

DEATH PENALTY UNDER DIFFERENT NATIONAL LEGAL SYSTEMS AND ASSESSING ITS COMPATIBILITY WITH INTERNATIONAL HUMAN RIGHTS

Mohammad Towhidul Islam

1. Introduction:

'Neither in the heart of individuals nor in the morals of society will there be a lasting peace as long as death is not outlawed.'¹

In spite of the fact that the modern world is very sympathetic to the concept of human rights issues, death penalty as a form of capital punishment has still been going in rampage in the world. During 2001, at least 3,048 people were executed in 31 countries. At least 5,265 people were sentenced to death in 68 countries.² It is very funny to see that some advanced countries, which assert themselves to be pioneer for the protection and promotion of human rights and which are also very vocal to the human rights situation in the developing world, do impose death penalty on offenders, even on children. This research aims at looking into some of the legal systems of the world like the United States of America, United Kingdom, China, South Africa and Bangladesh containing penal provisions for imposing death penalty and examining how far the State death penalty provisions are in accord with international human rights norms and conventions.

2. Development of the Term 'Human Rights':

The core concept of human rights takes its position in the political vocabulary quite recently i.e. after World War II.³ Its gradual promotion and emphasis paving the development of a legal policy doctrine, the creation of international agreements and monitoring mechanisms were a sentient reaction to the horrors of World War II. Once upon a time people felt helpless and insecure, then came out consensus among them on a certain list of those rights and freedoms, which characteristically and unavoidably belong to human beings,

¹ Camus, Albert, *Re'flexions Sur La Peine Capitale*, 1957, p 125.

² Amnesty International Report, 2001, available at: <http://www.web.amnesty.org/ai.nsf/index/ACT50005200019/03/2003>.

³ Davidson, Scott, *Human Rights*, Open University Press, London, 1993, p 1.

by way of giving necessary compensation in cases of violations. In criminology, the word 'punishment' is used to denote compensation to the violation of one's right to life and the violators (offenders) have to suffer different punishments depending on the aggravating form of violations (wrongdoings).⁷ In cases of grave violation of the right to life, the wrongdoers are executed by the punishment of death penalty.

5. Death Penalty as a Form of Punishment in History:

As a form of punishment death penalty has been getting on all the way through history by different societies. The most primitive death penalty laws dated back the Eighteen Century B.C.'s in the Code of King Hammurabi of Babylon. It contained death penalty provisions for twenty-five different crimes. The Fourteen Century B.C.'s Hittite Code, the Seventh Century B.C.'s Draconian Code of Athens and the Fifth Century B.C.'s Roman Law of the Twelve Tables made death penalty for all crimes. The death penalty was carried out by such means as crucifixion, beating to death, burning alive and impalement.⁸

During the Tenth Century A.D., Britain used hanging as the typical method of execution. In the subsequent century, William the Conqueror authorized hanging in times of war. This trend went wild in the Sixteenth Century, under the reign of Henry VIII. At that time more than 72,000 people are estimated to have been executed. Executions took place for such capital offences as marrying a Jew, not confessing to a crime and treason. By the Seventeen Century, Britain made 222 crimes punishable by death, including stealing, cutting down a tree, and robbing a rabbit warren. Assuming the severity of the punishment of death, many juries wouldn't convict defendants if the offence was not serious. This led to reforms of Britain's death penalty legislations. From 1823 to 1837, the death penalty was abolished for over 100 of the 222 crimes punishable by death.⁹

When European settlers occupied different parts of the world, they carried the practice of capital punishment. Britain as a colonial power influenced America's use of the death penalty more than any other country did. The first recorded execution in the new colonies was that

⁷ Grupp, Stanley E. (ed.), *Theories of Punishment*, Indiana University Press, New York, 1971, p 6.

⁸ Ibid.

⁹ <http://deathpenaltyinfo.msu.edu> 19/03/2003.

of Captain George Kendall in the Jamestown colony of Virginia in 1608. Kendall was exposed to execution for being a spy for Spain. In 1612, Virginia Governor Sir Thomas Dale enacted the Divine, Moral and Martial Laws, containing the death penalty for even minor offences such as stealing grapes, killing chickens and trading with the Indians.¹⁰

A great number of societies think that death penalty prevents future murderers and the society has always used punishment to dispirit future criminals from wrongdoing. Since the society has the highest interest in preventing murder, it imposes the strongest punishment to deter murderers. If murderers are executed, potential murderers will definitely rethink for own life before killing.¹¹ It is presumed by statistical displays, which are not beyond question but convincing, capital punishment is likely to deter more than other punishments because people get frightened of death more than anything else.¹²

Some society imposes death penalty for the taking of a life. The balance of justice is disturbed on killing. Unless that balance is restored by taking murderer's life, society succumbs to a rule of violence. Retributionists rooted in religious values, historically maintain that it is proper to take an 'eye for an eye' and a 'life for a life'. Although the victim and the victim's family cannot be restored to the earlier status, at least an execution brings closer to the murderer (and closer to the ordeal for the victim's family) and ensures that the murderer will make no more victims.¹³

Despite the fact that for centuries, the argument for retaining or abolishing death penalty continues, the abolitionist movement has developed over the life of the human rights movement. Those who do not hold up the death penalty, find support in the writings of European theorists Montesquieu, Voltaire and Bentham and English Quakers John Bellers, John Howard and Cesare Beccaria. In the essay, Beccaria theorised that there was no justification for the State's taking of a life. The abolitionists fuelled by him believe that the death penalty is not a proven deterrent to future murders. The conclusion from

¹⁰ Ibid.

¹¹ Ibid.

¹² Van den Haag Ernest, Amnesty International Report, 2001, available in <http://www.web.amnesty.org/ai.nsf/index/ACT500052000> 19/03/2003.

