

The background of the cover features a close-up, high-angle view of several books and stacks of papers. The books have various colored spines, including blue and black. The pages are mostly off-white or light beige, showing some signs of age. The lighting is dramatic, with strong highlights and deep shadows, creating a sense of depth and texture. The overall composition is centered and balanced, with the text overlaid on a dark, semi-transparent rectangular area.

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**REGIONAL MANDATE TO RESTRAIN THE APPLICATION OF DEATH PENALTY
(INCORPORATING MORAL BASIS ON PROGRESSIVE REALIZATION FOR THE
ABOLITION OF DEATH PENALTY)**

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“An eye for an eye will make the whole world blind,” as mentioned by Mahatma Gandhi while advocating against the use of violence. Some South Asian countries have so far retained the provision to inflict death penalty from some serious crimes. The reason for the imposition of such a cruel act is to deter from committing such crimes. The higher crime ratio in ‘retentionist countries’ than in ‘abolitionist countries’ has not, however, been able to justify this theory of deterrence to reduce the criminal intent of people to commit a crime. The case laws, in the other hand, has reflected the enforcement of death sentences to juvenile offenders and even to general offenses beyond the scope of serious crimes. Such misconducts go on severe the breach to impose a greater punishment for the crime, opposing the general principle of criminal law. The idea of killing convicts for an offense is in itself hard to justify morally. Influential philosophies, including Buddhism and Hinduism, denounce such concept. Regional cooperation from the part of SAARC is necessary to put effort for the abolition of death penalties. The paper will focus on addressing the inefficacy of the deterrent approach, and incorporate morality in law to deny the validation of the death penalty.

THE EMERGENCE OF DEATH PENALTY IN SOUTH ASIA

The history of the death penalty can be traced back to the very origin of the concept of crime and punishment itself. Hindu religious scripts dating back to the beginning of human civilization also includes execution as a form of *Danda* for the wrongdoers of the gravest offenses.¹ *Danda* is a symbol of punishment that is justly remarked to need retribution, restraint and reformation.² Requiring a retributive approach meant the imposition of death penalty on the gravest of crimes, including murder, treason and theft of a large scale. The imposition of such a punishment nevertheless was also included in political crimes, sexual offenses and assaults which were demonstrated publicly.³ The portrayal of such gruesome acts of execution affirms that the death penalty was used as a tool of deterrence as a

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¹ Sukla Das, *Crime and Punishment in Ancient India* (Published 1990 Abhinav Publication) 75.

² Ibid 55, 56.

³ Ibid 75.

matter of social significance and royal edicts. Nevertheless, the severe resort to execute someone was not encouraged in the wide scope of philosophical texts and works of literature.

The illustration of death penalty in the present context has, however, been guided from the western concept of punishment rather than from the historical perspective of *Danda*. The practice of death penalty got entrenched as a formal form of punishment by the rulers of the Mughal Empire and the British colonial regime. The use of brutal derogative means with accounts of execution by elephants, and by firing canons on offenders and hanging the offenders with gallows, reveal the extent of support for death penalty.⁴ Death Penalty as legal punishment got infixed during the formulation of legal codes of colonies during the British Empire. It is observed to have a reflection of Judeo – Christian approach of justice. This made the deterrent act indelible in the system of penology of colonial countries, including India and Sri Lanka. The alien nature of the punishment imposed in South Asia has therefore been stated as a form of oppressive and imperial British colonial rules of justice.⁵

The accounts of taking the life of criminals have also been located in Islamic law. Death penalty has been explicitly mentioned as a means of retribution and deterrence in Islam. The spirit of the Quran also mentions the taking of life for the sin committed as reasonable if it abides by law.⁶ The Muslim majority countries, including Pakistan, Bangladesh and Afghanistan, have a significant rate of execution of death row inmates. Amnesty International gives an account of these countries continuing to impose more execution among South Asian countries.⁷ The faith and practice of Sharia Law is frequently cited to justify death penalty by these countries.⁸ Nevertheless, the justification of the religious scope to encourage the practice of death penalty needs to be thoroughly observed and analyzed to connote whether such religious teaching actually encourage gruesome conduct.

In the present context, the existence of death penalty in the legal framework do reflect the historical context from which it got prescribed as a valid means of punishment. However, the countries have

⁴ C. Anderson, *A Global History of Execution and the Criminal Corpse; Ch. Execution and its Aftermath in the Nineteenth-Century British Empire* (Published 2015 Palgrave Macmillan) 174- 75.

