Star LAW *report*

THE CASE OF SHUKUR ALI

Mandatory death penalty and the 'hard case' phenomenon

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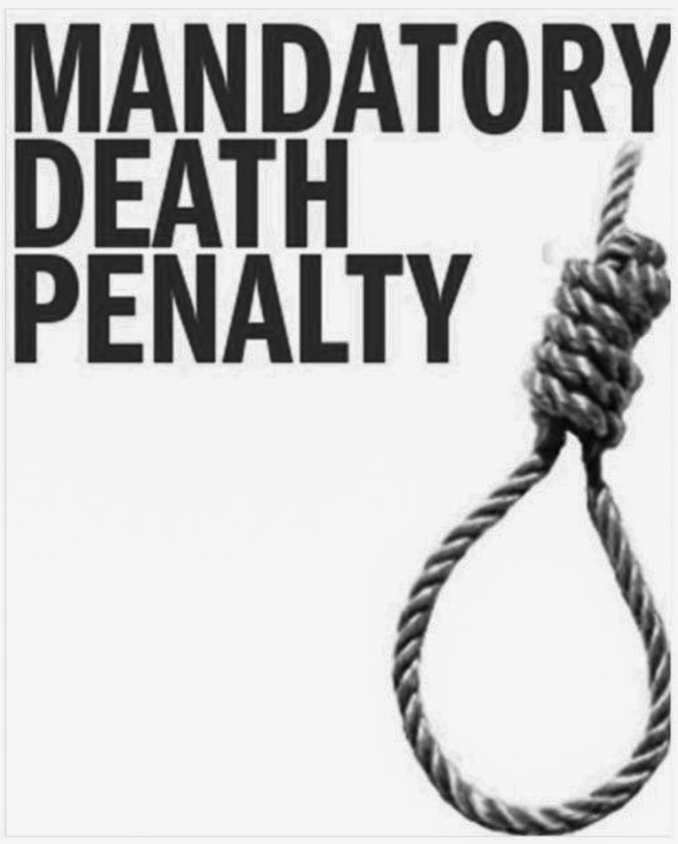

PROFESSOR Raul Pangalangan of the University of Philippines described the 'hard cases' as under: "In many Asian countries today, courts have faced hard cases where the constitutionally mandated results would have violated the communal sense of what is a "just" outcome, and judges have thus compromised their law for what purports to be a "higher" politics. In the process, they have reconceived themselves not as a check on popular power but as its handmaiden. This in turn transforms the source of legitimacy of judicial decision, the roles of the lawyer and the judge in vindicating public norms through non-democratic institutions and, generally, the place of courts in democratic governance".

Professor Pangalan was referring to an extremely complex legal arena of what is known as law and politics, or, to paraphrase, law in politics and to the judicial role in which the judge negotiates with (or navigates) the law to reach a pragmatic conclusion. In this write up, however, I will discuss a different type of hard case, the case of Shukur Ali, which arguably involves widely-framed constitutional rights and non-static moral standards and the conflict between law and morality. Hard cases are those cases for the adjudication of which the judge has to struggle to find 'judicially determinable' standards or principles to apply. This 'hardship' for the court may arise from the polycentricity of issues, or, for example, from the fact that a particular dispute is exceedingly value-laden or overly complex. For example, the issue of constitution-compatibility of the death penalty for any offence, homosexuality, or unregulated abortion, or of the like issues may fairly give birth to 'hard cases'. One should not, however, confuse the hard cases with unjusticiable causes which, too, may lack judicially determinable standards, and which are usually deferred to another more appropriate state-organ for determination. Hard cases are justiciable, but are very hard to decide upon. This is also to note that some scholars think that in 'hard cases' the judge has the 'discretion' to decide the case either way, a view which Dworkin thinks is "wholly inadequate".

I regard the cases discussed here as 'hard cases', as they were not quite easy to decide, mainly because, they indeed implicated, in differing ways, the perplexing issue of imposing death sentence on a minor youth. Also, needless to say, they involved competing approaches to legal interpretations. Firstly, however, let us take up the facts that led to what may be called Shukur Ali cases.