¹³ Grupp, (ed), op. cite (1971).

years of deterrence studies is, at best, no more of a deterrent than a sentence of life in prison. Criminologists like William Bowers of Northeastern University, maintain that the death penalty has the opposite effect i.e. society is brutalized by the use of the death penalty and this increases the likelihood of more murder.¹⁴ The United States of America, with death penalty, has a higher murder rate than the countries of Europe or Canada, which do not use the death penalty at all.

The abolitionists claim that death penalty does not deter as most people who commit murders either do not expect to be caught or do not carefully weigh the differences between a possible execution and life in prison before they act. Frequently murders are committed in moments of passion or anger, or by criminals who are substance abusers and acted impulsively. The US former Attorney General Jim Mattox who presided over many of Texas's executions, has remarked: 'I think in most cases you'll find that the murder was committed under severe drug and alcohol abuse.'¹⁵

The emotional infatuation for revenge is not a satisfactory justification for invoking a system of capital punishment, with all its associated problems and risks. The laws and criminal justice system should lead to higher principles that tell a complete respect for life, even the life of a murderer. Encouraging the motives of revenge, which ends in another killing, extends the chain of violence. Allowing executions supports killing as a form of 'pay-back.'¹⁶

The human society has never believed the notion of an eye for an eye, or a life for a life, which is a simplistic one. It is not legitimate to torture the torturer, or rape the rapist. Taking the life of a murderer is similarly a disproportionate punishment.¹⁷

The death penalty is unwarranted and unacceptable, since it does not single out the worst offenders. Rather it encourages an arbitrary group based on irrational factors such as the quality of the defence counsel, the country in which the crime was committed, or the race of the defendant or victim.

¹⁴ Amnesty International Report, 2001, available in <http://www.web.amnesty.org/ai.nsf/index/ACT500052000> 19/03/2003.

¹⁵ Ibid.

¹⁶ <http://deathpenaltyinfo.msu.edu> 19/03/2003.

¹⁷ Ibid.

The risk of executing the innocent rules out the use of the death penalty. The death penalty alone imposes an irretrievable sentence. Once an inmate is executed, nothing can make a correction if a mistake has already been done. Many of the innocent accused stays in the death row as a result of factors remaining in the justice system.¹⁸In other cases, DNA testing has exonerated death row inmates. So it can be said that society takes many risks in which innocent lives are lost.¹⁹

6. Death Penalty under International Law:

The Universal Declaration of Human Rights, which was adopted in 1948 as an outcome of World War II, has incorporated most of the human rights. It has specially enshrined the protection of the right to life in Article 3. However, Article 29 recognises that human rights and fundamental freedoms are subject to reasonable restrictions. Though it did not specify clearly, it is presumed that by imposing death penalty as compensation to the violation of one's right to life, the right to life of the wrongdoer may be curtailed in certain circumstances. The death penalty is the only exception that is mentioned in Article 6 of the International Covenant on Civil and Political Rights 1976.

Looking into the consequences that the death penalty has been causing, the community of nations has adopted three international treaties: one is of worldwide scope and application and the other two is regional. They are Second Optional Protocol to the International Covenant on Civil and Political Rights, Protocol to the American Convention on Human Rights, and Protocols 6 and 13 to the European Convention on Human Rights.

Article 6 of the 1976 Covenant containing the right to life provision, is composed of six paragraphs, four of which (2, 4, 5 and 6) make direct reference to the death penalty. This provision which, is set in Article 3 of the Universal Declaration of Human Rights, completes it depending upon the interpretation that is given to Article 3 and with the limitations herein provided. While Article 6 begins by speaking out the right to life, effectually it continues to identify capital punishment as a permissible exception to the right to life, and then spells out limitations on the use of capital punishment. At the same

¹⁸ Belluck, Pam, "Class of Sleuths on Death Row", *N. Y. Times*, February 5, 1999, p. A14.

¹⁹ Leibman, J. S., "The New Death Penalty Debate: What's DNA Got to Do with It?", (2002) 33: 2 *Columbia Human Rights Law Review*, p. 527.

time, in two places Article 6 also contemplates abolition of the death penalty.

(1) The Second Optional Protocol to the International Covenant on Civil and Political Rights:

The Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of death penalty, adopted by the UN General Assembly in 1989, is of worldwide reach.

Article 1 of the Second Optional Protocol consists of two paragraphs. The first provides that no one within the jurisdiction of a State part shall be executed. The second paragraph was added imposing an obligation on States parties to abolish the death penalty.

Article 2 of the Second Optional Protocol permits reservation of the application of the death penalty in time of war, pursuant to a conviction for a most serious crime of a military nature committed during war.

Article 3 of the Second Optional Protocol obliges States parties to take account of information about progress in abolition of the death penalty in their periodic reports to the Human Rights Committee. According to articles 4 and 5, if a State party has already accepted the inter-State and individual communications procedures for the Covenant, these are also relevant to the Second Optional Protocol. However, a State may pronounce otherwise at the time of ratification or accession. Article 6 portrays the provisions of the Second Optional Protocol as additional to the International Covenants on Civil and Political rights. In assessing whether a State has violated article 6 of the Covenant by extraditing an individual to a country where he or she might be executed, the Human Rights Committee deems it relevant that a State may have ratified the Second Optional Protocol to the Covenants.

Any State, which is a party to the International Covenant on Civil and Political Rights, can happen to be a party to the Protocol. This Protocol has 49 parties, and 7 countries have signed but haven't yet ratified.²⁰

²⁰ Amnesty International, *Ratifications of International Treaties to Abolish Death Penalty*, 2001, available at: <http://www.web.amnesty.org/ai.nsf/index/ACT500052000> 19/03/2003.

(2) The Protocol to the American Convention on Human Rights:

The Inter-American human rights system of the Organization of American States, encircling the Western hemisphere, is one of two regional systems with a convention abolishing the death penalty. The Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty was adopted in 1990.

