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Sentenced to Uncertainty: Judicial Arbitrariness in India's Death Penalty System

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India's death penalty, intended as a societal retribution, stands accused of succumbing to the very injustice it seeks to combat. This research dissects the system's Achilles' heel: judicial arbitrariness. Discretion, a double-edged sword, empowers judges but simultaneously fuels inconsistencies. Dissenting voices like Justices Krishna Iyer and Bhagwati echo throughout, challenging the constitutionality and inherent randomness of capital punishment. The elusive 'rarest of rare' standard, meant to guide execution, becomes a mirage, further fueling disparities.[1] Public sentiment further complicates the issue, potentially influencing decisions and compromising objectivity. Justice Chandrachud's metamorphosis on the death penalty underscores its complexities. One case, three judges, five lives – a microcosm of the vast, and often arbitrary, variations in applying the death penalty. Only transparency and data can illuminate the path ahead. Lifting the veil on executions – demographics, crimes, commutation rates – is crucial for informed discourse and reform. Recommendations like mandatory appeals, five-judge benches, and independent review can pave the way for a fairer, more consistent system if the death penalty is indeed to persist. [2]Moving forward, a crucial question remains: how can India ensure a consistent and equitable application of the death penalty, if at all, or should it consider alternative avenues for achieving justice?

Keywords: *death penalty, judiciary, arbitrary, conviction, discretion, rarest of rare.*

[1] Yug Mohit Chaudhry, 'Uneven Balance' *The Hindu* (07 September 2012) <https://frontline.thehindu.com/cover-story/article30167199.ece> accessed 27 January 2024

[2] Law Commission, *On Mode of Execution of Death Sentence and Incidental Matters* (Law Com No 187, 2003)

INTRODUCTION

The law serves as a mechanism by which society imposes social regulation on individuals to sustain peace and order. To achieve the deterrent effect of the legal system, a court of law imposes a penalty for each illegal action. Punishment is the result of an offender's unpleasant action. As society and law progressed, several notions of punishment were developed. There are primarily four punishment theories that are based on the objective of punishment: deterrent, retributive, preventive, and reformative.[3]Although these theories have faced criticism, they hold considerable jurisprudential importance as they have greatly contributed to the development of the legal system's punishment mechanism.

The origin of capital punishment can be attributed to the Retributive theory of punishment. This idea holds that the punishment should be proportionate to the harm the offender caused. The goal is to hold the perpetrator accountable for their misdeeds. Capital punishment is the ultimate penalty within the framework of the criminal justice system.

Capital punishment or the death penalty is 'the deprivation of life as a punishment for a crime committed.' In India, it is a form of punishment for specific offenses under the IPC and certain non-IPC offenses. Additionally, 59 sections in 18 central legislations, containing both homicide and non-homicide offenses, provide for the death sentence as a form of punishment. Executions are carried out by hanging as the primary method of execution, as given under Section 354(5) of the Criminal Code of Procedure, 1973, 'Hanging by the neck until dead' and is imposed only in the 'rarest of cases.[4] Although no government agency has kept official records of the total number of prisoners executed in India since independence, the estimate is that there have been

[3] Lore Rutz Burri, '3.1. Functions and Limitations of Law' (*OpenOregon, 2019*) <https://openoregon.pressbooks.pub/ccj230/chapter/8-1-functions-and-limitations-of-law/> accessed 27 January 2024

[4] Criminal Procedure Code 1973, s 354(5)

about 385 executions. The most recent execution took place in March 2020, when the four perpetrators of the Nirbhaya case were executed in Tihar Jail.[5]

THE EVOLUTION OF THE DEATH PENALTY

In the Code of Criminal Procedure (CrPC), 1898 death was the default punishment for murder and required the concerned judges to give reasons in their judgment if they wanted to give life imprisonment instead. The legal position did not change after independence, as India retained a majority of the legal statutes put in place by the colonial British government, including the IPC of 1860 and the CrPC of 1898.[6]

