

Summary Report¹

The Death Penalty in India: A Lethal Lottery

A study of Supreme Court judgments in death penalty cases 1950-2006

Introduction

India stands poised between the global trend to end the death penalty and those nations that continue to execute. Like many of the diminishing number of nations that still apply the death penalty, over the last two decades, India has reduced the number of executions carried out.

The Indian judiciary has ruled that the death penalty for murder must be restricted to the “rarest of rare” cases, but this instruction has been contradicted by the legislature increasing the number of offences punishable by death. The death penalty is mandatory under two of the relevant laws, including for drug-related offences. Death sentences have been imposed on people who may have been children at the time of the crime, and on people suffering from mental illness. There are grave concerns about arbitrariness and discrimination in the processes that lead to people being sentenced to death. Such factors would render India’s use of the death penalty to be in violation of international laws and standards.

Amnesty International is urging the Government of India to declare an immediate moratorium on executions with a view to abolishing the death penalty. As an emerging global and regional power and a party to the International Covenant on Civil and Political Rights and other international human rights treaties, India has an

¹ This report available at <http://www.amnesty.org/en/report/info/ASA20/006/2008>. It summarises a 243-page study published by Amnesty International-India and the People’s Union for Civil Liberties (Tamil Nadu & Puducherry), *Lethal Lottery: The Death Penalty in India, A study of Supreme Court judgments in death penalty cases 1950-2006*, New Delhi, 2 May 2008, AI Index: ASA 20/007/2008. This full report is available at <http://www.amnesty.org/en/report/info/ASA20/007/2008>.

opportunity to exercise regional leadership and to strong signal of its determination to fully uphold human rights by abolishing the death penalty.

In the past three decades, great strides have been made towards a world free from executions. In 1980 only 25 countries had abolished the death penalty for all crimes. That figure now stands at 91, with a further 11 countries having abolished the death penalty for “ordinary” crimes (but retained it for offences such as treason or under military law). Thirty-three countries are considered by Amnesty International to be “abolitionist in practice” in that they retain the death penalty for ordinary crimes such as murder but have not executed anyone during the past 10 years and are believed to have a policy or established practice of not carrying out executions, meaning that a total of 135 of the world’s nations have turned their back on capital punishment in law or practice.

The worldwide trend towards abolition is strong and clear. Outside China, an execution is becoming an increasingly rare event. Vast swathes of the world are now execution-free. In Africa only five countries executed in 2007; Belarus is the only European country that continues to use the death penalty; and the USA is the sole country in the Americas to have carried out any executions since 2003.

This trend was most recently illustrated by the world community voting at the United Nations General Assembly for a moratorium on executions. The resolution was passed on 18 December 2007 by 104 votes to 54 (with 29 abstentions). Regrettably, India voted with the minority. The resolution is clear in its aim and instructs countries to impose an immediate moratorium on executions as a first step towards abolition.

At the end of 2007, some 14 countries in Asia Pacific still retained the death penalty, including China, where executions outnumber those in the rest of the world combined. However, there is movement towards abolition in the region. In 2006 and 2007 respectively, the Philippines and the Cook Islands abolished the death penalty joining those 17 other Asia Pacific countries that have abolished the death penalty for all crimes.² Twenty seven countries have now abolished the death penalty in law or in practice in the Asia Pacific region. In South Korea and Mongolia there have been legislative initiatives to abolish the death penalty. There have also been increased

² Australia, Bhutan, Cambodia, Cook Islands, Kiribati, Marshall Islands, Micronesia, Nepal, New Zealand, Nieu, Palau, Philippines, Samoa, Solomon Islands, Timor-Leste, Tuvalu, Vanuatu.

levels of regional activism against the death penalty by individuals and civil society groups.³

This report summarises the key findings of the report of Amnesty International-India and the People's Union for Civil Liberties (Tamil Nadu & Puducherry), released on 2 May 2008 (hereafter referred to as the study). The study, entitled *Lethal Lottery: The Death Penalty in India - A Study of Supreme judgments in death penalty cases, 1950-2006* highlights the essential unfairness of the death penalty in India by analysing evidence found in Supreme Court judgments of abuse of law and procedure and of arbitrariness and inconsistency in the investigation, trial, sentencing and appeal stages in capital cases.

The study and its summary seek to bring objectivity to the debate on the death penalty in India and, by so doing, to persuade the public and decision-makers that society will be better off by outlawing the punishment.

Facts and figures

There are two broad categories of legislation providing for the death penalty in India: the Indian Penal Code (IPC), and special or local legislation. Within the IPC, nine offences are punishable by death.⁴ At least 14 other 'special' or 'local' laws also provide for the death penalty.⁵ Three of these are successive anti-terror laws. The most

³ In July 2006 lawyers, parliamentarians, representatives of non-governmental organizations and activists from India and across Asia Pacific met in Hong Kong to discuss future campaigning against the death penalty in the region. The Anti-Death Penalty Asia Network (ADPAN) was launched in October 2006 to raise public awareness about the inequalities and unfairness of the death penalty.

See <http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/adpan>

⁴ The IPC provides for capital punishment for the following offences, or for criminal conspiracy to commit any of the following offences (Section 120-B):

- (1) Treason, for waging war against the Government of India (s.121)
- (2) Abetment of mutiny actually committed (s.132)
- (3) Perjury resulting in the conviction and death of an innocent person (s.194)
- (4) Threatening or inducing any person to give false evidence resulting in the conviction and death of an innocent person (s.195A)
- (5) Murder (s.302) and murder committed by a life convict (s. 303). Though the latter was struck down by the Supreme Court, it still remains in the IPC
- (6) Abetment of a suicide by a minor, insane person or intoxicated person (s.305)
- (7) Attempted murder by a serving life convict (s.307(2))
- (8) Kidnapping for ransom (s.364A)
- (9) Dacoity [armed robbery or banditry] with murder (s.396)

⁵ The death penalty is provided under the following special and local laws:

recent law to be passed that provides for the death penalty is the Unlawful Activities (Prevention) Ordinance 2004.

The government of India will not disclose how many people have been executed and how many are awaiting execution today. According to the latest official figures, there were 273 persons under sentence of death as of 31 December 2005. However, the National Crime Records Bureau, which publishes these figures, does not distinguish between condemned prisoners whose sentences have been passed by a trial court, those whose sentences have been upheld by a High Court or the Supreme Court, and those whose mercy petitions are pending or have been rejected by the executive.

Amnesty International believes this figure to be a gross underestimate. At least 140 people are believed to have been sentenced to death in 2006 and 2007. Some 44 persons are currently known to be on death row awaiting a decision on their mercy petitions by the President of India (the last possible recourse). The execution of some of these prisoners may be imminent.

Executions in India are carried out by hanging.

