitigating circumstances and inflict upon them the dubious and unconscionable duty of imposing a pre-ordained sentence of death.<sup>83</sup>

In addition, because India’s revised Criminal Procedure Code required judges to articulate the “special circumstances” meriting a heightened penalty of death, a mandatory death sentence made compliance with this provision

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77. *Id.*

78. *Rajesh Kumar v. State of Delhi*, Crim. App. Nos. 1871-2 of 2011 (Sept 28, 2011) (India S.C.).

79. NOORANI, *supra* note 69, at 125.

80. *Id.* at 132.

81. *See Bindal & Kumar*, *supra* note 38 at 132-33.

82. *Mithu v. State of Punjab* (1983) 2 S.C.R. 690, 697-98 (India).

83. *Id.* at 692.

impossible, as the sentence was automatic.<sup>84</sup> According to the Court, this aggravated the arbitrariness of the statute by depriving a life-term offender of a procedural safeguard provided to all other capital defendants.<sup>85</sup> 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.<sup>86</sup>

The Court also found that Section 303 violated the guarantee of equality under Article 14 of the Constitution, as no rational justification existed for treating murder by life-term prisoners differently from all other murders.<sup>87</sup> The Indian Penal Code authorized life imprisonment for crimes such as forgery and counterfeiting, which have no bearing on a life-term prisoner's culpability for homicide.<sup>88</sup> The Court noted that there "might have been the semblance of some logic" if the provision were limited to repeat murderers, such that the intention of the legislature was to provide for an enhanced sentence for the second murder.<sup>89</sup> This was not the case with Section 303. A concurrence by Justice O. Chinnappa Reddy memorably noted that Section 303 removed the scales of justice from the hands of the judge. He wrote: "So final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just, and reasonable."<sup>90</sup> According to Justice Reddy, *Bachan Singh* upheld the constitutionality of the death penalty in India in part on the existence of an alternative sanction of life imprisonment as the presumptive punishment for murder.<sup>91</sup> However, in the years following *Mithu*, the Indian Parliament passed several new mandatory death statutes, on the theory that these narrow, specific-intent crimes required aggravating circumstances and involved a limited range of culpability vis-à-vis murder.<sup>92</sup> The most recent challenges to the mandatory death penalty in India focused on these specific-intent crimes.

#### IV. THE DEATH PENALTY AND SOCIETY IN BANGLADESH

Unlike the Constitution of India, the more recent 1972 Constitution of Bangladesh contained both a prohibition on cruel, inhuman, and degrading

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84. *Id.* at 708.

85. *Id.*

86. *Id.* at 702.

87. *Id.* at 711.

88. *Mithu*, 2 S.C.R. at 708-09 (citing Indian Pen. Code Act, 1860, No. 45, §§ 232, 467).

89. *Id.* at 708.

90. *Id.* at 713.

91. *Id.*

92. See Narcotic Drugs and Psychotropic Substances Act, 1985, No. 65, Acts of Parliament, 1985 (India); Arms Act, 1959, No. 54, as amended by Arms (Amendment) Act, 1988, No. 42, Acts of Parliament, 1988 (India); Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, Acts of Parliament, 1989.

treatment, and a clause providing for the due process of law.<sup>93</sup> Bangladesh has a more robust modern history of capital punishment than India, having carried out about five known executions per year between 2005 and 2010, though statistics are not publicly released and executions are secret.<sup>94</sup> As of 2010, about 90 prisoners were on death row at one facility outside the capital of Dhaka, and roughly 100 to 200 death sentences were handed down each year.<sup>95</sup> Bangladesh has come in for criticism for its poor juvenile justice system, including the possibility that a death sentence could be imposed on a child under the age of 16.<sup>96</sup> The Government of Bangladesh states that the death penalty is an “exemplary punishment for heinous crimes such as the throwing of acid, acts of terrorism, planned murder, trafficking of drugs, rape, [and] abduction of women and children.”<sup>97</sup> Although Bangladesh has a relatively new National Human Rights Commission, which began operation in December 2008, the Commission has not strayed from the official government position on the death penalty, failing to protest several high-profile death sentences for those sentenced to heinous crimes committed during the 1971 war for independence from Pakistan.<sup>98</sup>

Bangladesh authorizes the death penalty for a similar list of crimes as India, as descended from the 1860 Penal Code: waging war, abetting mutiny, false testimony in a capital case, murder, assisting suicide of a child or insane person, aggravated kidnapping of a child, and armed robbery resulting in murder.<sup>99</sup> In addition, other legislation provides death sentences for sabotage, dealing on the black market, counterfeiting, smuggling, poisoning of consumables, a variety of firearms- and explosives-related offenses, and terrorism-related crimes.<sup>100</sup> The Women and Children Repression Prevention Act of 2000 and the Acid Crime Control Act of 2002, likewise punish as capital crimes a variety of gender-based crimes, such as sexual assault resulting in death, trafficking of women and children, or injuring or maiming with acid.<sup>101</sup> Currently, the death penalty is only

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93. BANGL. CONST., arts. 32, 35(5).