Shukur Ali was charged with committing the offence of raping and murdering a seven-year-old girl under s. 6(2) of the Nari O Shisho Nirjaton (Bishesh Bidhan) Ain, 1995, and was arrested when he was aged 14. After a trial conducted in company with adult offenders, in contravention of the Children Act 1974 that provided for separate trial for juveniles (s. 6), Shukur Ali was sentenced to death in July 2001 by the concerned special tribunal. In the death reference, the High Court Division on 25 February 2004 confirmed the death sentence. Shukur Ali appealed against this confirming decision, but the Appellate Division on 23 February 2005 rejected the appeal. A review petition to the Appellate Division was also rejected on 4 May 2005. In this background, a judicial review challenging the concerned law was instituted immediately (WP No. 8283/2005).

In BLAST v. Bangladesh (2010) 30 BLD (HCD) 194, the petitioner brought a public interest challenge against s. 6(2) of the 1995 Act for unconstitutionally prescribing the mandatory death penalty for the offence of 'rape and murder' committed by 'any person'. It was argued that the mandatory capital punishment is unconstitutional for breaching, among other rights, the constitutional right to life and liberty. Based on a contextualised constitutional interpretation, which is nevertheless informed of international human rights instruments and comparative constitutional decisions of some foreign top courts, the High Court Division declared unconstitutional the mandatory death penalty in the 1995 Act on the ground that the provision of mandatory death sentence interfered with the discretion of the judge and hence judicial independence. The Court also found the mandatory death penalty as a breach of one's constitutional right to life, but did not, at the end of the day, quash the death penalty already awarded by the trial court and confirmed by the Appellate Division of the Supreme Court. The Court (at p. 203) straightforwardly reasoned that, "sitting in the writ jurisdiction [they] cannot adjudicate upon the facts of the case and the punishment awarded by the competent Court [...]."

Leaving the constitutional challenge to the mandatory death penalty here for a while, let us take the death reference case in the High Court Division State v. Sukur Ali (2004) (2004) 9 BLC (HCD) 238. In this death reference, the principal ground of contestation was whether Shukur Ali's trial by the Nari O Shishu Nirjaton Daman Tribunal rather than by a juvenile court incurred an illegality, warranting the setting aside of the conviction. In finding that no illegality occurred in the trial of the minor by the special tribunal, the High Court Division took a positivistic approach to statutory laws. It held that the overriding applicability of the 1995 Act (s. 3) made the Children Act 1974 inapplicable to offences under this special law. Once it endorsed the disputed trial, the next tough job for the court was to decide whether the death penalty under the 1995 Act could be imposed upon the minor. Here, the Court entered into the hard case scenario. It argued that since the Act of 1995 provided no alternative to the death penalty for the offence of rape and murder and since the punishment applied to "any person" convicted, it had no discretion to consider the accused's minority to commute the death sentence.

One may question the view of the Court that the special law of 1995 had overridden the Children Act, 1974, another special law of a sui generis kind. It is also doubtful whether by the term 'any person' the legislature intended to include children within its ambit, particularly when it comes to the question of awarding mandatory capital sentence. This argument may find a base in the different expressions in the 1995 Act namely, 'child' and 'any person', which are broadly used respectively for victims and those accused. Arguably, the absence of a legislative intention to include children within the meaning of 'any person' particularly for the punishment of mandatory death penalty can be presumed, inter alia, from Bangladesh's ratification of the Convention of the Rights of the Child, 1989, which prohibits the death penalty for children [art. 37(a)].

One may argue that these issues could not be raised and lawfully addressed in a death reference case, in which the High Court Division's role is to assess the 'due'-ness of the processes followed by the court below. Interestingly, however, the Shukur Ali Court recorded their "pangs and agony" while confirming Ali's death penalty. The Court also observed that this was a fit case to attract the President's clemency (at p. 25) under the Constitution. These observations lend a virtual recognition to the unjustness of the Act of 1995 and, probably, to the death penalty for juveniles. One might thus wonder whether the Court could have taken a sensitised approach to higher constitutional principles, particularly in light of Bangladesh's obligation under the CRC. There had been a series of early decisions with a direct import for the Shukur Ali's death reference, in which cases trials by special courts of youthful offenders under certain special laws were nullified. Particularly in BLAST & Another v. Bangladesh & Others (2002) 22 BLD (HCD) 206, the High Court Division held unlawful the conviction of a minor by a special tribunal under the 1995 Act. The Shukur Ali (2002) Court, however, distinguished this case and refused to follow its dictum, reasoning that while Shukur Ali made a voluntary confession, the concerned minor in BLAST v. Bangladesh made a 'non-voluntary' confessional statement. It is submitted that the Shukur Ali (2002) Court misplaced the distinction between holding a trial of a minor in a non-juvenile court and the reliance on non-corroborated evidence.

