

Provision of Legal Aid for Asylum-Seekers,
Refugees, and Others Forcibly Displaced in Asia

Country-Level Memorandum: India



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STATE FUNDED LEGAL AID

Eligibility, Nature and Scope

Eligibility of Asylum-Seekers, Refugees and Stateless Persons

Article 39A of the Indian Constitution requires the State to “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.”¹ Pursuant to Article 39A, the Indian government passed the Legal Services Authorities Act in 1987 (the “Legal Services Act” or the “Act”). The preamble of the Act quotes the foregoing language from Article 39A – “opportunities for securing justice [shall]not be denied to any citizen[.]”² However, Section 12 of the Act provides that state-funded legal aid is available to “every person” who fits the criteria provided therein.³ Thus, it is unclear whether non-citizens, including refugees and stateless persons, who meet the requirements of Section 12 are entitled to state-funded legal aid. To the extent of the authors’ knowledge, no court has yet opined on this question.

Even if non-citizens are eligible for state-funded legal aid, only a subset of the Target Group⁴ would be so eligible. Section 12 of the Legal Services Act provides that

“every person who has to file or defend a case shall be entitled to legal services under this Act if that person is (a) a member of a Scheduled Caste or Scheduled Tribe; (b) a victim of trafficking in human beings...; (c) a woman or a child; (d) a mentally ill or otherwise disabled person; (e) 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; or (f) an industrial workman; (g) in custody...; or in a juvenile home...or in a psychiatric hospital or psychiatric nursing home...; or (h) 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.”

In 2019, the Indian government updated the National Register of Citizens in the State of Assam. However, as many as 1.9 million people claiming to be citizens of India, were left off the list. They have the right to challenge their exclusion from the list, but most cannot afford lawyers. Considering this, the government of Assam made assurances to the effect that it would provide legal aid to those challenging their exclusion through the District

¹ India Const., Art. 39A (emphasis added).

² Legal Services Authorities Act, No. 39 of 1987, India Code (emphasis added).

³ *Id.*

⁴ The Target Group consists of asylum-seekers, refugees and stateless persons.

Legal Services Authority, established pursuant to the Legal Services Act.⁵ Consistent with the Act's textual ambiguity, the Assamese government's statement could be construed both as its commitment to expand the legal aid already available to non-citizens under the Act, or as its commitment to provide legal aid, through the same machinery as is deployed under the Act, to non-citizens who are not otherwise eligible for legal aid under the Act.

Refugees and Asylum Seekers: India is not a party to the 1951 Refugee Convention or its 1967 Protocol and does not have a national refugee protection framework.⁶ Instead, India processes asylum requests on an ad hoc basis – some are processed by the central government and some by the United Nations High Commissioner for Refugees (“UNHCR”).⁷ Tibetans and Sri Lankan refugees are protected and assisted by the Indian government, while UNHCR is directly involved with groups arriving from other countries (notably Afghanistan and Myanmar).⁸ In many cases, the Indian government does not recognize the status of individuals recognized by the UNHCR to be refugees.⁹ This leaves individual institutions to make their own decision on whether to accept the UNHCR's determination.¹⁰ Having said that, India generally respects the principle of *non-refoulement* for holders of UNHCR documentation.¹¹

Because there is no national law governing refugees, there is also no state-funded legal aid earmarked for asylum seekers to enable them to establish their refugee status or their fulfilment of the criteria for relief under the Convention Against Torture. Given the low literacy rates among refugees and asylum seekers coming into India, the total lack of transparency on the criteria for the grant of asylum, and an acute problem of inadequate personal identity documentation held by refugees coming into India, this group of individuals needs legal aid in at least three ways. Asylum seekers need legal advice on when and how to approach the government/UNHCR about their asylum claims; they need legal aid to gather/obtain identity documents; and they need lawyers to assert India's obligations under the principle of *non-refoulement* in domestic courts if they are threatened with expulsion.

Stateless persons: The Foreigners Act, 1946 regulates “the entry of foreigners into India or their departure therefrom or their presence or continued presence therein.”¹² In 1968,

⁵ Assam Govt to Offer Free Legal Aid to Those Excluded from Final NRC, Business Standard (Aug. 27, 2019), https://www.business-standard.com/article/pti-stories/needy-people-excluded-from-final-nrc-will-get-free-legal-aid-119082700439_1.html

⁶ State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, UNHCR, <https://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>.

