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ABOLITION OF MANDATORY DEATH PENALTY BILL 2023 AND REVISION OF SENTENCE OF DEATH AND IMPRISONMENT FOR NATURAL LIFE (TEMPORARY JURISDICTION OF THE FEDERAL COURT) BILL 2023

by

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DEATH SENTENCE IN INDIA

There are several types of offences in India which will attract death penalties. In fact, as at the time of writing this short write-up in April 2023, the special court in the state of Uttar Pradesh has recently handed down death sentences to seven men who were convicted of being Islamic State operatives.¹

There are quite a number of provisions in the Indian Penal Code, Narcotics Drug & Psychotropic Substances Act 1985, the Scheduled Caste & Scheduled Tribes (Prevention of Atrocities Act) 1989, the Army Act 1950, the Air Force Act 1950 and the Navy Act 1957 which respectively provide for death sentences.²

Below are some of sections in various penal statutes in India when death penalty may be handed down by the Indian Courts:

- (a) s 121 of the Indian Penal Code ('the IPC') — waging war against the Indian Government;

¹ *India Refuses To Abolish Death Penalty* by Nidhi Sureh in
<https://www.dw.com/en/india-refuses-to-abolish-death-penalty/a-64934705>.

² *Capital Punishment In India* by Naveen Talawar.

(b) s 132 of the IPC — abetting mutiny;

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(c) s 302 of the IPC — murder;

(d) s 305 of the IPC — abetment of suicide of a minor or insane or intoxicated person;

(e) s 364A of the IPC — kidnapping for ransom; and

(f) s 31A of the Narcotic Drugs & Psychotropic Substances Act — engaging in production, possession, transportation, manufacture of certain drugs of certain quantity or being involved in financing whether directly or indirectly of such activities;

In India, death sentences are executed either by hanging³ or shooting.⁴

Unlike Malaysia's pre-Abolition of Mandatory Death Penalty Bill 2023, all these provisions in the Indian penal statutes do not carry a mandatory death sentence.

The leading principle regarding the imposition of death sentence in India is the case of *Bachan Singh v State of Punjab*.⁵

The Supreme Court in *Bachan Singh*'s case upheld the validity of capital sentence by a majority decision of 4:1. However, the Supreme Court laid down certain and rarest of rare cases where death sentence can be imposed. The court laid down some guidelines which may be summarised as below:⁶

- (a) the extreme penalty of death need not to be inflicted except in gravest cases of extreme culpability;
- (b) before opting for the death penalty, the circumstances of the 'offender' will be taken into consideration along with the circumstances of the 'crime';
- (c) life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life

³ Section 345(5) of the Indian Criminal Procedure Code — hanging by the neck till he is dead.

⁴ Section 163 of the Air Forces Act 1950 — 'In awarding a sentence of death, a court-martial shall, in its discretion, direct that the offender shall suffer death by being hung by the neck until he is dead or shall suffer death by being shot'.

⁵ *Bachan Singh v State of Punjab* AIR 1983 SC 957; 1983 Cri LJ 1457

⁶ *Ratanlal & Dhirajlal's Law of Crimes* (26th Ed) at p 1635

cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

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- (d) a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weight and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.⁷

The Supreme Court in *Bachan's* case considered the following factors as aggravating circumstances which may attract imposition of death penalty:

- (a) If the murder is a pre-planned murder and involves extreme brutality; (b)

If the murder involves exceptional depravity; or

- (c) If the murder is of a member of any of the armed forces in India or any police force members or of any public servant who committed such offences:

- (i) while they were on duty; or
- (ii) in consequence of anything done or attempted to be done by them in the lawful discharge of his duty whether at the time of murder, he was such member or public servant, as the case may be, or had ceased to be such member or public servant

According to the author in the *Ratanlal & Dhirajlal's Law of Crimes* (26th Ed), the judges are expected to inflict death penalty on the convict in rarest of rare cases when the collective conscience of the community is so shocked.