94. INTERNATIONAL FEDERATION FOR HUMAN RIGHTS (FIDH), *BANGLADESH: CRIMINAL JUSTICE THROUGH THE PRISON OF CAPITAL PUNISHMENT AND THE FIGHT AGAINST TERRORISM* 14 (2010).

95. *Id.* at 13-14.

96. Y.S.R. Murthy, *The Role of National Human Rights Institutions in Abolishing Capital Punishment: A Critical Evaluation*, in *CONFRONTING CAPITAL PUNISHMENT IN ASIA: HUMAN RIGHTS, POLITICS, AND PUBLIC OPINION* 84 (Roger Hood & Surya Deva eds., 2013).

97. *Id.* at 84 (citing United Nations Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Bangladesh, Addendum*, U.N. Doc. A/HRC/11/18/Add.1, 9 June 2009, 4, Recommendation 19).

98. *Id.* at 84-85.

99. Bangl. Pen. Code Act, No. 45 of 1860, §§ 121, 132, 194, 302, 305, 396, PEN. CODE (1860).

100. Special Powers Act, 1974, No. 14, 1974, §§ 15, 25, 25A, 25B, 25C, 25D (Bangl.); Arms Act, 1878, No. 11, Acts of the Imperial Legislative Council, 1871, § 20A (Bangl.); Explosives Act, 1884, No. 4, Acts of the Imperial Legislative Council, 1884 § 12 (Bangl.); Explosive Substances Act, 1908, No. 6, Acts of the Imperial Legislative Council, 1908 § 3 (Bangl.).

101. Women and Children Repression Prevention Act, No. 8 (2000), §§ 4, 4(2)(ka), 5, 6, 8, 9(2), 11(Bangl.); Acid Crime Control Act, 2002, No. 1, 2000 § 4, 5(ka) (Bangl.).



mandatory for three crimes: murder by a life-term prisoner (Section 303 of the Penal Code, the same provision at issue in *Mithu*), *attempted* murder by a life-term prisoner (Section 307 of the Penal Code), and dowry murder under the Women and Children Repression Prevention Act.<sup>102</sup> This latter act repealed the Oppression of Women and Children (Special Enactment) Act of 1995, which authorized the mandatory death penalty for murder to extort a higher dowry, murder of a woman or child by explosives, acid, or poison, and murder following rape.<sup>103</sup> As explained below, however, the repeal of this provision was not retroactive and some prisoners remained under mandatory death sentences for these crimes.

The death penalty in Bangladesh is deeply troubled. In September 2013, riots broke out when the Bangladesh Appellate Division handed down a death sentence to Abdul Quader Molla of the opposition Islamist party Jamaat-e-Islami, for crimes committed during the war of independence from Pakistan in 1971.<sup>104</sup> Molla had been convicted of crimes against humanity and war crimes in February 2013 and given a life sentence by the International Crimes Tribunal, but due to public pressure, the legislation was subsequently amended to provide for the death sentence in his case.<sup>105</sup> Although human rights organizations condemned the Appellate Division's imposition of the death sentence, Molla was executed in December 2013.<sup>106</sup> Other controversial convictions have followed. In October 2013, former Member of Parliament, Salahuddin Quader Chowdhury, was sentenced to death by the International Crimes Tribunal for crimes committed during the war of independence.<sup>107</sup> In January 2014, a trial court handed down a death sentence *in absentia* to an Islamic militant leader for large-scale arms trafficking.<sup>108</sup> As in India, Bangladesh reports a high rate of extrajudicial executions, including death in police custody.<sup>109</sup> The country has also faced criticism for its overly broad terrorism laws, inadequate protections from state-sanctioned torture, and the speed with which a prisoner is executed following

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102. Bangl. Pen. Code of 1860, §§ 303, 307; Women and Children Repression Prevention Act § 11(ka).

103. Oppression of Women and Children (Special Enactment) Act, No. 18 (1995), §§ 4, 6(2), 10(1) (Bangl.).

104. Mark Magnier, *In Bangladesh, Death Penalty for Islamist Leader Sparks Riots*, L.A. TIMES (Sept. 17, 2013), <http://articles.latimes.com/2013/sep/17/world/la-fg-wn-bangladesh-death-sentence-20130917>.

105. Human Rights Watch, *Bangladesh: Death Sentence Violates Fair Trial Standards* (Sept. 18, 2013), <http://www.hrw.org/news/2013/09/18/bangladesh-death-sentence-violates-fair-trial-standards>.

