INTERNATIONAL JOURNAL OF NOVEL RESEARCH AND DEVELOPMENT (IJNRD)
© 2026 IJNRD | Volume 11, Issue 3, March 2026 | ISSN: 2456-4184 | IJNRD.ORG

LEGAL AID AS A TOOL FOR SOCIAL JUSTICE: RHETORIC, REALITY, AND REFORM IN THE INDIAN CONTEXT

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Abstract : In its complete sense legal aid is not a charitable gift of the State to people who are in need of lawyers- it is a structural precondition of any justice system, which wishes to be a fair one. The constitutional pledge of equal justice and free legal aid enshrined in Article 39A and donned with the Legal Services Authorities Act, 1987, in India has created a rich institutional structure: national and state legal services authorities, district legal aid panels, Lok Adalats, para-legal volunteers, legal literacy camps all over India. Even the groups most desperately intended to receive legal assistance: the rural poor, the Scheduled Caste and Scheduled Tribe groups, women facing domestic violence, labourers in the unorganized sector, undertrial prisoners, report either that the system is not available, or that is inadequate when they do. This paper aims to critically analyze the legal aid in India as the means of promoting social justice. It looks at the constitutional and legislative underpinnings of legal aid, explores the structural and cultural obstacles that limit its access, and makes the argument that the divide between the discourse about the equal justice and its practical implementation stems from not only a lack of resources but also a failure to structure legal aid in accordance with the needs of the people it is supposedly benefiting. The paper also ends with some reform recommendations that would help redress the legal aid system by transforming it into a much more transformative social institution rather than a mere entitlement.

IndexTerms **- legal aid, access to justice, social justice, Legal Services Authorities Act, NALSA, undertrial prisoners, India**

1. INTRODUCTION

An ancient legal sociological observation, frequently credited to Anatole France although the feeling is even earlier, is that the majestic equality of the law prohibits even the poor, not to sleep in the bridges, to beg in the streets, and to steal bread. In this context, the argument is, of course, that formal equality, the equal treatment of the same rules to all, is not identical to substantive equality, and that a legal system constructed out of formal equality will recreate and tend to entrench the inequalities of the society that it governs. Legal assistance is there, theoretically, to disrupt this process: to make sure that the availability of the institutions of law is no longer a factor of the profundity of the pocket but rather the quality of the claim.

The practicality of this, as in fact accomplished, is a question which is forcefully brought home by the experience of India. Legal aid system is constructed in the country in an impressive manner. At the summit of a tiered scheme, which runs down to state, district, taluk, and sub-divisional legal services committees, employing thousands of panel advocates, organizing tens of thousands of Lok Adalats each year, and extending into every district nationwide, at least on paper, is the National Legal Services Authority (NALSA), which is the creation of the Legal Services Authorities Act, 1987. The figures, which are available in NALSA annual reports, are, per se, staggering: millions of people received legal aid annually, crores of rupees adjudicated by Lok Adalats, hundreds of legal literacy camps held.

But there is obviously something that is amiss. The number of undertrial prisoners in India -the most viscerally needy group of legal service in the country- had long comprised more than two-thirds of the population of Indian prisons, many of them accused of crimes that would not be prosecuted in court to their convictions. The victims of trafficking, bonded labourers, the displaced tribals and victims of domestic violence have all reported that they were not aware of their right to access free legal representation, or that the lawyer appointed to them barely knew their name. The courts are filled with first-generation litigants who cannot read the summons which they have been served, much less in a procedural maze which they have to navigate.

The gap between the institutional framework and the lived experience of its target beneficiaries is the puzzle that is in the center of interest of this paper. This paper contends that it is not a puzzle that can be easily answered by investing additional funds in NALSA or increasing the number of panel advocates. The issue is more fundamental, into the design of legal aid services, the systems of incentives within which the legal aid lawyers can work, the social and cultural obstacles that do not allow the marginalised communities to access the services which they are formally entitled to, and even the political economy of a justice system that has not traditionally been structured around the needs of its poorest users.