By an amendment to the CrPC in 1955, the requirement of written reasons for not imposing the death penalty was removed. With this deletion, the special status accorded to the death penalty was done away with, and judges now had the discretion to award any of the punishments allowed by the law. Along with the increased discretion given to the judiciary came an increase in the arbitrary use of that discretion. In *Kundan Singh & Ors. v The State of Punjab,* despite failing to find 'any logical ground for making a distinction between appellants Shavinder Singh and Karam Singh,' the Supreme Court refused to commute Karam Singh's death sentence, stating, '…the fact that the Sessions Judge drew such a distinction on a ground which cannot be said to be either logical or in consonance with the evidence on record can hardly be a reason for us to interfere with the sentence imposed on appellant Karam Singh confirmed as it is by the High Court after a full reappraisal of all the facts and circumstances of the case.'[7]

The amended CrPC of 1973 was the first time the legislature laid down that the death penalty was an exceptional punishment under the IPC. It required judges to note down special reasons when awarding a death sentence and also made pre-sentencing hearings mandatory.[8]

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[5] *Mukesh & Anr v State for NCT Of Delhi & Ors* (2017) 6 SCC 1
[6] Amnesty International India, *Lethal Lottery: The Death Penalty in India* (2008) <https://www.amnesty.org/en/wp-content/uploads/2021/07/asa200072008eng.pdf> accessed 25 January 2024
[7] *Kundan Singh & Ors v The State of Punjab* (1971) 3 SCC 900
[8] Criminal Procedure Code 1973, s 354 (3)

A leading scholar who examined seventy judgments of the Indian Supreme Court between 1972 and 1976 in which judges had to decide whether to uphold the death sentence or commute it to life imprisonment concluded that part of the problem was that different judges had different attitudes toward capital cases. Of the sample cases studied between November 1972 and January 1973, the Professor noted that the large number of death sentences upheld may have been partly due to the misfortune of their appeals being heard by the Bench of Justices Vaidialingam, Dua, and Alagiriswami.[9]

JUSTICE KRISHNA IYER: DISSENTING FROM DEATH ROW AND ADVOCATING FOR REFORM

Justice V.R. Krishna Iyer, said in *Ediga Anamma v State of Andhra Pradesh (1974)*, 'It is unfortunate that there are no penological guidelines in the statute for preferring the lesser sentence; it being left to ad-hoc forensic impressionism to decide for life or death.'[10]

The imposition of the death penalty in India faced growing scrutiny with the emergence of a dissenting minority on the Supreme Court, spearheaded by Justice Krishna Iyer. This divide reached a critical juncture in the case of *Rajendra Prasad v State of Uttar Pradesh (1979)*. In a starkly divergent judgment, Justices Iyer and Desai, echoing an academic treatise, advocated for 'tangible guidelines' to refine the exercise of sentencing discretion. They lamented the 'impressionistic and unpredictable' nature of previous rulings, highlighting inconsistencies and the occasional resort to emotive language in death penalty pronouncements. This lack of specificity, they argued, rendered Section 302 IPC of the Indian Penal Code insufficiently 'constitutional and functional' in a domain as grave as capital punishment. Quoting Professor Blackshield's observation of inherent 'arbitrariness and uneven incidence' in the existing system, they deemed a thorough jurisprudential exploration—'guided' missiles with lethal

[9] A.R. Blackshield, 'Capital Punishment in India' (1979) 21(2) Journal of the Indian Law Institute <https://www.jstor.org/stable/43950631> accessed 27 January 2024
[10] *Ediga Anamma v State of Andhra Pradesh* AIR 1974 SC 799

potential in unguided hands'—imperative to ensure just and consistent application of the death penalty.[11]

In the case of *Srirangan v State of Tamil Nadu (1978),* Justice Krishna Iyer played a pivotal role in emphasizing the arbitrary nature of capital punishment within the Indian judicial system. Despite the heinous nature of the crime, which the court described as a 'brutal triple murder,' it decided that the imposition of the lesser penalty of life imprisonment would be more appropriate.[12] This marked a departure from the recent Sarveshwar Prasad Sharma judgment, highlighting the inconsistency in the court's approach. Justice Iyer, a known abolitionist post-Ediga Anamma, consistently advocated against the death penalty. In cases like Shiv Mohan Singh v The State and Joseph Peter v State of Goa, Daman, and Diu, he endeavored to reconcile personal abolitionist views with judicial duties. Notably, in Shiv Mohan Singh, a review petition was surprisingly admitted, and Justice Iyer questioned the irreversible nature of capital punishment, emphasizing the lack of recourse for society if a flawed conviction is later revealed. Despite being unable to find sufficient grounds to reduce the sentence in Srirangan, the bench subtly urged the President to consider clemency, recognizing the distinction between judicial and mercy powers and suggesting that the accused could invoke the latter for potential reprieve. This case underscores Justice Iyer's commitment to challenging the imposition of the death penalty and promoting a more considered, humane approach within the legal framework.[13]