106. *Opposition Leader Executed for War Crimes in Bangladesh*, VOICE OF AMERICA NEWS (Dec. 12, 2013, 2:36 AM), <http://www.voanews.com/content/bangladesh-supreme-court-will-not-review-death-penalty/1808614.html>.

107. *Bangladesh Must Overturn All Death Sentences*, AMNESTY INTERNATIONAL (Oct. 1, 2013), <http://www.amnesty.org/en/news/bangladesh-mp-war-crimes-death-penalty-2013-10-01>.

108. *Bangladesh Court Gives ULFA Chief Death Sentence*, BUSINESS STANDARD (Jan. 31, 2014), [http://www.business-standard.com/article/current-affairs/bangladesh-court-gives-ulfa-chief-death-sentence-114013000489\\_1.html](http://www.business-standard.com/article/current-affairs/bangladesh-court-gives-ulfa-chief-death-sentence-114013000489_1.html).

109. FIDH, *supra* note 94, at 17.

denial of a clemency petition.<sup>110</sup> Between 1975 and 2008, at least 247 prisoners were hanged in Bangladesh.<sup>111</sup> Currently, at least 1,500 convicted criminals face the death penalty, of whom 950 are in custody and the rest still at large.<sup>112</sup>

In line with the jurisprudence of neighboring India, Bangladesh adheres to 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 every case “be considered in the facts and circumstances of that case only.”<sup>113</sup> 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.<sup>114</sup> In 2009, the Appellate Division reversed a death sentence for ordinary murder without premeditation, finding that it was 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.”<sup>115</sup>

In ordinary murder cases, the Appellate Division requires trial courts to weigh aggravating and mitigating factors and determine whether a death sentence is appropriate, a similar approach to that of the Indian Supreme Court.

V. HIGH COURT DIVISION OF BANGLADESH: BANGLADESH LEGAL AID AND SERVICES TRUST (ON BEHALF OF SUKUR ALI) V. BANGLADESH (2010)

Unlike India, Bangladesh maintained the mandatory death sentence for murder and attempted murder by a life-term prisoner, as well as a mandatory death penalty under the Oppression of Women and Children (Special Enactment) Act of 1995, until its repeal in 2000 for three crimes: murder of a woman or child using explosives, corrosive substances, or poison; dowry murder, in which a woman was killed by her husband or his family after suffering harassment or torture to extort a higher dowry; and murder following rape.<sup>116</sup> In 1995, Sukur Ali, a 14-year-old boy, was sentenced to death under this law for the rape and murder of a 7-year-old girl, a sentence that was upheld by the High Court

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110. *Id.* at 23-24, 27, 34-35.

111. *Id.* at 26.

112. *Id.*

113. *Sarder v. State*, (1987) 7 B.L.D. (A.D.) 324, 328.

114. *Abdul Awal v. State*, (1998) 18 B.L.D. (H.C.D.) 605, 610.

115. *Sarder v. State*, (1987) 7 B.L.D. (A.D.) 324, 328; *see also State v. Pinto*, (2009) 29 B.L.D. (A.D.) 73.

116. Oppression of Women and Children (Special Enactment) Act 18 (1995), §§ 4, 6(2), 10(1); *see also* Bangladesh Penal Code, 1860, §§ 303 (murder by life-term prisoner), 307 (attempted murder by life-term prisoner).

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.”<sup>117</sup> 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. The decision was later confirmed by the Appellate Division.<sup>118</sup> 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 in March 2010, indicating that the mandatory death penalty was not just struck down for offenses under the Oppression of Women and Children (Special Enactment) Act, but for offenses under the Bangladesh Penal Code as well.<sup>119</sup>

As an initial matter, the petitioners objected to treating Sukur Ali as an adult and denying him the more lenient punishment subsequently passed after the repeal of the law under which he was charged.<sup>120</sup> However, the State pointed out that the revised law was purposefully not retroactive, keeping the harsher sentences of the former law intact.<sup>121</sup> As for the mandatory death sentences still provided for under the Bangladesh Penal Code, namely murder and attempted murder by life-term prisoners, the State argued that the offender “committed an offence over an[d] above the substantive offence for which he had been convicted,” a rejection of the Indian Supreme Court’s reasoning in *Mithu*.<sup>122</sup> The State also sought to distinguish *Mithu* by arguing that in India, the normal punishment upon conviction for murder is life imprisonment and judges are required to give special reasons if they choose to impose a death sentence; by contrast, in Bangladesh, a judge must give reasons for selecting *either* sentence, which does not operate as a presumption against death.<sup>123</sup> The Court was unpersuaded. First, the Court upheld the constitutionality of the death penalty *per se*, but found that a defendant must have the opportunity to put forward mitigating evidence in a sentencing hearing.<sup>124</sup> The Court also expressed concern about the possibility of wrongful convictions in Bangladesh, but noted that abolition required public and parliamentary debate, as well as research on alternatives.<sup>125</sup>

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117. *State v. Sukur Ali*, (2004) 9 B.L.C. (H.C.D.) 238, 250.