The paper continues in the following way. Part two focuses on legal aid in India and traces the normative commitments on which the system is built by using the constitutional and legislative foundations of legal aid. Part three situates the legal aid in the wider

context of the social justice theory, posing the question of what it would mean a legal aid system to be truly transformative, as opposed to being palliative. Section four examines the major obstacles namely structural, institutional and cultural barriers to the effectiveness of available legal aid services. Part five focuses on three particular groups of people whose need of legal assistance is the most urgent and the most unmet at all times: prisoners who have not been put to trial yet, women who have to deal with domestic violence, tribal communities that depend on forests. Part six is concerned with reform, suggesting a range of reforms aimed at transforming legal aid into a more truly useful social justice tool. Section seven concludes.

2. LEGISLATIVE AND CONSTITUTIONAL FOUNDATIONS.

The legal aid in India has its constitutional foundation in a number of provisions, with the most explicit of them being Article 39A, which was added to the Constitution following the forty-two amendment in 1976. The Article makes the State section and provides that the working of the legal system is such as to facilitate justice on a basis of equal opportunity and that free legal assistance is provided by appropriate legislation or schemes to the effect that opportunities are not denied to any citizen based on economic or other disabilities. It is located in the Directive Principles of State Policy section and not the Fundamental Rights section, historically, which has been interpreted as indicating that it is an aspirational obligation but not a right that can be enforced, a fact which over time, the Supreme Court gradually has been overturning.

2.1 The Constitutional Mandate

The greatest intervention of the Court was in the case of Hussainara Khatoon v. The decision of Article 39A was still recently in place when Home Secretary, State of Bihar (1979), ruled. Looking at the circumstances of undertrial prisoners in Bihar, where a large number of detainees had been in custody longer than their possible sentences would have been, the Court said that the right to legal assistance was a necessary component of a reasonable, fair and just procedure, and was thus a protection of Article 21. It was a turning point: the legal aid was now a principle and not a directive, at least to individuals who are subject to criminal prosecution and do not have the means to hire an attorney. Later cases, such as, M.H. Hoskot v. Khatri v. State of Maharashtra (1978). State of Bihar (1981), took this stance and applied it to other phases of criminal proceedings.

Article 14 (equality before law), Article 22(1), (right to consult and be defended by a legal practitioner of their choice), and the obligation to justice of the Preamble based on social, economic, and political justice are also used in the constitutional structure. Cumulatively, these provisions give rise to the fact that the right to a lawyer is not a privilege of the State, but rather a right which is founded on constitutional provisions of dignity, equality, and due process.

2.2 The Legal Services Authorities Act 1987.

The constitutional requirement was converted into the institutional reality by the Legal Services Authorities Act. The Act also provides a four-tier system: NALSA with national level, State Legal Services Authorities (SLSA) with the state level, District Legal Services Authorities (DSLSA) with the district level and Taluk Legal Services committees with the sub-district level. All of them are chaired by a sitting judge and this indicates the desire by the legislature to make legal assistance part of the core of the judicial system and not a fringe benefit operation.

The Act under section 12 defines the types of persons that have the right to free legal services. These are women and children, members of Scheduled Castes and Scheduled Tribes, and persons with disabilities, victims of any mass disaster, trafficking or ethnic violence, industrial workmen, persons in custody, persons whose annual income is not more than a limit stipulated by the authority concerned. This list is quite extensive: it includes most of the population of India that is both economical and socially vulnerable. The question on the ground is whether the institutional arrangements that the Act has put in place can reach this population or not.