⁵ The provision of death sentence was prescribed for more than 200 crimes. Andrew Novak, *The Global Decline of the Mandatory Death Penalty* (Published 2014, Ashgate Publishing Ltd.) 32. See also A. Prasad et.al, 'Should India Retain Death Penalty' (2016) 1(1) Liberal Studies 7, 22.

⁶ Quran (Surah Al – 'An' am) 6:1. *Take not life, which God has made sacred, except by way of justice and law. Thus, does he command you, so that you may learn wisdom.*

⁷ Except on year 2014, rate of execution of convict by death penalty is consistent. See also Amnesty International, 'A.I.: Death Sentences and Executions 2014' (AI Index: ACT 50/001/2015, Amnesty International 2015).

⁸ Penal Reform International, *Sharia law and the death penalty: Would abolition of the death penalty be unfaithful to the message of Islam?* (2015) 1, 34.

made efforts to limit the practice of death penalty. The retentionist countries which retain the provision of death penalty in South Asia have tried largely to decline death penalty.⁹ India and Bangladesh have brought the doctrine of ‘*the rarest of rare cases*’ for executing criminals on an exceptional basis for the most severe crimes. However, issues regarding its application are widely criticized. The Maldives and Sri Lanka despite the inclusion of the provision of death penalty, did not practice the application of such a punishment for a long time. The commutation of death penalty for decades has made them as ‘de – facto abolitionist’ countries.¹⁰ Nepal and Bhutan have been prominent to avoid such practices as they abolish death penalty for all crimes.

Now it becomes the necessity of this current movement to have a synchronized effort for a regional mandate on the abolition of death penalty. The necessity of abolition has been viewed not only as an affirmative approach by human rights groups but also as a philosophical discussion largely structuring the religious frameworks giving priority to the restriction and abolition of death penalty. The observation of different perspectives on death penalty is necessary to assimilate morality and law on disregarding death penalty. This paper thus identifies the philosophical as well as realistic perspectives in the recent debate in the context of death penalty in South Asia.

TOLERANCE ON DEATH PENALTY: RELIGION ASPECT

The thoughts and ideas we adhere to are undeniably influenced by religion as it is the forum that guides the majority of people across the globe, not least in South Asia. So, it would be challenging to commence a philosophical excavation without accompanying the contemporary shape of religion and its argument on death penalty. The will to have a stronger social fabric and lesser deviation of people from societal values stated the existence of the retaliation and deterrence concepts amongst social sanctions. In the *Mahabharata*, execution is regarded to be sometimes necessary for the larger benefits of a safer kingdom. Authors of legal writings in ancient Hindu community preferred death penalty including Manu, Yajnavalkya, Brhaspati, Kamandaka, Bana, and Kautilya. For theft of gold and other precious metals, gems and fine clothes, corporal punishment or death was the general punishment which is seen in *Agni Purana*. Islamic law also mentions execution possible under the subject of law.

⁹ Countries retaining death penalty are considered retentionist countries. Amnesty International, ‘Abolitionist and Retentionist Countries’ (AI index: ACT 50/6665/2017, Amnesty International 2018) 2.

¹⁰ Amnesty International, (n 7).

A cohesive society is envisioned in every religious preaching and every sphere of our life. Nevertheless, the way envisioned to maintain such peace and stability differs. The concept of punishment has evolved during the later phase of Upanishad in Hinduism. It is expanded even to be a matter of social significance for the removal of guilt of misdeeds from the offender.¹¹ The reformed concept of punishment was more on the crime which the person commits than on the criminal. The transition that has been observed in the latter part shows less stress given on deterrence and more on causation of crime to highlight the progressive status of reformatory approach.

Much earlier, the execution of criminals was held to be appropriate as going against the social structure and rules meant for disturbing the balance of a transitional society from an uncivilized society. However, even then execution was always the last resort, neither desired nor encouraged. Even here, we observe that the concept of *ahimsa* (non-violence) is emphasized. Later during the age of Buddhism, the morality constituted on the universal law of *karma*. It casts light on how actions may have good or bad intent. The bad intent has been deemed as an act causing physical and mental pain to another being.¹² This is how the Buddhists have immensely signified the importance of *ahimsa*¹³ and completely rejected any possibility of death penalty. While focusing on enlightenment with the teaching of *dharma*, Buddhism portrays a progressive narrative on the wisdom of a person for attaining their karma (individual action). An eminent symbol of what the reformatory approach holds to reform criminals.

The repository of knowledge in the religious discussion under the philosophy of punishment to combat crimes has changed. The necessity of deterrence has defiled out to connect mutual prospects for regarding reformatory approach. This is how the concept of morality has emerged to respect human life and dignity, thus rejecting to justify death penalty.