Article 1 asserts that the death penalty shall not be applied by States parties, in their territory to any person subject to their jurisdiction. In the Inter-American Protocol, States parties may apply the death penalty in wartime in harmony with international law, for extremely serious crimes of a military nature. The reference to international law, which incorporates the death penalty provisions of the Geneva Conventions as well as the additional protocols, does not emerge in the Second Optional Protocol.

Any State party to the American Convention on Human Rights can become a party to the Protocol. The Protocol has been signed and ratified by 8 countries; Chile has signed but not yet ratified.²¹

According to Roger Hood's study, 'the hundred year tradition of abolition in South America now hold sway over almost all of the region ... However history shows that, in this region at times of political instability, military governments may reinstate the death penalty for a variety of offences against the state and public order.' On the other hand, the membership of the Organization of American States also includes some of the most ardent retentionist States, including Jamaica, Trinidad and Tobago and the United States of America.²²

(3) Protocol No. 6 to the European Convention on Human Rights:

Protocol No.6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) providing for abolition of death penalty, was adopted by the Council of Europe in 1982.

Article 1 of Protocol 6 establishes three principles:

²¹ Amnesty International, 2001, available at: <http://www.web.amnesty.org/ai.nsf/index/ACT50005200019/03/2003>.

²² Schriffin , N., "Jamaica Withdraws the Right of Individual Petition under the International Covenant on Civil and Political Rights", (1998) 92 :3 *American Journal of International Law*, p. 563.

- a) the death penalty shall be abolished,
- b) no one may be condemned to death and
- c) no one may be executed.

The second sentence of Article 1 prohibits execution, even in the case of an individual destined to death prior to the entry into force of the Protocol.

Article 2 sets out the lone exception to the principle of abolition, that a State may make provision in its law for the death penalty in respect of acts committed in time of war or imminent threat of war. The principal effect of Article 2 is to confirm that the Protocol applies only in time of peace.

Article 3 prohibits any derogation by virtue of article 15 of the European Convention. Ordinarily Article 15 would apply to an additional protocol to the Convention, permitting States parties to derogate in time of war or public emergency threatening the life of the nation. The Protocol does not apply in time of war, where there is a clear overlap between its Article 2 and Article 15 of the Convention.

39 countries have signed and ratified this Protocol and 3 countries have signed but not yet ratified it.²³

(4) Protocol No. 13 to the European Convention on Human Rights:

Protocol No. 13 to the European Convention on Human Rights adopted by the Council of Europe in 2002, provides for the abolition of death penalty in all circumstances, including the time of war or of imminent threat of war. This Protocol has 8 Articles with a preamble. Article 2 of the Protocol prohibits any derogation under Article 15 of the European Convention of Human Rights. Article 3 of the Protocol prohibits any reservation under Article 57 of the European Convention of Human Rights.²⁴

This Protocol has only 5 parties and there are 34 States who have signed but not yet ratified including France, Germany and United Kingdom.

Besides those international treaties, there are some other conventions such as-

²³ Amnesty International Report, 2001, available at: <http://www.web.amnesty.org/ai.nsf/index/ACT500052000> 19/03/2003.

²⁴ <http://deathpenaltyinfo.msu.edu> 19/03/2003.

- (1) the Convention on the Rights of the Child, which prohibits execution of individuals for crimes committed while under the age eighteen years. Article 51 explicitly permits reservations, but only to the extent that they are compatible with the object and purpose of the Convention;
- (2) the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment which envisages that 'all were agreed that the death penalty was a cruel, inhuman and degrading punishment';
- (3) Convention on the Elimination of All Forms of Racial Discrimination, which in its article 5 says, on the issue of death penalty, that States parties will 'undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, ...'.²⁵

7. Death Penalty under International Islamic Law:

- a) The Islamic Council adopted a Universal Islamic Declaration of Rights in 1981, which states: 'Human life is sacred and inviolable and every effort shall be made to protect it. In particular no one shall be exposed to injury or death, except **under the authority of the law.**' The concluding phrase appears to permit capital punishment and is in any case consistent with the practice of all Islamic States.
- b) The Islamic Conference has prepared a document on human rights and Islam, in which Article 2 guarantees the right to life to every human being.²⁶
- c) The Arab Charter of Human Rights, adopted in 15 September 1994, but not yet ratified by any members of the League of Arab States, proclaims the right to life in the same manner as the other international instruments. However, three distinct provisions contained in Articles 10, 11 and 12 recognize the legitimacy of the death penalty in the case of 'serious violations of general law,' prohibit the death penalty for

²⁵ Schabas, William A., *The Abolition of Death Penalty in International Law*, Cambridge University Press, Second Edition, 1997, pp. 364-368.

²⁶ Schabas, William A., "Islam and Death Penalty", (2000) 9: 1 *Bill of Rights Journal*, pp. 223-37.

political crimes and exclude capital punishment for crimes committed under the age of eighteen and for both pregnant women and nursing mothers for a period of up to two years following childbirth.²⁷

8. Death penalty under State Legal Systems:

On the basis of the international conventions and norms stated above, the death penalty provisions of some leading and developing legal systems will be closely examined in the following way---

(1) The United States of America:

The US Supreme Court Justice Arthur Goldberg once said that the deliberate institutionalised taking of human life by the state is the greatest degradation and humiliation of the human personality that one can think of. Although most developed nations in the world have abandoned the death penalty, the US which purports to be a leader in the protection of human rights, retains the death penalty even in the case of children with Somalia.²⁸

The death penalty law, which travelled to America with the European settlers, exists till date with some exceptions. On seeing global protests by the theorists, criminologists and politicians against death penalty having its inhumane consequences, American intellectuals were influenced for abolition of death penalty. Here the credit goes especially to Beccaria, who persuaded them by saying that there was no justification for the States taking for a life.²⁹ In 1794 Pennsylvania repealed the death penalty for all offences except first-degree murder and followed by Michigan, Rhode Island and Wisconsin, which abolished the death penalty for all crimes as well. Although some US states began abolishing the death penalty, most states held onto capital punishment. Some states made more capital offences, especially for offences committed by slaves. In 1838, in an effort to make the death penalty more edible to the public, some states passed laws against mandatory death sentencing, instead enacting discretionary death penalty statutes. With the exception of a small

²⁷ Ibid.