The following circumstances may be circumstances where death penalty may be handed down by the courts in India:

- (a) when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community;
- (b) when the murder is committed for a motive which evinces total depravity and meanness; eg murder by hired assassin for money or reward; cold blooded murder for gains of a person vis a vis whom the murderer is in a dominating position or in a position of trust or murder is committed in the course of betrayal of the mother land;
- (c) when murder of a member of a Scheduled Caste or minority community is committed not for personal reasons but in

⁷ *Ratanlal & Dhirajlal's Law of Crimes*, (26th Ed) at pp 1634–1635

circumstances which arouse social wrath, or in cases of ‘bride burning’ or ‘dowry death’ or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation;

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- (d) when the crime is enormous in proportion for instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed; and
- (e) when the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis a vis whom the murderer is in a dominating position or a public figure generally loved and respected by a community.⁸

The principles enunciated above will be important principles or guidelines which may have to be applied or considered in our courts in light of the recently passed Abolition of Mandatory Death Penalty Bill 2023 and Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023.

We shall discuss about the applicability of the above principles in India in Malaysia in sections B and C below.

ABOLITION OF MANDATORY DEATH PENALTY BILL 2023 ('THE BILL')

The Dewan Rakyat has recently passed the Abolition of Mandatory Death Penalty Bill and the Revision of Sentence of Death and Imprisonment for Natural Life (Temporary Jurisdiction of the Federal Court) Bill 2023 on 3 April 2023. Both bills were subsequently passed by the Dewan Negara on 11 April 2023.

Both bills are expected to be gazetted soon.

Below are some of the amendments to relevant penal or criminal statutes made in the Abolition of Mandatory Death Penalty Bill 2023 ('the Bill'). We shall only discuss a few Acts for the purposes of this article: *Penal Code Offences*

(a) Generally, 'imprisonment for life' is now replaced with an

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⁸ *Ratanlal & Dhirajlal's Law of Crimes* (26th Ed) at pp 1635–1636

imprisonment term for not less than 30 years and not more than 40 years.⁹

- (b) Gone are the days of mandatory death sentence. However, with the new regime of law, it does not *ipso facto* mean that there is no death sentence in Malaysia. Judges are entitled to impose death sentence in appropriate cases. That is the reason why the legislature has amended mandatory death sentence with ‘death or imprisonment of not less than 30 years and not more than 40 years if not sentenced to death’¹⁰ and ‘shall also be liable with whipping of not less than twelve strokes’ for offences under s 302 of the Penal Code.
- (c) It means that if no death sentence is handed down by the judges, whipping can be imposed on the convict. However, it is not mandatory as the wordings of the amendment suggests some form of discretion. The words ‘shall also be liable with whipping’ confers the courts with such discretion.¹¹

The Dangerous Drugs Act 1952 (‘the DDA’)

- (a) Section 39B is now amended. The new s 39B(2) shall be as follows:¹²
- (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against the Act and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, be punished with whipping of not less than twelve strokes.
- (b) ss 39B(2A) and (2B) of the DDA are now deleted. Therefore, the previous considerations to be taken into consideration by the courts before deciding whether to impose death sentence or imprisonment sentence for example no evidence of buying or selling

⁹ Eg s 121 of the Penal Code for waging war against the Government is now amended by substituting ‘imprisonment for life’ with ‘imprisonment for a term not less than 30 years but not more than 40 years’ — see s 6 of the Bill; s 130B of the Penal Code — offences relating to terrorism definition under s 130B(1) for ‘imprisonment for life’ has been deleted paving way to imposition of ‘imprisonment for not less than 30 years but not more than 40 years’ in corresponding sections or in certain sections with imprisonment for 40 years in terrorism offences.

¹⁰ Eg s 302 of the Penal Code; s 130I of the Penal Code; s 130O of the Penal Code for providing services for terrorist purposes; ss 130QA, 130ZB of the Penal Code; s 364 of the Penal Code.

¹¹ *Public Prosecutor v Man bin Ismail* [1939] 1 MLJ 207; *Public Prosecutor v Lee Ah Sam* [1949] 1 MLJ 236; *Khor Seek Pok v Public Prosecutor* [1958] 1 MLJ 170; *Public Prosecutor v Wahab* [1964] 1 MLJ 265; *Jayanathan v Public Prosecutor* [1973] 2 MLJ 68; *Public Prosecutor v Yeoh Eng Khuan* [1976] 1 MLJ 238.