On May 4, 1979, the bench comprising Justices Krishna Iyer, Desai, and A.P. Sen engaged in another judicial dispute in Dalbir Singh and Ors. v State of Punjab. In this case, the majority, under the leadership of Justice Krishna Iyer, commuted the sentences after heavily referencing Mahatma Gandhi's and other Indian leaders' teachings opposing the death penalty. Justice A.P. Sen dissented, echoing arguments similar to those in his previous dissent in Rajendra Prasad v State of Uttar Pradesh, asserting, 'I have no sympathy for these trigger-happy gentlemen, and the sentence imposed on them is well-merited.' The judgment underscores the ongoing disagreement within the bench on the matter of capital punishment, with Justice Iyer

[11] *Rajendra Prasad v State of Uttar Pradesh* (1979) SCR 3 78
[12] *Srirangan v State of Tamil Nadu* AIR 1978 SC 274
[13] Amnesty International India (n 6)

emphasizing humanitarian considerations and Justice Sen maintaining a strict stance against the convicts.[14]

THE ELUSIVE NATURE OF 'RAREST OF RARE': LOST IN INTERPRETATION

'What would constitute a rarest of rare cases must be determined in the fact situation [sic] obtaining in each case. We have also noticed hereinbefore that different criteria have been adopted by different benches of this Court, although the offenses are similar… No sentencing policy in clear-cut terms has been evolved by the Supreme Court. What should we do?' These words of Justice S.B. Sinha in *Aloke Nath Dutta and Ors. v State of West Bengal (2006)*, underscores the critical need for a well-defined sentencing policy, outlining the detrimental consequences of its current absence.[15]

In the case of *Machhi Singh and Ors v State of Punjab (1983)*, the bench faced a complex scenario involving multiple incidents in which the accused, Machhi Singh, and 11 accomplices killed a total of 17 people in one night. The judgment gained prominence for its discussion of the 'rarest of rare' formulation and the guidelines outlined in the Bachan Singh case. While upholding three death sentences, the court seemed to extend the 'rarest of rare' concept beyond the specific aggravating factors listed in Bachan Singh, suggesting that cases shocking the 'collective conscience' of a community could warrant capital punishment. The judges argued for a balanced consideration of aggravating and mitigating circumstances, emphasizing the need for a just balance before opting for the death penalty.[16] However, the expansion of Bachan Singh guidelines in Machhi Singh is debatable, particularly as the former was established by a five-judge Constitutional Bench. At the same time, the latter was decided by a regular three-judge bench. Despite this, subsequent benches relied on the Machhi Singh guidelines to uphold death sentences, even in cases that might have otherwise failed to meet the Bachan Singh criteria[17].

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[14] *Ibid*
[15] *Aloke Nath Dutta and Ors. v State of West Bengal* MANU/SC/8774/2006
[16] *Machhi Singh and Others v State of Punjab* (1983) 3 SCC 470
[17] Amnesty International India (n 6)

MAJORITY *v* J. BHAGWATI'S STAND: THE DEBATE ON DEATH PENALTY

'The question may well be asked by the accused: Am I to live or die depending upon how the Benches are constituted from time to time? Is that not violative of the fundamental guarantees enshrined in Articles 14 and 21?' Justice Bhagwati, in his dissenting judgment, *Bachan Singh v State of Punjab (1980).*[18]

Justice Bhagwati held that not only was the death penalty against national and international norms and therefore unconstitutional, but he also pointed out that in practice, the death penalty process created a context of arbitrariness and that it was unsafe to provide powers to any set of judges since a failproof manner of administering criminal justice systems could never be developed. He also pointed out the dangers of depending on judges to administer laws and follow procedures providing for sentencing guidelines. As he explained, 'It is, therefore, obvious that when a judge is called upon to exercise his discretion as to whether the accused shall be killed or shall be permitted to live, his conclusion would depend to a large extent on his approach and attitude, his predilections and preconceptions, his value system and social philosophy, and his response to the evolving norms of decency and newly developing concepts and ideas in penological jurisprudence.'[19]