⁷ Hamsa Vijayaraghavan, Migration Policy Institute, Gaps in India's Treatment of Refugees and Vulnerable Internal Migrants are Exposed by the Pandemic (Sept. 10, 2020) <https://www.migrationpolicy.org/article/gaps-india-refugees-vulnerable-internal-migrants-pandemic>.

⁸ <https://www.migrationpolicy.org/article/gaps-india-refugees-vulnerable-internal-migrants-pandemic.%20India:%20Working%20Environment,%20UNHCR,%20https://www.unhcr.org/4cd96e919.pdf>

⁹ Hamsa Vijayaraghavan (Sept. 10, 2020).

¹⁰ *Id.*

¹¹ *Work Environment*, UNHCR, <https://www.unhcr.org/4ec230f20.pdf>

¹² Foreigners Act, No. 31 of 1946, India Code, <https://www.refworld.org/docid/3ae6b4df4.html>.

citing its authority under the Foreigners Act, 1946, the Indian government passed an executive order – the Foreigners (Tribunals) Order – which provided for the establishment of a quasi-judicial body to adjudicate upon the citizenship status of persons brought before it.¹³ Through the years, “illegal immigrants,” especially in Assam, a state bordering India’s neighbor Bangladesh, have been hauled and presented to the Foreigners Tribunals.¹⁴ Most claim to be bona fide Indian citizens, while the government claims they are illegal migrants from Bangladesh. Once a Foreigners Tribunal decides that an individual is not an Indian citizen, assuming all appeals are exhausted, the individual is effectively rendered a stateless person since Bangladesh does not acknowledge them as citizens.¹⁵

Both the Foreigners Act and the Foreigners (Tribunals) Order are silent on the provision of legal aid to those whose citizen status is challenged before the Tribunals. Accordingly, this section of society in India, whose numbers are as high as two million, needs access to lawyers who will represent them before these courts in an effort to prevent their Indian citizenship from being stripped away.

Scope of State-Funded Legal Aid

As discussed above, legal aid does not explicitly cover any asylum-related matters. Further, it is unclear whether non-citizens, including alleged non-citizens, are eligible for legal aid under the Legal Services Act. However, assuming they are eligible, according to section 2(1)(a) of the Act, legal aid can be provided to a person for a ‘case,’ which includes a suit or any proceeding before a court. Section 2(1)(aaa) defines the ‘court’ as a civil, criminal or revenue court and includes any tribunal or any other authority constituted under any law for the time being in force, to exercise judicial or quasi-judicial functions.¹⁶

Structures and Procedures

Process for Obtaining Legal Aid

Assuming members of the Target Group are eligible for state-funded legal aid, they can obtain free legal services by approaching either the National Legal Services Authority (“NALSA”) or its state, district, and local-level counterparts within the states in which such members of the Target Group reside. They are required to fill out the legal aid application forms available online at NALSA’s website or can make their request in

¹³ Foreigners (Tribunals) Order, G.S.R. 1401 of 1964, <https://www.refworld.org/docid/3ae6b5308.html>.

¹⁴ Sagar, Case Closed, The Caravan (Nov. 5, 2019), <https://caravanmagazine.in/law/assam-foreigners-tribunals-function-like-kangaroo-courts-persecute-minorities>).

¹⁵ Annie Gowen, *India’s crackdown on illegal immigration could leave 4 million people stateless*, The Washington Post, https://www.washingtonpost.com/world/asia_pacific/indias-muslim-migrants-fear-deportation-after-4-million-are-left-off-citizens-list/2018/07/30/0d5c28fc-bbd7-4934-821c-17e9520c0d60_story.html.

¹⁶ National Legal Services Authority, <https://nalsa.gov.in/about-us>.

written or orally at the concerned authority's office.¹⁷ Once the concerned authority determines that the applicant seeking legal aid is eligible for it and that a prima facie case can be made in the applicant's favor in the legal matter for which the applicant seeks aid, the authority then provides him or her with counsel at the state's expense, pays the required court fee in the matter, and bears all incidental expenses in connection with the case.¹⁸ Recipients of legal aid have no particular obligations once they are found to be eligible for legal aid.