¹² Section 54 of the Abolition of Mandatory Death Penalty Bill and Explanatory Statement.

of dangerous drugs or where the case does not involve any agent provocateur are no longer relevant with the passing of the new Bill;

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- (c) Based on the Bill, it appears that the sentence for imprisonment for life is retained. 'Imprisonment for life' under s 3 of the Criminal Justice Act 1953 is 'deemed for all purposes to be a sentence of imprisonment for thirty years'. In October 2022, the Government tried to introduce an amendment to Criminal Justice Act by introducing a new s 3A. The new s 3A was to define what is 'natural life sentence' means as opposed to 'imprisonment for life'. According to the Bill which was supposed to be introduced in October 2022, natural life sentence is 'deemed for all purposes to be a sentence of imprisonment until the death of the person on whom the sentence is imposed'. However, a check from the Parliament's website reveals that the intended amendment to s 3A of the Criminal Justice Act was not tabled in October 2022. Despite the non-amendment to s 3A of the Criminal Justice Act, it is submitted that there is a distinction in criminal procedure and criminal practice between 'imprisonment for life' and 'imprisonment for natural life'. 'Imprisonment for natural life' has the meaning of imprisonment till the convict dies a natural life in the prison. 'Imprisonment for life' will mean a sentence of 30 years imprisonment according to s 3 of the Criminal Justice Act;
- (d) Whipping is now mandatory. The words 'shall, if he is not sentenced to death, be punished with whipping of not less than twelve strokes' is interpreted as compulsory or mandatory.¹³

Firearms (Increased Penalties) Act 1971 ('the FIPA')

- (a) Generally, the sentence for imprisonment for life has been substituted with 'imprisonment for a term of not less than 30 years but not more than 40 years';¹⁴
- (b) Death sentence is now replaced with 'imprisonment for a term of not less than 30 years but not more than 40 years' and 'with whipping with not less than 12 strokes'. Eg 41 of the Bill amending s 3 of the FIPA and s 42 of the Bill amending s 3A of the FIPA. It means a total

¹³ *Public Prosecutor v Hassan Ali a/l Abdul Razak* [2016] 12 MLJ 283; [2016] 9 CLJ 584 which was adopted and affirmed by the Court of Appeal in *Public Prosecutor v Mohd Firdaus bin Mohamed Fuad* [2022] MLJU 1461; [2022] 1 LNS 1437; *Public Prosecutor v Mohamad Ramadan bin Mohd Yusof* [2021] MLJU 1629; [2021] 1 LNS 1345; *Public Prosecutor v Dato Alimikadi bin Dato Hadi* [2022] MLJU 1718.

¹⁴ Section 43 of the Bill amending s 4 of the FIPA; s 44 of the Bill amending s 5 of the FIPA.

abolition of death sentence in offences relating to the FIPA. Whipping is mandatory based on the reading of the proposed amendments to ss 3, 3A and new s 7(1) of the FIPA. For example, the new s 7(1) of the FIPA is amended to the following:

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(1) Any person trafficking in firearms shall be punished with imprisonment for a term of not less than thirty years but not exceeding forty years and with whipping with not less than six strokes.

The Arms Act 1960

- (a) Section 32 of the Arms Act is now amended by substituting ‘imprisonment for life or for a term not exceeding fourteen years’ with ‘imprisonment for a term not exceeding forty years’;

The Kidnapping Act 1961

- (a) Death sentence in the Kidnapping Act 1961 is abolished. Section 3(1) of the Kidnapping Act is now amended to ‘shall be punished upon conviction with imprisonment for a term of not less than 30 years but not exceeding 40 years and with whipping’. Whipping in light of the Bill is now mandatory;
- (b) Previously, the offence of kidnapping with ransom would carry a sentence of death or imprisonment for life and ‘shall if he was not sentenced to death, also be liable to whipping’.