The death penalty process

Under the ordinary criminal law, all trials involving a possible death sentence are initially held before a District and Sessions Court at state level. Death sentences imposed in such trials must be reviewed by the High Court of the same state, which

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- (1) Laws relating to the Armed Forces, for example the Air Force Act 1950, the Army Act 1950 and the Navy Act 1950 and the Indo-Tibetan Border Police Force Act 1992
 - (2) Defence and Internal Security of India Act 1971
 - (3) Defence of India Act 1971 (s.5)
 - (4) Commission of Sati (Prevention) Act 1987 (s.4(1))
 - (5) Narcotic Drugs and Psychotropic Substances (Prevention) Act, 1985, as amended in 1988 (s.31A)
 - (6) Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) (s.3(2)(i))
 - (7) Prevention of Terrorism Act 2002 (POTA) (s.3(2)(a))
 - (8) Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989 (s.3(2)(i))
 - (9) Explosive Substances Act 1908, as amended in 2001 (s.3(b))
 - (10) Arms Act 1959 (as amended in 1988), (s.27)
 - (11) Unlawful Activities Prevention Act 1967 (as amended in 2004) (s.16(1))
 - (12) A number of state laws, including: Maharashtra Control of Organised Crime Act 1999 (s.3(1)(i)), Karnataka Control of Organised Crime Act 2000 (s.3(1)(i)), The Andhra Pradesh Control of Organised Crime Act, 2001(s.3(1)(i)), The Arunachal Pradesh Control of Organised Crime Act, 2002 (s. 3(1)(i))

has the power to direct further inquiry to be made or additional evidence to be taken upon any point bearing on the guilt or innocence of the defendant. In the High Court, a bench comprising a minimum of two judges must, on appreciation of the facts, come to its own conclusion on guilt and award sentence as deemed fit in the circumstances of the case. Based on its assessment of the evidence on record, the High Court may

- (1) confirm the death sentence or impose another sentence in its place;
- (2) annul the conviction and convict for any other offence of which the Sessions Court might have convicted the defendant, or order a new trial on the basis of the amended charge; or
- (3) acquit the defendant.

The High Court serves as the first court of appeal for a person sentenced to death, except under some anti-terrorist legislation where the Supreme Court of India is the first appellate court. Where a death sentence has not been imposed by a trial court, the State can appeal to the High Court to enhance the sentence to one of death.

There is no automatic right of appeal to the Supreme Court, except in cases where a High Court has imposed a death sentence while quashing a trial court acquittal. Even where a High Court enhances a trial court's sentence to that of death, there is no automatic right of appeal to the Supreme Court. 'Special leave' to file an appeal with the Supreme Court has to be granted by the High Court or by the Supreme Court itself.⁶

The judicial process in capital cases comes to an end once the higher courts have confirmed the death sentence. At this stage, the defendant can file a mercy petition with the state or national executive. Under Articles 72 and 161 of the Constitution of India, the state governor and the President of India have the power to grant pardon or commutation of sentence. These constitutional provisions implicitly allow for a two-tier process of seeking commutation, first from the state governor and then from the President. The executive also has the power under the Indian Penal Code to commute a death sentence without the consent of the offender.

⁶ It is impossible to know how many special leave petitions have been summarily rejected by the Supreme Court given the Court's standard one-line orders, dismissals of special leave petitions are largely unreported. In a report published in 2003, the Law Commission of India declared that it was in favour of amending the law to provide for a mandatory appeal to the Supreme Court in capital cases, given that the death penalty "is qualitatively different from any other punishment and is irreversible and there is scope for correcting an error." (Report No.187 of the 17th Law Commission of India, 2003, *Mode of Execution of Death Sentence and Incidental Matters*)

Constitutionality and procedural reforms

'A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.' – Indian Supreme Court judgment in *Bachan Singh v. State of Punjab* (All India Reporter – AIR 1980 SC 898) (emphasis added)

At independence in 1947, India retained the 1861 Penal Code which provided for the death penalty for murder, requiring judges to state the reasons if a death sentence was not imposed.⁷ During the drafting of the Indian Constitution between 1947 and 1949, several members of the Constituent Assembly expressed the ideal of abolishing the death penalty, but no such provision was incorporated in the Constitution. Private members' bills to abolish the death penalty were introduced in both houses of parliament over the next two decades, but none of them was adopted.

In 1973, the Supreme Court of India upheld the constitutionality of the death penalty for the first time in the case of *Jagmohan Singh v. State of U.P.* (AIR 1973 SC 947). In the same year, a new Code of Criminal Procedure was adopted. The new Code required judges to note 'special reasons' when imposing death sentences and required a mandatory pre-sentencing hearing to be held in the trial court. The requirement of such a hearing was obvious, as it would assist the judge in concluding whether the facts indicated any 'special reasons' to impose the death penalty.

In 1980, the Supreme Court again upheld the constitutionality of the death penalty in the key case of *Bachan Singh v. State of Punjab (with 7 other cases)*, although the bench was not unanimous. The judgment called for aggravating and mitigating circumstances with reference to both the crime and the convicted prisoner to be considered in passing sentence and emphasised that the death penalty should be used only in the "rarest of rare" cases.

In 1991, a Supreme Court bench again upheld the constitutionality of the death penalty in *Smt. Shashi Nayar v. Union of India and others* (AIR 1992 SC 395). The Court did not go into the merits of the argument against constitutionality, arguing that the law and order situation in the country had worsened and now was therefore

⁷ An Act amending the Code of Criminal Procedure that came into force in 1956 deleted the requirement for judges to give reasons for awarding a punishment other than death after conviction in a capital case. Judges now had the discretion to award any of the punishments provided by the relevant law. In the case of murder, the choice available to the judge was a death sentence or life imprisonment.

not an opportune time to abolish the death penalty. An argument which assumes executions address such situations.

In recent years, the Supreme Court has reversed two practices that had been observed for several decades in capital cases. The first practice was not to impose a death sentence where the judges hearing the case had not reached unanimity on the question of sentence or of guilt. The second was not to impose a death sentence on a person who had previously been acquitted by a lower court. Since 1999 and 2003 respectively, the Supreme Court has imposed or upheld death sentences in such cases.⁸

A survey of Supreme Court judgments

The study, by Amnesty International-India and the People's Union for Civil Liberties (Tamil Nadu & Puducherry), was initiated because of a vital gap that affected those campaigning against the death penalty: the absence of a comprehensive analysis of facts relating to the practice of capital punishment. There exist woefully few researched studies on the subject. In its most recent ruling upholding the constitutionality of the death penalty, delivered in 1991, the Supreme Court relied on a report on the death penalty compiled by the Law Commission of India over two decades earlier in 1967.