Justice Bhagwati warned: 'Howsoever careful may be the safeguards erected by the law before the death penalty can be imposed, it is impossible to eliminate the chance of judicial murder… the possibility of error in judgment cannot, therefore, be ruled out on any theoretical considerations. It is indeed a very live possibility and, it is not at all unlikely that so long as the death penalty remains a constitutionally valid alternative, the court or the State acting through the instrumentality of the court may have on its conscience the blood of an innocent man.'[20]

This was a clear recognition of the inherent problems within the administration of criminal justice that render the system of sentencing individuals to death arbitrary. Unfortunately, the

[18] *Bachan Singh v State of Punjab* AIR 1980 SC 898
[19] Amnesty International India (n 6)
[20] *Bachan Singh v State of Punjab* AIR 1980 SC 898

majority of the judges did not support this view and held the death penalty to be constitutional, directing instead that it should not be used except in the 'rarest of rare' cases.[21]

BETWEEN LAW AND PUBLIC SENTIMENT: SUPREME COURT'S DEATH PENALTY DILEMMA

The Supreme Court has called the death penalty a 'just dessert' for particular crimes[22] and a punishment that reflects 'society's cry for justice against the criminal.'[23] This legally couched language found in many judgments reveals the perception amongst several judges that their role is not just as arbiters of just law but also as sentinels of morality and justice. The language is explicit because it frequently includes the warning that taking the bus will result in 'spasmodic sentiment, unmitigated benevolence, and misplaced sympathy.'[24] A majority section of the community supports the death penalty, which is seen as a factor supportive of retaining the death penalty.

'Undue sympathy to impose an inadequate sentence would do more harm to the justice system and undermine public confidence in the efficacy of the law, and society could not long endure under such serious threats.'[25] What is remarkable in such judgments is the apparent view that anything less than the death sentence would be a betrayal of social interests and would wreak severe damage on the fabric of trust and confidence in the rule of law. This is clear from the Supreme Court's decision in Jashubha Bharatsinh Gohil and Ors v State of Gujarat, where the court said again, 'Any liberal attitude by passing down light sentences or being too sympathetic just because time has passed for such offenses will be wisely counterproductive in the long run and against societal interest, which needs to be cared for and strengthened by a string of deterrence built into the sentencing system.'[26]

[21] Amnesty International India (n 6)
[22] *State of M.P. v Babbu Barkare* (2005) 5 SCC 413
[23] *Surja Ram v State of Rajasthan* AIR 1997 SC 18
[24] *Govindasami v State of Tamil Nadu* AIR 1998 SC 2889
[25] *State of M.P. v Babbu Barkare* (2005) 5 SCC 413
[26] *Jashubha Bharatsinh Gohil and Ors. v State of Gujarat* (1994) 4 SCC 353

It is worth noting that there has been limited exploration of the diverse approaches taken by different judges when it comes to addressing crime, despite Justice Bhagwati's acknowledgment of this fact. Even more pertinent today than it was 25 years ago was Justice Bhagwati's astute observation regarding the various perspectives of judges on heinous, cruel, and demonic acts. The social and personal perspectives of the judges play a complex role in determining what constitutes a crime that deeply disturbs the public conscience.[27]

In the case of *Earabhadrappa alias Krishnappa v State of Karnataka (1983),* the concept of 'social necessity' was introduced. Justice A.P. Sen, who consistently opposed the abolition of the death penalty, emphasized the court's responsibility to impose an appropriate punishment based on the level of criminality and the importance of deterring potential offenders for the sake of society. Restrained by the guidelines in Bachan Singh, in this case, the bench decided grudgingly to commute the sentence, warning that 'failure to impose a death sentence in such grave cases where it is a crime against society—particularly in cases of murders committed with extreme brutality—will bring to naught the sentence of death provided by Section 302 of the Indian Penal Code.'[28]

Justice Chaskalson emphasizes the distinction between the legislative and judicial functions, citing the opinion of Justice Powell in the US judgment of Furman v State of Georgia. In his dissenting judgment, Justice Ackermann refers to the thoughtfully articulated stance on the matter presented by Justice Blackmun in the United States Callins v Collins case: Although most of the public seems to desire, and the Constitution seems to permit, the penalty of death, it surely is beyond dispute that if the death penalty cannot be administered consistently and rationally, it must not be administered at all.'[29]