118. The decision does not appear to be reported, but is referred to a number of times by the High Court Division. *Id.* at 3-4. The statute itself defines “child” but does not define any limits on the person of the offender. *See, e.g.*, Oppression of Women and Children (Special Enactment) Act 18 (1995), §§ 4, 5, 6 (noting that “whoever” commits the capital crimes shall be punished with death).

119. *Bangladesh Legal Aid and Services Trust v. Bangl.*, (2010) 30 B.L.D. (H.C.D.) 194.

120. *Id.* at 4, 12.

121. *Id.* at 14.

122. *Id.* at 15.

123. *Id.* at 16 (citing *Bangl. Code of Criminal Procedure*, § 367(5)).

124. *Id.* at 20, 31.

125. *Bangladesh Legal Aid and Services Trust*, 30 B.L.D.. at 33.

One of the more remarkable aspects of the decision was the extent to which it considered jurisprudence from other Commonwealth nations on the constitutionality of the mandatory death penalty in addition to *Mithu*. The Court cited to the Privy Council's decision in *Reyes v. 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.<sup>126</sup> The Court carefully noted the slightly different wording of the right to life provisions of the Bangladeshi and Belizean constitutions, but indicated that Bangladesh was a party to the ICCPR and the country's constitution contained a prohibition on cruel, inhuman, and degrading punishment.<sup>127</sup> The Court also referenced *Roberts v. Louisiana*, the companion case of *Woodson v. North Carolina*, decided by the United States Supreme Court in 1976, as well as the Malawian case striking down the mandatory death penalty in *Kafantayeni* and the South African decision abolishing capital punishment in *Makwanyane*.<sup>128</sup>

The Court was also receptive to a separation of powers argument, finding that a constraint on judicial sentencing discretion unconstitutionally infringed the judicial power.<sup>129</sup> According to the High Court Division, when the legislature prescribed a mandatory punishment, "the hands of the court are thereby tied" and the "court becomes a simple rubberstamp [sic] 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."<sup>130</sup> This rationale parallels *Mithu* closely. 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."<sup>131</sup> 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."<sup>132</sup> Additionally, the decision's reasoning

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126. *Id.* at 20-21.

127. *Id.* at 21, 24.

128. *Id.* at 10, 28 (citing *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976); *Kafantayeni v. Att'y Gen.*, [2007] MWHC 1; *State v. Makwanyane*, 1995 (3) SA 391 (CC) (S. Afr.)).

129. *Id.* at 29.

130. *Bangladesh Legal Aid and Services Trust*, 30 B.L.D. at 29-30.

131. *Id.* at 32.

132. *Id.*

almost certainly encompassed the mandatory death sentence for prisoners under a sentence of life imprisonment who committed murder.<sup>133</sup>

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 hid behind a false guise of judicial restraint, leaving it to the Appellate Division to overturn the sentence at issue.<sup>134</sup> The Court's final holding is inconsonant with its reasoning, as it only issued a stay of execution for two months from the decision despite the troubling constitutional defects in Sukur Ali's sentence. 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.

VI. 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 Drugs and Psychotropic Substances Act of 1985, unconstitutional in *Indian Harm Reduction Network (on behalf of Gulam Mohammed Malik) v. Union of India*, which involved a challenge to one of the specific intent crimes punishable by an automatic death sentence: repeated large-scale drug trafficking.<sup>135</sup> In that case, the Court read the mandatory death provision (“shall be punishable with death”) as discretionary (“may be punishable with death”) in order to align Section 31A with Article 21 of the Constitution of India, becoming the first court in the Commonwealth to find a mandatory death penalty for drug trafficking unconstitutional.<sup>136</sup> India's provision for an automatic death sentence under the Narcotic and Psychotropic Drugs Act only applied to repeat drug traffickers, making it narrower than similar legislation in Southeast Asia, such as in Malaysia and Singapore.<sup>137</sup> In addition to the Article

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133. *See id.* at 34.

134. Ridwanul Hoque, *Constitutionalism and the Judiciary in Bangladesh*, in *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* 303, 325 (Sunil Khilani, Vikram Raghavan & Arun Thiruvengadam eds., 2013).

135. *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 H.C.).

136. *Id.* at 23. The Sri Lanka Court of Appeal had previously read a mandatory death penalty for drug trafficking as discretionary based on statutory interpretation, but that provision used the word “liable,” i.e., “shall be *liable*” to suffer death rather than “shall” suffer death, which is more ambiguous than the Indian provision. *Van Der Jhultes v. Attorney General*, (1989) 1 Sri L.R. 204 (C.A. 1988).