Appreciably, however, in a later case, the State v. Md. Roushan Mondal @ Hashem (2007) 4 LG (HCD) 12, in which a youth offender was convicted with the death penalty by a non-juvenile special tribunal under the Suppression of Violence against Women and Children Act, 2000 (which replaced the Act of 1995, keeping an alternate to the death penalty for the offence of rape and murder), the Court disapproved of the Shukur Ali dictum and compensated its jurisprudential deficiency. Informed of procedural safeguards under international human rights treaties, the Court held that a youth offender's right of trial in a juvenile court is a special right of "universal application" (at p. 30) which, having a coverage under Art. 28(4) of the Constitution, remains untainted by any special law like the Act of 2000.

Now we are reverting to the constitutional litigation, i.e., BLAST v. Bangladesh (2010). It is more than obvious that, by striking a constitutionality challenge to the legal provision that prescribed mandatory death penalty, the petitioner (BLAST) was trying to save Shukur Ali from the death sentence. As told earlier, the Court refused to decide on the legality of death sentence awarded to Shukur Ali and which came to be confirmed by the court of last resort (the Appellate Division) through appeal processes.

The BLAST v. Bangladesh (2010) decision calls for a number of plain observations. First, the Court did not nullify the conviction of death sentence, but prospectively invalidated the legal provision on the basis of which the death sentence was awarded and conformed. Although the Court did not make it clear, it perhaps endorsed the view that 'creation' of criminal law (if that at all be created) cannot be retrospective, as the concerned offender, when committing the offence, legally knew that a law prohibiting his/her action existed. By contrast, there is also an argument that, when a law is declared unconstitutional, the unconstitutionality has to be construed as having accrued from the very start, especially when constitutional rights are implicated. Interestingly, although the Court did not quash the awarded death sentence, it kept the sentence suspended until the disposal of the case. Second, while the Court declared unconstitutional the mandatory death penalty under a special law, it did not say anything about the constitutionality of section 303 of the Penal Code 1860 which, too, prescribed mandatory death penalty for the offence of murder when committed by a life term convict. One may draw a hunch that the Court was exercising judicial economy in that this was not an "issue" before it. Third, again maybe for the sake of judicial economy or because of the exclusive nature of the litigation at its hand, the Court did not scrutinize in detail the issue of legality of the trial of a minor by a non-juvenile court. For this, the Court remained content with the contention of the death reference Court (above) which thought that the special tribunal (the trial court) was a competent court as the issue of minority of Shukur Ali was not raised at the time of trial. By contrast, this may invite question as to the role of the court when 'injustice' is brought to judicial notice only at the appellate or review stages. Fourthly, the issue of constitutionality of death penalty for children when it is prescribed not as a mandatory punishment was not raised from the Bar and hence escaped judicial consideration. Fifthly, the Court retained, with reasons having been given, the jurisdiction even after the challenged law was repealed by Parliament.

The thoughts described in the preceding paragraph suggest that the Shukur Ali cases belong to the category of what can be called 'hard cases', adjudication of which requires the judge to navigate a plurality of competing legal and moral principles.

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At the outset, I would like to note that analyses made above are in the academic tenor, and not intended to violate the sub judice rule that prohibits comments on cases awaiting judgment (as the case noted has been appealed to the Appellate Division where it awaits disposal).

GOOD NEWS

Suu Kyi released

World leaders should turn up heat to free all other political prisoners

DEMOCRACY leader Aung San Suu Kyi's release should be the first step for Burma's military government to free more than 2,100 political prisoners, Human Rights Watch said. The government released Suu Kyi, a Nobel laureate, from house arrest, in accordance with Burmese law, under which her house arrest order expired on November 13, 2010.

"Aung San Suu Kyi should never have been imprisoned in the first place," said Elaine Pearson, deputy Asia director at Human Rights Watch. "Her release now is a deeply cynical ploy by the military government to distract the international community from its illegitimate elections."

Aung San Suu's Kyi's release comes soon after the November 7 elections in Burma that the ruling junta designed to entrench military rule with a civilian façade. Burma's military rulers have repeatedly imprisoned Suu Kyi, the daughter of Burma's leading independence figure, General Aung San, for her charismatic promotion of democracy and human rights in Burma and her leadership of the opposition party, the National League for Democracy (NLD). The party won an election landslide in 1990, but was never permitted to assume power.

