

# Behind Bars not Beyond Justice: Legal Aid to Under-trial Prisoners

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*Pro bono publico*, 'for the public good' is not just in the sense of professional work undertaken voluntarily and without payment, but in the sense of a public service to those who are unable to afford the services of skilled professionals. It is a noble and necessary calling for all attorneys.

In India 'Humanism' is the source and strength of Legality, is writ large in the concept of legal services to the poor in that slice of our planet where backwardness and impoverishment have hit the hardest blows through the legal process itself on the plebian and the lost.

Soon after India got independence the concept of Legal Aid took roots under the leadership of Justice N.H. Bhagwati of Bombay High Court and Justice Trevo Harris of Calcutta High Court.<sup>3</sup>

Legal Aid system took ages to grow but still it is Dysfunctional. India is a civilized country still India does not have codified Rights for the Prisoners. The plight of the Under-trials prisoners is at mercy. Across India, lakhs of Under-trials inmates decay in prisons, while their trials proceed at tormenting slow in the stuff burdened criminal courts.

Under-trials are those who are in detention and are presumed innocent until proven guilty. But still they are served as they are criminals. The over peopled, understaffing, physical mistreatment of prisoners leading to custodial deaths, poor conditions for women, long awaiting trials etc. are some hounding problems in the jail. Red Tapism is rampant.

This Paper is basically analytical and descriptive in nature. In this paper, the authors make a humble attempt to review the working of various Legal Aid Clinics whose objectives are to provide free legal help to under-trials prisoners. Further, the paper also identifies the gap that may be taken up for further investigation and research. The data used in it, is from secondary sources according to the needs of this study. It shall also suggest potential suggestions and recommendations for safeguarding the rights of under-trials prisoners.

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## **Introduction**

Punishing the offender is the primary function of the civil society. The well-organized system of prisons is known to have subsisted from the earliest times. The bona-fide purpose of remitting criminals to prison is to metamorphose them into truthful and law abiding citizen by inducing in them a loathing for crime and criminality.

The conditions of the prisoners were merciless in India and were treated with hatred. There was no uniform code for the punishment. The Jailors were ferocious. Therefore, the need for uniform code arises. In 1835 some thought of reformation arose. The second Jail Enquiry Committee in 1865 expressed the concern for insanitary conditions of Indian prisoners which emanated into death due to illness and wide spread diseases.

The Prisoners Act was enacted to bring uniformity in the working of the prisoners in India. The Act provided for classification of prisoners and sentences of whipping was abolished.

The laws in India are replica of colonial times. It is antagonistic to the under privileged. The Law still serves to protect the needs of haves and not the have nots. This has created biasness as the rich escape the law very easily but the under privileged cannot and the prisons are full of poor people.

Justice Delayed is Justice Denied, though Legal Aid is a right of every citizen of India, but is far from reality. The legal rights entitled to needy under-trial have been mandated by the constitution. The State funded Legal Aid program is organized under the Legal Services Authorities Act of 1987. Under this Act, the NALSA has been set up by the Central Government and SLASA has been set up in each state. These authorities are bound to provide free legal aid to poor and needy. But these authorities have been largely futile in dealing with ample number of cases.

Though each citizen is entitled to free legal aid from the point of arrest, this objective is yet not achieved many times. In India under-trials continue to constitute majority of prisoners. The justice delivery system in India has seen more than two lakhs of under-trial prisoners being derelict in prison for years. As per the Prison Statistics of India issued by the National Crime Records Bureau, 2015, 67.2% of the total prisoners are under-trials and only 32% of the prisoners are convicts. Indian prisons continue to remain over crowded, as measures against their total capacity. This is due to lack of awareness on the part of the accused/victim, and the lack of initiative and coordination between the police and legal aid authority.

## **Research Methodology**

This study basically follows doctrinal research method in the compilation, organization, interpretation and systematization of the primary and secondary source material. The approach of the study is descriptive and analytical. The data collected, organized and systematized from the secondary data resources. We have collected the data from different websites and also websites of Indian Government.

### **Objectives**

1. This paper is conducted to address and analyse the issue of Legal Aid to under-trial prisoners.
2. To trace the transparency, accountability and working of various stakeholders such as Legal Services Authorities.
3. To suggest potential suggestions and recommendations for making Legal Aid system in prison more effective and efficient.

### **Innocent Until Proven Guilty**

“As per the Law Commission, 67% of India’s Prisons Inmates are Under-trial Prisoners who are presumably innocent according to law.”

