

**THE CRIMINAL JUSTICE SYSTEM IN SAARC COUNTRIES WITH  
SPECIAL REFERENCE TO AFGHANISTAN**

-Dr. Ashutosh Kumar Srivastava<sup>1</sup>

**ABSTRACT**

*The culture and belief in SAARC region facilitate to develop various religious beliefs in these countries and due to the common colony of British the justice system in all countries are more or less same apart from this evolution of criminal justice system in SAARC countries is different due to their cultural practices.*

*There is a major effect of followers who believe in cultural practices therefore Afghanistan, Pakistan, Bangladesh like countries having Islamic followers are major and Nepal, India like countries having Hindu followers in major populations.*

*SAARC countries who adopted their colonial Laws without even minor changes their criminal justice system is purely common law based and those who have given emphasis on colonial law as well as Islamic laws there are certain conflict in application while Penal code of SAARC countries having common origin, but there are certain differences like the development in member countries. Co-operation is the best guiding principle throughout the world among the nations, the same recognised as guiding principle for smooth governance of SAARC. Such co-operation in SAARC is based on some leading principles like Sovereign equality, Territorial integrity, and political independence, which makes truly cooperation among member nations, cooperation includes areas like security aspects, Drug related crimes, Terrorism, police matters, and social development in the field of criminal justice system which is one among the areas of co-operations*

*SAARC is not only working in criminal justice system enhancement through co-operation but also providing assistance to United Nations counter terrorism committee directorate, against terrorism by establishing Ground work for South Asian region, as terrorism is a mammoth threat to peace in South Asian region, it can be curbed by ground level cooperation among the officials like police judiciary etc.*

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<sup>1</sup> Assistant Professor, FOL, University of Delhi

*SAARC recognised such issues and SAARC terrorist offence monitoring Desk and SAARC Drug offences Monitoring Desk are operational in Colombo, for which police/judicial cooperation is also needed.*

*Afghanistan being country having conflict in two systems of laws needed active aid by SAARC to establish peace.*

### **Common Criminal Justice System is blessing in disguise**

#### **I. Reasons for common Criminal Justice System SAARC**

South Asian Association for Regional cooperation, SAARC was formed as regional cooperation among the regional countries, it was established on 08 December 1985 because its charter was formally approved on the same day by the head of states or government of Bangladesh ,Bhutan, India, Maldives ,Nepal , Pakistan and Srilanka. Afghanistan became a member of SAARC during fourteenth SAARC summit held in Delhi in 2007. Till 2009 china, Japan, republic of Korea, USA, Iran, Mauritius, Australia, Myanmar, and European union have joined SAARC as observer.

SAARC Secretariat is based in Katmandu. Coordinate and monitors implementation activities and serves as channel of communication between the association and its members states , secretariat is headed by Secretary general. Who is appointed from member state in alphabetical order for a three year term.

Decisions are taken on the basis of unanimity. Bilateral and contentious issues are excluded from the deliberations of SAARC.

SAARC is an economic and political organization. Having governing principle like: - respect for sovereignty , territorial integrity, political equality, and independence of all member states, Non interference in internal matters is another principle, Cooperation must be for mutual cooperation. All decision to be taken unanimously with the need of quorum of all eight members.Only multilateral issues to be discussed

#### **Common evolution of Law in SAARC countries**

SAARC member states having common evolution in Law due to same colonies of United Kingdom . The British parliament enacted and formulated Laws to their colonies of Asian Region keeping the view that common practice prevalent in these nations, even certain modifications also made by British parliament themselves. After the post independence period countries like India, Pakistan, Bangladesh & sri-lanka