[27] Amnesty International India (n 6)
[28] *Earabhadrappa alias Krishnappa v State of Karnataka* (1983) 2 SCC 330
[29] *Callins v Collins* [1994] 510 U.S. 1141

REASSESSING CAPITAL PUNISHMENT: JUSTICE CHANDRACHUD'S SHIFTING VIEWS ON THE DEATH PENALTY

Although Justice Bhagwati and Justice Krishna Iyer were notorious for their opposition to the death penalty while serving on the Bench, even Bachan Singh majority bench member and former Chief Justice Chandrachud re-evaluated the death penalty's effectiveness after his retirement. In 1989, Justice Chandrachud said, 'Life is never static. It moves on. I believe that the time is now ripe for asserting that the death penalty ought to be abolished… It would not be far from right to say that the death penalty neither deters the criminal who is determined to kill nor does it act as a fear in the mind of a marginal criminal who is always optimistic that he will not be found, and if found, will not be convicted of murder, and if so convicted, will not be sentenced to death….Since the death penalty has served no purpose, neither logic nor experience would justify its continuance in the statute book…The death sentence… must be discarded once and for all.[30]

DEATH OR DENIAL

Justice H.R. Khanna, in his judgment in *Kali Ram v State of Himachal Pradesh (1973)* mentioned the irreversible harm of wrongful convictions: 'It is no doubt true that wrongful acquittals are undesirable and shake the confidence of the people in the judicial system; much worse, however, is the wrongful conviction of an innocent person. The consequences of the conviction of an innocent person are far more serious, and their reverberations cannot be felt in a civilized society. Suppose an innocent person is convicted of the offense of murder and is hanged; nothing further can undo the mischief, for the wrong resulting from the unmerited conviction is irretrievable.'[31]

When an innocent person is wrongly convicted, it not only results in the devastating loss of their freedom and, in some cases, their life, but it also undermines the trust and confidence that

[30] N. Jayaram, 'Death Penalty Is State-Sponsored Murder, the Indian Judiciary Must Put a Stop to Executions' *The Wire* (08 March 2022) <https://thewire.in/law/death-penalty-is-state-sponsored-murder-the-indian-judiciary-must-put-a-stop-to-executions> accessed 24 January 2024

[31] *Kali Ram v State of Himachal Pradesh* (1973) 2 SCC 808

individuals place in the justice system. This undermines the core principles of fairness and justice, rendering a lasting impact on both the individual and society as a whole. The Supreme Court itself has recognized the concern surrounding the possibility of an unfair conviction of an innocent individual. Chief Justice Y.V. Chandrachud expressed this concern in State of Uttar Pradesh v Jageshwar and Others (1983); he stated, 'If 10 persons could be acquitted on a mere assumption, there is a fear that 10, who are not guilty, could be convicted by the same indifferent process.'[32]

Elaborating on the theme of the death penalty in the context of `The Right to Life and Proportionality', Justice Sachs points out, 'Decent people throughout the world are divided over which arouses the greatest horror: the thought of the state deliberately killing its citizens or the idea of allowing cruel killers to co-exist with honest citizens. For some, the fact that we cold-bloodedly kill our kind taints the whole of our society and makes us all accomplices to the premeditated and solemn extinction of human life. For others, on the contrary, the disgrace is that we place a higher value on the life and dignity of the killer than on that of the victim.' He further points to those pragmatists who emphasize not the moral issues but the 'inordinate stress that capital punishment puts on the judicial process' and argues that from a practical point of view, capital punishment offers an illusory solution to crime and detracts from truly effective measures to protect the public.[33]

THREE JUDGES, FIVE LIVES, AND THE SPECTRUM OF SENTENCING

In *Pandurang and others v State of Hyderabad (1956),* the Supreme Court heard a case in which the trial court had sentenced five people to death. Of the two judges on the original High Court Bench, one decided to uphold the conviction of all five accused but award life imprisonment, while the second judge directed the acquittal of all five. As per the law, a third judge was brought in, and he decided to be final. The third judge decided to uphold the conviction of all five and further sentenced three of the accused to death. Finally, the Supreme Court subsequently

[32] *State of Uttar Pradesh v Jageshwar and Ors* (1983) 2 SCC 305
[33] Amnesty International India (n 6)

commuted the sentence of death.[34] This is a classic example of how different judges see the same facts and reach different conclusions on questions literally about life and death.

