



**LEGAL SOLUTIONS FOR SUSTAINABLE
FUTURES IN SOUTH ASIA: HOW PRO
BONO CONTRIBUTES TO SDG
PROGRESS**



ABOUT ADVOCATES FOR INTERNATIONAL DEVELOPMENT

Advocates for International Development (A4ID), founded in 2006, is a global charity that believes the law can and should be used more effectively to advance fair and sustainable development. A4ID aims to inspire and enable lawyers to join the global fight to eradicate poverty by advancing the United Nation's Sustainable Development Goals (SDGs). Through A4ID, the world's top lawyers provide free legal support to organisations, working to advance human dignity, equality, and justice. Its work has so far impacted over 130 countries.

A4ID's Rule of Law Expertise (ROLE UK) Programme is funded by the Foreign, Commonwealth and Development Office. It supports partnerships to provide pro bono legal and judicial expertise with the aim to strengthen the rule of law in official development assistance (ODA)-eligible countries. The Programme also provides the pro bono legal sector with access to targeted and relevant information to inform and improve their technical assistance in development contexts.

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Report Cover Photo Credit: *Stephan Bachenheimer, World Bank Nepal*



INDIA: ACCESS TO JUSTICE THROUGH DEATH PENALTY REFORM



Being the world's largest democracy, and the largest economy in South Asia, India holds a unique position in effecting both its own development, and the wider socio-economic capacities of the region. Under the MDGs, impressive gains in poverty alleviation, maternal health, gender parity in education, and water availability were contrasted against severe regional disparities across the country. For example, challenges persisted in youth unemployment, educational enrollment and completion, poor progress in women's emancipation, children's health, and insufficient sanitation facilities¹; making these core priorities for the country within the SDG framework.

Over the course of the SDG Agenda so far, India has made great strides in reducing poverty, halving those living under \$2.15 a day between 2011 and 2019,² and lifting 271 million people out of multidimensional poverty over the past decade.³ While this pace slowed somewhat during the COVID-19 pandemic, it has shown signs of recovery in the time since. This is particularly noteworthy given the country's sizable population, making it difficult to achieve consistent economic gains across all demographics. In SDG 12 (Responsible Consumption and Production), India also continues to perform positively, having already achieved its targets relating to this goal.⁴ Herein the country remains an important leader

in the South Asia region, highlighting potential to lead progress in areas such as South-South cooperation, as well as industrial and technological trade and development.

However, apprehensions have been raised by some commentators over the country's approach to geopolitics, governance, and institutional efficacy in general - all of which speak directly to SDG 16 (peace, justice and strong institutions).⁵ These concerns may be seen as part of broader discussions of a 'democratic recession' – a trend toward more authoritarian principles in the operation of legal and governmental institutions.⁶ For organisations such as Freedom House, V-DEM, and the Economist Intelligence Unit, they also speak to recent deteriorations in the protection of certain rights and civil liberties.⁷

SECTOR OVERVIEW: JUSTICE SYSTEM

Of specific relevance to the legal community, are the ways in which these trends intersect with the Indian justice sector. For example, the extent to which civil liberties and legal rights are upheld and enforced before the courts, the extent to which justice institutions remain accountable to high-level checks and balances that allow for the proper administration of justice, and the extent to which the rule of law is embodied within court processes and institutions.⁸

Herein, a number of challenges emerge within the Indian justice system as evidenced by The India Justice Report. The report, which collates publicly available government data to rank the capacity of Indian states when delivering justice, looks at various relevant sectors including the police, judiciary, prisons and legal aid systems. A key finding to materialise from the report centres around the wide array of volatilities that exist across all these sectors, particularly following the challenges and uncertainties caused by the COVID-19 pandemic. For example, whilst moderate increases in funding have been made available for the prison and legal aid sectors, systemic resource shortages, budget underutilisation, court backlogs, and an abundance of unfilled vacancies throughout the justice system have compromised the sector's ability to deliver justice in a timely manner.⁹