However, people meanwhile recognize to abide by the religious belief with a nuanced understanding, which makes them unequivocally set perception different from the actual preaching. This goes on to be similar even in the case of death penalty where people incline towards the view that death penalties are necessary to punish criminals. The 35th law commission report of India (1967) concluded as to

¹¹ Das, (n 1) 60.

¹² LF Alarid & HM Wang, 'Mercy and Punishment: Buddhism and the Death Penalty' (2001) 28 Social Justice Journal 231, 236.

¹³ MT Adam, 'Nonviolence and Emptiness: Buddha, Gandhi, and the "Essence of Religion"' (2006) 34 The Journal of the Faculty of Religious Studies 1, 4.

state the existence of religious, socio-economic – cultural structures (including education levels and crime rates) requiring death penalty to be retained.¹⁴ This condition has illustrated that the significance of death penalty has been exaggerated.

It is not the preaching of religion, encouraging the cruel action. The false judgment and interpretation diluting the true spirit of such writings emphasize death penalty. One of the prominent examples is of The Federal Shariat Court of Pakistan, where the court decided on a judgment to recognize lapidation for offense of illicit sexual offense to be legal. The primary reason behind incorporating such a barbaric punishment was affirmed to have accepted the classical doctrine of Islamic law, albeit such doctrine was never mentioned in the Quran.¹⁵

Morality is a concept to distinguish the rights and wrongs as an idea to separate the goodness and badness of any act.¹⁶ The deprivation of human life can never be considered as right. The larger discourse of religious texts also reflects the same spirit to denounce death penalty. It is evident that the progressive aspect of oriental philosophy focuses on the common notion to respect human dignity and disregard any exception for the deprivation of human life.

REFLECTION IN INTERNATIONAL INSTRUMENT TO RESTRICT DEATH PENALTY

The reflection of philosophical understanding denounces death penalty; they imply it to be inessential and most often against the spirit of human dignity. The progressive human rights in the international sphere began condemning death penalty despite the support and practice of death penalty remaining notably very high. The UDHR can be recognized as the first instrument which refutes the validation of death penalty.¹⁷ Since the declaration did not specifically condemn death penalty and the declaration not being a treaty, it did not create direct legal obligation. The compatibility of death penalty, however, with international human rights became less certain.

¹⁴ Indian Law Commission, *The Death Penalty Report 1967* (Law Com No. 313, 2008).

¹⁵ *Hazoor Bakhsb v. Federal Government of Pakistan* [1981] PLD 145 (FSC) 145; *Federation of Pakistan v. Hazoor Bakhsb* [1983] PLD 255 (FSC).

¹⁶ Yubaraj Sangroula, *The Philosophy of Law Oriental Perspective with Special Reference to Nepal* (Kathmandu School of Law, 2010) 31.

¹⁷ Subjected against cruel, inhuman or degrading treatment. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 5.

Further expansion of the human right declaration came on with International Covenant on Civil and Political Right (ICCPR). The covenant encouraged countries to abolish death penalty. It mentioned the provision for member countries incorporating the covenant and practicing such execution to limit it for the “most serious crimes”.¹⁸ The *ad hoc* tribunals for the former Yugoslavia and Rwanda and Rome Statute of the International Criminal court also nullified death penalty. This emphasized the practice of international bodies ruling out any possible scope of death penalty.¹⁹ At that point, the UN General Assembly made a major proclamation of the Second optional protocol on ICCPR on 1989.²⁰ It got in force from 1991 which completely prohibited use of the death penalty. At the moment, 85 members have ratified the protocol. The protocol contains no provision for reservation from death penalty, which makes it the prominent source for the abolition of death penalty.

Even though 56 countries still retain the provisions for the imposition of death penalty, the ethical responsibility to ensure the protection for vulnerable groups is prior and under obligation to every country. Pregnant women and juvenile delinquencies are subjected to gain full immunity under the customary norms of international law against execution. The state practice also evolved to certain that the convicts should also be given fair procedural guarantee before being sentenced to death under the criminal justice system.²¹

The international recognition for opposing any discriminatory provision in the deprivation of life, albeit of the wrongdoer has been imperative to imbibe the moral character in the construction of progressive law. Countries around the world have largely incorporated the imperative effort from the international community to diminish death penalty. In the present context, 142 countries have abolished death penalty in law or in practice.²² This is significant to support common a moral stand to assert the recognition of human dignity and life prior to any falsified provision of deterrence.