adapted their colonial legislations rather enacting new penal Laws. Even so these countries made modifications according to their normative structure according to their geographical religious and customary practices. But in the pattern of evolution in Laws in SAARC countries we can see that more or less all are same due to common origin. In south Asia except Nepal other countries have succeeded enough to draft their penal code for stipulating the punishment of criminal offences. However the General code<sup>2</sup>, which is likely to be repealed by civil and criminal code bill, deals with criminal and civil offences in Nepal As the Indian penal code 1860 is a colonial legislation, which is applicable to whole British India even after the Independence of India the two separated countries Pakistan and Bangladesh adopted the same statute of criminal Laws with some minor amendments, Pakistan renamed it as Pakistan penal code PPC- 1860, and Bangladesh renamed it as Bangladesh Penal Code BPC-1860, although the countries have agreed to live an umbrella cooperation of SAARC even they have different punishment provisions for the same nature of offence. Bhutan, Nepal and Sri Lanka abolished the Death penalty so that the highest penalties in these countries are life imprisonment with confiscation of his property even in the case of intentional murder<sup>3</sup>. While some other countries retributive mode of punishment system adopted by some countries like Afghanistan where 514 sections are part of Afghanistan penal code which includes death punishment as maximum punishment. It is similar to Bangladesh and India.

### **Distinguishing Penal Provision in SAARC Nations**

#### **Bangladesh**

- Establishing sexual intercourse without the consent of wife constitute marital rape

#### **Bhutan**

- Doli incapax : child below 10 years
- Pickpocketing : Value-based sentencing
- Money laundering: Value-based sentencing
- Prostitution: Jail imprisonment extend up to 13 years
- Consuming liquor at public place: fine

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<sup>2</sup> Muliki Ain

<sup>3</sup> Penal code of Bhutan, Nepal, srilanka

- Environmental pollution: 1-3 year jail

**Sri Lanka<sup>4</sup>**

- Marrying again during the lifetime of husband or wife leads to punishment of imprisonment for a term of 7 years and fine

**Maldives<sup>5</sup>**

- On intentional crime committed by a child of seven he/she can be sentenced to death
- Disobedience of Sharia Law : Severe punishment
- Adultery, extra-marital relationship, illicit relationship, rape and pre-marital sex, public stoning stripping at public place , and stoned to death in case of rape
- Blasphemy : stoned to death , or death penalty
- Criticizing Islamic Laws or allah or quran: stoned to death or death penalty.

**Pakistan<sup>6</sup>**

- Insulting or defamation of Islam , holy personages, prophet Mohammad and religious artifacts is bigger crime than all other crime
- A person charged under Blasphemy (sec 295B& 295C PPC-1860) goes down the sand as the law provision for death penalty or life time imprisonment and also fine.
- Adultery , illicit relations and premarital sex : Stoning at public place or stripping
- Rape: Publically stoned to death
- Judicial decision is awarded in the line with retributive (tooth for tooth) mode of punishment.

**Nepal<sup>7</sup>**

- Minor below 16
- No one shall injure four footed animal even if such an animal causes loss to one's crop.
- Any person kills or injures that other's person who was killing cow or ox shall not be held guilty.

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<sup>4</sup> Penal code of srilanka

<sup>5</sup> Penal code of Maldives

<sup>6</sup> Penal code of Pakistan

<sup>7</sup> Penal code of Nepal

- Killing of cow or bullock leads to punishment for a term of twelve years and the instigator meets the fate of jail for 6 years
- A person kills yak : Fine of 40 rupee each yak
- Grievous hurts caused to cow: 2years of jail

#### **India<sup>8</sup>**

- Right of Private defence extends to causing death of other on the vent of acid attack Sec 100 IPC
- Unnatural sexual offences lead to punishment of imprisonment for life or imprisonment which may extend to 10 years