Process for Providing Legal Aid

The respective legal services authorities invite applications from legal professionals and lawyers with at least 3 years of work experience.¹⁹ Once enlisted, a lawyer must volunteer for at least two years.²⁰ Volunteer-lawyers are not allowed to charge their state-assigned legal aid clients. Instead, they are paid a nominal honorarium from the national authority's Legal Aid Fund. Currently, the honorarium for lawyers at the Bombay High Court is Rs. 7,500 per case (it is assumed a case would conclude in about 10 hearings); for lawyers at lower courts and in small towns, the amount can vary from Rs. 1,500 to Rs. 5,000.²¹

Funding for State-Funded Legal Aid

Legal aid is funded by the central government of India pursuant to Article 15 of the Legal Services Act.²² For instance, in 2016, the Ministry of Law and Justice provided a grant of Rs. 69,700,000 to NALSA, which released Rs. 603,000,000 to its state, district, and local level counterparts.²³

Barriers to State Funded Legal Aid

Availability of Interpretation/Translation Services

The extent of translation services actually provided under the Legal Services Act is unknown. NALSA's official website states that "preparation of pleadings, memo of appeal,

¹⁷ *Free legal aid is crucial right granted by Constitution; SCs, STs, women among categories of people eligible for provision*, Firstpost (Jul. 22, 2019), <https://www.firstpost.com/india/free-legal-aid-is-crucial-right-granted-by-constitution-scs-sts-women-among-categories-of-people-eligible-for-provision-7034801.html>

¹⁸ National Legal Services Authority, <https://nalsa.gov.in/about-us>.

¹⁹ Hrishikesh Jaiswal, *Good Quality Free Legal Aid in India is a Distant Dream*, 7(2) IJRAR (May 2020).

²⁰ *Aarefa Johari, How well do India's free legal aid services work? Not nearly well enough* (May 19, 2018), <https://scroll.in/article/877225/how-well-do-indias-free-legal-aid-services-work-not-nearly-well-enough>.

²¹ *Id.*

²² Annual Accounts of National Legal Aid Fund And Audit Report of the Comptroller and Auditor General of India New Delhi for 2015-16, National Legal Services Authority, <https://doj.gov.in/sites/default/files/Annual%20Accounts%20of%20NALSA%20and%20Audit%20Report%20of%20CA%20English%202015-16.pdf>.

²³ *Id.*

paper book including printing and translation of documents in legal proceedings,” is among the free legal services provided by the legal service authorities.²⁴

Geographic Limitations

In theory, because NALSA has counterparts at state, district, and ‘taluk’ levels, there should be minimal geographical limitations on access to legal aid. However, this is not the case. The concentration of lawyers is higher in areas with courthouses. These happen to be areas that are at least somewhat urbanized. A lot of refugees and “illegal immigrants,” especially in Assam, do not live in these areas. They live in remote parts of states that are poorly connected to these urban areas with courthouses. One of the authors of this research memo interviewed declared “illegal immigrants” in Assam in 2019, as part of a law-school clinic. Many of the interviewees complained of the significant drain on their limited resources that travel for hearings, court appearances, and meetings with lawyers caused.

Other Barriers

Quality of legal aid: Lawyers are often unmotivated to work hard on their state assigned pro bono cases because of the amount of compensation they receive. The “honorarium” amounts of approximately Rs. 5,000 per case are not nearly enough for lawyers to sustain themselves. Because trial lawyers are underpaid in the first few years of their practice even on non-pro bono matters, this becomes a hindrance to accessing quality legal aid.²⁵

Lack of literacy and awareness: Often, poor people are exploited by state appointed legal aid lawyers who attempt to charge their pro bono clients for representation or drag cases on for much longer than needed or do not act as fiduciaries of their clients in other ways.²⁶ Lack of literacy also creates problems of awareness, including about the existence of state-funded legal aid. Arguably, this is one of the reasons for the underutilization of NALSA’s resources. While India’s legal aid budget, for a population of 1.3 billion people, was about Rs. 600,000,000 in 2016 (or Rs. 2.16 per capita), its actual spending hovered around Rs. 0.75 per capita.²⁷

Bureaucracy: A lawyer seeking compensation for his legal aid work under the Legal Services Act is subject to satisfaction of tedious and cumbersome procedural requirements. For instance, a lawyer gets Rs. 1,000 for making a jail visit but to be reimbursed for each such visit, he or she must obtain numerous signatures from different

²⁴ National Services Authority of India, <https://nalsa.gov.in/faqs>

²⁵ Aarefa Johari, How well do India’s free legal aid services work? Not nearly well enough (May 19, 2018) <https://scroll.in/article/877225/how-well-do-indias-free-legal-aid-services-work-not-nearly-well-enough>.