As this chronology shows, Suu Kyi has been under house arrest for 15 of the past 21 years. She was first arrested by Burma's military government in 1989 and held under house arrest until 1995. The military junta, the State Peace and Development Council (SPDC), placed her under house arrest a second time in 2000, and she was released in 2002. The SPDC detained her for a third time in 2003 after an attack on her convoy while she was traveling in the country. Her house arrest order was extended by another year in May 2008, and it was expected to be unlawfully extended again in May 2009.

The military government, however, used the bizarre incident in which an American man swam across a nearby lake to her house in May 2009 as an excuse to put her on trial - for the first time during her periods of detention. She was sentenced to house arrest for another 18 months. Political trials in Burma are conducted by judges who are not independent, and the trials do not meet international fair trial standards.

"Suu Kyi has been in a revolving door from detention to freedom for more than 20 years, so the real question is how long she will be free this time and under what conditions." Pearson said. "If the military government is serious about increasing political space after the elections then it will release all political prisoners immediately and unconditionally."

Human Rights Watch said that this month's elections were not credible, with access to Burma largely closed to observers, and reports - particularly from ethnic areas - of serious voting irregularities, such as questionable "advance voting ballots" submitted to shore up support for the military-backed parties. Recently released official results from the elections point to an overwhelming victory by the military-formed party, the Union Solidarity and Development Party (USDP), with more than 90 percent of the national upper house seats and 85 percent of the national level lower house seats.

Human Rights Watch's campaign, "2100 in 2010: Free Burma's Political Prisoners," aims to increase international awareness and pressure for the release of all political prisoners in Burma in 2010. Here are key facts about the arrests of civil society leaders, journalists, monks, artists, students, and other critics of Burma's military government.

Human Rights Watch said the focus should turn to the other leading rights defenders and political prisoners still held in Burma's squalid jails. They include:

- Zargana, Burma's most famous comedian, who is serving a 35-year sentence for criticizing the military government's slow response to Cyclone Nargis;
- Su Su Nway, a female labor rights activist serving an 8½-year sentence after raising a banner criticizing Burma's government at the hotel of a visiting United Nations special envoy;
- U Gambira, a 30-year-old monk who was one of the leaders of the peaceful protests known as the "Saffron Revolution" in August and September 2007 and is now serving a 63-year sentence;
- Min Ko Naing, a former student leader currently serving a 65-year sentence; and
- Nay Phone Latt, a 30-year-old blogger who used his blog to spread news about the 2007 protests and was subsequently sentenced to 12 years in prison.

Following the release of Aung San Suu Kyi, Human Rights Watch called on world leaders to turn up the pressure to free these and the remaining more than two thousand political prisoners in the country.

Source: Human Rights Watch.

RIGHTS *corner*

People on the move: safeguarding the rights of migrants

HUMAN Rights High Commissioner, Navi Pillay told the Global Forum on Migration and Development meeting in Mexico that the global community must work together to overcome the problems associated with irregular migration and the demand side of trafficking.

In her capacity as Chair of the Global Migration Group for the past six months, Pillay adopted as her central theme the centrality of human rights to the complex and multiple problems created by the movement of millions of people globally.

Pillay recalled in her address to the Forum that today, 214 million people or almost three percent of the world's population are migrants. She emphasized the economic benefits that flow to countries of origin and destination because of contributions from migrants and described the other ways in which migrants enrich other societies through new practices, ideas and technology, fostering understanding and respect among peoples, and contributing to demographic balance.

"For many, migration is a positive and empowering experience," Pillay said, "but many others endure human rights violations, discrimination, and exploitation."

The High Commissioner highlighted the problems faced by irregular migrants. Their situation, she said, should not deprive them either of their humanity or their rights. "Government authorities, the media, the general public, often behave as though abuse of a migrant somehow matters less than the abuse of a regular citizen. It does not. A child is a child, a woman is a woman, a man is a man: whoever and wherever they may happen to be, at home or abroad," Pillay said.

The GMG brings together 14 UN agencies, the International Organization for Migration and the World Bank. Both the GMG and the Global Forum were established in 2006 to find solutions to the many complex issues arising from global migration.

Source: The Office of the United Nations High Commissioner for Human Rights (OHCHR).