

COMPARATIVE ANALYSIS OF STATUTORY PROVISIONS Vis-à-vis JUDICIAL PRONOUNCEMENTS ON THE RIGHT TO FREE LEGAL AID FOR UNDER-TRIAL PRISONERS IN INDIA

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Abstract

The right to free legal aid for under-trial prisoners in India represents a vital intersection of access to justice, criminal procedure, and human rights jurisprudence. This article undertakes a comparative analysis of the statutory framework and the judicial pronouncements on this right, with specific reference to under-trial prisoners. On the statutory side, key enactments such as the Legal Services Authorities Act, 1987 (LSA Act), the constitutional guarantee under Article 39A of the Constitution of India, and special provisions in the recently enacted Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) are examined. On the judicial side, seminal judgments such as *Hussainara Khatoon v. State of Bihar*, *Supreme Court Legal Aid Committee v. Union of India*, *Sheela Barse v. State of Maharashtra* and more recent decisions are analysed for how courts have interpreted and operationalised the statutory right. The article finds that while the statutory framework establishes the architecture for free legal aid, judicial pronouncements have progressively expanded its contours, applicability to under-trial prisoners, and enforcement mechanisms. Nevertheless, a gap persists between the legal promise and ground-level implementation, especially for under-trial prisoners trapped in prolonged detention without effective representation. The article concludes with policy recommendations to strengthen both legislative clarity and implementation oversight.

Keywords: Free legal aid, under-trial prisoners, India, Legal Services Authorities Act, Article 39A, judicial pronouncements, access to justice.

1. Introduction

Under-trial prisoners constitute a large proportion of India's prison population. The inability of many accused persons to secure adequate legal representation leads to prolonged detention, unfair trials and the denial of access to justice. Free legal aid is thereby a critical safeguard for ensuring fairness, equality and the constitutional guarantee of personal liberty under Article 21 of the Constitution of India. This article focuses specifically on under-trial prisoners and undertakes a two-pronged analysis: first, the statutory provisions governing free legal aid; second, the judicial pronouncements that have shaped and enforced this right. The comparative lens seeks to identify where statutes leave gaps or ambiguities, how courts interpret and fill those gaps, and how the two together function in practice for under-trial prisoners.

2. Statutory Framework for Free Legal Aid

2.1 Constitutional Mandate – Article 39A

The Forty-Second Amendment to the Constitution inserted Article 39A, which provides that the State shall “in particular provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.” This directive principle creates the constitutional foundation for legislative action in this sphere. While a directive principle and thus non-justiciable per se, Article 39A has been treated by courts as giving rise to a legal obligation on the State to enact legislation and to comply with the standards of access to justice.

2.2 Legal Services Authorities Act, 1987

The Legal Services Authorities Act (LSA Act) was enacted to give effect to Article 39A. It creates the National Legal Services Authority (NALSA), state and district legal services

authorities, and frames schemes to provide free legal services to specified categories of persons. Key provisions include:

- Section 3: Constitution of NALSA.
- Section 4: Functions of NALSA.
- Section 12: Persons entitled to legal services (including persons in custody). Under-trial prisoners clearly fall within a category that may receive legal aid under the statute. The Act therefore provides a statutory right to legal aid for eligible persons including prisoners or persons in custody.

2.3 Other Statutory Provisions & Recent Reforms

Beyond the LSA Act, other statutory or regulatory instruments refer to free legal aid in the criminal justice system, including the recent BNSS 2023 which includes Section 341 mandating assignment of an advocate at State expense where the accused cannot afford one. In addition, the Rules concerning prison legal aid clinics (for example the Jail Legal Aid Clinics regulations) under state legal services authorities play a role. These statutory provisions together build a legislative architecture for the right to free legal aid, relevant for under-trial prisoners.

3. Judicial Pronouncements: Evolution and Application to Under-Trial Prisoners

3.1 Early Jurisprudence

***M. H. Hoskot v. State of Maharashtra*, AIR 1978 S.C. 1548; (1978) 3 SCC 544**

In this case the Court held that the right to free legal aid—particularly for persons deprived of liberty who cannot afford counsel—is an essential part of “fair, just and reasonable” procedure under Article 21. It emphasised that the State has a duty to appoint competent counsel for an indigent prisoner when circumstances so require. It thereby laid an important foundation for subsequent jurisprudence on free legal aid for under-trials and prisoners.

***Hussainara Khatoon & Ors v. Home Secretary, State of Bihar*, AIR 1979 SC 1369; 1979 SCR (3) 532; (1980) 1 SCC 98**

A seminal PIL-case concerning under-trial prisoners languishing in jails for long periods without trial. The Court held that delay in trial and prolonged detention violated Article 21, and that legal aid services for the poor are an essential ingredient of “just, fair and reasonable” procedure under Article 21. The Court directed that under-trial prisoners who were in custody for more than half the maximum sentence should be considered for bail and legal aid assigned. This case is often cited as a major step in access to justice for the under-trial population.