#### **Afghanistan**

- Judges shall be punished for making unlawful judgement and they can be sent behind the bar for term of one year which may extend up to 5 years sec 283 <sup>9</sup>
- A person who cut the tree have to meet the fate of imprisonment for a term of three months , a fine of 5000 and compensation for the loss <sup>10</sup>section 349,
- On the event of consuming alcohol, and narcotics substances , one can be punished with imprisonment for a term of 3to 6 months and fine , <sup>11</sup>section 349
- Adultery : imprisonment of 5to 15 years,
- Section 27 defines however other countries statute has not been defined the same.
- As many as 25 sections deals with death penalty
- Showing slides, pictures contrary to culture of Afghanistan leads to imprisonment for 2 years and fine of 24,000; <sup>12</sup>Section 236
- Newsmen, editor, columnist, publisher and among other media content writer can also be punished with imprisonment of a term of 2 years when found disseminating information contrary to the culture of Afghanistan, Section 237.
- Public servant taking bribe: 2-10 years of jail, Section 255.
- A Person who lowers or tears the flag of Afghan : 5-15 years jail<sup>13</sup>

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<sup>8</sup> Indian penal code

<sup>9</sup> Afghanistan Penal Code 1976

<sup>10</sup> Afghanistan Penal Code 1976

<sup>11</sup> Afghanistan Penal Code 1976

<sup>12</sup> Afghanistan Penal Code 1976

- When minor commits crime including a child of below 12 ,may sent to reformation home

## **II. Regional Cooperation on criminal justice system SAARC Cooperation and Law<sup>14</sup>**

Law is nothing but codified commonsense, we can say like at domestic level, while at international level Law is need of region which is codified in an instrument for better cooperation among the region, SAARC also identified some area for concern among all member countries. These areas of concern are like magnacarta and provide strategies to achieve common object of all regional countries.

Area of concern identified by SAARC Countries:

- a) **Cooperation on regional Security** : regional cooperation on area of security was pressing need of the SAARC countries, unethical trade , trafficking, poor infrastructure, technological up gradation, poor labor management, poor man power management, unemployment etc all these are creating threat to regional security in promoting trans boundary problems, an enormous numbers of target have been achieved through successful coordination among the SAARC member countries in the field of drug related crimes , terrorism and police matters. But the regional security and cooperations must be progressive and it should be extend in the area like poverty alleviation, health, human resource development, higher education etc.
- b) **Cooperation on Drugs and Drug related Crime:** fight against unlawful use of drugs and drug related crimes is major aspect in the south Asia, the efforts of SAARC are establishment of agencies to combat with problems. The SAARC Drug Offences Monitoring Desk (SDOMD) was established in Colombo in 1992 with a view to collating, analyzing and disseminating information on drug related offences in the region, which help in cooperation among SAARC Countries.

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<sup>13</sup> Sec 218 Afghanistan Penal Code 1976

<sup>14</sup> nyulaglobal.org /globalex/SAARC

The SAARC has adopted a convention on narcotic drugs and psychotropic substances. SAARC Convention on Narcotic Drugs and Psychotropic Substances was signed on 23 November, 1990. The convention entered into force on 15 November 1993 following its ratification by all member states. It is an achievement of SAARC to combat this problem

- c) **Cooperation against terrorism:** The SAARC Terrorist Offences Monitoring Desk (STOMD) was established in Colombo in 1995. The objectives of the Desk are to collate, analyze and disseminate information on terrorist offences, tactics, strategies and methods.

The SAARC also organized the convention on terrorism i.e. Regional Convention on Suppression of Terrorism which was signed on 4 November, 1987 by member countries and came into force on 22 August, 1988. In twelfth SAARC Summit which was held in Islamabad on 4-6 January, 2004, the Council of Ministers of SAARC countries signed the Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism. The purpose of this Additional Protocol is to strengthen the SAARC Regional Convention on Suppression of Terrorism, particularly by criminalizing the provision, collection or acquisition of funds for the purpose of committing terrorist acts and taking further measures to prevent and suppress financing of such acts. The Additional Protocol to the SAARC Regional Convention on Suppression of Terrorism came into force on 12 January, 2006 and duly ratification by all Member States.