²⁶ *Id.*

²⁷ Annual Accounts of National Legal Aid Fund and Audit Report of the Comptroller and Auditor General of India New Delhi for 2015-16, National Legal Services Authority, <https://doj.gov.in/sites/default/files/Annual%20Accounts%20of%20NALSA%20and%20Audit%20Report%20of%20CAG%20English%202015-16.pdf>; Mahtab Alam, India’s Per Capita Expenditure on Free Legal Aid is Just 75 Paise Per Annum: Report, The Wire, <https://thewire.in/rights/free-legal-aid>.

authorities and submit a report with the legal aid office.²⁸ This becomes a significant disincentive for a lawyer to volunteer for pro bono work under the Legal Services Act, thereby resulting in a lack of lawyers available to render legal aid. Citizens for Justice and Peace, a human rights organization, petitioned the Guwahati High Court (located in Assam) in March 2021 to provide proper legal aid to those left off the NRC after its survey of 10 District Legal Services Authorities revealed that they were understaffed, their paralegal volunteers were undertrained and their infrastructure was poor.²⁹

NON-STATE FUNDED LEGAL AID

Eligibility, Nature and Scope

Eligibility of Asylum-Seekers, Refugees and Stateless Persons

Members of the Target Group are able to access non-state funded legal aid. For instance, after 1.9 million people were excluded from the National Register of Citizens, five premier law schools in India jointly launched a legal aid clinic called ‘Parichay,’ to help people with their claims before the Foreigners Tribunals.³⁰ In a statement, the clinic said that it would assist lawyers in drafting appeals and conducting research on questions of law. It would also train lawyers and paralegals and generate documentation on the functioning of the Foreigners Tribunals.³¹

To the limited extent that such aid exists in rural and remote parts of the country, members of the Target Group are not restricted from accessing non-state-funded legal aid for non-asylum matters. India is a very populous country; the central government has been hostile to non-governmental organizations (“NGOs”) for a long time; and aid, even when resources are available, is difficult to transport to remote and poorly connected parts of the country.³²

NGOs and law school clinics practicing immigration law in India are aware of the acute lack of personal identity documentation that persists across the country, especially within refugee and internally displaced communities, the latter being overrepresented in the part of the population that has been declared to be “foreigner,” to a great extent because of the connection between geographical displacement and lack of personal identity

²⁸ Aarefa Johari, How well do India’s free legal aid services work? Not nearly well enough (May 19, 2018), <https://scroll.in/article/877225/how-well-do-indias-free-legal-aid-services-work-not-nearly-well-enough>.

²⁹ Rights forum seeks proper legal aid for those left out of NRC, The Hindu (Mar. 2, 2021), <https://www.thehindu.com/news/national/rights-forum-seeks-proper-legal-aid-for-those-left-out-of-nrc/article33962145.ece>.

³⁰ Prabin Kalita, Legal aid clinic to help NRC-rejects file appeals in foreigners’ tribunals (Oct. 2, 2019), <https://timesofindia.indiatimes.com/city/guwahati/legal-aid-clinic-to-help-nrc-rejects-file-appeals-in-foreigners-tribunals/articleshow/71405567.cms>.

³¹ *Id.*

³² Sujeet Kumar, *India has been hostile to NGOs for decades. Modi made it worse*, Quartz India (May 3, 2019), <https://qz.com/india/1611326/india-has-been-hostile-to-ngos-for-decades-modi-made-it-worse/>.

documentation. The non-governmental legal aid sector in India strives to serve people who lack proper documentation due to poverty, illiteracy, geographical displacement, etc.