²⁸ Bright, S. B., "Will the Death Penalty Remain Alive in the Twenty-First Century: International Norms, Discrimination, Arbitrariness, and the Risk of Executing the Innocent" (2001) 1 *Wisconsin Law Review*, p. 1.

²⁹ Beccaria, C., *On Crime and Punishment*, H. Paoluccitans, 1963, available in <http://deathpenaltyinfo.msu.edu> 19/03/2003.

number of rarely committed crimes in a few jurisdictions, all mandatory capital punishment laws had been abolished by 1963. During the Civil War, opposition to the death penalty declined, since more attention was given to the anti-slavery movement.³⁰

From 1907 to 1917, six states totally outlawed the death penalty and three limited in to the rarely committed crimes of treason and first-degree murder of a law enforcement official. However, this reform was for the time being. There was turbulent atmosphere in the US, as citizens began to panic about the threat of revolution in the wake of the Russian Revolution. In addition, the US had just entered World War I and there were severe class conflicts as socialists mounted the first serious confrontation to capitalism, As a result, five of the six abolitionist states reinstated their death penalty by 1920.³¹

From the 1920s to the 1940s, there was restoration in the use of the death penalty. This happened partially because of the writings of criminologists, who argued that the death penalty was an indispensable social measure. The 1960s came across challenges to the fundamental legality of the death penalty. Before then, the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution were interpreted as permitting the death penalty. However, in the early 1960s, it was recommended that the death penalty was a 'cruel and unusual' punishment and therefore unconstitutional under the eighth Amendment.

The question of the arbitrariness of the death penalty was brought before the Supreme Court in *Furman v. Georgia*.³² *Furman*, bringing an Eighth Amendment challenge, argued that capital cases resulted in arbitrary and capricious sentencing. In 9 separate opinions, and by a vote of 5 to 4, the Court held that Georgia's death penalty statute, which gave the jury absolute sentencing discretion without any guidance as to how to exercise that discretion, could result in arbitrary sentencing. The Court held that the design of punishment under the statute was therefore 'cruel and unusual' and violated the Eighth Amendment. Thus, on 29 June 1972, the Supreme Court effectively invalidated 40 death penalty statutes, thereby commuting the sentence of 629 death row inmates around the country and

³⁰ <http://deathpenaltyinfo.msu.edu> 19/03/2003.

³¹ *Ibid.*

³² 408 U. S. 238 (1972).

suspending the death penalty because existing statutes were no longer valid. To address the unconstitutionality of unguided jury discretion, some states eliminated all of that discretion by mandating capital punishment for those convicted of capital crimes. However, the Supreme Court in *Woodson v. North Carolina* held this practice unconstitutional.³³

Other states sought to diminish that discretion by providing sentencing guidelines for the judge and jury when deciding whether to impose death penalty. The guidelines authorized for the introduction of aggravating and mitigating factors in determining sentencing. These guided discretion statutes were permitted by the Supreme Court in *Gregg v. Georgia*.³⁴ The Court also said that the death penalty itself was constitutional under the Eighth Amendment. The Court maintained that only after the jury has determined that the defendant is guilty of capital punishment, it would decide in second trial whether the defendant should be sentenced to death or given a lesser sentence of prison time. The Court also accepted the practice of automatic appellate review of convictions and proportionality review.

After the World War II, when many European Countries prohibited or restricted death penalty signing and ratifying international treaties abolishing death penalty, the federal government adopted the death penalty in 1988, expanded it to over forty crimes in 1994 and limited federal review of capital cases in 1996.³⁵ The US retained death penalty through some limitations on capital punishment. The US Supreme Court held in *Coker v. Georgia*³⁶ that the death penalty is an unconstitutional punishment for the rape of an adult woman when the victim was not killed.

The Supreme Court banned the execution of insane persons in *Ford v. Wainwright*.³⁷ However, the Court held that executing persons with mental retardation was not a violation of the Eight Amendment in *Perry v. Lynaugh*.³⁸ Mental retardation would as an alternative, be a mitigating factor to be considered during sentencing. The United

³³ 428 U.S. 280 (1976).

³⁴ 428 U.S. 153 (1976).

³⁵ The Violent Crime Control and Law Enforcement Act 1994.

³⁶ 433 U.S. 584 (1977).

³⁷ 477 U.S. 399 (1986).

³⁸ 492 U.S. (1989).

States Supreme Court agreed to reconsider a twelve-year-old ruling permitting the execution of the mentally retarded in *McCarver v. North Carolina*.³⁹ Governor Jeb Bush confirmed an administrative halt on executions of the retarded in Florida, and legislative bans thereafter passed the legislatures of Arizona, Connecticut, Florida, Missouri, and Texas.⁴⁰

From detention to sentencing, the criminal justice system treats people in a different way based on their race. A person of colour is more likely than a white person to be stopped up by the police, to be abused by the police during that stop, to be arrested, to be deprived of bail, to be charged with a serious crime, to be convicted, and to receive a harsher sentence.⁴¹

Meticulous judges, who have had no knowledge about people of other races, may be prejudiced in their decision making by racial stereotypes and attitudes they have developed over their lives. Without realizing it, a white judge may consider a young white man who is before the court for sentencing as a youth with potential in need of help, but see a young black man as a thug who is to be feared.⁴²

The same favouritism, whether conscious or unconscious, influences the decisions of prosecutors, jurors and other actors in the system. The prosecutor has always discretion to ask for death penalty or not to ask for death penalty or to recommend a sentence less than death in exchange for the defendant's guilty-plea.

That race plays a crucial role in capital sentencing has been confirmed by several studies. Most recently, the US Department of Justice made a thorough examination of its own record on the use of the death penalty and uncovered that over three-fourths of the people given death penalty were members of racial minorities.