***Khatri & Ors. v. State of Bihar & Ors.*, AIR 1981 SC 1068; (1981) SCC (2) 493; 1981 SCR (3) 145**

The Court reinforced the constitutional obligation of the State to provide free legal aid to an accused who cannot afford a lawyer, and held that magistrates/courts have the duty to inform an accused of such right. It also emphasised that the State cannot plead paucity of funds or resources to deny this right. Though this case is known for other issues (e.g., torture of under-trial prisoners), its holding on legal aid is directly relevant.

***Sheela Barse v. State of Maharashtra*, AIR 1983 S.C. 378; 1983 SCR (2) 337**

The Court emphasised that under-trial prisoners (particularly women) in custody also have the right to legal assistance, and ordered legal-aid committees and other measures to assist prisoners in jails. The judgment held that legal aid is a constitutional imperative under Articles 14, 21 and 39A when the accused is indigent.

In the above-mentioned landmark cases, the Supreme Court concluded that the right to speedy trial and the release of undertrial prisoners who had been detained for periods longer than the maximum term of punishment violated Article 21. While primarily about speed of trial and detention, the decision underscored that under-trial prisoners must not languish without access

to justice. The case thus set the tone for subsequent free legal aid jurisprudence for under-trial prisoners.

Supreme Court Legal Aid Committee v. Union of India (1994 SCC (6) 731)

In this decision, the Court emphasised that free legal services must be provided to those who are unable to afford representation, and that legal aid should be effective and properly monitored. Over time, the Court held that the right to legal aid for accused persons arises when the absence of representation would amount to denial of fair trial under Article 21.

3.2 Rights of Under-Trial Prisoners and Prison Legal Aid

In several cases, courts have emphasised that persons in custody or detention (including under-trial prisoners) are particularly vulnerable and have the right to free legal aid as part of the fair trial guarantee. For example, in *Sheela Barse v. State of Maharashtra (1983)*, the Court recognised that vulnerable prisoners, including women under-trial prisoners, should be informed of their right to legal aid and be provided counsel at state expense if necessary. Further, courts have held that the State cannot refuse free legal aid on grounds of limited resources, when the denial causes deprivation of the right to a fair trial.

3.3 Recent Developments

Recent judgments have sharpened the contours of legal aid for prisoners. For example, courts have held that:

- The right to counsel arises immediately upon arrest for a cognizable offence, and the accused must be informed of this right.
- The assigned legal aid lawyer must be competent, must have time to prepare, and legal aid must be meaningful (not merely nominal) for the accused.
- Prison legal aid clinics and jail visiting lawyers must be set up to ensure access for under-trial prisoners inside prisons. The Court in the recent case of *Suhas Chakma v. Union of India & Others (2024)* directed NALSA and the State Legal Services Authorities to adopt Standard Operating Procedures (SOPs) for prison legal aid clinics, monitor them, and update data periodically.
- The BNSS (2023) Section 341 provides for appointment of advocate at state expense if accused cannot afford one. This statutory reform reflects judicially emphasised principles being codified.

3.4 Judicial-Statutory Interplay, Gaps and Implementation Challenges

While judicial pronouncements have repeatedly reinforced and expanded the right to free legal aid for under-trial prisoners, implementation remains a serious challenge. Studies show that many under-trial prisoners do not access legal aid, or have ineffective representation, leading to prolonged detention and miscarriage of justice. For example, empirical research finds that under-trial prisoners in India spend on average 12.3 months in prison pre-trial and legal aid assignment remains patchy. The judicial pronouncements fill gaps left by statutes (such as competency of assigned counsel, time to prepare, prison-based access) and impose monitoring obligations, but statutory clarity and ground-level infrastructure often lag.

4. Comparative Analysis: Statute viz-a-viz Judiciary

4.1 Scope and Coverage

Statutory provisions (LSA Act, BNSS) provide the main entitlement to free legal aid, but do not always explicitly specify under-trial prisoners in prisons or define modalities of prison-based legal aid. The judiciary, on the other hand, has emphasised under-trial prisoners' vulnerability and given richer detail (for example, access inside jail, timely assignment, informed of rights). Thus, the jurisprudence supplements the statute by operationalising the right for under-trial prisoners.

4.2 Quality, Effectiveness and Monitoring

The statute creates mechanisms (NALSA, SLSAs, DLSAs) and mandates schemes, but is relatively silent on quality standards of counsel, monitoring, and data-collection. Judicial pronouncements have filled that gap by requiring meaningful legal aid (not mere tokenism), regular monitoring of legal aid clinics in prisons, and data collection on assigned counsel and outcomes. For instance, the recent court order in Suhas Chakma ensures monitoring of prison legal aid clinics.