¹⁸ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 6. The interpretation of the “most serious crimes” has been well commented on universal periodic review on Lebanon. See also UNHRC ‘Report of the Working Group on the Universal Periodic Review* Lebanon’ (22 December 2015) UN Doc A/HRC/31/5 para 22.

¹⁹ Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) 25 May 1993; Statute of the International Tribunal for the Rwanda (as last amended on 13 October 2006) 8 November 1994; Rome Statute of the International Criminal Court (adopted on 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.

²⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights (adopted on 15 December 1989, entered into force 11 JULY 1991) 1642 UNTS 414.

²¹ W.A Schabas, ‘International Law and Abolition of the Death Penalty’ (1998) 55 Wash & Lee Law Review 797, 813, 814.

²² As of the date of 31 December, 2017. Amnesty International, ‘Death Sentences and Executions 2017’ (AI Index: ACT 50/7955/2018, Amnesty International 2018).

RESTRICTING OR RECOGNIZING DEATH PENALTY IN SOUTH ASIA

The international recognition to accept the value of morality is a pre-eminent source to ascribe the practice on limiting the practice of death penalty. The brief indication of the progressive recognition in oriental philosophy to denounce death penalty suggest the countries affirm such policies. Indeed, there has been some progressive steps on restricting death penalty. However, the *de facto* support for death penalty remains to be consistent. The lack of affirming set principles on limiting death penalty still remains to be a pending response to an ample of directives which suggest the minimization of the scope of death penalty.

LIMITING DEATH PENALTY FOR “MOST SERIOUS CRIMES” IN SOUTH ASIA

It would be an ideal state to mention complete abolition of death penalty in the South Asian region. On status quo, four countries retain death penalty in practice which make them retentionist countries. Among retentionist countries, all remain obliged under Article 6 of the ICCPR which mentions the provision of death penalty only to the “most serious crime.”²³

Beyond such restrain, there has also been the establishment of regional limitation for death penalty in India and Bangladesh. India has had pivotal efforts in reducing the execution through death penalty. In the case of *Anamma v. State of Andhra Pradesh*, the court observed to seek the realization of reformatory components as much as of deterrent element.²⁴ This discretion indeed was opined to be important for the progressive realization to step from partial reservation towards to total abolition of death penalty.²⁵ In 1979, *Bachan Singh v. State of Punjab* judgment was proven to be a landmark in limiting death penalty.²⁶ The court adopted a guideline, ‘rarest of rare’ for sentencing death penalty where such punishment would be imposed on the issues of public order, the security of state and society and the interest of the general public.

However, the lack of set principles to determine the ‘rarest of rare’ cases does provide a wider discretionary power of judges; albeit increase in the imposition of death sentences truly shades the practice not having an impact as it would want to have as mentioned in case of *Bhachan Singh*.²⁷

²³ ICCPR, (n 22).

²⁴ *Ediga Anamma v. State of Andhra Pradesh* [1974] AIR 799 (SC).

²⁵ Ibid 14.

²⁶ *Bachan Singh v. State of Punjab* [1980] AIR SC 898 (SC).

²⁷ *Shankar Kisanrao Khade v. State of Maharashtra* [2013] 5 SCC 546.

Bangladesh also faced the similar issue while the practice of such a doctrine of the ‘rarest of the rare’. One of the illustrations would be of *State v. Mohammed Monir Ahmeda*, where the death sentence was reduced to life imprisonment, noting that, the prisoner was “suffering mental agony of death”. Bangladesh’s constitution contains an explicit clause for the prohibition of cruel, inhuman and degrading punishment.²⁸ However, the courts of Bangladesh have received a fair amount of criticism regarding the doctrine of the ‘rarest of rare’ cases as the application of death penalty is high in context to other countries in South Asia.²⁹ Bangladesh introduced death penalty for financing terrorism under Anti – Terrorism Amendment Bill, 2012. The provision was widely criticized for not qualifying as the “most serious crimes.”³⁰

The establishment of the ‘rarest of the rare’ doctrines entails us to step on eliminating mandatory death penalty. But, fair shares of doubt and controversy indulge with the question regarding the practice of ‘rarest of the rare’ case. So, the confusion of whether death penalty is consistently recognized into practice or restricted from practice still remain largely unclarified. Even though the execution of death row inmates has dropped significantly in recent decade, the envisioned path to only have ‘rarest of rare’ use of such punishment has not been clearly realized during adjudication of cases.