The study was based on judgments of the Indian Supreme Court given between 1950 (when the Indian Constitution came into effect, establishing the Supreme Court as the highest court of the land) and 2006, in which the Court considered the imposition of the death penalty or adjudicated on a particular aspect of capital punishment. The research involved the study of over 700 judgments given during the period that were reported in law reporters (journals).

As the study relied on reported judgments, it was bound by certain limitations. For example, the socio-economic background of defendants does not normally emerge from the rulings, as it is judicial practice in India to avoid references to caste, community, religion and other socio-economic factors relevant to the victim or the accused, unless seen to be of direct relevance to the adjudication of the case. It is therefore almost impossible to analyse the impact of the application of the death penalty on members of particular religious or caste groups through a study of the judgments. There is an urgent need for more detailed studies, including detailed analyses of individual cases. Other countries have been shown to be using the death penalty in a highly prejudicial manner against individuals based on their ethnic origins

⁸ See, for example, *State through Superintendent of Police, CBI/SIT v. Nalini and Others* ((1999) 5 SCC 253); *State of Rajasthan v. Kheraj Ram* ((2003) 8 SCC 224).

or similar factors. For example, in the United States of America the death penalty has been shown to be disproportionately used against African Americans.⁹

Amnesty International believes that it is impossible for a judicial system to completely insulate itself from prejudices present in the society it serves. Therefore the only way to ensure that individuals are not subjected to the death penalty because of prejudice against their ethnic or social background is to abolish the death penalty.

The hanging of a person by the neck, at the end of a legal process involving the executive and the judiciary at various stages, was found in the study to be profoundly arbitrary. Taken as a whole, the cases indicated abuses of law and procedure throughout the legal process: from the initial collection of evidence (including interrogation of the accused) by police, to the consideration of evidence by the courts, to the process of sentencing and appeals. As regards sentencing, the study focused on the results of judicial discretion as well as on the process itself, which was found to be flawed. The study also looked at the executive process of consideration of mercy petitions.

Consideration of evidence

It is a shocking fact that most death sentences handed down in India are based on circumstantial evidence alone. In the absence of forensic facilities, the testimony of witnesses is crucial, but there is widespread acknowledgement of the use by police and prosecution of stock or professional witnesses. A 1979 study of Supreme Court judgments in capital cases between 1972 and 1976 found that the most common defence put forward was that of false implication. This also concluded that the reason this defence was so common was that it was very often true.¹⁰

In his dissenting judgment in *Bachan Singh v. State of Punjab (Minority Judgment)*, published in 1982, in which he argued that the death penalty was unconstitutional, Justice Bhagwati of the Supreme Court identified a number of problems within the criminal justice system:

“Our convictions are based largely on oral evidence of witnesses. Often, witnesses perjure themselves as they are motivated by caste, communal and factional considerations. Sometimes they are even got up by the police to prove

⁹ For further information see Amnesty International, *USA: Death by discrimination – the continuing role of race in capital cases*, AI index AMR 51/046/2003, available at <http://www.amnesty.org/en/library/info/AMR51/046/2003>

¹⁰ A.R. Blackshield, ‘Capital Punishment in India’, *Journal of the Indian Law Institute*, Volume 21(2), 1979

what the police believes to be a true case. Sometimes there is also mistaken eyewitness identification and this evidence is almost always difficult to shake in cross-examination. Then there is also the possibility of a frame up of innocent men by their enemies. There are also cases where an overzealous prosecutor may fail to disclose evidence of innocence known to him but not known to the defence. The possibility of error in judgment cannot therefore be ruled out on any theoretical considerations. It is indeed a very live possibility ..."

Justice Bhagwati's concerns in 1982 reflected concerns raised 35 years earlier by members of India's Constituent Assembly when they drew up its constitution. The concerns unfortunately remain relevant today.

International laws and standards pertaining to the death penalty are clear on this issue and state the death penalty can only be imposed after exacting legal standards. For example, Safeguard 5 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, states: "Capital punishment may only be carried out pursuant to a final judgment rendered by a competent court after legal process which gives all possible safeguards to ensure a fair trial, at least equal to those contained in article 14 of the International Covenant on Civil and Political Rights, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings."¹¹

Any judicial system that carries out executions runs the ever present risk of executing those innocent of the crime for which they were condemned. Such risks are compounded when the judicial system lacks fairness and adequate safeguards.

A number of cases examined in the present study illustrate how innocent persons have been sentenced to death on the basis of false and fabricated evidence, often used in manipulated investigations and prosecutions, with investigating and prosecuting agencies acting in collusion. The object is often to protect influential offenders. The study revealed a number of capital cases in which confessions appear to have been procured forcibly. The Supreme Court's acceptance of evidence that might not have been given voluntarily in a number of cases tried under the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) is a matter of particular concern.

¹¹ For further information see Amnesty International, *International Standards on the Death Penalty*, AI Index:Act 50/001/2006, January 2006, available at <http://www.amnesty.org/en/library/info/ACT50/001/2006>

In a 1994 Supreme Court judgment (*Rampal Pithwa Rahidas v. State of Maharashtra* (1994 Supp (2) Supreme Court Cases - SCC 478)), the Court observed that 'the manner in which the investigating agency acted in this case causes concern to us. In every civilised country the police force is invested with the powers of investigation of the crime to secure punishment for the criminal and it is in the interest of society that the investigating agency must act honestly and fairly and not resort to fabricating false evidence or creating false clues only with a view to secure conviction because such acts shake the confidence of the common man not only in the investigating agency but in the ultimate analysis in the system of dispensation of criminal justice.'

In this case, the trial court had sentenced eight people to death. The High Court upheld the sentences of five of them, but the Supreme Court acquitted them all, noting that the main evidence against them was not trustworthy. The Court noted sarcastically that the main witness's memory constantly improved (his testimony at the trial three years after the incident was observed to be far more detailed than his confessional statement recorded a few days after the incident). The Court concluded that the witness was pressured by the police to give evidence because "the investigation had drawn a blank and admittedly the District Police of Chandrapur was under constant attack from the media and the public."

In a judgment in 2001 (*Sudama Pandey and others v. State of Bihar* (AIR 2002 SC 293)) relating to a case in which the trial court had sentenced five people to death for the attempted rape and murder of a 12-year-old child, the High Court had commuted the sentences, but the Supreme Court noted that it was unfortunate that the High Court did not also properly review the evidence. Acquitting the accused, the Supreme Court noted that both the trial court and the High Court had committed a serious error by appreciating circumstantial evidence, resulting in a miscarriage of justice. In an indictment of the lower judiciary, the Supreme Court remarked: "The learned Sessions Judge found the appellants guilty on fanciful reasons based purely on conjectures and surmises ... It is all the more painful to note that the learned Sessions Judge, on the basis of the scanty, discrepant and fragile evidence, found the appellants guilty and had chosen to impose capital punishment on the appellants."