137. In Malaysia and Singapore, the mandatory death penalty applies to drug traffickers for their first offense, based on a statutory schedule of the quantities of the narcotic being trafficked. *See* *Dangerous Drugs*

21 challenge to the death penalty as a violation of the right to life based on *Mithu*, the petitioners also raised an Article 14 equal protection challenge to the drug thresholds and the “repeat” status of the provision. In essence, the petitioners argued that the quantity thresholds separating those condemned to death from those receiving lesser sentences were arbitrary: trafficking in one kilogram of heroin, for instance, triggered a mandatory death sentence, while trafficking in 0.99 kilogram would not, even though the culpability was not discernibly greater.<sup>138</sup>

In addition, the petitioners made a second equality argument. They argued that the requirement that the mandatory death penalty for drug trafficking fall only on *repeat* offenders was akin to murder by a life-term prisoner as in *Mithu*, where the Supreme Court determined that the fact that the prisoner was already under a life sentence was not a rational ground for determining that the murder that he or she committed—to the exclusion of all other murders—was necessarily more deserving of death.<sup>139</sup> The Court rejected both equality arguments. The judges found that the differentia in the law that assigned culpability based on the volume of the drug being trafficked was rational. In doing so, the Court followed the jurisprudence of the Singapore Court of Appeal, which had determined that small-scale and large-scale drug traffickers were not similarly situated in terms of culpability, and differentiating between them was constitutional.<sup>140</sup> The Court also rejected the challenge to the “repeat” status of an offender under Section 31A of the Narcotic Drugs Act, finding that a repeated conviction of an offender was not an arbitrary distinction and bore a nexus to criminal culpability.<sup>141</sup> This is probably the right result, or at least it avoids the unconstitutional aspect of Section 303 of the Indian Penal Code at issue in *Mithu*—which authorized the

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Act, 1952, No. 234, § 39B (Malay.); Misuse of Drugs Act, 1973, No. 5, *as amended by* Misuse of Drugs (Amendment) Act, 1975, No. 49 (Sing.). In 2012, Singapore enacted a sweeping law reform that removed most drug trafficking from the scope of the mandatory death penalty. Misuse of Drugs (Amendment) Act, 2012, No. 27 (Sing.).

138. *Indian Harm Reduction Network*, Crim. Writ Petition No. 1784 of 2010 at 65-66. In any event, creating a discretionary death penalty largely solves this problem, as a judge will have discretion to determine the culpability of a repeat offender.

139. *See Mithu v. State of Punjab*, (1983) 2 S.C.R. 690, 702-03 (India). According to the Court: The circumstance that a person is undergoing a sentence of life imprisonment does not minimize the importance of mitigating factors which are relevant on the question of sentence which should be imposed for the offence committed by him while he is under the sentence of life imprisonment. Indeed, a crime committed by a convict within the jail while he is under the sentence of life imprisonment may, in certain circumstances, demand and deserve greater consideration, understanding and sympathy than the original offence for which he was sentenced to life imprisonment.

*Mithu v. State of Punjab*, (1983) 2 S.C.R. 690, 702-03 (India). This rationale is virtually identical to that of the U.S. Supreme Court four years later in *Sumner v. Shuman*, 483 U.S. 66, 81 (1987).

140. *Indian Harm Reduction Network*, Crim. Writ Petition No. 1784 of 2010 at 69; *Yong Vui Kong v. Public Prosecutor*, [2010] 3 S.L.R. 491, 538-39 (Sing. C.A.) (according to the Court in *Yong Vui Kong*, two drug traffickers carrying different amounts of drugs were not equal at all; they were, in fact, distinguishable, and the legislature could assign them different penalties).

141. *Indian Harm Reduction Network*, Crim. Writ Petition No. 1784 of 2010 at 67-68.

mandatory death penalty for prisoners who committed murder while already under a sentence of life imprisonment—namely that the offense underlying the life sentence was irrelevant to the culpability of the subsequent murder.<sup>142</sup> By contrast, a second offense for large-scale drug trafficking could be relevant to the culpability of the defendant, as suggested by the dicta in *Mithu*.<sup>143</sup>