PROCEDURAL FAIRNESS AND IMPOSITION OF DEATH PENALTY

The practice of death penalty seems to disregard the guarantee of procedural fairness to the accused in wide ambit. The provisions, as well as the application of death penalty, does not seem to qualify the required framework on reasonable doubts actually to consider such a punishment being imposed as a last resort. The lack on providing a basic procedural guarantee for criminal trial leads to violation on ethical responsibility of countries to safeguard the interest of the vulnerable class including juvenile, economically deprived person and most probably even the innocent agents. The observation of such

²⁸ Constitution of Peoples’ Republic of Bangladesh (1972), art 32, 35 (2).

²⁹ Six executions were recorded in 2017 while 1465 were under death row at the end of 2017. Amnesty International, ‘Death Sentences and Executions 2017, Asia – Pacific’ (Global Report AI Index: ACT 50/7955/2018, Amnesty International 2018) 18.

³⁰ FIDH, ‘Bangladesh: New Amendment to Anti-Terrorism Act Gags Freedom of Expression’ (*Death Penalty Database*, 14 June 2013)

<<http://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Bangladesh>> accessed 4 February 2019.

instances subject for the needless deprivation of human life that only accounts to another civilian harm rather than serve any penological purpose.

i. Mandatory death sentence

'Relic of Ancient history' is what the mandatory death penalty is considered. Mandatory death penalty deprives judges to have discretionary power while imposing sentence on convicts.³¹ The imperialist era brought a mandatory death penalty during the formulation of colonies legal codes.

India and Bangladesh following the doctrine of the 'rarest of rare' have abandoned the mandatory death penalty from their law. The Supreme Court of India declared the provision as unconstitutional. It stated it to be severe, relentless and inexorable in operation.³² Later on, on a similar premise, the court then stated mandatory death sentences to be unconstitutional.³³ Bangladesh eliminated mandatory sentence even though it was for the gravest of offense.³⁴

However, Sri Lanka, Afghanistan Maldives and Pakistan still uphold the mandatory death sentence. Pakistan and Afghanistan descend their criminal law from *Sharia law* which validates the mandatory death penalty for *Hudud* crimes. Abiding by the *Sharia* law in the movement to Islamize legal code, special provision for discretion power was introduced. The discretion of sentencing the convict for death indeed resided on the heir of the victim that the court as similar of concepts inclusive in *Qusais* and *Diyat*.³⁵

The Maldives enforces a mandatory death sentence on intentional homicide and premeditated murder. Although, the Supreme Court of Maldives has the final authority on issuing the sentence.³⁶ Exceptionally, the provision also entails for murders in Sri Lanka. In *Weerawardane v. State*, the court

³¹ The aggravating or mitigating measures are not taken into consideration while imposing punishment according to the severity of crime.

³² *Dilip Kumar Sharma v. State of M.P* [1976] 2 SCR 289 (MPHC).

³³ Mandatory provision of death sentence would fail to take account of facts and circumstances of each particular case; *Mithu v. State of Punjab*, [1983] 2 SCC 277 (SC).

³⁴ Mandatory death sentence was only applicable for murder of women and child after rape; Shukur Ali, 'Bangladesh Legal Aid and Services Trust v. Bangladesh' 30 BLD 194 (2010).

³⁵ About half of the cases have been determined by settlement of courts. See also E. Sugarman et al, *Afghanistan and Islamic Law* (2nd edn, ALEP at Stanford Law School 2012) 101.

³⁶ Cornell Center on the Death Penalty Worldwide, 'Maldives: Death Penalty Database' (*Death Penalty Database*, 4 June 2014) <<https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Maldives#f22-3>> accessed 4 February 2019.

stated that the conviction of murder is only liable for death penalty.³⁷ Even mandatory death sentence remains in their provision, these countries as ‘de – facto abolitionist’ countries have not executed death row inmates for a long time.³⁸

The existence of mandatory provision of death penalty to deprive a person of their life implies that the legal provision in these countries has remained stagnant ever since first codification during the colonial regime. The revision, however, needs to be accomplished with the regional effort to promote essential prerequisite of human rights.

ii. Death sentence and execution of Juvenile delinquency

The scenario of a juvenile being sentenced and executed in South Asia must be addressed. According to former chief justice Uz Abdullah of Maldives, there was a 117% increase in child-related cases to the court in the year 2017.³⁹ Among the cases also include cases involves of death sentence. The child activist in Maldives critic that death sentence is being imposed in Maldives to juvenile offenders by delaying the proceedings for the implementation of the sentence until the juvenile reached the age of 18.⁴⁰ Sri Lanka have been reported of juvenile sentencing according to the Amnesty International global report.⁴¹ Although, further research is required by the regional or international bodies as no legal framework or reports support the critic.