In *Krishna Mochi and others v. State of Bihar* ((2002) 6 SCC 81) a three-judge bench disagreed over the sentence imposed on one of the appellants, while agreeing on the conviction and upholding the death sentence awarded to three other appellants. In a dissenting judgment, Justice Shah argued that the shortcomings in the investigation and the evidence that only proved the presence of the accused at the scene of the offence meant that this could not be a fit case for imposing the death penalty. On the other hand, he observed, "this case illustrates how faulty, delayed, casual, unscientific investigation and lapse of long period of trial affects the administration of justice which in turn shakes the public confidence in the system."

Of the over 700 cases examined in the study, over 100 were found to have resulted in acquittals by the Supreme Court. In a small number of cases the accused were sentenced to life imprisonment by the trial court, the sentence was enhanced to death by the High Court, and the accused were then acquitted by the Supreme Court. These are perhaps the most blatant examples of the arbitrary and deadly potential of the criminal justice system. In a considerably larger number of cases the accused were sentenced to death by the trial court, had their sentence commuted by the High Court, and were acquitted of the capital charge by the Supreme Court. While it may be tempting to use these cases as proof of the benefits of a hierarchy of courts where errors are ultimately corrected, the reality reveals a number of gravely concerning features. First, in all such cases *both* of the lower courts were in error. Second, the errors were corrected only after the convicted person had spent a long time in prison, with a substantial part of it under sentence of death. Some of these people had been in prison for over 10 years before being acquitted.

It is pertinent to keep in mind that the cases discussed in the study are cases in which errors were uncovered by the Supreme Court. Given the large number of special leave petitions that have been dismissed summarily by the Supreme Court and the absence of a mandatory appeal to the Supreme Court, it is impossible to quantify the number of capital cases in which errors may have slipped through the system. Similarly, it is impossible to quantify those errors that the Supreme Court may have missed despite examining the material available to them. An analysis of cases since 1999 where death sentences were upheld by non-unanimous benches of the Supreme Court indicates that dissenting voices were raised largely because of concerns that the evidence on record was insufficient to prove guilt, or that there were other errors fatal to the prosecution case. The study also shows that the Supreme Court has ignored evidence that lawful procedures have been bypassed and upheld death sentences that may have been founded on wrongful convictions. Given the absence of a higher judicial forum and the rarity of review proceedings, the vagaries of such cases hardly ever come to light.

Inadequate legal representation

The study identified a number of concerns about legal representation in capital cases. The concerns included lawyers ignoring key facts of mental incompetence, omitting to provide any arguments on sentencing, or failing to dispute claims that the accused was under 18 years of age at the time of the crime despite evidence to the contrary. These facts came to light only because they were observed by the Supreme Court in their judgments. On other occasions the Supreme Court may have disregarded evidence of the absence or ineffectiveness of counsel, leading the authors of the study to conclude that the number of accused in capital trials who were been served by inadequate counsel is probably high but remains unknown.

It should not be necessary to underline the importance of adequate legal representation for those facing trial in capital cases, particularly at the earliest stages. For them it can literally be a matter of life or death. Crucially, the higher judicial fora hearing appeals in India are constrained by being able to consider only the evidence brought before the trial court. Although a High Court has the powers to issue directions for fresh evidence to be introduced, these powers are rarely used. Hence the quality of defence evidence at the trial stage is of utmost importance. It is not just evidence relating to the innocence or culpability of the accused which can be vital, but also evidence relevant to the court's consideration of mitigating factors when deliberating on sentence – social, personal, psychological or cultural information that shows the context of the crime and the character of the accused. The absence of such evidence in the sentencing process can seriously prejudice the way in which the case is treated through the remaining judicial process.

With a large number of the accused in capital trials poor and illiterate (reflecting the general picture for the criminal justice system as a whole), even where individuals may be able to afford legal representation, the quality, ability and experience of counsel in capital cases are unknown variables. This is particularly problematic as regards legal aid counsel.

The study noted the lack of legal aid and legal representations immediately after arrest and during remand and bail proceedings. Legal representations at these stages can play a vital role in preventing torture and ill-treatment, which can result in forced confessions. This is particularly problematic in cases where detainees are detained under anti-terrorism legislation, where the law has allowed for long periods in police detention and for confessions made to a police officer to be used as evidence. Furthermore, the study noted that the need for legal aid and legal representation during preparation of mercy petitions and in filing writ petitions in the Supreme Court or the High Courts after completion of the appeals stage has not been adequately addressed, either by the state – which has responsibility for ensuring provision of such services – or by the Supreme Court in its adjudication of individual cases.

Anti-terrorist legislation

The study highlighted cases of people sentenced to death under successive special anti-terrorist laws. Major concerns include the broad definition of 'terrorist acts' for which the death penalty can be imposed; insufficient safeguards on arrest; provisions allowing for confessions made to police to be admissible as evidence, unlike the provisions under ordinary criminal procedure; obstacles to confidential communication with counsel; insufficient independence of special courts from executive power; insufficient safeguards for the principles of presumption of innocence; provisions for

discretionary *in camera* (closed) trial; provisions for secrecy of witnesses' identity; and limits to appeal.

The cases examined in the study that have been tried under special anti-terror laws not only reveal capital trials in which safeguards for fair trial have been inadequate; they also raise concerns that the suspension of safeguards has been resorted to far too broadly, encompassing cases that should not have been tried under special legislation at all, such as kidnapping and communal violence. The fact that the death penalty is involved only serves to heighten the concern.

Devinder Pal Singh Bhullar was sentenced to death by a designated court in 2001 under the Terrorist and Disruptive Activities (Prevention) Act 1987 (TADA) after being found guilty of involvement in the 1993 bombing of the Youth Congress Office in Delhi, which led to the deaths of many persons (*Devender Pal Singh v. State, N.C.T. of Delhi and arr.* ((2002) 5 SCC 234)). The prosecution's case was that he had voluntarily confessed to his role in the bombing to the police. The prosecution relied almost solely on this alleged confession by the accused, which he subsequently retracted. The Supreme Court, sitting as a court of first appeal under the TADA, confirmed the death sentence in 2002.

In a dissenting judgment, Justice Shah of the Supreme Court recommended acquittal of the accused, doubting the veracity and voluntary character of a confessional statement made to a police officer. Justice Shah concluded that there was no evidence to convict Bhullar and that a dubious confession could not be the basis for awarding the death sentence. But the majority bench, upholding the sentence, merely suggested that such concerns could be taken into account by the executive during their decision on clemency.

Devinder Pal Singh Bhullar's mercy petition remains pending before the President. He is currently on death row in Tihar Jail, Delhi.