The Supreme Court's decision in a case, named *McCleskey v. Kemp*⁴³ race was again in the headline The Supreme Court held that racial disparities would not be acknowledged as a constitutional

³⁹ 532 U.S. 941 (2001).

⁴⁰ Leibman, op cit., at p. 527.

⁴¹ Ibid.

⁴² Ibid.

⁴³ 481 U.S. 279 (1987).

violation of 'equal protection of law' unless intentional racial discrimination against the defendant could be shown.⁴⁴

Poverty enhances the chances of being sentenced to death. All the way through history, the death penalty has been retained almost exclusively for those who are poor. A Court-appointed lawyer who may be short of the skill, resources, and, in some cases, even the inclination to provide a competent defence is representing the major consequence of poverty.⁴⁵

In the late 1980s the Supreme Court disposed of three cases regarding the constitutionality of executing juvenile offenders. In *Thompson v. Oklahoma*,⁴⁶ four Justices held that the execution of offenders aged fifteen and younger at the time of their crimes was unconstitutional. The fifth vote was Justice O'Connor's concurrence, which restricted Thompson to states without a specific minimum age limit in their death penalty statute. The joint effect of the opinions by the four Justices and Justice O'Connor is that no state without a minimum age in its death penalty statute can put to death someone who was under sixteen at the time of the crime.

The subsequent year, the Supreme Court held in the cases *Stanford v. Kentucky* and *Wilkins v. Missouri*⁴⁷ that the Eight Amendment of the Constitution doesn't not prohibit the death penalty for crimes committed at age sixteen or seventeen as it does not fall within the Eight Amendment's prohibition against 'cruel and unusual punishments.' At present 15 States block the execution of anyone under 18 at the time of his or her crime.⁴⁸

In 1992, the United States ratified the International Covenant on Civil and Political Rights. Article 6(5) of this treaty requires that the death penalty not be used on those who committed their crimes when they were below the age of 18. However, although the US ratified the treaty, they have made reservation as to the right to execute juvenile offenders. The Human Rights Committee noted that the ICCPR neither prohibits nor permits reservations and that 'it is desirable in principle that States accept the full range of obligations' and as

⁴⁴ Leibmann (2002), op. cit.

⁴⁵ Ibid.

⁴⁶ 487 U.S. 815 (1988).

⁴⁷ 492 U.S. 361 (1989).

⁴⁸ Leibmann, (2002), op. cit.

evidenced by the preparatory works, the drafters intended to create binding norms that give effect to the standards of the UDHR. As the reservation made by the US offends a preemptory or binding norm, including the prohibition on executing juveniles, it is illegal and must be cut off from the treaty and the US will be bound to the ICCPR without the benefit of the reservation.⁴⁹

Even though the US participated in the drafting of the American Convention on Human Rights and has signed it, it has not ratified it. It failed to put objection to the prohibition of the juvenile death penalty. Therefore, the United States is abstained to Article 4 (Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age...)⁵⁰

Every UN member had ratified the Child Rights Convention except the US and Somalia. A few months before the United Nations Human Rights Committee announced that reservations concerning execution of children were incompatible with rules of customary international law and therefore were invalid. The US seeing this situation and getting no other alternative to make reservation, refused to ratify it.⁵¹

Although the US has not ratified Protocols I and II to the Fourth Geneva Convention, it has ratified the Geneva Convention. Upon the adoption of the text of the Geneva Convention, the US reserved 'the right to impose the death penalty in accordance with the provisions of Article 68', without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins. The US, however, made no reservation to Article 68 at the time of ratification.⁵²

Given these, the US is in violations of the ICCPR, the ACHR, the Child Rights Convention and the Fourth Geneva Convention. Although the US reserved the right to execute defendants according to the standards set by the Supreme Court, its reservations are invalid because they are incompatible with the object and purpose of these

⁴⁹ Ibid.

⁵⁰ Levesque, C. A., "International Covenant on Civil and Political Rights: A Primer for Raising a Defense against the Juvenile Death Penalty in Federal Courts", (2001) 50:3 *American University Law Review*, p. 755.

⁵¹ Ibid.

⁵² Ibid.

treaties. Although its reservations are illegal, the US is still a party without the benefit of the reservations.⁵³

The prohibition of juvenile death penalty has matured into a *jus cogens*, i.e. customary rule of international law. There is a worldwide acceptance of prohibition of juvenile death penalty, which satisfies the first element of generality. As there is little discrepancy concerning the prohibition, the second element of consistency is met. The prohibition has lasted long enough for an extensive and virtually uniform practice to develop, which satisfies the third element of duration. A presumption exists that *opinio juris*, the final element, is fulfilled as only a handful of states practice the juvenile death penalty. Therefore the US is in violation of international customary law regardless of whether its reservations to these four treaties are legitimate.

In 2004, the US has imposed death penalty on 59 persons meaning 20 executions per 100 million residents.⁵⁴

(2) The United Kingdom:

"It is queer to look back and think that only a dozen years ago the abolition of the death penalty was one of those things that every enlightened person advocated as a matter of course, like divorce reform or the independence of India. Now, on the other hand, it is a mark of enlightenment not merely to approve of executions but to raise an outcry because there are not more of them."⁵⁵

Death penalty was the reprimand for murder in English law till the first half of the Twentieth Century. While retribution continued to exist only in a symbolic form elsewhere in the criminal law, capital punishment, as Oxford criminologist Max Grunhut maintained, was a 'powerful relic of retaliation in kind'. The law still replicated the ancient society that every murderer forfeits his life because he has taken another's life: 'He that smiteth a man, so that he die, shall be surely put to death'.⁵⁶

⁵³ Ibid.

⁵⁴ http://en.wikipedia.org/wiki/Right_to_life 18/10/2003.

⁵⁵ George Orwell.