However, these countries only account the paucity of what Pakistan is accused of misusing the provision of death penalty even to the juvenile offenders. Ten years after the ratification of the UNCRC, Pakistan’s government promulgated a law designed to ensure adherence to the terms of the

³⁷ The trial court did consider mitigating factors on reducing the offender’s culpability but not on discretion while imposing death sentence. The clemency process is executed by the president and no authority of judge is admissible. ‘*Weerawardane v. State*’ [2000] 2 SLR 391, 394 (note).

³⁸ Cornell Center on the Death Penalty Worldwide, ‘Sri Lanka: Death Penalty Database’ (*Death Penalty Database*, 4 April 2011) <<https://www.deathpenaltyworldwide.org/country-search-post.cfm?country=Sri+Lanka#f38-3>> accessed 4 February 2019.

³⁹ Department of Judicial Administration, ‘Judicial Symposium on Child Rights and the Juvenile Justice System held under the National Judicial Conference 2017 Concludes’ para 3 < <http://english.judiciary.gov.mv/judicial-symposium-on-child-rights-and-the-juvenile-justice-system-held-under-the-national-judicial-conference-2017-concludes/>> accessed 4 February 2019.

⁴⁰ Child Rights International Network, *Inhuman Sentencing of Children in the Maldives* (Campaign Report, 26 November 2015)7.

⁴¹ Sri Lankan courts sentenced over 61 people to death including juveniles; Amnesty International (n 7).

UNCRC – the juvenile justice system ordinance 2000 (JJSO).⁴² This law contained provisions aimed at ensuring that child prisoners were tried and held separately to adults, that age was considered a relevant factor in sentencing and crucially complying with international obligations by making it illegal to pass an order sentencing a child to either the death penalty or forced labor.⁴³ In 2001, President Musharraf commuted 100 death sentences of juveniles on death row enable to resist international outrage of execution carried on 13 year old boy Ali Sher. This hinted for the country to have a bold step to stress on juvenile justice.

Unfortunately, the pendulum swing upon the affirmative action for juvenile justice could not be consistent. Pakistan went on moratorium momentarily on the urge of the international community which was not for long. Pakistan ended its moratorium on death penalty for the reason to tackle terrorism and insurgent violence as well as increasing rate of crime. Afghanistan soon followed the move away from such international commitment.⁴⁴ The condition of procedural fairness for death penalty has however, been criticized ever since. As a significant proportion of juvenile offenders being sentenced to death; it exhibits a great disregard to juvenile justice system.⁴⁵ The move away from abolishing death penalty has been widely criticized by human rights groups and therefore implied to be a wrong direction taken by Pakistan. The case of Shafqat Hussain being executed, Muhammad Amin and Qadeer Ahmad under death row represents 800 estimated juvenile offender sentenced to death.⁴⁶ The documentary to prove the age of the accused is unavailable where police officers neglect seeking information and rely on physical appearance to detain the accused.⁴⁷ A report in 2017 estimated that the ratio of juvenile offenders under death penalty can account to 10 per cent of all

⁴² Convention on the Rights of the Child (adopted on 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 37 (a). It mentions that capital punishment cannot be imposed for offenses committed by persons under 18.

⁴³ Juvenile Justice System Ordinance, (Law No. XXII of 2000) s 12.

⁴⁷ Ali S L, 'A Call to reinstate Pakistan's Death Penalty moratorium' (2017) 390 (10113) *The Lancet* 2623 para 1; J. Bjelica & E Qaane, 'Afghanistan's latest Executions: Responding to calls for capital punishment' (Afghanistan Analysts Network, 11 May 2016) para 8.

<<https://www.afghanistan-analysts.org/afghanistans-latest-executions-responding-to-calls-for-capital-punishment/>> accessed 4 February 2019.

⁴⁵ 10 percent of death row population consists of juvenile offenders; J. Shahid, 'Juvenile Offenders Make 10 Percent of Current Death Row Population' *The Dawn* (Islamabad, Feb. 18, 2017) para 1 <<https://www.dawn.com/news/1315513>> accessed 13 September 2020.

⁴⁶ Justice Project Pakistan, *Juveniles on Pakistan's Death row* (Report, March 2015) para 2; Sabzeha, 'Save Mohammad Valian from Execution, Petition to UN High Commissioner for Human Rights' (GoPetition, Mar. 7, 2010) <<https://www.gopetition.com/petitions/save-mohammad-valian-from-execution.html>> accessed 4 Feb 2019.