Of further note is that India's long pursuit of gender and caste equalities, whilst reflected in constitutional and other national laws, are not adequately represented in the court system. Accordingly, whilst the lower courts reasonably represent the country's demographic diversity, the upper echelons of the justice system remain notably underserved, with only 13% female representation in the high courts and 17% in states' human rights commissions. As a result the sector not only requires additional financing and resourcing, but a need to train and recruit a more

diverse pool of incoming talent.¹⁰

These concerns surrounding India's justice system and institutional efficacy are also echoed at an international level by organisations such as the World Justice Project (WJP),¹¹ though it is noted that the country's overall rule of law score has remained relatively stable since 2015 – below the global average, but above the regional average.¹² More broadly, and in line with these findings, is that progress against SDG 16 in India is stagnating. In particular, the number of unsentenced detainees saw a sharp uptick from 2019 to 2020, reaching 76.12% of the overall prison population.¹³

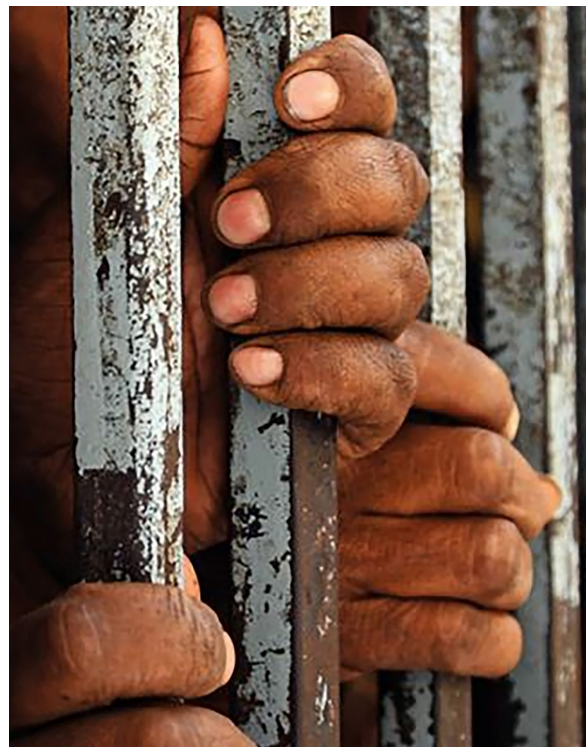


Photo Credit: Times Higher Education

POLICY LANDSCAPE

The below captures some of the key challenges and developments that have taken place more generally for the criminal justice system in India, particularly in the wake of seismic shifts to overhaul the sector in light of systemic challenges.

CHALLENGES

Court Backlogs
A significant number of cases are pending awaiting trial across the Indian justice system creating pressure on the system, as well as for court staff and the judiciary to serve justice fast.

Inconsistent Application of the Law
There are inconsistencies in the findings of the lower and upper courts, notwithstanding notions of precedence. Accordingly, the findings and practices of the Supreme Court are often unable to trickle down or effectively influence that of the lower courts, creating uncertainty across the criminal justice system.

Penal Populism
Tougher prison sentencing is forming a large part of political rhetoric in response to public outcry, particularly surrounding criminal activities such as sexual offence.

DEVELOPMENTS

Reforming the System
There are a number of new bills of parliament being debated to reform the Indian criminal justice system. These are, namely, the Bharatiya Nyaya Sanhita Bill 2023, the Bharatiya Nagarik Suraksha Sanhita Bill 2023, and the Bharatiya Sakshya Bill 2023; seeking to reform the Indian Penal Code (1860), Criminal Procedure Act (1898), and Indian Evidence Act (1872) respectively.

Whilst there are significant concerns surrounding a number of the proposed changes (including more lenient use of the death penalty and detainment), other changes are more hopeful, e.g.: digitising court processes, the introduction of community service as punishment and greater access to police services for registering complaints.