4.3 Timing and Access Points

Statute generally focuses on “persons entitled” and legal services offices. It does not always specify that assignment must happen at arrest or remand stage inside prison. Courts have insisted that access must be at the earliest stage (including first remand), especially for under-trial prisoners, to prevent deprivation of liberty by default. The judiciary thus extends the scope of statute in temporal and contextual dimensions.

4.4 Implementation and Gap Analysis

While the statutes provide the blueprint, the effectiveness depends on State-level implementation, resources, coordination with prisons, and monitoring. Empirical data shows that many under-trial prisoners do not receive legal aid or face delays and inadequate representation. Judicial pronouncements identify this gap but cannot by themselves ensure systemic reform. Thus, the comparative analysis shows that statute and judiciary complement each other: statute provides rights and architecture; judiciary provides enforcement, interpretation and expansion. Yet the “last mile” of implementation remains problematic.

5. Implications for Under-Trial Prisoners

Under-trial prisoners are especially disadvantaged: lack of means, often detained for long periods, limited access to counsel inside prison, and low awareness of rights. The combined statute-judiciary regime offers these protections: eligibility for free legal aid, obligation on the State to ensure assignment, requirement of meaningful representation, special mechanisms for prison access. However, the practical realities (overcrowding, scarce resources, inadequate clinics, low lawyer availability) mean that many under-trial prisoners still languish without effective legal aid. Judicial mandates such as periodic review of undertrial detention, bail promotion and prison legal aid clinics are designed to mitigate this but require strong implementation.

6. Recommendations

Based on the comparative analysis, the following reforms are recommended:

1. **Statutory Clarification & Amendment:** The LSA Act (or related criminal procedure statutes) should explicitly mention under-trial prisoners in custody as a priority category for free legal aid, define minimum standards of representation, and mandate prison-based legal aid clinics as part of scheme obligations.
2. **Quality Standards:** Legislation or regulations should incorporate minimum qualification standards for legal aid counsel, time allocation, and monitoring of performance. Judicial pronouncements have emphasised this but statutory backing would strengthen enforceability.
3. **Monitoring & Data-Collection:** State Legal Services Authorities should maintain and publish data on under-trial prisoners provided legal aid, case outcomes, duration of representation, bail outcomes, etc. The judiciary’s direction for periodic review should be institutionalised.

4. **Prison-Based Legal Aid Infrastructure:** Schemes should ensure that every prison (or cluster) has a functional legal aid clinic, jail-visiting lawyers, awareness boards, and easy referral mechanisms. The recent court order in Suhas Chakma sets a good precedent.
5. **Early Access & First-Remand Assignment:** Courts should ensure that under-trial prisoners are informed of their right to legal aid at the first remand stage, and that counsel is assigned promptly. This requires coordination between police/prison, court and legal services authorities.
6. **Resource Allocation:** Adequate funding must be committed by State Governments for legal services authorities, prison legal aid schemes, and training of legal aid lawyers and para-legal volunteers.
7. **Periodic Review of Under-Trial Detention:** Since free legal aid is closely tied to early case disposal and bail, States should adopt review committees in line with judicial prompts to evaluate under-trial detention and trigger legal aid referral.

7. Conclusion

The right to free legal aid for under-trial prisoners in India is firmly anchored in statute and enriched by judicial interpretation. The statutory framework provides entitlement and institutional architecture; the judiciary has expanded the right, clarified standards, and emphasised access in the context of custody. Yet the gap between legal promise and prison-realities remains significant. A comparative analysis shows that while statutes and judgments together offer a robust legal regime, effective implementation, monitoring and systemic reforms are essential to translating the right into lived justice for under-trial prisoners. Strengthening legislative clarity, ensuring quality and prison-centric outreach, and robust data-driven oversight will be necessary steps in fulfilling the constitutional commitment of equal access to justice.

References:

1. Bharti, N.K. & Kumar, N. *Justice for all? The impact of legal aid in India*. Paris School of Economics. 2024. parisschoolofeconomics.eu
2. "Legal Aid for Prisoners in India: A Constitutional Mandate." The Law institute (Nov 8, 2023). [The Law Institute](http://TheLawInstitute)
3. "Legal Representation for Under-trials in Maharashtra." TISS Report (Jan 30, 2023). tiss.ac.in
4. "Legal Aid in the Criminal Justice System." Indian Journal of Integrated Research in Law, Vol IV, Issue V. ijirl.com
5. "Right to Free Legal Aid." Drishti Judiciary (Oct 24, 2024). [Drishti Judiciary](http://DrishtiJudiciary)
6. "Judicial Pronouncements on Rights of Prisoners in India." In HRDP03 – Chapter on Prisoners' Rights. e-Adhyayan
7. "Legal Aid for Prisoners (Status Report – Rajasthan)." Human Rights Initiative. [Commonwealth Huma](http://CommonwealthHuma)