⁴⁷ Pakistan's Demographic and Health Survey 2012 -13, 46% of the general population has no form of registration. See: National Institute of Population Studies (NIPS), *Pakistan: Demographic and Health Survey: 2012-2013, 19-22* (Survey, December 2013) <<https://www.dhsprogram.com/pubs/pdf/FR290/FR290.pdf>> accessed 4 February 2018.

death row inmates. Such severe issue concerns again to the deprivation of life and justice that is realized to be omnipotent while abiding with human rights.⁴⁸ Human rights council from universal periodic review also made it aware that Pakistan needed to address the problem of juvenile offender in death sentence.⁴⁹

iii. Fair Trail and Guaranteed Right of Accused on Imposition of Death Penalty

It would not be inappropriate to raise the issues of the accused not getting the opportunities to seek justice and even to claim their innocence. The claim that the deterrence character to retain and in some cases, increase the scope of death penalty has always been in the spotlight for retentionist countries. Justice to convicts and the accused facing a death sentence has eventually been placed on the dimmest of the lights. The formulation has created hope, but implementation always seems to be back-burned. The impoverished citizens from largely stratified society have always been concerned about their reach from justice. South Asia carries a large portion of these impoverished population who are not ensured with fair trail and procedural fairness. The report from the law commission shows that nearly 74% of convicts were economically vulnerable. Unequivocally, the situation is expected when the accused cannot afford a private legal representative to claim on behalf of their arguments. Even legal aid is also not appropriately paid and is insufficient. The report also concerns that 36.2% decisions on death sentence involve the acceptance of trial hearing by *amicus curie* from the Supreme Court.⁵⁰ More upsetting part is that India still has not abolished discriminatory laws, where some tribes are portrayed as criminal tribes. One would eventually wonder why 75% of death row inmates are from backward classes and religious minorities.⁵¹

The purpose of Pakistan to reintroduce death penalty by ceasing the moratorium was to combat terrorism. The Anti-Terrorism Act, 1997 defines a terrorist act. which is It includes minor offenses that in most circumstances would not fall under the scope of terrorism and is rather vague.⁵² This lacuna has led to cover 88% of convicted terrorist crimes. While convicting terrorists in the case of

⁴⁸ OHCHR, 'UN experts urge Pakistan not to execute juveniles, United Nations Pakistan' (*OHCHR*, 20 March 2015) para 12 <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15729&LangID=E>> accessed 4 February 2019.

⁴⁹ OHCHR, 'Summary prepared by the Office of the High Commissioner for Human Rights', (3 April 2008) UN Doc A/HRC/WG.6/2/PAK/ 15.

⁵⁰ Indian Law Commission, *The Death Penalty Report 2015* (Law Com. no. 25, 2015), 151- 153

⁵¹ *Ibid* 149 para 2.

⁵² General offense includes kidnapping, robbery, and banditry. See also The Anti – Terrorism Act, 1997 (XXVII OF 1997) s 6(2).

Kashif Ali, the court held that it did not require to address the motive of the offense to create fear to the people in society which is regarded as the major element of terrorism.⁵³

The Bangladesh government needs to have trails of international standards for the protection of rights of the accused during mutiny and murder. The trials on mass death sentence for former Bangladesh Rifles (BDR).⁵⁴ This violation of procedural fairness was a direct retreat from the progressive move it took against death penalty.

The deep-rooted problem negates the right of the accused or the convict of a crime. The lack to safeguard procedural guarantee to the accused lug the innocent and vulnerable to be executed. It clearly disregards any principle of proportionality to punish the offender as a mitigating factor to limit the punishment would be unaddressed. This entails on to raise great concern even to question, “Do the offenders being executed from death penalty deserve to have the punishment of such intensity?”

REGIONAL MANDATE ON RESTRICTION OF DEATH PENALTY

SAARC has been an active organization on addressing the necessity for regional cooperation among nations to combat perilous threats, including terrorism, the problem of narcotic drugs and psychotropic substances.⁵⁵ The issue of the protection of human life is as important as these critical issues. The deprivation of civilian lives due to the lack of safeguard-basis procedural guarantee brings the responsibility of SAARC to appeal as a part of an advisory role for policy reforms and amendments regarding the subject of death penalty. The concept of suggestive role play; however, in the issue of the death penalty is not sudden, rather member abolitionist countries have consistently emphasized the retentionist member countries for the abolition of death penalty.⁵⁶ The regional development of the ‘*rarest of the rare*’ case on limiting the use of death penalty is pivotal. The cooperation of member states to recognize a well-reasonable basis to the development principle for setting limitation of the most severe crimes requires a formal structure. Furthermore, incorporating the provision of death

⁵³ *Kashif Ali v. the judge Anti – Terrorism*, Court No. II, Lahore [2016] PLD 951 (FSC).