Although the Court rejected the petitioner’s Article 14 equal protection challenges, it followed *Mithu* closely in determining that Section 31A was unconstitutional under Article 21, the right to life provision. The Court stated that Section 31A “completely takes away the judicial discretion, nay, abridges the entire 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.”<sup>144</sup> In accordance with *Mithu*, the Court found that judicial discretion in capital sentencing was required for a just and fair procedure under Article 21, as interpreted in *Maneka Gandhi*. That Section 31A distinguished traffickers based on the quantity of drugs being trafficked did not make less relevant the requirement to weigh aggravating and mitigating circumstances of the offense and of the offender.<sup>145</sup> The Court looked to the body of comparative jurisprudence on the mandatory death penalty arising from the United States and the Commonwealth, including *Woodson v. North Carolina* and similar cases arising out of the Commonwealth Caribbean and East Africa.<sup>146</sup>

More troublingly, the Court rejected the petitioner’s argument that even a discretionary death penalty *per se* was disproportionate to drug trafficking offenses because the crime did not result in death and was thus not among the “rarest of [the] rare.”<sup>147</sup> According to the Court, an offense “relating to [a] narcotic drug or psychotropic substance is even more heinous than culpable homicide, because the latter affects only an individual, while the former affects and leaves its deleterious effect on society, besides crippling the economy of the nation as well.”<sup>148</sup> This uncritical holding is troubling for two reasons. First, the distinction between an “individual” crime and a “societal” crime is a false one and subject to some manipulation by the Court. For instance, in dicta, the Court noted that white collar crime could be a most serious crime, as it is “less

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142. According to the Court in *Mithu*, prescribing a mandatory death sentence for murder for a prisoner serving a life sentence for forgery, for instance, would be an arbitrary application of the provision because the fact of the forgery had no nexus to the heightened penalty for murder. *Mithu*, 2 S.C.R. at 697-98. This is similar to the reasoning of the U.S. Supreme Court in *Sumner v. Shuman*, 438 U.S. 66, 81 (1987) (invalidated Nevada’s mandatory death penalty for life-term prisoners who committed murder while imprisoned. As Justice Blackmun wrote, without consideration of the nature of the underlying life-term offense, “the label ‘life-term inmate’ reveals little about the inmate’s record or character”).

143. See *supra* note 89 and accompanying text.

144. *Indian Harm Reduction Network*, Crim. Writ Petition No. 1784 of 2010 at 60.

145. *Id.* at 61.

146. *Id.* at 36-37.

147. *Id.* at 16.

148. *Id.* at 73.

shocking than the crime of murder, but [is] more heinous” than murder.<sup>149</sup> Surely, the distinction between a merely “shocking” crime and a “heinous” crime is not clear and consistent enough to be of constitutional importance. The Court manipulated the definition of drug trafficking in a way to presume its constitutionality.

Second, the Court cavalierly disregarded international human rights norms in determining that drug trafficking could be a “most serious” crime and therefore warranted the death penalty in accordance with the International Covenant on Civil and Political Rights.<sup>150</sup> By contrast, the United Nations Human Rights Committee has determined that drug-related offenses not resulting in death fall outside the scope of “most serious crimes,” under the Covenant.<sup>151</sup> Although the Court’s holding accorded with similar precedent arising from the Singapore Court of Appeal, Singapore is not a party to the Covenant.<sup>152</sup> This holding is also out of sync with the jurisprudence of the United States Supreme Court, hardly a progressive leader on the topic of capital punishment, which has generally held that the death penalty is unconstitutional for crimes not resulting in death.<sup>153</sup> The death penalty for drug trafficking is deeply problematic because it falls heavily on drug “mules” at the expense of drug “lords,” and the Indian court’s decision contradicts a growing international trend away from the death penalty for drug trafficking.<sup>154</sup>

Rather than striking Section 31A completely, as the petitioners argued, the Court opted to construe the mandatory sentencing provision as discretionary and replaced “shall” with “may” so that a trial court retained discretion to substitute death or a lesser punishment depending on the circumstances of the case.<sup>155</sup> This accords with the Court’s holding that a *discretionary* death penalty for drug

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149. *Id.* at 77-78.

150. *Indian Harm Reduction Network*, Crim. Writ Petition No. 1784 of 2010 at 77. According to the Court, “it is [a] well-established position that the International Conventions cannot be the governing law. It is the Municipal law which ought to prevail.” *Id.* However, an ambiguous law with two interpretations should be read in a manner that is consistent with fundamental rights, and particularly the right to life. Elizabeth Wicks, *The Meaning of “Life”: Dignity and the Right to Life in International Human Rights Treaties*, 12(2) HUMAN RIGHTS L. REV. 199, 201 (2012).

151. UN Human Rights Committee, *Concluding Observations: Thailand*, ¶ 14, UN Doc. No. CCPR/CO/84/THA, (July 8, 2005); UN Human Rights Committee, *Concluding Observations: Sudan*, ¶ 19, UN Doc. No. CCPR/C/SDN/CO/3, (Aug. 29, 2007).

152. Singapore is not bound by the Covenant, but considers drug trafficking to be a “most serious crime.” Michael Hor, *The Death Penalty in Singapore and International Law*, 8 SING. Y.B. INT’L L. 105, 106 (2004).