Arbitrariness in sentencing

While successive Supreme Court constitutional benches have favoured judicial discretion rather than the setting out of detailed guidelines on sentencing, the study demonstrated that judicial discretion has proved inadequate as a safeguard against arbitrariness. The judgments in numerous cases demonstrate that the courts, including the Supreme Court, have not always followed the existing law and jurisprudence on death penalty cases consistently. In the same month, different benches of the Supreme Court have treated similar cases differently, often apparently reflecting their own positions for or against the death penalty. While in one case the defendant's youth could be a mitigating factor sufficient to commute the death

sentence, in another it could be dismissed as a mitigating factor. In one case the gruesome nature of the crime could be sufficient for the Court to ignore mitigating factors and in another case a similar crime was clearly not gruesome enough.

In August 2004, Dhananjoy Chatterjee was executed for the 1990 rape and murder of a girl in the apartment building where he worked as a guard. He was the first person to be hanged in India for over six years, ending a *de facto* moratorium on executions

Three days after the execution, a similar case of rape and murder of a child was heard on appeal by the Supreme Court (*Rahul alias Raosaheb v. State of Maharashtra* ((2005) 10 SCC 322)). The victim in the former case was 13 years old; in the latter she was four-and-a-half. Neither of the accused had a previous criminal record, and in neither case was any report of misconduct while in prison. Yet the Supreme Court deemed Dhananjoy Chatterjee a menace to society and not only was his sentence upheld by the Court (*Dhananjoy Chatterjee alias Dhana v. State of West Bengal* ((1994) 2 SCC 220)), but he was subsequently hanged. In Rahul's case, he was not deemed a menace, and his sentence was commuted to life imprisonment.¹²

It is ironic that even while upholding Dhananjoy Chatterjee's death sentence in 1994, Justice Anand of the Supreme Court accepted that there were huge disparities in sentencing. He noted: 'Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby weakening the system's credibility.' Two contradictory events over three days show that a decade later, the inconsistencies remain. (For more on Dhananjoy Chatterjee's case, see below)

Delay in the carrying out of sentence

Prisoners sentenced to death may wait many years while their cases are under consideration. The length of time a person spends on death row presents conflicting problems. Too short a time will not allow for an adequate appeals process or for further evidence of the possible innocence of the person to emerge. However prolonged periods on death row – as occurs in such countries as Japan, the USA and Pakistan – leave the individual facing the constant strain of living with the fear of execution, almost always in harsh prison conditions. Amnesty International believes that there is no “appropriate” length of time a prisoner should be held before

¹² An aggravating factor recorded by the Court in the case of Dhananjoy Chatterjee was his position as a security guard, whose duty was to protect. The judgment in the case of Rahul does not provide any information about the accused, the victim or their relationship that would allow for a comparison on this point.

execution. The dilemma described above provides another important reason why the death penalty should be abolished.

The study showed great disparities in whether and for how long a delay in the process would be considered by the Supreme Court to justify commutation of a death sentence. Other courts have laid out clear standards for the time prisoners can spend under sentence of death before their sentences are commuted. In the case of *Pratt and Morgan v. the Attorney General of Jamaica*, the Judicial Committee of the Privy Council ruled that no condemned prisoner could be held under sentence of death for longer than five years.¹³

Following a long period of legal ambiguity, during which time a number of death sentences were commuted on grounds of delay, while others were not, in 1988 a constitutional bench of the Supreme Court ruled that an unduly long delay in execution of the sentence of death would entitle an approach to the Court, but that only delay *after* the conclusion of the judicial process would be relevant, and that the period could not be fixed (*Smt. Triveniben v. State of Gujarat* ((1988) 4 SCC 574)). This ruling effectively moved the focus of the question of delay away from the judicial process to that of the process of executive clemency.

Dhananjay Chatterjee had completed over 14 years in prison, most of them under sentence of death and in solitary confinement, before he was executed in August 2004 (see above). No action had been taken on his case for nine years because the West Bengal state officials had failed to inform the High Court of the rejection of his mercy petition by the state governor. These facts were not considered a ground for commutation by the Supreme Court, which refused to be drawn on the issue of delay in dismissing appeals on his behalf in 2004.

In the case of *Gurmeet Singh v. State of Uttar Pradesh* (AIR 2005 SC 3611) the Supreme Court similarly refused to take into account a delay of a number of years, caused in this case by the negligence of staff of the High Court of Allahabad. In March 1996 Gurmeet Singh had sought special leave from the High Court to appeal to the Supreme Court after the High Court had confirmed his death sentence. Despite several reminders sent by the jail authorities, there was no response from the High Court. Finally, after a petition had been filed in the Supreme Court, an inquiry was ordered which found that officials of the High Court had been negligent in failing to respond, and action was initiated against the officers responsible. Nonetheless, the Supreme Court refused to commute the sentence on the ground of delay, relying on the position that only delays in mercy petitions would be material for consideration. Gurmeet Singh is currently on death row in Uttar Pradesh.

¹³ The full ruling is available at <http://www.privacy-council.org.uk/files/other/PRATTJ~1.rtf>

A reading of the 1988 judgment shows that the rationale for the Court's position was to avoid a rush through the judicial process which might jeopardise procedural safeguards and lead to challenges based on the fairness of the trial. The intention was clearly not to exclude cases like those of Dhananjay Chatterjee and Gurmeet Singh (see above), where the judicial process was stalled for years through negligence on the part of executive or judicial officials. Yet when presented with appeals in these two cases, the Supreme Court refused to consider the issue of delay.

Mandatory pre-sentencing hearings and the statement of "special reasons"

In 1973, as noted above, a new Code of Criminal Procedure was adopted, requiring that a pre-sentencing hearing be held in the trial court in capital cases. In 1974 the Supreme Court referred to this requirement as an improvement over the "judicial hunch in imposing or avoiding capital sentence" and stated that "to personalise the punishment so that the reformatory component is as much operative as the deterrent element, it is essential that facts of a social and personal nature, sometimes altogether irrelevant if not injurious at the stage of fixing the guilt, may have to be brought to the notice of the Court when the actual sentence is determined" (*Ediga Anamma v. State of Andhra Pradesh* (AIR 1974 SC 799)). In 1976, the Court noted that the mandatory pre-sentencing hearing was "in consonance with the modern trends in penology and sentencing procedures" and commented on what such hearings were meant to achieve:

"a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances - extenuating or aggravating - of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home, life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such deterrent in respect to the particular type of sentence" (*Santa Singh v. State of Punjab* ((1976) 4 SCC 190)).

By 1979, it was becoming clear that the system was not working as intended. Voicing its concern that the pre-sentencing hearing had become little more than a repeat of the facts of the case, the Supreme Court expressed the hope "that the Bar will assist the Bench in fully using the resources of the new provision to ensure socio-personal justice, instead of ritualising the submissions on sentencing by reference

only to materials brought on record for proof or disproof of guilt" (*Rajendra Prasad v. State of Uttar Pradesh* (AIR 1979 SC 916)).

