

Why did the Law Commission recommend Abolition of 'Death Penalty' except in cases of Terror?

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The Law Commission of India submitted its 262nd report on the issue of 'Death Penalty' in India. The commission, in its report, discussed issues ranging from death penalty being a deterrent, to changing International & National scenario to arbitrariness in the decision making & existence of bias as some of the reasons for recommending abolition of death penalty except in cases of terrorism related offences.

The Law Commission of India finally submitted its much **publicized report** on the contentious issue of 'Death Penalty'. In this report, it recommended abolition of Death Penalty except in cases of Terrorism related offences. The commission received a wide range of suggestions from various quarters including from the likes of the former **President Dr. Abdul Kalam**.

The commission recommended that the death penalty be abolished for all crimes except for terrorism related offences and waging war. The commission came to this conclusion based on the following reasons

- Changing International & National Situation towards abolition of death penalty
- Death Penalty as a Deterrent is a Myth
- Complete Arbitrariness in sentencing in Capital Offences leading to a high number of rejections (more than 95%) of trial court decisions in higher courts
- Geographical Variations in imposition of death penalty
- Structural Issues & existence of a bias
- Evolving Jurisprudence

Background

The Law Commission of India received a reference from the Supreme Court in **Santosh Kumar Satishbhusan Bariyar v. Maharashtra** and **Shankar Kisanrao Khade v. Maharashtra** to study the issue of the death penalty in India to "allow for an up-to-date and informed discussion and debate on the subject."

uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.

But, this is not the first time that the Commission has looked into the issue of death penalty. The **35th Report of the Law Commission** looked into the issue of Capital Punishment in 1967. That Report recommended the retention of the death penalty in India.

Having regard, however, to the conditions in India, to the variety of the social upbringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country at the present juncture, India cannot risk the experiment of abolition of capital punishment³.

The Supreme Court has also upheld the **constitutionality of the death penalty**, but confined its application to the 'rarest of rare cases', to reduce the arbitrariness of the penalty. The Law Commission of India however felt that the social, economic and cultural contexts of the country have changed drastically since the 35th report in 1967. Arbitrariness has remained a major concern in the adjudication of death penalty cases in the 35 years since the precedent was laid down by the Supreme Court in 1980.

The Issues

The Law Commission mentioned the following six factors that necessitated a fresh look at this issue since the 35th report of the commission already dealt with this issue.

- Development in India (Social & Economic Conditions are vastly different now)
- The new Code of Criminal Procedure in 1973 that requires special reasons to be given when death sentence is imposed
- The emergence of constitutional due-process standards

- Judicial developments on the arbitrary and subjective application of the death penalty
- Recent Political Developments like Tripura Assembly’s resolution and demand from various political parties for the abolition of Death Penalty
- International Developments

History of Death Penalty in India

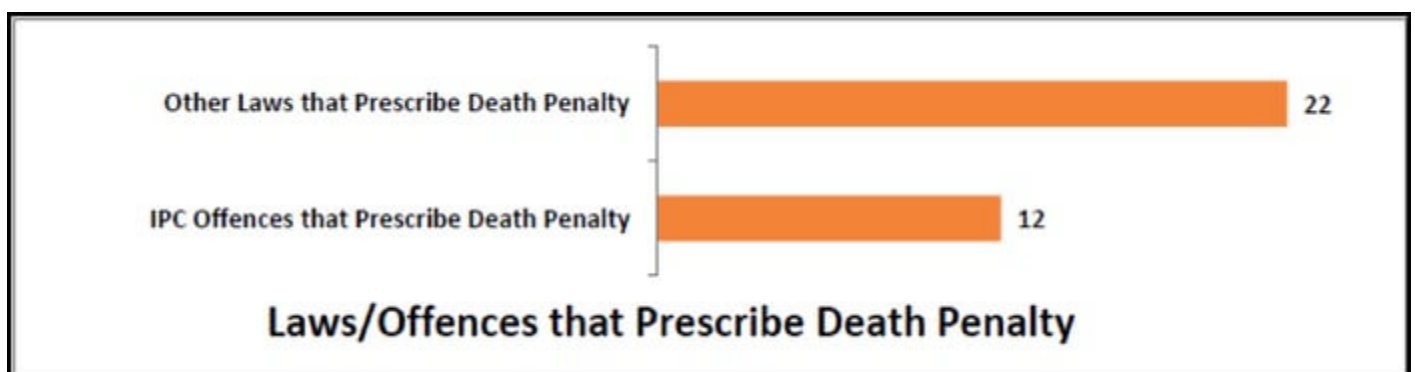
During the debates of the constituent assembly, the main architect of the Indian Constitution, Dr. B R Ambedkar was personally in favour of the abolition of death penalty. After Independence, India retained several laws put in place by the colonial government including the Code of Criminal Procedure (1898) and the Indian Penal Code, IPC (1860). The IPC prescribed six punishments that could be imposed including death.