153. That is, at least non-military crimes. See *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (invalidating death penalty for rape). *Coker* was a plurality decision, but it was confirmed by a majority in *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (invalidating the death penalty for rape of a child under 12).

154. See, e.g., Griffith Edwards et al., *Drug Trafficking: Time to Abolish the Death Penalty*, in 8 INT’L J. MENTAL HEALTH ADDICTION 616, 617-18 (2010). Countries such as The Gambia and Nigeria have abolished the death penalty for drug trafficking in recent years. ANDREW NOVAK, THE DEATH PENALTY IN AFRICA: FOUNDATIONS AND FUTURE PROSPECTS 76 (2014).

155. *Indian Harm Reduction Network*, Crim. Writ Petition No. 1784 of 2010 at 79.



trafficking was not unconstitutional.<sup>156</sup> Despite this strained holding, the Court's decision in *Gulam Mohammed Malik* accords with the regime established in *Mithu*, requiring judicial sentencing discretion in every capital case, at least as to the mandatory nature of the death sentence under Section 31A.<sup>157</sup>

VII. SUPREME COURT OF INDIA: DALBIR SINGH V. STATE OF PUNJAB (2012)

In February 2012, the Supreme Court of India invalidated the mandatory death penalty under the Arms Act, originally passed in 1959 but amended in 1988, to clarify which weapons were prohibited and to sync provisions on possession of prohibited weapons with those on the use of such weapons.<sup>158</sup> The amendment at Section 27(3) of the Arms Act introduced the mandatory death penalty for causing death through acquiring, carrying, manufacturing, or selling prohibited arms of war, another piece of specific-intent legislation that was passed subsequently to *Mithu*.<sup>159</sup> 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.<sup>160</sup> By drawing on the transnational corpus of death penalty jurisprudence, the Indian Supreme Court's decision contributed to the harmonization of death penalty regimes across borders and helped integrate international human rights norms in domestic law.<sup>161</sup> Although legislation to repeal Section 27(3) of the Arms Act had been introduced in Parliament and the defendant, Dalbir Singh, had been acquitted by the High Court, the Supreme Court nonetheless pronounced on the validity of the mandatory death provision.<sup>162</sup>

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.<sup>163</sup> The Court relied on *Mithu*'s holding that Article 21 of the Constitution required consideration of aggravating and mitigating factors in order to limit the death sentence only to the most serious or heinous offenses, even for narrowly-defined, specific-intent crimes.<sup>164</sup> According to the Court, the Arms Act prohibited the "use" of any prohibited weapon that "resulted" in death. As the

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156. *Id.* at 77.

157. *See id.* at 77.

158. *State of Punjab v. Dalbir Singh*, A.I.R. 2012 S.C. 1040, [12] (India).

159. The Arms Act, No. 54 of 1959, INDIA CODE (1959), as amended by The Arms (Amendment) Act, No. 42 of 1988, Acts of Parliament, 1988 (introducing mandatory death sentence).

160. *Dalbir Singh*, A.I.R. 2012 at [81.5].

161. *Id.* at [100-01].

162. *Id.* at [103].

163. *Id.* at [89, 98].

164. *Id.* at [89].

word “use” is undefined in the Act and both words are extremely broad, the prohibition fell afoul of the due process test of Article 21 and *Maneka Gandhi*.<sup>165</sup>

In addition to reviewing domestic precedent, the Court engaged in a searching analysis of *Woodson v. North Carolina* and other American decisions. The Court also considered the more recent cases from the Privy Council’s Caribbean jurisprudence and from the highest courts of Kenya, Malawi, and Uganda, which found the mandatory nature of the death sentence unconstitutional.<sup>166</sup> The Court extensively quoted many of these precedents, summarizing the grounds on which they were decided. “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, sensing an emerging global norm.<sup>167</sup> The Court distinguished the jurisprudence of Malaysia and Singapore, where courts have upheld the constitutionality of the mandatory death penalty under constitutions that do not explicitly prohibit cruel and degrading punishment or provide due process of law protections.<sup>168</sup> By contrast, the Court noted, such provisions became part of Indian constitutional doctrine through *Maneka Gandhi* and *Sunil Batra*.<sup>169</sup> Finding this comparative jurisprudence persuasive, 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.<sup>170</sup> If anything, the Court’s review of this foreign case law was wholly accepting, almost completely uncritical, and it is not clear from the decision whether the Court merely quoted or actually relied on the rationale of the foreign decisions, such as that of the Supreme Court of Uganda, which found the legislative enactment of a mandatory death penalty to constrain judicial discretion and therefore violate the separation of powers.<sup>171</sup>

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165. *Id.* at [88].