⁵⁶ Hodgkinson, P., "Europe - A Death Penalty Free Zone: Commentary and Critique of Abolitionist Strategies", (2000) 26: 3 *Ohio Northern University Law Review*, p. 626.

From 1887, executions for those under eighteen years were virtually abolished by the use of royal prerogative of mercy. The Children Act 1908 formally abolished the death penalty for persons under sixteen; the Children and Young Persons Act 1933 confirmed capital punishment for those under eighteen. The Sentence (Expectant Mothers) Act 1931 prohibited the death sentence on a pregnant woman.⁵⁷

In practice, the rigidity of the law was lessened by the exercise of the royal clemency. The effect of a reprieve, before 1948, was to decrease the sentence to penal servitude for life.

Nonetheless, the debate in favour of retaining or abolishing death penalty continued in the Parliament, media and streets. Political scientists like John Stuart Mill and his followers supported the retentionists saying that death is more humane than the 'rotting death' of a long prison and Harold J. Laski took the abolitionist view. The Labour Party introduced the Criminal Justice Bill in the Parliament and some amendments were proposed abolishing death penalty but the bill was delayed due to the World War II. After the World War II, some public support went in favour of the retentionists as Nuremberg lent justification to a retributive approach to indigenous murder.⁵⁸ More influential was the rise in officially recorded crime and the 'moral panic' the figures generated. So there was no solution on the issue of death penalty. Prior to 1965, there had been a number of attempts towards the abolition, which were debated and defeated in the main through the un-elected and largely hereditary House of the Lords where the Bishops were instrumental in carrying the opposition.⁵⁹

Following the Royal Commission (Gower Report) in 1953 to report on capital punishment, as a concession the Homicide Act of 1957 was drafted into legislation to distinguish between capital and non-capital homicide. Luckily for the abolitionist movement, this legislation had been drafted so poorly as to make the dissimilarity between capital and non-capital even more ambiguous. The Act attempted to define as capital those crimes that might be deterred by the death penalty,

⁵⁷ Ibid.

⁵⁸ Bailey, V., "Shadow of the Gallows: The Death Penalty and the British Labour Government, 1945-51", (2000) 18: 2 *Law and History Review*, p. 305.

⁵⁹ Ibid.

overlooking any consideration of a moral dimensions. Many commentators assumed that the problems associated with the legislation would lead to perverse jury decisions and this, combined with a recent history of questionable executions, led finally to abolition.⁶⁰

The Murder (Abolition of the Death Penalty) Act of 1965 abolished the death penalty except for treason and piracy, initially for a period of five years, after which it was ratified by a free vote in Parliament.

In 1990, the Parliament considered an abolitionist amendment attempting to bring the residual legislation into line by replacing the words 'hanged by the neck until he be severely dead' with 'sentenced to imprisonment for life' but was defeated. The last instance on which there was a restoration debate was in February of 1994, when all amendments were defeated because of the Conservative Party.⁶¹

Labour's huge win at the general election in 1997 gave all those with an interest in human rights great hope that the UK had finally come into line with its EU partners in such areas as the death penalty, minimum wage, freedom of information and the incorporation of the European Convention on Human Rights into domestic legislation. The House of Commons voted on 20 May 1998, to incorporate into domestic law the 6th Protocol of the ECHR, which was subsequently ratified on 20 May 1999. In the meantime, in the upper house, the House of Lords' amendments to the Crime and Disorder Act, 1998, led to the repeal of the remaining civilian crimes of treason and piracy. The final provisions for the death penalty under military law were eliminated when the Human Rights Act came into force in November 1998.⁶²

There waited one more hurdle for the UK to straddle. This was finally consummated with ratification of the 2nd Optional Protocol to the International Covenant on Civil and Political Rights in December 1999. Little or nothing of these developments was reported in the media, suggesting perhaps that the Government's opposition was superfluous and misjudged. For example, there was no remark, adverse or otherwise, following the decision to sign the 6th Protocol to the ECHR and the 2nd Optional Protocol to the ICCPR. This is especially attention grabbing, given the sensitivity there is in the UK

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid.

to issues of sovereignty and its reputation for being somewhat europhobic.⁶³

The United Kingdom has signed the Protocol No.13 to the European Convention on Human Rights i.e. abolition of death penalty in all circumstances, including time of war or of imminent threat of war, but it has not yet ratified the Protocol.⁶⁴

(3) The People's Republic of China:

For centuries, the state machinery on the Chinese mainland has had a very advanced system of legal enumeration and codification. Imperial dynasties dating back to the Tang (A.D. 619-906) enacted full sets of penal statutes with significant staying power. One factor in such perpetuity may have been the threat of violent justice. Tradition dates the first public execution in China as early as 2601 B.C. In each dynastic Code thereafter, up to and including the final Code of Qing dynasty, there were well over one hundred crimes (such as Plotting Rebellion and Gross Unfilialness) legally punishable by death. In these instances when 'evil is extreme', the offender was usually executed by slicing without the possibility of amnesty. In addition to harsh punishment for these serious crimes against the social and political order, the imperial Codes imposed death sentences for 'ordinary crimes', including trespassing on imperial property, non-manifest theft and the taking of illegal property by an official or clerk. Useless to say, by the time of the Qing the lengthy list of death-eligible crimes in the Code was enforced with great frequency.⁶⁵

The second decade of the Twentieth Century witnessed the fall of the imperial system in China, but the death penalty was retained by its successors. During this turbulent 'Republican Era' from 1911 to 1949, the formal authorities, from Yuan Shikai's Revolutionary Alliance to the developing Chinese Communists and Sun Yat-sen's National People's Party, all had their own laws imposing death penalty. The 'warlords' actually in command of most of the mainland territory during this period certainly had their own extreme form of justice.

⁶³ Ibid.

⁶⁴ Amnesty International, 2001, available at: <http://www.web.amnesty.org/ai.nsf/index/ACT500052000> 19/03/2003.