The Code of Criminal Procedure was again enacted in 1973 and many notable changes were made to the then existing colonial law including the one to Section 354(3), that now required reasons to be stated whenever death penalty is imposed in cases where imprisonment for life could have been imposed.

The Supreme Court also looked into the issue of death penalty in various cases. Most notably, it adopted the ‘rarest of rare’ guideline in the **Bachan Singh case of 1980**. The court noted that reasons to impose or not impose the death penalty must include the circumstances of the crime and the criminal. On various occasions, the court also expressed concern over the delay in execution.

Laws on Death Penalty in India

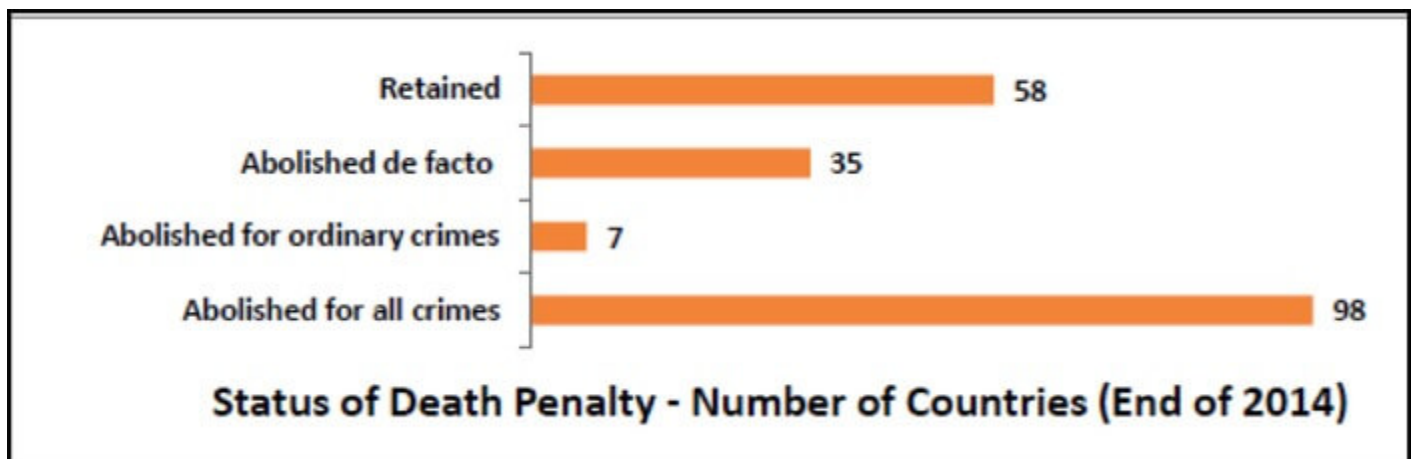
Under the IPC, the death sentence may be imposed for twelve different offences including Murder, Rape etc. Apart from IPC, several other laws also prescribe the death penalty as a possible punishment. As per the commission’s report, there are about 22 such laws in the country including The Air Force Act, 1950, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, The Unlawful Activities Prevention Act, 1967 etc.