The extent to which only lip service was being paid to the importance of pre-sentencing hearings was evident in *Muniappan v. State of Tamil Nadu* ((1981) 3 SCC 11), where the Supreme Court noted that the trial court had sentenced the accused to death stating that when the accused was asked to speak on the question of sentence, he did not say anything. The Supreme Court noted that the requirement laid down in the Code of Criminal Procedure was not discharged by merely putting a formal question to the accused.

Under the 1973 Code of Criminal Procedure, "special reasons" must be established before a trial court can impose a death sentence. In its 1980 *Bachan Singh* judgment, the Supreme Court set out aggravating and mitigating circumstances to be taken into account during consideration of sentencing and specified that evidence must be presented by the State demonstrating a lack of potential for reform of the convicted person, in the absence of which the case would not fall within the "rarest of rare" category. But in practice, the onus on the state in relation to this procedure has rarely been respected. In the consideration of appeals, Supreme Court judges have ignored the fact that procedures for proper consideration of sentence were absent during the preceding judicial proceedings and have themselves decided on whether cases fall within the "rarest of rare" category, thereby denying convicted prisoners an opportunity to be heard on sentence. Given the dangers of subjective judicial decision-making, the erosion of the safeguards introduced in the 1970s raises serious concern.

What is a "rarest of rare" case?

In the *Bachan Singh* judgment of 1980, the Supreme Court ruled that the death penalty should be used only in the "rarest of rare" cases. More than a quarter of a century later, it is clear that through the failure of the courts and the State authorities to apply consistently the procedures laid down by law and by that judgment, the Court's strictures remain unfulfilled.

In a judgment delivered in December 2006, a Supreme Court bench admitted the Court's failure to evolve a sentencing policy in capital cases (*Aloke Nath Dutta and ors. v. State of West Bengal* (MANU/SC/8774/2006)). The bench examined judgments over the past two decades in which the Supreme Court adjudicated upon whether a case was one of the 'rarest of the rare' or not and concluded: "What would constitute a rarest of rare case must be determined in the fact situation obtaining in each case [sic]. We have also noticed hereinbefore that different criteria have been adopted by different benches of this Court, although the offences are similar in nature. Because

the case involved offences under the same provision, the same by itself may not be a ground to lay down any uniform criteria for awarding a death penalty or a lesser penalty as several factors therefore are required to be taken into consideration.” The frustration of the Court was evident when it stated: “No sentencing policy in clear cut terms has been evolved by the Supreme Court. What should we do?”

In that particular ruling, the Court commuted the appellant's death sentence. On the same day, however, another bench of the Supreme Court upheld the death sentence imposed on an appellant who had convicted of murdering his wife and four children (*Bablu @ Mubarik Hussain v. State of Rajasthan* (AIR 2007 SC 697)). After referring to the importance of reformation and rehabilitation of offenders as among the foremost objectives of the administration of criminal justice in the country, the judgment merely referred to the appellant's declaration of the murders as evidence of his lack of remorse. There was no discussion of the specific situation of the appellant, the motive for the killings or the possibility of reform in his case.

Executive clemency

An appeal to a higher court during the judicial process is based on a challenge to the evidence heard at trial that has a bearing on the guilt of the accused or on the sentence imposed. The process focuses on the appreciation of evidence placed before the courts and is therefore circumscribed both by the nature of the evidence and by the rules for assessment of the evidence. In contrast, the commutation powers of the executive are not limited by the evidence that can be considered by the courts. Mercy petitions to the executive are therefore often based on background personal and social factors that explain the conduct of the convicted person, their psychological and cultural background and other special features, including material that could not be placed before the courts.

In practice, the exercise of clemency has even more potential for arbitrariness than the judicial process, especially since there is no requirement to give reasons for either accepting or rejecting mercy petitions, and decisions are neither reported widely nor published. The absence of transparency in the clemency process is a serious concern, especially since the executive may be subject to pressures extraneous to the case.

A practice at variance with international standards

Not only is the application of the death penalty in India arbitrary and inconsistent: it is also at variance with international human rights standards and the strictures of UN bodies and experts.

Use of the death penalty for crimes other than the "most serious"

In 1979 India acceded to one of the main international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR). As a party to the treaty, India is bound under international law to respect its provisions.

Article 6(2) of the ICCPR states: "In countries which have not abolished the death penalty, sentence of death may be imposed only for *the most serious crimes...*" Further precision is provided in Safeguard 1 of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, adopted by the UN Economic and Social Council in 1984, which states that capital punishment may be imposed "only for the most serious crimes, it being understood that their scope should not go beyond *intentional crimes with lethal or other extremely grave consequences*" (emphases added).

In 1993, India introduced the death penalty for kidnapping for ransom (Section 364A, Indian Penal Code). The UN Human Rights Committee – the body charged with monitoring the compliance of states parties with the provisions of the ICCPR – has stated that abduction not resulting in death cannot be characterized as a "most serious crime" under Article 6(2) of the ICCPR and that the imposition of the death penalty for such an offence therefore violates the ICCPR.¹⁴

The provision of the death penalty under the Narcotics, Drugs and Psychotropic Substances (Prevention) Act, 1995, is similarly flawed. The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "the death penalty should be eliminated for crimes such as ... drug-related offences."¹⁵

Increasing the number of capital offences

In resolution 32/61, adopted by consensus on 8 December 1977, the UN General Assembly reaffirmed that "the main objective to be pursued in the field of capital punishment is that of *progressively restricting the number of offences for which the death penalty may be imposed*, with a view to the desirability of abolishing this punishment". In a similar vein, the UN Human Rights Committee stated in 1982 that "the death penalty should be a *quite exceptional measure*" and that under the terms of Article 6 of the ICCPR, "*all measures of abolition* [of the death penalty] *should be*

¹⁴ Concluding observations of the Human Rights Committee: Guatemala, UN Doc. CCPR/CO/72/GTM, 27 August 2001, para. 17.

¹⁵ UN Doc. E/CN.4/1997/60, 24 December 1996, para.91.

considered as progress in the enjoyment of the right to life"¹⁶ (emphases added). But far from reducing the number of capital offences in line with these strictures, India has expanded the scope of the death penalty under a number of special laws adopted after India's accession to the ICCPR in 1979.