166. *Dalbir Singh*, A.I.R. 2012 at [49-52], [75-76], [80]. *See generally also* 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 H.C.).

167. *Dalbir Singh*, A.I.R. 2012 at [87].

168. In particular, the Court distinguished the Privy Council’s decision in *Ong Ah Chuan*. *See id.* at [86].

169. *Id.* at [88].

170. The Court’s rationale on the equality provision (Article 14) is different from in *Gulam Mohammed Malik* or even in *Mithu* because the Arms Act did not require a classification scheme as such. In *Dalbir Singh*, the Court indicates that the mandatory death penalty violates equal protection because it denies due process (in the form of a sentencing hearing) only to defendants convicted of a mandatory capital crime, unlike all other capital defendants.

*Id.* at [101].

171. *Id.* at [78], quoting *Kigula v. A.G.*, [2009] 2 E.A.L.R. 1 (Uganda S.C.).

VIII. 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.<sup>172</sup> The experiences of Commonwealth Caribbean and East African courts have succeeded in building a corpus of transnational jurisprudence that other Commonwealth courts draw on, follow, and distinguish. As the recent case law from India and Bangladesh suggests, Global South nations are not just passive recipients of foreign jurisprudence from the Global North, 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 Indian and Bangladeshi courts in *Dalbir Singh*, *Gulam Mohammed Malik*, and *BLAST/Sukur Ali* together stand for the emerging proposition that the mandatory death penalty violates human rights norms, even for specific-intent crimes, such as drug trafficking and terrorist offenses, which possess aggravating factors and are typically premeditated, in contrast to the broad range of culpability of the crime of murder.<sup>173</sup> In this, the decisions provide a path forward for other common law nations that possess such laws, including Brunei, Malaysia, and Singapore.<sup>174</sup> Ultimately, this transnational “sharing” process of death penalty jurisprudence is helping to install prevailing norms of constitutional due process and human dignity into domestic constitutional jurisprudence.

As a doctrinal matter, the reasoning of these courts is clear that the mandatory sentence for death, no matter how narrowly-defined the crime or the mental state therein, always violates the right to life provisions of the Indian and Bangladeshi constitutions. With the invalidation of the mandatory death penalty under Section 303 of the Indian Penal Code, Section 27(3) of the Arms Act, and Section 31A of the Narcotic Drugs and Psychotropic Substances Act of 1985, the law is now settled that a mandatory death sentence is never constitutionally permissible under the Constitution of India.<sup>175</sup> The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act of 1989 still has the mandatory death penalty, but only for an extremely narrow class of crime that is virtually never prosecuted: false witness or fabrication of evidence that results in the

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172. See, e.g., *Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684.

173. See *supra* notes 67-72 and accompanying text.

174. See *supra* note 152 and accompanying text.

175. See *supra* notes 148-150 and accompanying text.

execution of an innocent person.<sup>176</sup> According to Batra, some prisoners may still be under a mandatory sentence of death in India for a law that has lapsed, the Terrorist and Disruptive Activities (Prevention) Act of 1985, and may need to bring original writs challenging their individual sentences.<sup>177</sup> Sukur Ali's case also raises the troubling possibility that other prisoners may be under a mandatory sentence of death under now-repealed laws in Bangladesh.

Nonetheless, the erosion of the mandatory death penalty in the common law world is a case study on the mutually reinforcing relationship between international human rights law and domestic constitutional law. The prohibition on cruel and degrading punishment in international law resulted from a prevailing consensus in domestic constitutional systems. In turn, human rights litigation in the Caribbean, Africa, and South and Southeast Asia relied on the persuasive authority of international law in bringing challenges in domestic systems, including in India and Bangladesh, both parties to the ICCPR and other human rights instruments.<sup>178</sup> The weight of this comparative domestic jurisprudence is in turn establishing a new norm of international human rights that punishment disproportionate to a crime constitutes cruel, inhuman, and degrading punishment, including an automatic death sentence upon conviction without regard to the circumstances of the offense or the offender. Even more remarkably, this human rights litigation was sponsored by a core group of transnational human rights lawyers with the specific agenda of narrowing the scope of capital punishment with a view to its total abolition, showing how a small group of lawyers can achieve significant criminal justice reform by relying on relatively uniform constitutional vulnerabilities in post-colonial common law constitutions.<sup>179</sup>

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176. Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989, INDIA CODE (1989), § 2(i).

177. *See* BIKRAM JEET BATRA, LETHAL LOTTERY: THE DEATH PENALTY IN INDIA: A STUDY OF SUPREME COURT JUDGMENTS IN DEATH PENALTY CASES, 1950-2006, 44 (2008).

178. *See supra* note 8 and accompanying text.

179. *See supra* note 14 and accompanying text.