⁶⁵ Mothy, J. T., "Internal Perspectives on Chinese Human Rights Reform: The Death Penalty in the PRC", (1998) 33: 1 *Texas International Law Journal*, p. 189.

Chiang Kai-shek's original Criminal Code of 1935 contained a number of crimes punishable by death.⁶⁶

In 1956, after a period of warlord and revolutionary violence, Mao Zedong denounced capital punishment and broke with the tradition of legal violence to the people and he expected death penalty to be abolished. But the Criminal Law adopted in 1979 after Mao era expanded the list of crimes punishable by death, a far cry from the hundreds in the Qing Code.⁶⁷

Under both systems i.e. Qing Code and Criminal Law, suspects were put to hardship to extract confessions; summary and secret trials were held, often without appropriate defence; where no law was available to punish, analogy was drawn and sentences were confirmed by nominal approval from the higher courts; executions were held in public places and executants were shown shackled at the ankles, handcuffed behind their backs until their execution. Prisoners may be paraded in trucks driven from a detention centre to the execution ground, often via a public rally sometimes with placards hanging from their necks listing their names and alleged crimes.⁶⁸

The new Criminal Law was passed by the fifth session of the Eighth Congress on 14 March 1997. It specifically laid down three principles that provide the sharpest break from imperial law: abolition of analogy stipulation, the end of special enforcement for cadres and the uniform imposition of punishments per severity of the crime. After the revision of Criminal Law, a total of 68 crimes including non-violent crimes, such as economic crimes, bear the death penalty in 'serious circumstances'.⁶⁹

The nationwide anti-crime campaign, Yanda (Strike Hard) launched on 28 April 1996, led to mass executions in 1996 on a level unprecedented since 1983 and was marked by numerous cases of

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Amnesty International Report, February, 2001, available in <http://www.web.amnesty.org/ai.nsf/index/ACT500052000>; visited on 19/03/2003.

⁶⁹ Svensson, Marina, "State Coercion, Deterrence, and the Death Penalty in the PRC", paper presented to the Annual Meeting of the Association for Asian Studies, Chicago, 22-25 March, 2001.

summary justice.⁷⁰ The campaign has continued until today, focussed in different provinces, on selected crimes and criminal activities. The crimes targeted include primarily corruption, drug trafficking, separatism and more general economic crimes. During 'Strike Hard' people are often sentenced to death or executed for crimes, which may have received a lesser penalty at other crimes or in another region.⁷¹

Under revised Criminal Law, death penalty will not be imposed to pregnant women and persons under the age of 18 at the time of their alleged offence. Though China, who is a party to the Convention of Child, cannot execute a juvenile of 18 under its own law as well, imposed death to Feng Jinliang for kidnapping and murder of two children and he was executed on 22 April 1999.

Though China is one of the five members of UN Security Council, it does not comply with international standards of human rights norms. The application of the death penalty for the non-violent crimes such as economic crimes causes a problem for China as it is in the process of ratifying ICCPR.

In 2004, China executed death penalty in 3,400+ cases meaning 260 executions per 100 million residents.⁷²

(4) The Republic of South Africa:

On the death penalty provision in Section 277 of the Criminal Procedure Act, the Constitutional Court of the Republic of South Africa in *State v. Makwanyane*⁷³ said that the death penalty was unconstitutional for breaching the rights to life and human dignity, and also for being unjustifiable in an open and democratic society.⁷⁴

⁷⁰ Boxer, J. T., "China's Death Penalty: Undermining Legal Reform and Threatening National Economic Interest", (1998) 22: 2 *Suffolk Transnational Law Review*, p. 593.

⁷¹ Amnesty International Report, August, 1997, available at: <http://www.web.amnesty.org/ai.nsf/index/ACT500052000> visited on 19/03/2003.

⁷² http://en.wikipedia.org/wiki/Right_to_life 18/10/2003.

⁷³ 1 LRC 269 (1995).

⁷⁴ Section 33 (1) of the Constitution provided that the rights entrenched in the Constitution may be limited by law of general application, provided that such limitations shall be permissible only to the extent that it is reasonable and justifiable in an open and democratic society based on freedom and equality; and shall not negate the essential content of the right in question. The Court held that since these requirements are not met, the provision of death penalty must be held to be inconsistent with Section 11(2) of the Constitution prohibiting 'cruel, inhuman and degrading treatment or punishment'.

Moreover, South Africa is a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights, which provides for the total abolition of death penalty.

(5) The People's Republic of Bangladesh:

The death penalty provisions contained in several legislations in Bangladesh can be compared with the provisions found in the legislations of Britain before 1823 where the death penalty was imposed for 222 crimes or with the 1612 Virginia Divine, Moral and Martial Laws, which provided the death penalty for even insignificant offences such as stealing grapes, killing chickens and trading with the Indians. The following are the offences punishable by death in the legislations of Bangladesh:

- a) under the Penal Code 1860-
 - i) waging or attempting to wage war or abetting waging of war against Bangladesh,⁷⁵
 - ii) abetment of mutiny, if mutiny is committed in consequence thereof,⁷⁶
 - iii) giving and fabricating false evidence with intent to cause any person to be convicted of a capital offence, if an innocent person is consequently convicted and executed,⁷⁷
 - iv) murder,⁷⁸
 - v) murder by a person under sentence of imprisonment for life,⁷⁹
 - vi) abetment of suicide of child or insane person,⁸⁰
 - vii) attempt by life convicts to murder, if hurt is caused⁸¹
 - viii) kidnapping or abducting a person under the age of ten,⁸²
 - ix) dacoity with murder.⁸³
- b) under the Special Powers Act 1974-
 - i) sabotage,⁸⁴

⁷⁵ Section 121, The Penal Code, 1860.

⁷⁶ Section 132, *ibid.*

⁷⁷ Section 194, *ibid.*

⁷⁸ Section 302, *ibid.*

⁷⁹ Section 303, *ibid.*

⁸⁰ Section 305, *ibid.*

⁸¹ Section 307, *ibid.*

⁸² Section 364A, *ibid.*

⁸³ Section 396, *ibid.*

⁸⁴ Section 15, The Special Powers Act 1974.