- d) cooperation in Some new aspects :

### **Criminal Justice System**

Criminal Justice System is labyrinthine of various agencies and process that seeks to control crime , minimize the crime and impose penalties for commission of crimes. There are various levels of criminal justice system in all common law countries these level may be local , state or federal each level have their police department and court. Various critical component comprise the criminal justice system these include law enforcement agencies, various courts etc.

- (A)**Law enforcement** In Law enforcement component the police are the initial element who contact with actual criminal activity police function including taking statement gathering evidences , performing investigations arresting

offenders and providing testimony in courts , on the other hand police has to follow some basic rights like one's right to remain silence , right to an attorney, right against self incrimination.

**(B) Court System**

After filing of formal charges against offender the case against the criminal offender will be commenced, criminal justice system include prosecutors, defense attorney and judges prosecutor file case against the offender, lead the case against the offender and also represent the state. While defense lawyer represent the view of offender and work to remove the liability against offender. In this system truth got opportunity to represent themselves Sentencing depend upon capacity of court to pronounce judgment as per their level .

**(C)Legislative Laws:** In common Law countries law legislate by legislature which is meant for this purpose only to avoid arbitrariness of political superior. Criminal justice system follows the legislated laws to solve any conflict or better administration in the countries

**(D) Common feature in SAARC Countries**

In SAARC Countries common aspect is that all countries having criminal justice system based on common law pattern due to the common history as most of them were the colony of United Kingdom where common law system use to prevailed which spread among all.

**III. Criminal justice system in Afghanistan**

In a common law system State is always under onus to provide security to their citizen for attaining this target state become a legitimate user of force against violation in the established rule of Law and under international Law state established under either or both de-facto/ de-jure recognition, in such a case state is legitimate user of force for providing security to their citizen

In order to do this the state needs to apprehend those who use violence illegally and commit crime, this is the job of Law enforcement and security forces. Once apprehended, the state must then hold offenders to account for their actions. This is done through the justice system. Thus there is a clear link between the justice system and the core law and order functions of the state.

In Afghanistan, Justice delivery system is very complex because, while the other states generally have a single justice system that is prominent or dominant, unlike other Afghanistan has two systems, first is the formal state system and the second is informal traditional system. These systems have emerged and coalesced at different historical junctures and draw on various traditions, yet they have evolved to become a part of the same continuum.

Traditional justice system and its mechanisms in Afghanistan<sup>15</sup> operate through two keys informal institutions through – Jirga and Shura. The jirga is an institution unique to the community of Pashtun people. It is a community-based process for collective decision-making and is often used as a dispute settlement mechanism, including imposing agreed sanctions and using tribal forces to enforce its decisions. The Scholars who have studied jirga<sup>16</sup> (the caveat) have pointed out its democratic principles. The term Shura refers to a group of elders or recognized leaders who make decisions on behalf of the community to whom they represent. A quarter of a century of civil strife in Afghanistan weakened not only the central state but also its various systems such as the formal justice system, which meant that people relied more on the informal justice system to resolve their disputes. The weakness, if not virtual non-existence, of state systems during this period ensured the continued salience of the informal traditional system. The use of shura to dispense justice at local levels was also endorsed by the Taliban during their period in power (1996-2001).

Pre-colonial states had their own judicial systems but these were colonized and a uniform judicial system evolved with indigenous legal systems being subsumed under the colonial state justice system. For example, in British India, Hindu law and Muslim law were subsumed under the British model of personal law, while criminal law was applicable to all, irrespective of religious allegiance. In countries that were not formally colonized, indigenous jurisprudence – based on a combination of religion and local customs – was generally formally endorsed by the state, while in Afghanistan the indigenous legal system was a combination of Islamic and tribal jurisprudence. In fact, scholars have pointed to the rich legal traditions in Afghanistan

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<sup>15</sup> <https://asiafoundation.org/2009/02/04/afghanistans-justice-system/>

<sup>16</sup> the caveat however being that in general it includes only men

where the laws of the land before the onset of modernization drew from various sources. What is known as “customary law” in Afghanistan was, an amalgamation of historical traditions, local understandings of Islam and Sharia and the spiritual role of the Sufi leaders.