This Act institutionalises also another dispute resolution system, Lok Adalats, where disputes are determined by conciliation and compromise without an actual adversarial hearing. Verdicts by Lok Adalats are considered orders of civil courts and are final and not subject to any appeal. Lok Adalat mechanism has been utilized extensively in settlement of huge volumes of cases especially in areas like claims in motor accidents, matrimonial disputes and labour cases. Critics have however questioned the authenticity of settlements made under Lok Adalats to the real informed consent or whether weaker parties under the influence of the cost and time required to undergo formal litigation are forced to accept less than they would otherwise get had they had to go through a formal litigation process.

3. LEGAL AID IN THE PRISM OF SOCIAL JUSTICE.

Social justice, being a promise of the constitution is not only a promise of the redistribution of the economic resources. It involves the breaking down of hierarchies of structure of caste, class, gender and ethnicity, which dictate who wields power in a given society, and who becomes its victim. The Preamble to the Constitution is categorical in the promises that India would provide justice (social, economic, and political) to all its citizens, which B.R. Ambedkar interpreted to mean that this could not be done without the abolition of the social disabilities that had historically excluded the most marginalized communities of India in the realm of civic life. In this context, legal access is not an independent problem of social justice: it is one of its necessary conditions, since the law is the main place of power struggle, its distribution, and its re-distribution.

3.1 The Constitutional Value Social Justice.

To serve as a social justice tool, legal assistance should not simply be a warm body in the courtroom to those who simply cannot afford an attorney. It needs to allow meaningful involvement in the legal process - and this involves having lawyers who are knowledgeable of the situations of their clients, who can communicate with their clients safely despite language and literacy barriers, whose knowledge of the laws that are most likely to benefit the marginalized communities, and who are eager to advocate actively in the interest of their clients. It demands, that is to say, quality, as well as quantity, and a devotion to the substantive results of legal transactions, and not to its formal accomplishment.

3.2 Instrumental and Transformative Leanings of Legal Aid.

Legal aid scholarship identifies two dimensions of the role which could be termed as instrumental and transformative. In its instrumental aspect, legal assistance consists in making sure that the formally legitimate person can actually claim the right in fact i. e. that the person accused of crime has a good representation, that the woman who is owed salary can claim her rights, that the woman whose property is infringed can acquire redress. This is all that any system which is dedicated to formal equality can offer. The transformational aspect is more. It posits the question of whether a legal aid can be organized to do not only facilitate the process of people navigating the legal institutions that exist, but also to question the conditions under which legal disadvantage arises in the first place, via public interest litigation, strategic litigation on behalf of marginalized groups, legal literacy programmes that foster the awareness of communities to their rights, and legal reform advocacy. The legal aid system in India has, in the best case desired to realize this potential of change. This more ambitious vision of the purpose of legal aid can be seen in the landmark scheme of legal services to transgender persons devised by NALSA, in its programmes aimed at the legal empowerment of sex workers and manual scavengers, and in the application of public interest litigation by the legal services authorities to systemic breaches of the fundamental rights.

4. OBSTACLES TO GOOD LEGAL ASSISTANCE: A CRITICAL EXAMINATION.

The most enduring critique of what could be termed the legal aid system in India, which keeps on re-occurring in empirical studies, bar association reviews, and narratives of the civil society organizations, is the quality of legal advocacy offered to aided clients. Panel advocates, the main vehicle of delivering legal aid services are paid a fee that in most states equates to a very small percentage of market rates of similar legal services. The incentive system this fosters is easily faulty: the work of the legal aid in most cases is either an adjunctary undertaking that is made between more lucrative business, and the time and effort spent on the aided client reflects this.

4.1 The Quality Problem

The outcomes are reported. Legal aid studies have established that legal aid lawyers often have little or no prior contact with their client prior to the hearing, often do not investigate or obtain recordings, often not well informed on the particular legal provision applicable to the case of their client, and often they just seek an early disposition instead of an optimum legal result. In the case of undertrial prisoners who are specifically those who might have served years in custody and the entire future of such inmates relies on the quality of the representation furnished; this is not a peripheral inadequacy but a central failure to the very point of the system.

4.2 Gaps in Awareness and Accessibility.

It is only those who are aware of the existence of legal aid system and where to access it who will be assisted. The level of awareness on the entitlement to free legal services is critical among the population that most require them in India. In the surveys, it has always been reported that the proportions of rural households, daily wage workers, and first-generation litigants who do not know that legal aid is available to them, do not know how to access legal aid, or have beliefs that go against it, such as believing that legal aid is only available to those who have been accused of crimes, or that there is a certain cost involved that they cannot meet.

This is worsened by the geographical distribution of legal aid services. District Legal Services Authorities are normally based in district headquarters - towns that could be several hours of travelling distance of remote rural areas. Village and panchayat legal aid clinics, which are now encouraged by NALSA, are patchy in most states, and usually delivered at a visiting basis instead of on a dependable, available basis. The linguistic aspect brings on another dimension legal aid is often provided using official languages, not the native language of tribal groups, migrants, or minority caste groups and little is done to interpret or translate.

4.3 Attitudes in the Institution and Disposal Culture.

It is a part of the judicial system that has at least some presence even now, as it did before, of a culture of considering a legal aid case as being less significant, less complicated, and thus requiring less serious treatment than an independently retained case. Lawyers who have legal aid may be allowed less time to present themselves before the court and may not be as patient with them when seeking an adjournment to allow adequate preparation and may have their objections and arguments being taken less seriously. This is not necessarily an intentional discrimination; it is usually a subconscious indication of systematic devaluation of legal aid work.

The urgency to reach high disposal figures, which also dominate the performance measurements applied to assess legal services authorities, is in itself perverse. Quick settlement of cases in the Lok Adalats, disposal of criminal cases, by agreeing on plea or filing of files as settled by a technical but not a substantive resolution may improve the statistics but not the substantive legal interests of assisted clients. The conflict between measurable performance indicators and qualitative results is an inherent aspect of legal aid systems across the world, yet it is especially sharp in India due to the colossal number of cases to be processed and the associated need of the institution to minimize backlogs.

4.4 Caste, Gender and Structural Discrimination.

The obstacles to legal aid are not social in nature. They mingle with the structural inequalities of caste, gender, and ethnicity in a manner that creates a systematic disadvantage in the lives of people at the extreme of the social marginalization. The legal system has historically been the place of oppression and not protection to the Dalit communities, whose people are governed by the representatives of the higher castes, who enforce the law that legitimized their subordination, and who, as a result, have their own historically justified suspicion of the formal legal institutions. Such mistrust is not diffused with the official declaration of free legal assistance. Women who experience domestic violence, harassment, or property claims in the family are confronted with another group of obstacles: the social stigma against bringing family issues to the attention of official institutions, the reliance of the members of the family on whom the victim may end up being the victim, and in most societies the disapproval of the male family members against any interaction with the formal justice system. Women who do get the services of legal aid often discover that the attorney allocated to them is a man, perhaps does not even understand their language, and does not know the details of the law, including that of the Protection of Women from Domestic Violence Act, 2005, best applicable in their individual case.

5. Legal Aid in Context: Three Critical Populations

The most conspicuous, and the most significant failure of the Indian system of legal assistance victims is their treatment of the undertrial prisoners. According to the latest data available by the National Crime Records Bureau, there are about seventy-six percent of the total prison population in India who are under trial a number that has not gone down by decades with repeated interventions of Supreme Court, legislative amendments and executive orders. Most of them are charged with bailable offences but they are kept in prison due to the inability to pay bail. Some have been put under custody longer than the maximum term their offence would have awarded had they been convicted. A large percentage are of Scheduled Castes, Scheduled Tribes and Other Backward Classes.

5.1 Undertrial Prisoners

The instructions of the Supreme Court in Hussainara Khatoon, Khatri v.. The right of undertrial prisoners to have legal assistance and have specific measures directed to examine them and release them has been repeatedly established by State of Bihar, and more recently by Re-Inhuman Conditions in 1382 Prisons (2016). NALSA has put in place undertrial review committees at district level, which are required to determine the prisoners who are entitled to bail, release on personal bond or discharge. There has been unequal application of such committees with a high disparity among the states on the frequency of meetings, the quality of review and the recommendations follow-through. The lesson that the undertrial prisoner crisis brings out, most of all, is the price of a legal aid system which is administrative on paper, but functionally insufficient. Imprisonment before trial is not a technical matter of law: it is the ruining of livelihoods, the disintegration of communities, the declining of psychological well-being, and in most instances the imprisonment of individuals who in any event do not end up being found guilty. A legal aid system which were sincerely interested in social justice would prioritize this crisis as its highest priority.

5.2 Women Gone through Domestic Violence and Matrimonial Disputes.

Women form one of the highest groups of individuals who are entitled to free legal assistance by Section 12 of the Legal Services Authorities Act and domestic violence and matrimonial disputes are the most sought after issues that women present to the legal services authorities. The legal system of treating domestic violence mainly Protection of Women against Domestic Violence Act, 2005 has been fairly comprehensive, giving it protection order, residence order, maintenance and custody relief by a somewhat accessible process of Magistrate level assisted by Protection Officer.

Practically, women who use the legal assistance when addressing domestic violence issues often find themselves in a reconciliation-oriented system instead of a protection one. Both the mediators and the legal aid attorneys can pressurize the women to go back to an abusive relationship in the guise of culturally correct decision, and not as a failure of the justice system. The Protection Officer system which is at the core of the PWDVA institutional design is an issue of serious understaffing in most states, where individual Protection Officers cover districts and have caseloads that preclude meaningful support. The legal aid attorneys that deal with the matrimonial issues do not have specialist knowledge about family law and are not aware of the connection between the civil protection remedies and the criminal section of the Indian Penal Code and the Dowry Prohibition Act.

5.3 Forest-Reliant and Tribal Peoples.

The legal status of the Adivasi peoples of India is one of the most dramatic examples of the disjunction between legal rights and the legal access. The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 - also referred to as the Forest Rights Act established a system to establish the land and resource rights of forest dwelling communities who had long been dispossessed by years of colonial and post-colonial forest management. Its application, though, has been highly disputed with state governments denying substantial portions of claims, evictions going forward despite the procedural safeguards of the Act, and communities being unable to effectively enquire their rights in formal legal forums.

Legal assistance is not an added tool to tribal communities living in forest-related areas, but is frequently the sole tool they can use to challenge the state authority officials, which have direct control over their land, their livelihood, and their very physical safety. However, these are also the very communities that are least likely to receive the formal legal aid services: geographically isolated, linguistically diverse, highly mistrustful of the state institutions that historically have been serving against their interests and often poorly informed that the Forest Rights Act is a thing that exists, not mentioning that they can take legal action against its violation. Community-based legal aid, implementation of para-legal volunteers in tribal communities, the development of legal literacy in the

local languages, and the facilitation of claim-filing procedures at a community level, have proven to be effective in a few states, but are scattered and rely on donor support.

6. REIMAGINING LEGAL AID: PROPOSAL TO REFORM.

The set of reforms, which are presented in this section are presented not as a blueprint of reforms, but as a set of priority directions that become evident out of the previous analysis. They are similar in reasoning in that legal aid in India must be reformulated in terms of the needs and conditions of the beneficiaries of the service and not in terms of the findability of the delivery institutions.

The first reform that is the most urgent is the quality assurance. The present system of per-case fee system among panel advocates, though administratively easy, structurally cannot result in quality representation. The changing of the incentive by moving towards committed, fully salaried legal aid lawyers, who would be employed by legal services authorities as full-time public defenders and not as part-time panel employees, would be consistent with quality outcomes. A number of states have tried variants of this model, and experience in offices of the public defender in other countries has repeatedly shown it to be the most appropriate on the question of quality of representation, as compared to the panel system. This is not an inexpensive fix, but it is one that must be done in order to make legal aid be as constitutional as it could be.

The legal literacy and community outreach should be restructured on the basis of true accessibility. This implies that it should have materials and programmes in languages and dialects of the locality and not only in the official languages. It refers to mobilizing para-legal volunteers in the marginalized communities' individuals who are not only trusted figures of those communities but also are able to articulate the legal rights and procedures in a way that their neighbours can and will comprehend. The para-legal volunteer programme is a potentially powerful initiative of NALSA in this respect; it only requires regular funding, institutional training, and being incorporated into the formal system of legal aid provision as opposed to being considered an auxiliary awareness programme.

There is need to reform the Lok Adalat system to allow settlements to have real informed consent. This implies the introduction of the obligation to seek independent legal advice where the unrepresented side is involved in settlement, the development of clearer standards on the nature of situations that should be subjected to Lok Adalat resolution, and the provision of a means through which settlements reached by either side in cases where the one was not well-informed or pressured can be reviewed. It is hard to understand how the finality of Lok Adalat awards, whereby there is no appeal, and review on merit, can be justified, when one of the parties in the case was not legally represented.

State Legal Services Authorities should create special law aid departments that are familiar with the legal problems that have been the most prevalent in marginalized communities. Tribal rights, bonded labour, caste based atrocities, domestic violence units, manned by a lawyer with actual expertise, rather than a generalist panellist advocate, would bring a vast improvement in the level of representation in the area where it is most needed. The thematic schemes developed in recent years as the NALSA thematic schemes are the steps in this direction, and the next step is to institutionalize them and fund them properly.

Lastly, legal aid institutions need to make their accountability structures stronger. Legal aid delivery is currently quantified mainly in terms of quantitative indicators, the number of people who received assistance, the number of cases that have been closed, the number of camps that have been organized, etc. that do not tell much about the quality or result of the assistance given. Bringing in outcome-based assessment, independent evaluation of the quality of representation, formal feedback systems where aided clients can provide feedback on their experience of legal aid services would generate the accountability pressures which would foster actual improvement.

7. CONCLUSION

Legal assistance in India is at an awkward cross road. It has the institutional architecture, the constitutional mandate is credible and the political commitment, at least in its rhetorical manifestation, has never been greater. And still the societies in which access to justice is the most vital need sustained is said to record a system that is frequently unreachable, occasionally inadequate and occasionally transformative. The paper has contended that this disparity cannot be well explained by resource constraints alone even though resources also play a significant role. It is indicative of underlying institutional design flaws a panel system that is not incentivizing to quality, an outreach model that is presuming communities will move towards services instead of services moving towards communities, a performance culture in which there is an incentive to dispose of people instead of justice, and an institutional culture that is yet to internalize the notion that legal aid is a right and not a charity.

Social justice is a constitutional value that is not acquired through building institutions and making them open. It is realized when the people the institutions exist to serve, the Dalit woman in the rural district, the corporation in the metropolitan High Court, actually use it, when the protection of law applies to the rights of the Dalit woman in the rural district, as fully, as in the case of the corporation in the metropolitan High Court, and when the distance between the statements of the rights and the facts lived in is not so great as to be called, with some truth, equality. Through that, India is yet to cover a long way in its legal aid system. The distance itself is not impossible. The constitutional vision is strong, the legislative framework is widely sufficient and there is a real desire in the legal services authorities, the judiciary, and the civil society to get the legal aid work better. Direction is what that commitment needs: a clearer sense of what successful legal aid involves, a readiness to restructure systems of delivery around users, as opposed to administrators, and the institutional boldness to apply to legal aid services the same quality and accountability standards that the legal system places on all other people. Playing the role of a social justice tool, legal aid must be given the weight it is first due.

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