International Trends

Much has changed since the 35th report of the Law Commission report in 1967. More countries have abolished the death penalty since then. Internationally, countries are classified on their death penalty status, based on the following categories (as per standards of the United Nations)

- Abolished for all crimes
- Abolished for ordinary crimes
- Abolished de facto (death penalty is lawful, but executions have not taken place in the last 10 years)
- Retained



At the end of 2014, 98 countries abolished death penalty for all crimes. 7 countries have abolished it for ordinary crimes and 35 countries have abolished it in practice or de facto (executions did not take place). 58 countries have retained the death penalty including India. Three of the 98 countries (Suriname, Madagascar and Fiji) formally abolished the death penalty in 2015.

Though the number of countries that still retain the death penalty is in a minority, the list includes the most populous nations of the world like India, China, USA & Indonesia. That in way is an indication that a large part of the world population is still subject to this punishment. About 40% of the countries in the Asia-Pacific are retentionists, and maintain and use the death penalty. China, Iran, Iraq and Saudi Arabia remain amongst the highest executors globally. India is one of the few big countries in the world that executes convicts on the death row along with China, Iran, Iraq & Saudi Arabia.

There are also international treaties like 'The International Covenant on Civil and Political Rights (ICCPR)'. Though this does not abolish the use of the death penalty, it contains guarantees regarding the right to life, and contains important safeguards to be followed by signatories who retain the death penalty. At present 168 countries including India are parties to ICCPR.

Death Penalty as a Deterrent is a Myth

One of the arguments for the retention of death penalty is that it has a deterrence value and prevents individuals from committing crimes because of the threat of punishment. The commission in its report

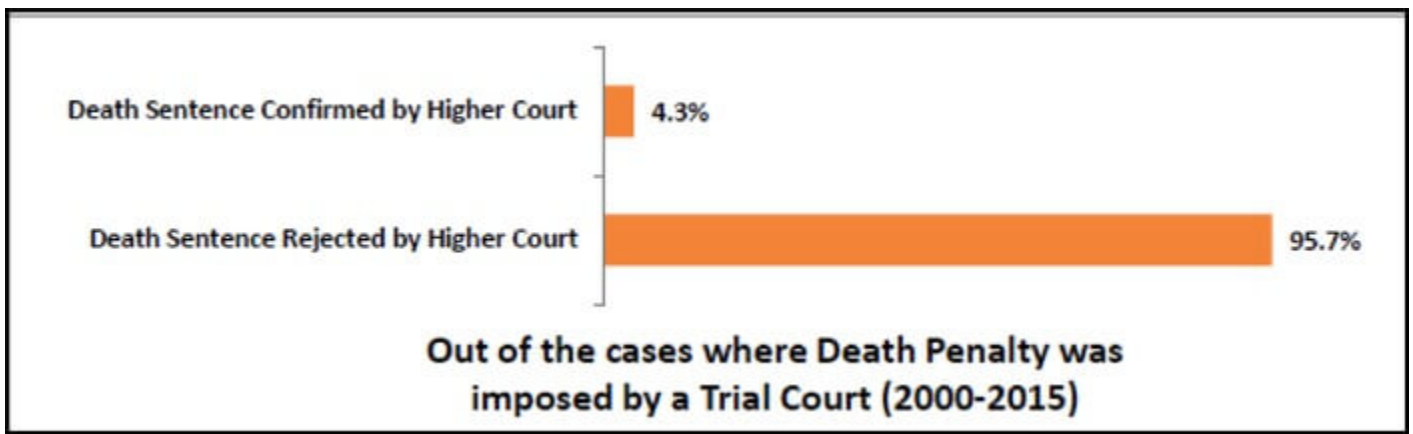
concluded that there is no empirical evidence to suggest that the death penalty has a deterrent effect over and above its alternative – life imprisonment. The report cites various international studies debunking the theory of deterrence. The Report also mentions the United Nations ('UN'), which has consistently held that there is no conclusive evidence on deterrence and the death penalty. The UN, in Reports published as recently as 2014 has noted that no evidence of deterrence can be presumed to exist. The UN has also noted that deterrence is nothing more than a “myth.