Nepal is another country in SAARC region which is not formally colonized and the indigenous legal system was a combination of Hindu law and local customs.

From the second half of the twentieth century onwards, formally colonized legal systems began to modernize and were streamlined, this process leading to the refinement, revision and assimilation of the indigenous legal system under the modern state system. It was also begun in Afghanistan, The 1964 Constitution and various modernization initiatives undertaken during the 1950s and 1960s are testimony to this. However, for various reasons such as political instability (that began with the ousting of the monarchy), the Soviet occupation and the subsequent civil war, the momentum was lost. The geographic terrain, with its rugged mountains and the lack of road networks that can ensure the reach of the state to remote areas, also played a role in delaying this process. Thus, unlike other non-colonized states which eventually came to have a unified justice system, Afghanistan continues to have a dual system, albeit one in which the two systems have a relationship with one another and are not mutually exclusive.

Just as the traditional justice system draws from a multitude of sources, so too does Afghanistan’s formal justice system reflects the various regimes that have controlled the state apparatus in different periods of Afghanistan’s history and sought to introduce their own variants of state law. The formal state system reveals influences of French legal thought, moderate Islam, Marxism, and radical interpretations of Islam. Various initiatives undertaken during the 1960s and which received a new lease of life after the Bonn Conference of December 2001 furthered the process of relative secularization of the formal justice system of Afghanistan. Moreover, in the post-Taliban era, attempts have been made to integrate the fundamental principles of human rights and international standards of procedures into the Afghan justice system, while simultaneously forging a stronger and more transparent relationship with traditional justice mechanisms. It is sought to measure public perceptions and experiences of both the formal and informal justice systems. What the data broadly

suggest is the association of the modern state judicial system with the urban milieu, and local shura and jirga with rural locales<sup>17</sup>.

### **Sufferings of Afghanistan**

Afghanistan being a war country having continues civil war and this is responsible for many more violations of civil rights due to all indigenous conflicts in due course of time condition of country gives so much contribution to conflict in SAARC region many more problem of SAARC having Afghanistan connection , and people of Afghanistan facing continuous ill effect on country . due to inefficient criminal justice system in country responsible for lots of problem in country some are studied by UNICEF as mention below.

### **Concept of Double Victims in criminal justice system of Afghanistan<sup>18</sup>**

Many child victims in Afghanistan are punished by the juvenile justice system – victims of sexual abuse, forced marriage, or underage marriage these children are victimised by the justice system as they are prosecuted for having committed crimes. These children are essentially punished for having violated social behaviour and religious norms while they are victims in need of care, protection and justice. The present system results in the under-reporting of sexual abuse and exploitation because victims are afraid to come forward as their testimony may be used against them. The Law and its present implementation lack protective measures for victims of crime and children are particularly vulnerable to being targeted with charge of moral offences as a mean of social control. The prosecution of these children goes against international standards of juvenile justice as well as those rights guaranteed children in the Juvenile Code (2005).

### **Concept of Re-Victimisation in criminal justice system of Afghanistan<sup>19</sup> :**

Where children are the victims of crimes and /or abuse they should not be victimised again by juvenile justice system

### **Conclusion**

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<sup>17</sup> The [Asia Foundation survey](#) Report 2008

<sup>18</sup> Unisef report justice for children in Afghanistan

<sup>19</sup> Unisef report justice for children in Afghanistan

Due to inefficient criminal justice system in Afghanistan, it become epicentre for many more conflict related to criminal justice system of SAARC , so we must help to Afghanistan to build their effective criminal justice system, it will be real help to people of Afghanistan and real cooperation of SAARC to their member countries even it is contrary to SAARC objective , but we cannot cooperate in region without establishing peace in region, we can do it without invading sovereignty of Afghanistan.