CONCLUSION

The safeguards put in place to prevent errors and arbitrariness have not effectively checked these issues, and judges themselves have often failed to adhere to the requirements outlined in Bachan Singh. As a result, the judge's subjective judgment frequently determines the fate of the accused-appellant. Even though the arbitrariness is pernicious, it also exhibits discrimination and selectivity. There may be a discernible pattern to the seemingly arbitrary nature of the death penalty in India. There appears to be a correlation between a person's level of wealth and influence and their likelihood of receiving a death sentence.

The Supreme Court itself has acknowledged the class bias in death sentences. In his dissenting judgment in Bachan Singh, Justice Bhagwati commented, 'The death penalty has a certain class complexion or class bias since it is largely the poor and downtrodden who are the victims of this extreme penalty. We would hardly find an affluent person going to the gallows.' The judge concluded: 'There can be no doubt that the death penalty in its actual operation is discriminatory, for it strikes mostly against the poor and deprived section of the community… this circumstance also adds to the arbitrary and capricious nature of the death penalty and renders it unconstitutional.'[35]

On the opposite side of the spectrum, numerous underprivileged individuals remain in prison without trial for durations that exceed the maximum penalty allowed upon conviction, often due to a lack of proper representation in court. It is crucial to acknowledge and address the lack of comprehensive research on bias within the criminal justice system and the specific application of the death penalty. This oversight should not be used as a reason to disregard the grave injustice at hand.

[34] *Pandurang and others v State of Hyderabad* AIR 1956 SC 216
[35] *Bachan Singh v State of Punjab* AIR 1980 SC 898

More investigation is needed to fully understand the implications of India's death penalty and the possibility of arbitrary decisions by the judiciary. The findings presented in this analysis, although not exhaustive, raise important concerns regarding the consistency and equity of capital punishment applications. It is crucial to conduct additional research into the decision-making procedure and underlying factors that influence death sentences to effectively address these concerns. Furthermore, it is of utmost importance to promptly release comprehensive data regarding the execution of the death penalty. This data should encompass various aspects such as demographics, types of crimes committed, and rates of commutation and execution. Such transparency is essential to facilitating a well-informed and meaningful public discourse. Access to such information is crucial for developing a comprehensive understanding of the issue, which can then inform the creation of impactful policy reforms and prompt a reconsideration of the death penalty's role in India's legal system. To uphold the principles of justice and protect the sanctity of life, it is crucial to thoroughly and openly analyze capital punishment, including its implementation and the possibility of it being applied arbitrarily. India needs to advance and realize a future where justice is strongly committed to fairness and equality.

RECOMMENDATIONS

This research presents a set of practical recommendations aimed at enhancing transparency, ensuring legal consistency, and upholding human rights principles within India's death penalty system. First and foremost, to address the lack of transparency surrounding the implementation of the death penalty, it is crucial to ensure that all pertinent information is accessible to the public. Transparency should include historical execution data, the current number of death row inmates, and detailed, case-specific information. Meaningful assessments of the death penalty following national and international legal frameworks can only be undertaken once transparency is established. Furthermore, it is recommended to establish a compulsory appeal route to the Supreme Court for all death sentences, including those issued by military courts, in line with the Law Commission's proposal.[36] This would guarantee the consistent application of legal standards throughout the judicial process. Furthermore, it is proposed that to strengthen

[36] Law Commission, *Mode of Execution of Death Sentence and Incidental Matters* (Law Com No 187, 2003)

scrutiny and promote more thorough deliberations, all capital cases in the Supreme Court should be decided by a bench of five judges, following the Law Commission's additional recommendation[37]. Finally, it is proposed that implementing a mandatory unanimous jury agreement during the sentencing process would serve as a crucial safeguard, given the seriousness of the death penalty and the irreversible nature of its outcomes. [38]Implementing these recommendations alongside an independent review of capital cases can help India progress towards a fair and balanced application of the death penalty, should it decide to maintain it.

[37] *Ibid*

[38] Amnesty International India (n 6)