Sentencing in Capital Offences – Arbitrariness

The Supreme Court in the recent times has advocated the three test theory in deciding the death penalty cases. It means *“that three tests have to be satisfied before awarding the death penalty: the crime test, meaning the aggravating circumstances of the case; the criminal test, meaning that there should be no mitigating circumstance favouring the accused; and if both tests are satisfied, then the rarest of rare cases test, “which depends on the perception of the society and not “judge-centric”, that is whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society’s abhorrence, extreme indignation and antipathy to certain types of crimes...”*

Even with such framework in place, there have been geographical variations in the numbers. Data gathered by the National Crimes Record Bureau on death sentences indicates that in the period between 2000 and 2012, 1677 death sentences were imposed by Indian courts. On an average, India sends on average 129 persons to death row every year, or roughly one person every third day. Juxtaposing the NCRB data on death sentences imposed against the overall convictions for murder during the period 2004-2012, convictions were recorded by courts in 180439 cases involving murder. In the same time period, the death sentence was imposed in 1178 cases, that is, in 0.65% of the cases involving murder convictions.

As per the report, the excessive use of the death penalty is clear by another figure supplied by the Supreme Court to the Death Penalty Litigation Clinic, National Law University, Delhi, and presented at the National Consultation indicates that between 2000- 2015, trial courts imposed the death sentence on 1790 persons. Of these, 1512 cases were decided by the High Court. The remaining are either still pending, or their judgments have not been located. In 62.8% of these 1512 cases, the appellate courts commuted the sentence. That is, though the appellate courts agreed with the trial court on conviction, they rejected the court’s sentencing. In another 28.9 % of the cases where the trial court awarded the death sentence, or roughly a third, ended in acquittal, pointing to an even deeper systemic problem relating to the quality of adjudication in the lower courts. In all, the death sentence was confirmed only in 4.3% of the cases. The Supreme Court’s data thus shows that trial courts erroneously impose the death penalty in 95.7% cases. There are many other cases where the judges disagreed with each other.



Sentencing in Capital Offences – Geographical Variations

The NCRB data cited above also points to geographical variations. When broken down by state, the rate of imposition of death sentences as a percentage of the rate of convictions for murder for the period 2004-12, shows significant disparity by state. Compared to the rest of the country, a murder convict in Kerala is about twice as likely to get the death sentence; a murder convict in Jharkhand is 2.4 times as likely to get the death sentence compared to the rest of the country. This number for Gujarat is 2.5 times, for West Bengal 3 times, for Karnataka 3.2 times, for Delhi 6 times, and for Jammu and Kashmir 6.8 times. Though Uttar Pradesh sends the most number of persons to the death row, but as a proportion of the conviction rate for murder, it is about par with the national average. Karnataka was the second largest contributor to the death row in this period, and its death sentence rate was 3.2 times the national average.

Kerala	2 times the rest of the country
Jharkhand	2.4 times the rest of the country
Gujarat	2.5 times the rest of the country
West Bengal	3 times the rest of the country
Karnataka	3.2 times the rest of the country
Delhi	6 times the rest of the country
Jammu & Kashmir	6.8 times the rest of the country

Systemic & Structural Concerns – Existence of Bias

The report mentions that the data on death penalty indicates the existence of disparity in the imposition of the death penalty, reflecting systemic and structural disadvantages, particularly of the socially and economically marginalized.

The data presented to the commission by the Death Penalty Research Project of National Law University, Delhi indicates that out of 373 prisoners on death row in the country, over 75% belong to backward

classes and religious minorities. 93.5% of those sentenced to death for terror offences are religious minorities or Dalits. The data also showed that nearly 74% of convicts were economically vulnerable.

The issue of disposal of **mercy petitions by the President** and the ensuing delay was also discussed in the commission's report.

Recommendations

The commission concluded that death penalty does not serve the goal of deterrence any more than life imprisonment. The commission made the following recommendations

- The Commission recommended various provisions for police reforms, witness protection scheme and victim compensation scheme.
- The Commission felt that time has come for India to move towards abolition of the death penalty.
- The Commission recommended that the death penalty be abolished for all crimes other than terrorism related offences and waging war.

Three members of the commission namely, Justice (retd.) Ms Usha Mehra, Mr PK Malhotra, Law Secretary and Dr. Sanjay Singh, Secretary, Legislative Department, chose not to sign the Report and have submitted notes on the issue.