- ii) hoarding or dealing in black market,⁸⁵
- iii) counterfeiting currency notes and Government stamps,⁸⁶
- iv) smuggling,⁸⁷
- v) adulteration or sale of adulterated food, drink, drugs or cosmetics⁸⁸and
- vi) attempt for committing offences punishable with death.⁸⁹
- c) under the Arms Act 1878 - using unlicensed firearms for murder;⁹⁰
- d) under the Explosives Act 1884 - abetment and attempts to commit offences punishable with death;⁹¹
- e) under the Explosive Substances Act 1908- causing explosion likely to endanger life, person or property;⁹²
- f) under the Women and Children Anti-oppression Act 2000-
 - i) causing or attempt to cause death to women and children by inflammatory, corrosive or poisonous substances.⁹³
 - ii) trafficking women,⁹⁴
 - iii) trafficking children,⁹⁵
 - iv) detaining women or children for claiming pawn⁹⁶
 - v) causing death by rape,⁹⁷
 - vi) taking part in gang rape⁹⁸
 - vii) causing death for dowry,⁹⁹ and
 - viii) taking any part of the body off for engaging a child in begging etc.¹⁰⁰

⁸⁵ Section 25, *ibid.*

⁸⁶ Section 25A, *ibid.*

⁸⁷ Section 25B, *ibid.*

⁸⁸ Section 25C, *ibid.*

⁸⁹ Sections 25D, *ibid.*

⁹⁰ Section 20A of the Arms Act 1908.

⁹¹ Section 12 of the Explosives Act 1884.

⁹² Section 3 of the Explosives Substances Act.

⁹³ Section 4 of the Women and Children Anti Oppression Act 2000.

⁹⁴ Section 5, *ibid.*

⁹⁵ Section 6, *ibid.*

⁹⁶ Section 8, *ibid.*

⁹⁷ Section 9(2), *ibid.*

⁹⁸ Section 9 (3), *ibid.*

⁹⁹ Section 11(a), *ibid.*

¹⁰⁰ Section 12, *ibid.*

Bangladesh is a party to the Convention on the Rights of Child and hence it cannot impose death penalty on children. Sometimes death penalty is inflicted on children here in Bangladesh due to faulty birth registration system which fails to determine who is a child.

Bangladesh is neither a party to the Second Optional Protocol to the International Covenant on Civil and Political Rights abolishing death penalty nor had been in the process of signing and ratifying it. For this reason it may be claimed that the Second Optional Protocol to the International Covenant on Civil and Political Rights is not binding on Bangladesh. Still Bangladesh can abolish death penalty provisions from its statutes if it tries to promote and protect human rights in compliance with the International Bill of Rights. This is because the Bill neither supports violation of one's inherent right by another nor encourages taking off another's life as compensation for his or her wrongdoing nor expects the violators of one's right to place in the inhumane conditions of the condemned cell for ages awaiting hanging.

However, the Constitution of the People's Republic of Bangladesh embedded in the International Bill of Rights gives recognition that fundamental rights are not absolute; they are subject to reasonable restrictions. Though it has not mentioned plainly, it can be taken from reading that by imposing death penalty as payment to the violation of one's right to life, the right to life of the wrongdoer is shortened in certain circumstances, e.g. trying the offenders without having properly heard, putting the inmates in the brutal conditions of the condemned cell for a considerable period of time awaiting execution.

In 2004, Bangladesh hanged in 7+ cases meaning 5 executions per 100 million residents.¹⁰¹

9. Conclusion:

At the dawn of the 21st Century, the death penalty is considered by most civilized nations as a cruel and inhuman punishment. Like other civilized countries Bangladesh should also consider abolishing cruel and inhuman punishment of death penalty. It has been abolished *de jure* or *de facto* by 106 nations, 30 countries have abolished it since 1990. However, the death penalty continues to be commonly applied in other nations. China, the Democratic Republic of Congo, the United States and Iran are the most prolific executioners in the world. Indeed, the USA is one of six countries (including also Iran in 2004, 159+ hanging; Vietnam in 2004, 64+; Nigeria, Pakistan in 2004, 15+; Saudi

¹⁰¹ <http://en.wikipedia.org/wiki/Right_to_life18/10/2005>.

Arabia in 2004, 33+ and Yemen in 2004, 6+), which executes people who were under 18 years old at the time they committed their crimes.¹⁰² For executing people under 18, the USA and Somalia have not yet fully ratified the UN Child Convention. While international documents have restricted and in some cases even banned the death penalty, its application is still not considered to be against customary international law. Much debate continues in the USA as to whether it constitutes suitable punishment, at least to the most heinous crimes. In recent years, the debate has been further energised by the use of new technologies, which have shown that a large proportion of people sentenced to death are, indeed, innocent.

Despite the fact that we are very far from achieving a worldwide ban on capital punishment considering its harshness, there are certain situations in which the death penalty as a capital punishment should be looked upon as a violation of universally accepted international norms. Where the death sentence is imposed on minors, pregnant woman or persons with psychiatric disorder, at odds with internationally recognised norms, it constitutes a human rights violation. Even where a death sentence is carried out in circumstances that are not in accordance with internationally accepted procedural norms, this constitutes a human rights violation. Further, where the death penalty is imposed for less serious crimes - economic crimes or drug offences - this constitutes a violation of human rights. Again, not only on the grounds of personal circumstances, or because of the disproportionality of the punishment in relation to the crime, but also on the grounds of attendant circumstances, such as the manner in which the sentence is imposed or executed, the conditions of detention and the time spent awaiting execution, the death penalty amounts to a violation of human rights.¹⁰³

¹⁰² Ibid.

¹⁰³ Some portion of the research was done as a part of the coursework at the University of East London and later on it was published in *The Daily Star*, Dhaka, on 29 June 2003.