All the above amendments to the Acts or Penal Code have similar transitional periods. If a person is convicted for the offence under the relevant Acts or Penal Code, the person whether at a trial or on an appeal shall be sentenced in accordance with the provisions of the principal Act as amended by the Bill although the offence was committed before the date of coming into the operation of the Bill. It means that for on-going trials involving the amended Bill, the Court shall sentence the offender, or if convicted and upon appeal, with the sentence as amended by the Bill¹⁵.

Since the purport and the intent of the Bill is to grant the courts with discretion whether to impose death sentence or imprisonment terms, the principles enunciated in the Indian cases above will be instructive and useful for the Courts in Malaysia. Therefore, the principles propounded in *Bachan*

¹⁵ Eg s 39 of the Bill providing transitional period for amendments in the Penal Code; s 46 of the Bill providing transitional period for the amendments in the FIPA; s 53 of the Bill providing transitional period for amendment to the Kidnapping Act and s 55 of the Bill providing transitional period for amendment to DDA.

Singh v State of Punjab should be adopted where appropriate in Malaysian legal system.

It is submitted that the position taken by the previous Federal Court case of *Loh Hock Seng & Anor v Public Prosecutor*¹⁶ with regard to sentencing in drug trafficking cases should be reviewed by our Federal Court. In the case of *Loh*

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Hock Seng, the Federal Court was discussing the appropriate sentence under the old s 39B of the Dangerous Drugs Ordinance. The old s 39B of the Ordinance gave an option and discretion on the courts to either impose death penalty or imprisonment for life. Justice Raja Azlan Shah departed from the previous practice of the court in imposing alternative of a sentence of life imprisonment instead of passing death sentences to the accused persons in cases involving drugs trafficking. Justice Raja Azlan Shah (CJ Malaya as he then was) took into consideration of the decision in *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors*¹⁷ by Justice Abdooldader where he held that ‘trafficking in drugs is a crime which also affects public health and public safety and can indeed be the spawn or nidus of crimes that ultimately result in violence or at least have a shattering effect on public tranquility and society generally’. The sentence of imprisonment for life in *Loh Hock Seng*’s case was set aside and substituted with death sentence by the Federal Court.

The case of *Loh Hock Seng* was followed in a series of cases involving s 39B of the Ordinance. In the case of *Chang Liang Sang & Ors v Public Prosecutor*,¹⁸ the Federal Court through the decision of Justice Raja Azlan Shah again held that ‘in trafficking cases very little allowance can be made for the circumstances of individual offenders’. The Federal Court further held that ‘a study of these cases indicate the strong concern of this Court that as far as possible in this difficult area of sentencing there should be reasonable conformity in the sentences imposed in similar cases. Other than in the most exceptional circumstances, a sentence of death should be imposed following a conviction for trafficking, in order to mark the gravity of the offence, to emphasise public disapproval, to serve as a warning to others, to punish offenders and most of all to protect the public’.

¹⁶ *Loh Hock Seng & Anor v Public Prosecutor* [1980] 2 MLJ 13; [1979] 1 MLRA 264.

¹⁷ *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83.

¹⁸ *Chang Liang Sang & Ors v Public Prosecutor* [1982] 2 MLJ 231.

If the principles in *Loh Hock Seng* and *Chang Liang Sang* are not relooked at or reviewed by the Federal Court, then, the amendments in the Bill may be rendered otiose.

If *Loh Hock Seng*'s case is still applied despite the Bill, the conclusion is inevitably clear. It would mean that death sentence is the most appropriate sentence for a conviction under s 39B of the DDA despite the purport and intent of the amendment Bill. That approach cannot stand in light of the spirit and purport of the amendment Bill. Further, various studies have suggested

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that the imposition of death sentences in drug trafficking cases are not the most effective way to curtail the drug menace in the society. Capital punishments in drug related offences will instead produce disproportionate punishment to the gravity of drug related offences on the following grounds:

- (a) consideration of drug trafficking among the most serious crimes is questionable;
- (b) the use of death sentence for drug offences is an arbitrary exercise; and
- (c) there is a greater risk for a wrongful conviction when using mandatory death sentence¹⁹. It is suggested that the principles enunciated in the Indian jurisprudence regarding death penalty should be applied in this new regime.