⁵⁴ Recent examples of November 2017, where 139 persons were convicted for death sentence by high court. Human Rights Watch, ‘Mass Death Sentences Confirmed’ (Bangladesh Report, 28 November 2017).

⁵⁵ SAARC, *Compilation of SAARC Charter/ Conventions/ Agreements* (1985 – 2016)

<http://saarc-sec.org/download/publications/compilation_of_Charter_conv_20161227112809.pdf> accessed 4 February 2019.

⁵⁶ Nepal has encouraged Sri Lanka during the universal periodic review. As well as the effective abolition of death penalty in country has made them prominent model to restrict death penalty. See also UNHRC ‘Report of the Working Group on the Universal Periodic Review - Sri Lanka’ (29 December 2017) UN Doc A/HRC/37/17 47.

penalty needs to be restrained from other legal provisions which do not fall under the scope of the most severe crimes.

The revision, however, needs to be accomplished with the regional effort to promote essential prerequisite of human rights. The state of negligence on maintaining proper amendments and reforms has validated the errors and irregularities of previous prescriptive laws such as of mandatory provisions. Such mandatory provisions go beyond the theory of penology as they deny to include any mitigating factors while imposing punishments.⁵⁷ The accounts of juvenile execution and exception of fair trial in retentionist countries show an alarming use of the death penalty. The surge to introduce the application of death penalty has even been emanated in recent times from ‘de – facto abolitionist countries.’⁵⁸ However, even these countries have also failed to safeguard the procedural fairness to the death row inmates.⁵⁹ This requires a diligent effort from the regional cooperation among member countries to appoint a standing committee to monitor the cases of death penalty, which would be inclusive of the following responsibility:

1. The committee should monitor the application of the death penalty for tracing any deviant conduct by the state against the legal obligation to comply with the laws.
2. The concern of the report should be clarified to the country’s representative authority during the specific periodic review of these retentionist countries to recognize and readjust on the lacunas in existent practice of death penalty.
3. The static legal provisions depriving procedural guarantee to the accused and convict of death row should be amended with legal experts from national and international sphere to assist for complying the domestic laws as per the international recognition:
4. The advisory position of the committee must be critical to domesticate the following provision for *de facto* attainment of legal procedural guarantee.
 - a. Mandatory provision of legal representation to the accused of ‘most serious crime.’
 - b. Review of fair trail and procedural fairness while adjudicating the verdict of death penalty by the apex court of the country.

⁵⁷ Prof. Madhav P. Acharya et al, *Criminal Penology* (Bhributi Academic Publication 2012) 69.

⁵⁸ S. Fernando Pulle, ‘Death Penalty: Govt. Hangs on Despite Debate on Execution Plan’ *Daily Mirror* (Colombo, 19 July 2018) para 9 < <http://www.dailymirror.lk/article/Death-penalty-Govt-hangs-on-despite-debate-on-execution-plan-152897.html> > accessed 4 February 2019.

⁵⁹ Amnesty International Global Report (n 41).

5. The committee should be active in a reciprocal dialogue with the judiciary of SAARC member countries to establish principle for crimes that suffice the recognition of most serious crimes. This would be essential to lodge the regional commitment to limit death penalty on only “*rarest of the rare*” cases.
6. The committee shall recognize the support of all SAARC member countries to abide with international standards to dislodge the application of death penalty as a part of progressive realization and therefore formulation a recognition commitment to abolish death penalty.

This would create an obligation towards retentionist countries to have an affirmative approach on the limitation and restriction of death penalty. The international instrument significantly condemns death penalty safeguarding the spirit of human rights to respect human dignity.⁶⁰ The restriction of death penalty would assimilate the prospect of morality into law with emphasizing the common notion of *abimsa*.⁶¹

CONCLUSION

The purpose of imposing *Danda* and approach on reforming the criminal connote to only a common aim, which is to maintain social cohesion and harmony. The avoidance of death penalty affirms the prospect to respect human dignity and life which has been well affirmed even in the religious preaching (i.e. Buddhism) to re-envision the concept of deterrent punishment into a reformative approach. The abolition of death penalty is not envisioned in *status quo*, but the regional cooperation to bring about change in the legal framework cannot be denied. It would be better to conclude with implying that the regional mandate to cooperate for the restriction of death penalty should be envisioned soon to assimilate the moral values to the ambit of law.

⁶⁰ Second Optional Protocol to the International Covenant on Civil and Political Rights (n 24).

⁶¹ Adam (n 17).