CHALLENGES

Use of Detention

Alongside the rising population of unsentenced detainees within the Indian criminal justice system, are concerns around the use of unlawful detainment particularly in response to political activism.¹⁴

DEVELOPMENTS

Reforming Prisons

The Model Prisons Act 2023, prepared by the Indian Home Ministry, has been put forth to reform prison conditions. Positive reform proposals include: provisions for greater access to legal aid, parole, furlough, and premature release; separate accommodation for women and transgender inmates; and a focus on vocational training for rehabilitation and reintegration into society.

However, among the Government's efforts to overhaul the criminal justice system and related institutions including prisons, concerns have been raised that some proposals could see more punitive sanctions introduced at the cost of justice outcomes. One organisation advocating against this trend is A4ID's in-country partner, Project 39A, who work on the most punitive measure of all: the death penalty.

THE WORK OF PROJECT 39A

Project 39A, formerly known as the Centre on the Death Penalty, was established in 2014 as part of the National Law University in Delhi. The research institute's first project involved interviewing all of India's death row prisoners and their families

between July 2013 to January 2015, building a dataset around use of the death penalty in India. The findings of this project culminated in the Death Penalty India Report (2016)¹⁵, and unveiled the level of poor quality legal representation received by those facing the death sentence. Today the organisation operates as a multidisciplinary unit at the nexus between academic research, advocacy, and legal practice, looking at ways to design interventions that would provide high quality legal representation to individuals sentenced to death.

In the past few years, the organisation's review of final outcomes in death penalty cases at the Supreme Court have revealed serious problems with the administration of justice. Since 2021, out of the 30 death penalty cases heard, the Supreme

“Our death penalty representation involves an interdisciplinary team including lawyers, mitigation investigators trained in different social sciences, mental health professionals and forensic experts... We believe that lawyers are central to this process, and may contribute to the same by ensuring greater adoption of progressive standards in their practice”

PROJECT 39A

Court has acquitted (reversed the guilt of) 11 prisoners. Further, death sentences of 17 prisoners were commuted (reduced to life imprisonment). This trend however is not seen in the lower courts. In the year 2022 for instance, Trial Courts imposed 165 death sentences, the highest in a single year since 2020.¹⁶ As a consequence, there are currently over 500 prisoners on death row, the highest number since 2004.¹⁷

For Project 39A, the high degree of alienation that many of the accused on death row have faced from the legal process, combined with poor levels of legal representation, has significantly compromised their quality of defence. This, coupled with the tendency for death row inmates

to belong to marginalised communities, throws into question the ability of the Indian criminal justice system to ensure due process and fair treatment under the law. As a result, it is argued that the imposition of the death penalty is often awarded through unfair and unjust legal processes, with arbitrary sentencing by the courts often failing to consider the circumstances of the accused (as required by law).

Crucially, the organisation advocates for a multidisciplinary approach for strengthening India's criminal justice institutions, emphasising the value of other professions such as forensic experts, mental health professionals, and mitigation investigators with backgrounds in

“An overwhelming majority of death row prisoners belong to the most socio-economically marginalised sections of the society. The quality of representation provided to them is also very poor - for most prisoners at the Trial Court stage, their lawyers never discussed the case with them; for those at the Supreme Court, many did not even know their lawyer’s name”

PROJECT 39A

social science, to support in legal representations. From a litigation and public policy perspective, this also includes multidisciplinary efforts as an academic institution, with Project 39A co-authoring a report with the National Institute of Mental Health and Neurosciences (NIMHANS, Bangalore) to produce the first report of its kind documenting an empirical medico-legal study on the psychosocial realities of prisoners on death row.¹⁸ Other multidisciplinary projects to raise awareness of death row conditions, include their virtual art exhibition ‘Capital Letters from Death Row’¹⁹, in collaboration with artistic initiative reFrame which brought to light the lived experiences of death row prisoners in India through letters and other forms of artistic expression.

“We hope to create a better culture of protecting the fair trial rights of accused persons in the criminal process”

PROJECT 39A

In response to Project 39A's findings dating back to August 2014, the organisation has been providing pro bono legal representation to death row prisoners, expanding in its reach and scope. To date it has represented 194 death row prisoners and been involved in 60% of death penalty cases pending before the Supreme Court. Of representations made, 21 acquittals have been obtained and 39 commuted thus far.

Below are two examples of instances where the organisation's pro bono legal representation and advocacy have been key to ensuring the proper administration of justice for individuals on death row in India. Notably, the challenges and impacts made through these contributions are also explored.

“The death penalty in India operates in a criminal justice system that is riddled with systemic issues such as fabrication of evidence and wrongful determinations of guilt”

PROJECT 39A



Photo Credit: The Guardian

PROVIDING MITIGATION SERVICES FOR INDIVIDUALS ON DEATH ROW



Photo Credit: NDTV

The death penalty in India is imposed only after consideration of circumstances relating to the crime and the criminal, and only where the probability of reformation is ruled out. While information about the crime is readily available from case records, information about the accused is not available or presented before the courts. This severely restricts the appreciation of mitigating circumstances, and can undermine the court's sentencing ability in the absence of important materials relating to the accused.

In response to these procedural shortcomings, the litigation and mitigation teams of Project 39A have been working with criminal law practitioners across the country to visit death row prisoners in jail. The purpose of these visits is to conduct in-person interviews to collect information relevant to hearings on the death sentence.

By seeking permission for mitigation investigators to visit the accused in prison, Project 39A has sought to introduce, for the first time, a practice of rigorous collection and documentation of information relating to the individual. The findings obtained have subsequently been presented to several courts during death penalty hearings in the form of mitigation investigation reports.

CHALLENGES: Access to prisons has been difficult to achieve in many instances. Here, Project 39A attest to resistance by some High Courts in refusing permission to mitigation investigators to collect data ahead of death penalty hearings. This has included instances in the Calcutta High Court and the Bombay High Court. Consequently, notwithstanding efforts made, the project has been unable to provide a consistent level of mitigation to prisoners across all cases.

In addition, challenges arise as a result of the public pressure surrounding cases that evoke the utmost outrage and contempt by society. Excessive and exclusive reliance on the nature of the crime was therefore often considered adequate in determining an appropriate sentence, notwithstanding requirements under law to consider the circumstances of the accused as well as the crime.

LESSONS: In order to overcome these difficulties, Project 39A's emphasis on data driven approaches to advocacy, coupled with the use of a multidisciplinary team to highlight the realities of death row prisoners are critical to shifting mindsets and re-imagining the manner in which quality legal representation can be provided. Accordingly, changes can be realised gradually as new spaces and practices are encouraged within the criminal justice system for restoring the dignity of death row prisoners.

IMPACTS: These changes are already being witnessed. In January 2022, when permission was granted to one of Project 39A's mitigation investigators, it marked the first time that such an order had been made by the Supreme Court. Subsequently, through persistent efforts, permission is now granted as a matter of routine by the Supreme Court in all death penalty cases, and to date, has been granted on 18 occasions. This practice has subsequently spread to High Courts in the country (including the Bombay High Court at Aurangabad, and Kerala High Court), which have allowed access to mitigation investigators in 3 cases so far. The Kerala High Court has even gone a step further, requesting Project 39A to provide mitigation services for 6 death row prisoners (that had not previously been represented by the organisation).

At the same time, the contributions of Project 39A also unearthed the absence of guidelines for collecting mitigation material. As such, the Supreme Court, on its own motion, instituted a suo moto proceeding for enquiring into the same (*In Re: Framing Guidelines Re-garding Potential Mitigating Circumstances to be Considered While Imposing Death Sentences*). As a result of this action, the Supreme Court sought to address these concerns through a five-judge Constitution Bench focused on ensuring a uniform approach for sentencing hearings in death cases. The development is particularly significant given that this is the first time a Constitution Bench will sit on the issue of death penalty sentencing since 1980, when the constitutionality of the death penalty was upheld (in *Bachan Singh v. State*).



Photo Credit: PTI

CHALLENGING USE OF THE DEATH PENALTY FOR NON-HOMICIDAL OFFENCES



Photo Credit: Mukesh Gupta, Reuters

In 2022, Project 39A intervened in a proceeding challenging the legality and constitutionality of provisions which punish sexual offences with a mandatory minimum of life imprisonment. The organisation argued that it was an excessively punitive measure to establish a life sentence as a minimum or baseline standard. The litigation and research (death penalty sentencing) teams of Project 39A consequently worked with a senior advocate to bring the matter before the Supreme Court.

IMPACTS: The matter is currently pending, awaiting final hearing and adjudication, however if successful, it could see the court strike down provisions of law which provide for this punishment. This would be the first time for the Supreme Court to have engaged in determining the proportionality and constitutionality of a punishment other than the death sentence.

The case reflects wider legal trends, as in other jurisdictions such as Kenya, which have begun to recognise the cruelty of punishments such as mandatory life imprisonment as a violation to human dignity.

“These sentences are opposed to the principle of equality. They reduce an entire class of convicts to the circumstances of their crime and hold them irredeemable.”



Photo Credit: Mukesh Gupta, Reuters

LEGAL DEVELOPMENTS

As noted by the above contributions, Project 39A has successfully advocated for a number of legal reform efforts on the death penalty. However recent legislative changes at a state level have also been introduced that are often at odds with the trends seen within Supreme Court decisions.

The below snapshot highlights some of these underlying tensions. The developments hope to encourage and inspire involvement from the international legal community, and national law firms, on how they can contribute to strengthening SDG 16 in India, particularly with respect to safeguarding proper administration of justice within the Indian criminal justice system.



Photo Credit: The National News, Reuters

“We understand that institutional reforms are necessary to ensure the meaningful development of legal doctrine and due process for all. Currently, the reforms initiated by the Supreme Court often do not affect change in the practice before the High Courts and trial courts”

RECENT CASE LAW AND LEGISLATION ON THE DEATH PENALTY IN INDIA

INHUMAN CONDITIONS IN 1382 PRISONS, 2018 (SUPREME COURT): In this case the court found that death row prisoners retain the right to work and the right to education whilst on death row.

ACCUSED X V. STATE OF MAHARASHTRA, 2019: This landmark case saw the Court hold that prisoners who suffer from mental illnesses cannot be sentenced to death. The case precedence has since been built upon further, following the court's findings in Baburao Sangerao v. State of Maharashtra, Aurangabad High Court 2023, in which for the first time in India, a prisoner's Intellectual Disability diagnosis was considered when reducing his death sentence to life imprisonment.

MITIGATING CIRCUMSTANCES TO BE CONSIDERED WHILE IMPOSING DEATH SENTENCES, SUO MOTO CRL WRIT PETITION NO. 1 OF 2022: In a momentous development, the Supreme Court took note of fundamental gaps in the death penalty sentencing framework, which had led to inconsistent approaches within the Supreme Court itself. It then referred these issues to a Constitution Bench towards ensuring a uniform approach for sentencing hearings in death cases.

Further, Madhya Pradesh had a policy of promoting and rewarding public prosecutors for successful convictions and imposition of the death penalty. This policy was withdrawn by the state after submissions were made in this case about its effect of incentivising prosecutors to seek the death penalty; possibly undermining their independence, discretion and also affecting fair trial rights of the accused.

MANOJ & ORS. V. STATE OF MADHYA PRADESH, 2022: In this case the Supreme Court took note of the absence of a coherent legal and institutional framework for collecting and presenting mitigation circumstances in death penalty cases. The court proceeded to lay down detailed guidelines about the manner in which information about a prisoner had to be

collected before handing out the death sentence, placing onus on the state and court to elicit a wide range of information first. Pursuant to these guidelines, the Supreme Court has institutionalised the practice of calling for reports in death penalty cases, namely: (1) from Probation Officers, (2) from prison authorities regarding the prisoner's jail conduct, work done in jail etc. and (3) psychological and psychiatric evaluation reports including to ascertain presence of post conviction mental illness if any. It has also simultaneously allowed mitigation investigators, chosen by the defence, to interview the accused in person to collect information, and present the same before the court. Various High Courts have started issuing similar directions in death penalty cases pending before them.

RISHI MALHOTRA V. UNION OF INDIA, 2023: In this case, the Supreme Court is reconsidering whether hanging, the sole method of execution provided in Indian law, is a 'suitable' means for carrying out a death sentence. The Government of India submitted in response that it is considering setting up a review committee to consider this issue.

In contrast to the above-mentioned case law, the Government of India has introduced other legislation on the death penalty, many of which act to create greater leniency of its usage within the criminal justice system.

SECTION 376DB, INDIAN PENAL CODE, 1860; SECTION 6, PROTECTION OF CHILDREN FROM SEXUAL OFFENCES ACT, 2012: The Indian Penal Code was revised in 2018 after political pressure following incidents of child sexual abuse came to light. New legislation was therefore introduced to expand the scope of the death penalty to include the crimes of rape of children, even where such crimes did not result in death.

PUNJAB EXCISE (AMENDMENT) ACT, 2021 (07 OF 2021), SECTION 61A; MADHYA PRADESH EXCISE (AMENDMENT) ACT, 2021 (28 OF 2021), SECTION 49A; SHAKTI CRIMINAL LAWS (MAHARASHTRA AMENDMENT) BILL, 2020 (LI OF 2021): In recent years, a number of States have introduced the death penalty for wider criminal offences including: sexual offences and the sale of spurious liquor that is likely to cause grievous harm or death.

BHARATIYA NYAYA SANHITA BILL, 2023: In 2023, the Government of India proposed to completely overhaul the Indian Penal Code 1860 (the primary penal statute in the country) and replace it with the Bharatiya Nyaya Sanhita Bill. The Bill contains provisions for imposition of the death penalty in new offences, including: terrorist activities, organised crime, and mob-lynching.

RECOMMENDATIONS

In light of the shifting landscape on criminal justice and the use of the death penalty in India, a number of recommendations are outlined below for how the international and national legal community can get involved to strengthen progress towards SDG 16:



Photo Credit: Office of High Commissioner for Human Rights (OHCHR)

“The death penalty operates in a criminal justice system that is rife with systemic issues like prevalence of torture and use of unreliable forensic reports. This results in the imposition of the death penalty as an arbitrary, unfair and unjust outcome of a broken criminal justice system”

PROJECT 39A

DEVELOPING AN UNDERSTANDING OF FAIR AND DUE PROCESSES

- Legal institutions can work with lower levels of the judiciary through capacity building initiatives to encourage due process in sentencing decisions. This includes recognising and understanding the right to a fair trial.
- Lawyers can participate in training workshops and courses to develop their client care skills and deepen their understanding of due process within the criminal justice system.
- Lawyers can work with mitigation investigators and other professionals to better represent their clients where additional expertise is required.
- Law firms can embed a culture of high quality client care in daily practice, ensuring that clients are always well informed and kept up to date on their case particulars.

PROVIDING PRO BONO LEGAL REPRESENTATION

- Lawyers can extend quality pro bono legal representation across the criminal justice system, strengthening access to justice for marginalised groups (both on the prosecution and defence).
- Lawyers can advocate for stronger legal aid institutions to address unmet legal need.

ENGAGING ON TOPICAL REFORM EFFORTS

- Lawyers can work with public institutions and government to provide their expertise on criminal sentencing, particularly where they have experience representing both the prosecution and defence.
- Lawyers can work with academic institutions and multidisciplinary teams to contribute insights into the day-to-day workings of the criminal justice system.
- Lawyers can support reform efforts on issues including: the appropriateness of the death penalty, methods of execution and improved conditions for grant of parole for death row prisoners.
- Lawyers can contribute their expertise to the development of new sentencing frameworks and court guidelines for the proper functioning of the criminal justice system.
- Lawyers can raise awareness of the importance of due process to the criminal justice system, helping to shift public perceptions and understanding away from a simple victim (good)-perpetrator (bad) mindset.

INDIA: END NOTES

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Photo Credit: Media India