REVISION OF SENTENCE OF DEATH AND IMPRISONMENT FOR NATURAL LIFE (TEMPORARY JURISDICTION OF THE FEDERAL COURT) BILL 2023 ('THE REVISION OF SENTENCE BILL')

The Revision of Sentence Bill grants a temporary revisionary jurisdiction of the Federal Court on death sentence²⁰ and imprisonment for natural life. This type of 'review' is different from r 137 Review under the Rules of the Federal Court 1995. The review intended under the Revision of Sentence Bill is only confined to reviewing the term of the sentence. The Federal Court is not empowered under the Revision of Sentence Bill to review the conviction of the convicts. Sections 2(2) and 4(2) of the Revision of Sentence Bill clearly

¹⁹ *The Use of Death Penalty for Drug Tracking in the United States, Singapore, Malaysia, Indonesia and Thailand — A Comparative Legal Analysis* by Yingyos Leechaianan & Dennis R Longmire in www.mdpi.com/journal/laws.

²⁰ Sections 2 and 4 of the Revision of Sentence Bill. 21
Section 2(4) of the Revision of Sentence Bill.

states the function of the Federal Court in reviewing such application under the Bill.

For an application for review of death sentence, the Federal Court:

‘shall affirm or substitute the sentence of the applicant in accordance with the Penal Code, the Arms Act 1960, the Firearms (Increased Penalties) Act 1971, the Dangerous Drugs Act 1952 and the Kidnapping Act 1961 as amended by the Abolition of Mandatory Death Penalty Act 2023’.²¹

This means that where applicable, the sentence of death may still be affirmed by the Federal Court. Although not mandatory, the Court retains the discretion to affirm the death sentence passed by earlier courts under the Revision of Sentence Bill. However, before the Federal Court exercises its

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discretion to confirm a death sentence, the principles and matters considered in Indian jurisprudence on death sentence must be thoroughly examined first.

For cases involving imprisonment for life, if an application is filed under the Revision of Sentence Bill, the Federal Court shall substitute the sentence of imprisonment for natural life with imprisonment for a term of not less than 30 years but not exceeding 40 years.²¹ It is submitted that the Federal Court has a statutory duty under the Revision of Sentence Bill to convert the sentence of imprisonment for natural life to an imprisonment term of not less than 30 years but not more than 40 years. This provision is slightly different if we compare it with s 2 of the Revision of Sentence Bill.

Another point to note is this. An application for review of sentence be it to review death sentence or imprisonment for life may be filed within 90 days from the date of the Revision of Sentence Act coming into force.²² However, the Federal Court may extend the time specified to file review of sentence if it considers that there is a good reason for doing so.²³ However, the general rule of thumb, it is submitted still applies — such application must be filed promptly where possible. Application for review ‘may’ only be made once by any applicant.²⁴ It appears that the legislature may have intended some form of laxity for the Federal Court in granting extension of time and how many times the applicants can file such review. The word ‘may’ usually indicates some form of directory.

²¹ Section 4(4) of the Revision of Sentence Bill.

²² See ss 3(1) and 5(1) of the Revision of Sentence Bill.

²³ Sections 3(3) and 5(3) of the Revision of Sentence Bill.

²⁴ Sections 3(4) and 5(4) of the Revision of Sentence Bill.

CONCLUSION

Both the Bill and the Revision of Sentence Bill are much welcomed by criminal defence practitioners who have been advocating the abolishment of the mandatory death sentence in Malaysia for some time.

It is also our hope that the courts in Malaysia will import and apply the approved and tested principles in *Bachan Singh v State of Punjab* and subsequent precedents in India clarifying *Bachan Singh's* principles in Malaysia soon. Every life, whether of a free person or a convict is precious. A convict deserves a chance to turn over a new leaf. Therefore, the death sentence should only be handed down in the rarest of the rare criminal cases.