Mandatory death sentences

The UN Human Rights Committee has stated that "the automatic and mandatory imposition of the death penalty constitutes an arbitrary deprivation of life in violation of Article 6, paragraph 1, of the [International] Covenant [on Civil and Political Rights], in circumstances where the death penalty is imposed without any possibility of taking into account the defendant's personal circumstances or the circumstances of the particular offence."¹⁷ The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated that "the death penalty should under no circumstances be mandatory by law, regardless of the charges involved"¹⁸ and that "[t]he mandatory death penalty which precludes the possibility of a lesser sentence being imposed regardless of the circumstances, is inconsistent with the prohibition of cruel, inhuman or degrading treatment or punishment".¹⁹

Mandatory death sentences are currently prescribed in India in three 'special' laws: the Arms Act 1959; the Narcotic Drugs and Psychotropic Substances Act 1985; and the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989. Previously, mandatory death sentences were also prescribed in Section 303 of the Indian Penal Code and in Section 3(2)(i) of the Terrorist and Disruptive Activities (Prevention) Act 1985 (this section was amended in 1987 to permit alternative punishment).

Possible execution of child offenders

Article 6(5) of the ICCPR prohibits the use of the death penalty against people who were under 18 years old at the time of the crime, as does Article 37(a) of the Convention on the Rights of the Child, another international human rights treaty to

¹⁶ General comment on Article 6 of the International Covenant on Civil and Political Rights, adopted at its 378th meeting (16th session) on 27 July 1982 by the Human Rights Committee.

¹⁷ *Pagdayawon Rolando v. Philippines*, Views of the Human Rights Committee... Communication No. 1110/2002, UN Doc. CCPR/C/82/D/1110/2002, 8 December 2004, para. 5.2. Article 6(1) of the ICCPR proclaims the right to life and forbids the arbitrary deprivation of life.

¹⁸ *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN document E/CN.4/1999/39, 6 January 1999, para. 63.

¹⁹ *Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur...*, UN document E/CN.4/2005/7, 22 December 2004, para. 80.

which India acceded in 1992. Indian law came into conformity with this prohibition in 2000 with the passage of the Juvenile Justice (Care and Protection of Children) Act 2000. Before that, it was lawful for a boy of 16 to be sentenced to death,²⁰ but prior to 1986 there was no minimum age prohibition, contrary to India's obligations as a party to the ICCPR.

While the current legal position must be welcomed, the practice has not been clear-cut due to disputes over the age of offenders (birth registration in India is at about 50 per cent, but the level varies considerably across states). In such cases, as shown by the present study, the Supreme Court has not given individuals the benefit of the doubt and has upheld death sentences in cases in which there was evidence that the individuals may have been under 18 at the time of the offence. One such person - Amrutlal Someshwar Joshi - was executed in Pune Central Jail on 12 July 1995; the Supreme Court had dismissed the defence counsel's plea that a medical examination be carried out to determine his age (*Amrutlal Someshwar Joshi v. State of Maharashtra II* ((1994) 6 SCC 200)). Two others – Ram Deo Chauhan and Raju - are on death row, awaiting decisions on appeals.

Execution of the mentally ill

Safeguard 3 of the UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty states that "the death penalty [shall not] be carried out ... on persons who have become insane." In resolution 2005/59, adopted on 20 April 2005, the UN Commission on Human Rights urged all states that still maintain the death penalty "not to impose the death penalty on a person suffering from any mental or intellectual disabilities or to execute any such person".

The study found that while the Supreme Court had looked at various facets of mental health as a factor in adjudicating on sentencing, there was no consistent response to concerns about mental health, and no established practice of seeking medical evidence in the face of such concerns. In several cases the Court commuted sentences on grounds of questions over the mental health or state of mind of the appellant, while in other cases such questions were ignored.

Access to mental health professionals by condemned prisoners or by the accused at trial stage is extremely limited in India. There is no current research on the subject.

²⁰ The Juvenile Justice Act, 1986 prohibited the death penalty for juveniles but defined a juvenile boy as one who had not attained the age of sixteen years.

Capital punishment by neglect

Although the death penalty has its advocates in India, in some senses it appears to remain in law as much by neglect as through any considered criminal justice policy. Amnesty International is concerned that rather than taking effective steps to address structural problems that afflict the criminal justice systems, resulting in its ineffective and arbitrary qualities, the authorities have proposed stringent new laws providing for the death penalty in response to public concerns about increases in crime and 'terrorist' violence.

The neglect of the Indian state has been shown in the following areas:

- **Failure to repeal unconstitutional provisions for mandatory death sentences**

Section 303 Indian Penal Code, which provides for mandatory death sentences, remains in the Code despite the fact that it was struck down as unconstitutional in 1982. An Indian Penal Code Amendment Bill was drafted in 1972 which would have deleted this provision, but it was never passed. In 2005 a trial judge in *Saibanna v. State of Karnataka* ((2005) 4 SCC 165) convicted a person under Section 303 before the defence and the court realized during sentencing that the provision had been declared unconstitutional more than two decades earlier.

- **Neglect of the legal aid system**

The Legal Services Authorities Act, 1987, entitling detainees to legal aid, has not been effectively implemented in all parts of the country. As noted above, the inadequacy of legal representation in capital cases can be fatal.

- **Failure to maintain and publish statistics**

In resolution 1989/64, adopted on 24 May 1989, the UN Economic and Social Council urged UN member states "to publish, for each category of offence for which the death penalty is authorized, and if possible on an annual basis, information about the use of the death penalty, including the number of persons sentenced to death, the number of executions actually carried out, the number of persons under sentence of death, the number of death sentences reversed or commuted on appeal and the number of instances in which clemency has been granted, and to include information on the extent to which the safeguards referred to above are incorporated in national law." But the central government does not maintain detailed statistics on implementation of

the death penalty. It has not even been able to inform the UN Human Rights Committee how many of its citizens have been sentenced to death.²¹

- **Failure to undertake a study on the use of the death penalty, including miscarriages of justice**

The UN Special Rapporteur on extrajudicial, summary or arbitrary executions has stated: "Because it is impossible to ensure that wrongful executions do not occur, countries applying the death penalty should undertake regular, independent, periodic reviews of the extent to which international standards have been complied with and to consider any evidence of wrongful execution."²² But the government of India has not commissioned a study on implementation of the death penalty since the 1960s. Numerous Supreme Court judges have raised serious concerns in the course of judicial pronouncements about the arbitrariness of the death penalty and its disproportionate use against the poor, but these concerns have apparently been ignored by the state. There appears to have been no official attempt to examine why there has been such a high percentage of acquittals in capital cases, as revealed by the present study.

- **Failure to provide compensation for miscarriages of justice**

Article 14(6) of the ICCPR provides that victims of miscarriage of justice shall be compensated, but there is no provision for compensation for miscarriages of justice in Indian law. The present study has highlighted many cases in which acquittals were ordered by the Supreme Court. It is striking that while the Court may have expressed its dismay over wrongful convictions, it has not referred to the length of time that prisoners ultimately found innocent have spent in prison, much of that time on death row where solitary confinement is the norm.