Structures and Procedures

Process for Obtaining Legal Aid

Generally, NGOs such as the Human Rights Law Network (HRLN) have websites that provide contact information and points of contact to enable people to access their services. Law schools, on the other hand, might take on projects in remote areas of the country by doing a community survey and going door to door to identify those in need.

Process for Providing Legal Aid

There are no restrictions on who can provide asylum-related services as far as filing of asylum applications before the UNHCR and the central government is concerned. On the other hand, only lawyers can appear in court on clients' behalf, but law students and NGO staff cannot.

Funding for Non-State Funded Legal Aid

NGOs sometimes obtain funding from NALSA but most of their donors are domestic, private entities. Law schools provide legal aid to the Target Group by setting aside portions of the funds they obtain as universities.

Barriers to Non-State Funded Legal Aid

Geographic Limitations

The presence of NGOs in remote parts of the country is very limited. People in remote parts of the country, such as the Goalpara district of Assam where a substantial number of the "foreigners" reside, have to hire private lawyers with whatever little family income they have. One of the authors of this research memo interviewed farm laborers in Assam (as part of Cornell Law School's International Human Rights Policy Advocacy Clinic) whose citizenship was challenged before the Foreigners Tribunals, and they told the author that they were forced to sell their house and take on more farm labor to pay for private lawyers to fight their case.

Barriers to Operation/Funding

The Indian government amended the Foreign Contribution Regulatory Act ("FCRA") in 2010, under which "any organization of a political nature" is forbidden from taking

foreign funding.³³ Due to the textual ambiguity of this provision, the government has been able to cut off foreign funding from NGOs and entangle them in years-long “investigations.”³⁴ The FCRA has a particularly high likelihood of being used as a weapon against legal aid NGOs that are concerned with macro-level legal relief in India, which requires critiquing the law (for instance, by justifiably arguing that the Foreigners (Tribunals) Order is *ultra vires* the Constitution) as well as critiquing its implementation (for instance, by calling upon the government to fix a system that highly incentivizes Foreigners Tribunals to declare someone a foreigner) because it is considered to be “to the detriment of India’s image.”³⁵ According to a 2021 report, private-sector funding of philanthropy totaled approximately Rs. 640,000,000, of which foreign contributions accounted for 25 percent.³⁶

Distrust of the Legal Machinery and Lack of Literacy

During interviews with individuals who had been declared stateless and stripped of their Indian citizenship by a Foreigners Tribunal, the author of this memo learned that in some cases, individuals and their families did not understand the meaning or importance of the notices to appear issued to them by the Tribunals.³⁷ The failure of the Indian State’s literacy programs, and especially its legal literacy programs, prevents indigent communities, including refugees and migrants, from seeking legal aid simply because they do not understand that they need it until it is too late (such as when an individual is declared a foreigner in an *ex parte* decision after he fails to appear before a Foreigners Tribunal).

SOURCES

Saud Tahir - Human Rights Law Network

³³ *Id.*

³⁴ Amnesty International, *India Should Stop Using Abusive Foreign Funding Law* (Jan. 19, 2022), <https://www.amnesty.org/en/latest/news/2022/01/india-should-stop-using-abusive-foreign-funding-law/>

³⁵ *Id.*; Human Rights Watch, *India: Rights Groups Harassed Over Foreign Funding*, <https://www.hrw.org/news/2019/06/26/india-rights-groups-harassed-over-foreign-funding#> (the government used the FCRA to target Lawyers Collective, a group that “provides legal aid, advocates for advocates for rights of marginalized groups, campaigns to end discrimination against LGBTQ people, and seeks enforcement of workplace harassment laws.”)

³⁶ Arpan Sheth, *India Philanthropy Report 2021*, https://www.dasra.org/assets/uploads/resources/Bain_Dasra_India_Philanthropy_Report.pdf

³⁷ See also Prashant Bhushan, *Conduct of Foreigners Tribunals in Assam is Questionable*, <https://indianexpress.com/article/opinion/columns/assam-nrc-final-list-foreigners-tribunals-6011356/>.



This document is part of a collaborative, multi-jurisdictional research project on the availability of legal aid to refugees in Asia for use by refugees, other displaced people, and the lawyers and organizations that work with them. It was compiled by Dechert and provides information on both state and non-state funded legal aid in India.

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