Lack of inspection and sketchy implementation of oversight mechanism turn prisoners into frightening wrecks with shoddy living conditions. This rot in criminal justice system impacts the psychological condition of a prisoner making the person more vulnerable than before to criminal propensities. The prisoners get out of jail ruined and not reformed.<sup>4</sup>

Justice is the highest virtue of Human spirits, which conceives *fiat justiciarurat to elum* which means, Let heaven fall, Justice has to be done. The concept of equal justice visualizes a political and legal order in which justice will be brought within the reach of all, both, those blessed by their wealth and those depressed by their poverty.

Legal Aid has been recognized in the world over; as a mechanism to ensure easy and inexpensive access to justice and it has now been evolved as a distinct human right beginning its journey from charity- depending on the altruistic impulses of church, king, lawyers, and individuals- to a basic human right buttressed by the constitution, statutes and international humanitarian law to realize the substantive human rights through its processual arm.<sup>5</sup>

Legal aid, as a welfare right, is not the exclusive product of political right to seek representation in a court of law, but it is an outcome of the twentieth century “war against

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<sup>4</sup>*Prison Reform*, DRISHTHIAS (Aug. 05, 2018, 22:30 PM), <http://www.drishtiiias.com/upsc-exam-gs-resources-Prison-Reform>.

<sup>5</sup>J.S. Bisht, *Right to Legal Aid: A Basic Human Right*, 13(4) NYAYA DEEP 69, 69 (2012).

poverty” to ensure just and fair human conditions to the people.<sup>6</sup> Eradication and control of poverty is essential function of welfare state, which can be achieved by pursuing suitable socio-economic policies by the government. To ensure full benefits of socio-economic rights, the state is to take productive legislation for the weaker sections and to afford them additional leverage to reap the full benefits of the welfare legislation.<sup>7</sup>

### **Abstraction Of Legal Aid in India**

Apex court in *Bhim Singh*<sup>8</sup> case states that the government has the constitutional responsibility and statutory obligation to review the case of under-trial prisoners and take appropriate action including release of the prisoners and inform the prisoners and the concerned authorities.

During the commencement of the constitution there was no specific provision for legal aid, the conceptualization of legal aid began with judicial interpretation of the constitutional provisions of Equality, Justice, Right to Life and Personal Liberty etc. Equality before Law necessarily involves the concept that all the parties to a proceeding in which justice is sought must have an equal opportunity of access to the court and presenting their cases to the court. Furthermore, Rights to free Legal Aid and speedy trial are guaranteed fundamental rights under Article 21 of the Constitution.<sup>9</sup>

To ensure equal justice and to give constitutional status to free legal services to the poor Article 39-A was inserted by the amendment in the Constitution. Thus by this, a person should not be denied justice merely on the grounds of poverty or on ground that he is not in a position to engage a lawyer to conduct his case. The Apex Court has also considered the combined effect of Article 21 and Article 39A of the Constitution of India.

Since 39-A is a Directive Principle of State Policy, it is not enforceable. Subsequently, the Parliament accorded a statutory berth to the right by enacting the Legal Services Authorities Act, 1987 to advance the imperatives of Article 39A. Thus, Right to Legal Aid has acquired a pride place in the Constitution and statutory documents as Procedural Rights, as for poor without such a right the entire corpus of Human Rights is a mirage. Therefore, this right confers to be the basic Human Right, to be made available to all.

### **Rational Behind Legal Service Authorities Act, 1987**

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<sup>6</sup> S. Edgar & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317, 1317 (1964).

<sup>7</sup> Lucy Williams, et. al. (ed), *Law and Poverty: The Legal System and Poverty Reduction*, CROP INTERNATIONAL STUDIES IN POVERTY RESEARCH 11, 11 (2003).

<sup>8</sup> *Bhim Singh v. UOI*, W.P. (Criminal.) No. 310/2005 (India).

<sup>9</sup> Deepshikha, *Role of Advocates In Implementation of Legal Aid Schemes*, LEGALSERVICEINDIA, (Aug. 05, 2018, 22:30 PM), <http://www.legalserviceindia.com/article/I396-Role-Of-Advocates-In-Implementation-of-Legal-Aid-Schemes.html>.

In line of profuse movements, the Legal Service Authorities Act finally came into force on 9<sup>th</sup> November, 1995 on condition for providing free and competent Legal service to the poor and weaker section and ensuring that opportunities for securing justice were not denied to any citizen due to economic or other disabilities.

Under the Act, Section 12 and Section 13 are important provisions which talk about the entitlement of the legal services. Section 12 provides as to persons entitled to get legal services which include –

1. a member of a Scheduled Caste or Scheduled Tribe;
2. a victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution;
3. a woman or a child;
4. a mentally ill or otherwise disabled person;
5. a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster;
6. an industrial workman;
7. in custody, including custody in a protective home within the meaning of clause (g) of section 2 of the Immoral Traffic (Prevention) Act, 1956 (104 of 1956); or in a juvenile home within the meaning of clause (j) of section 2 of the Juvenile Justice Act, 1986 (53 of 1986) or in a psychiatric hospital or psychiatric nursing home within the meaning of clause (g) of section 2 of the Mental Health Act, 1987 (14 of 1987);
8. in receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Govt., if the case is before a court other than the Supreme Court, and less than rupees twelve thousand or such other higher amount as may be prescribed by the Central Govt., if the case is before the Supreme Court."<sup>10</sup>

Article 13 says that if anyone of the aforesaid criteria under Sec.12 is satisfied then the person concerned gets entitled to the legal service provided such person has a prime facie case to prosecute or to defend.<sup>11</sup>

In order to achieve the objective enshrined in Article 39-A, the government appointed a committee for implementing Legal Aid programs on uniform basis in all States and Union

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<sup>10</sup>Nalsa, *Introduction and History of NALSA*, NALSA (Aug. 05, 2018, 22:30 PM), <https://nalsa.gov.in/about-us>.

<sup>11</sup>RohitSoni, *Analysis of Position of Legal Aid to Prisoners in India*, LATESTLAWS(Aug. 05, 2018, 22:30 PM), <https://www.latestlaws.com/articles/analysis-of-position-of-legal-aid-to-prisoners-in-india-by-rohit-soni/>.

Territories. The said committee evolved a model scheme, which was implemented by the government. However, on review, certain deficiencies were found and it was considered desirable to constitute statutory legal authorities at National, State and District levels to provide effective monitoring of Legal Aid Programs.

### **Hierarchy of Committees Created Under the Act**

A significant proportion of people in custody is entirely dependent on the courts, the prison officials, the Legal Aid system or the jail visiting lawyers not only to identify their legal requirements at the earliest stage of pre-trial detention, particularly at the time of arrest and interrogation, but also to provide effective legal representation and advice that would safeguard liberty and prevent their unnecessary detention.<sup>12</sup>

The Legal Aid in India is stratified into National Legal Service Authority at Centre which is the Apex body, The State Legal Service Authority in every State heading the Legal Aid machinery of District Legal Service Authority and Taluka Legal Services Committee. These bodies are responsible for the formulation, implementation and monitoring of various Legal Aid Schemes.

National Legal Services Authority lays down policies and principles for making Legal Aid and Assistance available to all under the Act. It also frames most effective and economical schemes for legal services by distributing funds and grants to State Legal Service Authorities and NGOs for efficient enforcement of Legal Aid propaganda.

In every State, a State Legal Service Authority is established for implementation of legal aid schemes and programs of central authority and to succeed the motto of access to justice for all. Similarly, in every district a District Legal Services Authority is constituted for implementing the legal aid schemes and programs in particular district. In addition, Supreme Court Legal Services Committee has been constituted to deal with appeal or cases arising under the Original jurisdiction and High Court Legal Services Committees have been constituted to deal with appeals and cases arising under the original jurisdiction of that particular court. Taluk Legal Services Committees are also constituted for each/group of Taluk or Mandal to coordinate the activities of legal aid services and to organize Lok-Adalat.

### **Guidelines of NALSA**

The primary function of National Legal Service Authority is to lay down policies and principles for making legal services available under the provisions of the Act. The policies

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<sup>12</sup>Jail Mail, *Prison Reforms Updates*, HUMANRIGHTSINITIATIVE (Aug. 05, 2018, 22:30 PM), [http://www.humanrightsinitiative.org/publications/prisons/Jail%20Mail%20%20Legal%20Services%20Day%20\(07.11.15\)%20\(English\).pdf](http://www.humanrightsinitiative.org/publications/prisons/Jail%20Mail%20%20Legal%20Services%20Day%20(07.11.15)%20(English).pdf).

and guidelines so made are to provide free legal services to the eligible persons. Some of these policies and guidelines includes the following heads;

1. Every Judicial Member of District Legal Services Authority has to visit jails within specified time period to regularize and distinguish: -
  - Under-trialsdeteriorating in prisons in anticipation of Legal assistance;
  - Any convicts who were juveniles at the time of arrest;
  - Any non-criminal mentally ill persons detained in prisons;
  - Care provided to children below six with their mothers;
2. To provide suitable remedial operation by way of Legal aid and assistance;
3. To organize Lok-Adalats in compoundable matters in prisons and observation homes;
4. To report matters settled in Lok-Adalats to be sent to SLSA, which is required to compile all information and share with NALSA.

In addition to aforesaid, guidelines and policies pertaining to matters of Court fee, process fees and all other charges payable or incurred in connection with any legal proceedings, providing advocate in legal proceedings, obtaining and supply of certified copies of orders and other documents in legal proceedings, preparation of appeal, paper book, translation of documents etc. are also pen down in the guidelines of NALSA.

### **Legal Aid to Under-Trial Prisoners: Expectations versus Reality**

India's under-trial population is estimated to be the 18th highest in the world and the third highest in Asia.<sup>13</sup>The country's 1,412 jails are crowded to 114% of their capacity, with a count of 4.33 lakh prisoners against a capacity of less than 3.81 lakh until December 31, 2016, according to provisional figures cited by the government in RajyaSabha earlier this month. In 2015, when there were 1,401 jails, these had 4,19,623 prisoners, again 114% of the total capacity of 3,66,781, according to figures compiled by the National Crime Records Bureau.<sup>14</sup>

About 29% of under-trials are not formally literate, while 42% had not completed secondary education.<sup>15</sup> A quarter of all under-trials have been in prison for more than a year.<sup>16</sup>

Under-trials were a key feature among the eight-point guidelines that the Supreme Court issued in a landmark judgment on the *inhuman conditions*<sup>17</sup> in prisons. Among these were:

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<sup>13</sup>Roy Walmsley, *World Pre-trial/Remand Imprisonment List (Second Edition)*, INTERNATIONALCENTREFORPRISONSTUDIES, (Aug. 05, 2018, 22:30 PM), [http://www.prisonstudies.org/highest-to-lowest/pre-trialdetainees?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/pre-trialdetainees?field_region_taxonomy_tid=All).

<sup>14</sup>*Supra Note at 5.*

<sup>15</sup>*Supra Note at 5.*

<sup>16</sup>*Supra Note at 5.*

<sup>17</sup> Re-Inhuman Conditions in 1382 Prisons case, Writ Petition (Civil) No.406/2013 (India).

1. The Under-trial Review Committee in every district should meet every quarter;
2. The committee should look into aspects pertaining to effective implementation of Sections 436 and 436A of the CrPC so that under-trial prisoners are released at the earliest and those who cannot furnish bail bonds due to poverty are not subjected to incarceration only for that reason;
3. The secretary of the District Legal Services Committee will look into the issue of the release of under-trial prisoners in compoundable offences, the effort being to explore the possibility of compounding offences rather than requiring a trial to take place.

### **Expectation**

As per Model Prison Manual, 2016 the following practices should be adopted by the state to ensure free and competent legal services to persons in custody-

1. The state should nominate jail visiting advocates to help Under-trial prisoners. These advocates should visit prisons regularly on fixed days of the week. Through this Under-trials can seek aid and advice for their cases.
2. In every prison there should be set up of Legal Aid Clinic. Panel lawyers and Paralegal Volunteers should be trained to assess the legal aid clinic and provide free legal aid services.
3. In order to educate Under-trials about the free legal aid services Legal Awareness and Literacy classes should be arranged. Law schools, paralegal volunteers and legal aid lawyers must take these initiatives.
4. In order to reduce overcrowding of prison the Supreme Court in *Bhim Singh v. Union of India*<sup>18</sup> case it was held that if an Under-trial has served half of the maximum sentence of the offence for which he has been charged, he can be released on a personal bond, with or without sureties, as long as the offence is not punishable with a death sentence.
5. The constitution of Under-trial Review Committee to identify Under-trial prisoners who have completed half of the maximum period of imprisonment provided for the said offence under the law.

Duty of SLSA to instruct the panel Lawyers to meet the under-trials and discuss their cases and move appropriate application before the Court for their release.

6. The SLSA should secure that for offences which are compoundable, appropriate steps are to be taken for compounding, and where offences non-compoundable efforts should be made to dispose the case at the earliest.

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<sup>18</sup> Writ Petition (Civil) No.21 of 1999.

7. The fundamental Right of Free Legal Representation or Legal Aid to be provided in the prosecution of their cases at different levels of their trials.
8. Advocates dealing with criminal cases are made available in all courts so as to provide legal representation to the persons arrested.

### **The Reality**

1. Overcrowding continues to be the first and the foremost reason for ineffective implementation of Legal Aid schemes. Overcrowding continues in spite of moves undertaken to accommodate more prisoners and fast track cases. Under-trials are the major reason for overcrowding. Thus, this vicious circle goes on continue.
2. There is a strong link between denial of liberty and poverty which exist irrespective of whether Legal Representation is by a private lawyer or state appointed legal aid lawyer.
3. As per the study conducted by Amnesty International India the remuneration paid to Legal Aid Lawyers per Bail Application in State of Tripura is Rupees 1500 whereas the same is Rupees 100 in Andhra Pradesh. This inadequate payment and often delay in payments cited as justification of poor quality of legal representation by legal aid lawyers. A committee constituted by NALSA observed that, “The court fee paid to panel lawyers is very low and it is difficult to attract competent lawyers.”<sup>19</sup>
4. A majority of Under-trials are less educated, making it difficult for them to reach out for legal aid schemes.
5. A Parliamentary Panel report issued in February, stated, “The committee is pained to note that even after 30 years of the enactment of Legal Services Authorities Act, NALSA has not be able to establish legal services clinics in all the jails of the country.” According to NALSA, 1,070 legal services clinics have been established in various jails across the country as against 1387 functioning jails.
6. The committee also observed that in most cases, incompetent lawyers who do not understand the complexity of the crime, are empaneled. Also, in most cases the prisoners are unaware of who is representing them and at what stage their case is.
7. The number of legal aid lawyers per prison and the frequency of visits to prison per legal aid lawyer per month, varies significantly between states. Among the states with the largest under-trial populations, Haryana has the highest number of legal aid lawyers but each lawyer visits prison on an average 0.22 times a month, while West Bengal has the least number of

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<sup>19</sup>KanuSarda, *Fee hike for lawyers representing under-trials*, NEWINDIANEXPRESS (Aug. 05, 2018, 22:30 PM), <http://www.newindianexpress.com/thesundaystandard/2018/mar/25/fee-hike-for-lawyers-representing-under-trials-1791993.html>.

legal aid lawyers, but each lawyer visits prison on an average 1.44 times a month. The frequency of visits by lawyers is low in many states – in most states, legal aid lawyers visit prisons less than once a month. Significantly, 23 prisons reported having no legal aid lawyers.

8. India's Law Commission noted in a 2017 report that in practice, legal aid was provided only after charge-sheets were filed. This practice limits the access of poor detainees - who cannot afford private lawyers - to legal assistance in the crucial pre-charge stage.
9. Invariably it has been found that only the poor and indigent who have not been able to put up the surety are those who have continued to languish as under-trial for very long periods and that too for minor offences. The lack of adequate legal aid and a general lack of awareness about rights of arrestees are principal reasons for the continued detention of individuals accused of bailable offences, where bail is a matter of right and where an order of detention is supposed to be an aberration.

### **Potential Suggestions and Recommendations**

Addressing this issue need a comprehensive procedure and solid endeavor from all the authorities whether it be the State or an Executive body.

1. The researchers are of the view that the Under-trial prisoners should be kept in a different institution so that they do not indulge the feeling of a convict as they are still innocent until proven guilty.
2. The researchers opined that the States should adopt the Model Prison Manual 2016, and should also make rules for their implementations, so that no one is denied of Justice.
3. It is submitted by the researchers that the Member Secretary of NALSA, SLSA, and DLSA should co-ordinate among them and ensure that there are adequate number of competent Lawyers are empaneled to assist the Under-trials.
4. The researchers suggest that the fees paid to the lawyers should be increased and should be revised periodically, so that the quality Legal Aid Services can be provided to poor litigants.
5. The researchers submit that there shall be system of penal lawyers at the State, District, and Taluk levels and they should submit regular reports on the status of their cases and failing the same will make them answerable and the authorities should keep a check on the working of the Penal Lawyers so that no one escape from the same.
6. It is submitted by the researchers that to make Legal Aid efficient and easily available Paralegal staff such as final year law student may visit the prison to educate the Under-trials about Legal Aid and also providing them with appropriate Legal Aid.

## **Conclusion**

In a developing country like India where problems like illiteracy, ignorance, poverty and backwardness are still existing, providing of legal literacy and creation of legal awareness is more important than providing of legal aid, then only we can translate the constitutional philosophy of Article 39-A into a reality. Thus, the Legal Aid program, if implemented purely will go a long way towards wiping the tears from the eyes of the teeming millions of Indian people by advancing social justice and providing them equal access to the law and justice.

The question that whether it is a myth or reality, can be interpreted that the vision of the pioneers of the legal world is certainly turning into reality, the myth is only of its implementation which will also take a real shape once certain minor reforms are executed. It is only when Legal Aid schemes reach to the poorest of poor and to the remotest corner of India "*we the people of India*", shall overcome the brooding sense of injustice.