Given the state's lack of engagement with the issue of the death penalty, the legislature has failed to respond to concerns raised by the civil society and by the

²¹ When questioned by the Human Rights Committee in 1991 during examination of its second periodic report on implementation of the ICCPR, the government delegate responded that no information was available regarding the number of persons currently on death row (at para 47 in CCPR/C/SR.1040). The government failed to provide figures in its third period report submitted in 1995 and examined in 1997.

²² Extrajudicial, summary or arbitrary executions: Report of the Special Rapporteur..., UN Doc. E/CN.4/2005/7, 22 December 2004, para. 88.

judiciary. In general, the political class in India has not been willing to enter into a serious debate on the issue.

Conclusion: a confident nation has no place for state killing

As the study and this summary have illustrated, the administration of the death penalty in India is manifestly flawed and fraught with error. This situation has gone on unaddressed in a meaningful manner since the country gained independence in 1947. As the world moves steadily away from the use of the death penalty, the time has come for the Indian authorities to abolish this outmoded form of punishment.

Amnesty International fears that the leaders of India may lack the political courage and human rights leadership necessary to abolish the death penalty. Public opinion often supports retention of the death penalty based on the erroneous view that it deters violent crime. It is therefore up to the nation's leadership to explain the futility of retaining executions on this basis and to convey the unacceptability of such a grave human rights violation committed in the name of the people via the country's judicial system.

The Indian State argues that the death penalty is required to instil fear as a means of deterring future criminals, and to safeguard society against rising crime and "terrorist" acts. In 1995 the Indian government told the UN Human Rights Committee that "the death penalty has been retained in the Indian statutes, largely in view of its deterrent value."²³ Yet evidence from around the world does not support the deterrence argument. The most recent comprehensive survey of research findings on the relation between the death penalty and homicide rates, conducted for the United Nations in 1988 and updated in 2002, concluded: "...it is not prudent to accept the hypothesis that capital punishment deters murder to a marginally greater extent than does the threat and application of the supposedly lesser punishment of life imprisonment."²⁴

In addition to the adoption of mandatory death sentences in the 1980s and the inclusion of the death penalty in successive anti-terrorist legislation since the 1990s, there have been discussions in the Government about including the death penalty for several other crimes in response to public outcries about rising crime and the ineffectiveness of the criminal justice system. The death penalty for dangerous driving was reported to be under consideration in 1997, as has the death penalty for

²³ India's third periodic report to the UN Human Rights Committee on implementation of the ICCPR submitted in November 1995, UN Doc. CCPR/C/76/Add.6, para 57.

²⁴ Roger Hood, *The Death Penalty: A World-wide Perspective*, Oxford, Clarendon Press, Third edition, 2002, p. 230.

rape since the 1990s and for the sale and manufacture of counterfeit medicines in 2003. It is to be welcomed that sense has so far prevailed in such debates about expanding the death penalty still further as a means of addressing these problems. Such proposals simply distract attention from measures that might properly address the serious problem of violent crime.

In refusing over the years to declare the death penalty unconstitutional, the Supreme Court has relied on the fact that those framing the Constitution did not see fit to abolish capital punishment, and that the legislature has subsequently not done so. In turn, the failure of the Supreme Court to strike down capital punishment has become the rationale for the Indian state to deny any need to re-examine the relevance of death penalty provisions in Indian law or to abolish the punishment. This cycle of inertia needs to be broken and the reality of the death penalty exposed as both unfair and ineffective, and speedily acted on.

The arguments for abolishing the death penalty remain forceful and persuasive. State killing condones violence and brutalises society. The ever present risk of the execution of the innocent is enhanced by an unsafe judicial system. Disadvantaged sections of society – usually the poor and minorities – are disproportionately at risk of execution. The death penalty asks public servants – prosecutors, judges, prison guards, etc. – to betray their humanity and be involved in the brutal act of taking the life of a prisoner rendered defenceless, and no longer a threat to society, via their incarceration. The trauma and loss suffered by the family of the victim (in murder cases) is inflicted in turn upon the family of the person being executed, thereby continuing the cycle of violence.

India has entered the 21st century on a note of optimism, as expressed by the country's then Deputy Prime Minister in 2004: "India has acquired a new confidence in what it could achieve and that the twenty-first century would be India's century."²⁵ As the nation continues to meet its aspirations, it is vital that it examines its attachment to capital punishment. Judicial state killing has no place in the modern world and India should abolish the death penalty as soon as is practically possible.

What should be done?

Amnesty International and the People's Union for Civil Liberties (Tamil Nadu & Puduchery) urge the Government of India to abolish the death penalty and thereby open the way to accession to the Second Optional Protocol to the International

²⁵ L. K. Advani, Bharatiya Janata Party leader when he was Deputy Prime Minister, while addressing a session at the *Pravasi Bharatiya Divas*, New Delhi, 10 January 2004.

Covenant on Civil and Political Rights, which commits nations to the permanent abolition of the death penalty.

In the immediate interim, the following steps should be taken:

- Impose an immediate moratorium on executions pending abolition of the death penalty.
- Ensure that the death penalty is not imposed or carried out on anyone suffering from a mental disability – either permanent or temporary; remove anyone suffering from a mental disability from death row and provide them with appropriate medical treatment.
- Ensure that cases of persons who may have been under 18 years old at the time of the crime and are presently on death row, are examined without further delay.
- Abolish all provisions in legislation which provide for mandatory death sentences.
- Initiate an urgent independent study into the extent to which national law and international standards for fair trial and other relevant international standards have been complied with in capital cases over the past two decades.
- Provide compensation and redress to those found to have been victims of miscarriages of justice in capital cases.

Ensure openness, transparency and informed debate

- End the secrecy surrounding application of the death penalty by making all information regarding the past use of the death penalty, and the total number of persons presently on death row with details of their cases, publicly available.
- Initiate a parliamentary debate on abolition of the death penalty based on sound factual information.

Improve procedural safeguards

- Provide a mandatory appeal to the Supreme Court in all cases where a death sentence has been imposed, including by any military court, as recommended by the Law Commission of India.
- Implement the Law Commission's recommendation that a bench of five judges decides any capital case in the Supreme Court.
- Require unanimity of judges for the imposition or upholding of a death sentence.
- Disallow the imposition of or enhancement to a death sentence by an appellate court in any case where a lower court has directed an acquittal or awarded any other sentence.

End torture, ill-treatment and coerced confessions

- Order a prompt and impartial investigation into the cases of prisoners on death row who were reported to have been tortured, ill-treated or denied access to legal counsel during police questioning.
- Ensure that "confessions" obtained under duress are never invoked by state prosecutors in legal proceedings against criminal suspects.
- Ensure that anyone who faces the death penalty has a right to competent state-appointed legal counsel of the defendant's choice during the entire legal process, including appeals and mercy petitions
- Ratify the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol.