

INDIA
27th Session of the Working Group on the Universal Periodic Review
Human Rights Council
May 2017

**Written Statement submitted by the Centre on the Death Penalty, National Law University, Delhi,
India**

**This submission is an abstract of the conclusions of the ‘Death Penalty India Report 2016’
published by the National Law University, Delhi Press in May 2016**

The Death Penalty India Report is in 2 volumes and the full report can be accessed here:

Vol. 1 -- <http://www.deathpenaltyindia.com/wp-content/uploads/2016/05/Death-Penalty-India-Report-Volume-1.pdf>

Vol. 2 -- <http://www.deathpenaltyindia.com/wp-content/uploads/2016/05/Death-Penalty-India-Report-Volume-2.pdf>

Abstract of Conclusions:

1. There undoubtedly exist constitutional, legislative and judicial frameworks to ensure that accused are treated fairly before being convicted and sentenced to death. However, our conversations with prisoners and their families made it extremely clear that there were flagrant violations of even the most basic protections like those against torture and self-incrimination. The systemic inability to provide for competent representation or to undertake effective sentencing procedures in capital cases, along with the widespread dependence on extremely violent investigative methods is symptomatic of the nature and extent of crisis within the criminal justice system. There is widespread alienation from the legal system amongst prisoners sentenced to death with an intense sentiment of systemic injustice. The alienation that prisoners experience through acute lack of awareness of the proceedings in their cases only increases as the case moves up the appellate system. Not only do the geographical distances grow, prisoners are completely in the dark by virtue of being unable to meet their lawyers (or even know who they are) or by not being informed of the progress in their cases. All these factors significantly contribute to raising serious concerns about the fair trial credentials of judicial proceedings in capital cases. The extremely grave rule of law and fair trial concerns with death penalty cases in India cannot be explained away by referring to the general state of the criminal justice system. There must necessarily be a higher burden to be met in cases

where the death penalty is a possibility because of its unique nature as a punishment. The real question to be answered is whether the nature and intensity of violations documented in this Report are acceptable while condemning individuals to live under the sentence of death. This question must be answered on its own terms and it is not sufficient to state that these concerns might hold true of other criminal justice proceedings as well. The experience and consequences of living under the sentence of death are extremely excruciating and this must certainly be reflected in the standards we find acceptable.

2. The observations in Chapter 8 on ‘Living on Death Row’ provide a detailed account of the conditions under which prisons lodge those sentenced to death. Formal prison regulations and informal discriminatory practices adopted by prison administrations ensure that hostile conditions of incarceration are added to the punishment of living under the sentence of death. The treatment of prisoners sentenced to death purely as individuals awaiting execution and the consequential denial of opportunities in terms of education and work is particularly inhumane. It intensifies the uncertainty between life and death as prisoners are then left with very little to do except anticipate their own death. Though not a formal area of research in this Project, psychological consequences of living under such circumstances were evident and must become an institutional priority for further research and remedial measures. The range of factors that determine the experience of living under the sentence of death in an Indian prison provide a very strong case for the position that the extent of suffering under the sentence of death is qualitatively distinct. It is amply clear that there are multiple burdens that the criminal justice system imposes in terms of the death penalty in India. The practices documented in this Report at every stage of the criminal justice system render it extremely difficult to navigate without sufficient economic, social and political resources. In that context the issue on whom the burden of the death penalty falls is crucial. A discussion on the death penalty that is largely focused on the crime would be masking various dynamics of the criminal justice system. Multiple crisis points bear heavily on the criminal justice system and they in turn impose tremendous burdens on everyone coming in conflict with it. However, as far as the death penalty is concerned, the socio-economic profile of prisoners documented in this Report begins to demonstrate that these burdens have a disparate impact on vulnerable and marginalised sections of society along the lines of economic status, caste, religion, and levels of educational attainment. While there has always existed an intuition about this in discussions on the death penalty, the socio-economic profile presented in this Report is hopefully the first step towards understanding the precise burdens that such marginalised sections bear in the context of the death penalty. It is imperative that the socio-economic profile is read in conjunction with the various practices adopted in the criminal justice system to understand the full import of the methods adopted by the investigation agencies, the bar, courts, and prisons. In terms of the credibility of the legal system administering the death penalty, the lack of competent legal representation and the minimalistic (bordering on non-existent) sentencing practices are of particular concern.

3. Very often the concern about the quality of legal representation has been couched in terms of inadequacies of the legal aid system. Such an articulation significantly underestimates and misunderstands the problem. As discussed in Chapter 5 on ‘Legal Representation’, more than 60% of the prisoners sentenced to death had private lawyers in the trial court and High Courts. It must be a cause for extreme concern that prisoners and their families wanted to avoid the legal aid system at all costs and therefore went to great lengths to ensure that they had private legal representation. While this deepened their economic vulnerability, it did not ensure access to competent legal representation. It is evident that the problem of legal representation in capital cases cannot be meaningfully characterised as one of legal aid against private representation. The concern with competent legal representation in capital cases is much broader and cannot be restricted to just legal aid lawyers. This was perhaps most amplified at the stage of sentencing where the sentencing hearings seem to be conducted merely to meet the technical requirements of the law and very little else. Given the paucity of relevant sentencing information being brought before the courts, it is not surprising that the sentencing parts in judgments tend to focus almost exclusively on the nature of the crime.
4. The discourse on the death penalty in courts often reduces individuals to just the crime— with no real space for their past or their future. The lack of engagement with issues of reformation presents a very significant challenge to the manner in which the death penalty is administered. There is hardly ever any mention of the manner in which prisoners sentenced to death have spent their time in prison. As cases find their way up the appellate process with considerable number of years in between, questions of reformation cannot be limited to an evaluation of the individual merely as someone who committed a crime. Reformation is a central sentencing consideration according to the terms on which the Supreme Court upheld the constitutionality of the death penalty in Bachan Singh. In practice, there is negligible enquiry into the history and personality of the prisoner to evaluate her potential for reformation. Even once inside prison, the treatment meted out to prisoners sentenced to death does not facilitate any reformatory process. As stated above, though the appellate process could take many years, prisons often treat prisoners sentenced to death merely as individuals awaiting execution. They are denied opportunities that are available to the general prison population and this further places obstacles in any credible reformation process. The inability of courts to consider conduct of the prisoner during her incarceration, coupled with the restrictive prison conditions creates a situation where any meaningful discussion of reformation is impossible.
5. The Report also tries to bring out the fact that there are very serious and real social costs to the experience that prisoners and their families go through. The social and economic consequences along with debilitating forms of ostracisation that families face heightens their vulnerability, driving them deeper into destitution. The faith of the families in the criminal justice system is further eroded as the case moves into the realm of the appellate

courts and the mercy jurisdiction. The irony of the legal system is such that the closer a prisoner gets to execution, the administration of justice gets more opaque from the perspective of families. It is difficult for the families of prisoners to get any substantial information about the proceedings in the High Court and that problem only worsens when the case moves to the Supreme Court. There is no real protection against such multiple axes of vulnerability and the tendency to see the suffering of prisoner families as morally acceptable collateral costs must be resisted.

6. The contemporary public discourse in India on the death penalty has tremendous focus on issues of sexual violence and terrorism. The range of concerns identified in this Report apply with as much force, if not more, to these categories of crimes. The intense social reactions to such crimes only aggravates the systemic concerns identified in this Report. It puts even more pressure on actors within the criminal justice system to produce results and this often translates into more custodial violence, prosecutorial misconduct and fair trial violations. In that context, the recommendation of the Law Commission of India in its 262nd Report (August 2015) to abolish the death penalty for all crimes except terrorism must be treated with scepticism as a strategic compromise rather than a recommendation based on ground realities.
7. The questions that this Report raises for the criminal justice system are by no means unique to India. In the context of the death penalty, countries have responded to these challenges differently—abolition (complete or partial), moratorium on executions, widespread criminal justice reforms connected to various aspects of the administration of the death penalty are all responses that have been seen in different parts of the world. There is an unmistakable global trend with more than 150 of the 193 UN Member States abolishing the death penalty (in law or in practice) and even retentionist countries like the United States and China witnessing significantly lesser use of the death penalty. Surely, a discussion in India on the death penalty must give significant weight to its local context, but the systemic realities of its criminal justice system must also form an essential part of such a context. As stated in the Introduction, this Report is not meant to consider the case for abolition of the death penalty. While any discussion on the abolition of the death penalty requires a wider consideration of factors that are beyond the scope of this Report, such discussions cannot ignore the nature and extent of the crisis within the criminal justice system documented in this Report. However, a lot more research remains to be done on various aspects of the death penalty in addition to building on the small steps taken by this Report. Issues of mental health amongst prisoners sentenced to death, the relationship between victims' rights and the death penalty, deeper investigations into the nature and meaning of 'public opinion' on the death penalty, in-depth analysis of sentencing practices in trial courts are some of the areas that require urgent attention. Discussions on the death penalty are quick to dive into merits of the death penalty as a form of punishment without comprehending the systemic realities within which it operates. For far too long, discussions on the death penalty in India have been

characterised by rather disquieting levels of abstraction. It is rather curious that during these discussions, the realities of the criminal justice system are largely ignored and a misplaced confidence around it is constructed. Meanwhile, those inhabiting worlds locked away from our sights and minds, within high impenetrable walls, have stories to tell that ask damning questions of us.

Centre on the Death Penalty
National Law University, Delhi
Sector 14, Dwarka
New Delhi 110078
India

Email: deathpenalty@nludelhi.ac.in
Phone: +91-11-28032533