



**Position Paper**

# Free Legal Aid in Pakistan

October 2015



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PILDAT is an independent, non-partisan and not-for-profit indigenous research and training institution with the mission to strengthen democracy and democratic institutions in Pakistan.

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## **Preface**

In Pakistan, the crisis of lack of access to justice has worsened to a point where the justice system has failed to reach the doorsteps of people who live below the poverty line. Therefore to make justice accessible, particularly to the underprivileged communities, it becomes absolutely crucial to formulate and incorporate effective, sustainable and free services in the justice system.

In light of the prevailing state of the Rule of Law in Pakistan, PILDAT has taken the initiative aiming to bring reforms on free legal aid services in the current justice system for improving access to justice for underprivileged sections of society.

This position paper is an attempt to provide a fact-based discourse on the provision of free legal aid in Pakistan. It analyses case studies of international and regional frameworks, identifies key issues and challenges in Pakistan, and formulates recommendations and solutions to improve access to justice.

## **Acknowledgements**

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## **Disclaimer**

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October 2015



## ABOUT THE AUTHOR



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Dr. Shahzad has extensive knowledge and expertise on different aspects related to law. He has worked as Practitioner Lawyer at Peshawar Bar (1994 – 1997); Lecturer at Law College, University of Peshawar (1999 – 2006); and as Associate Professor, Department of Law, Hazara University (2006 – 2007).

He has also been actively working in various capacities at local and international organisations which include: National Technical Specialist, United Nations Development Programme (UNDP), Strengthening Rule of Law Program in Malakand (SRLM: May-July 2015); Technical Advisor Correctional Services, Coffey, Department for International Development, United Kingdom (DFID), Pakistan (December 2014); and Training Specialist, Human Rights Commission of Pakistan (October 2013).

Other organisations Dr. Shahzad has worked with in different capacities are American Bar Association Rule of Law Initiative, Foundation Open Society Initiative, USA/Pakistan; International Committee of the Red Cross, Pakistan and Khyber Pakhtunkhwa Judicial Academy Pakistan.

Dr. Shahzad has authored many publications and has actively participated in numerous national and international conferences, workshops and seminars.





## Executive Summary

The term 'legal aid' is used here for various forms of legal assistance and support services provided to indigent litigants for accessing the mainstream legal system. Legal aid is provided free of cost by a lawyer either in an individual or organisational capacity through a legal aid firm, department, or Non-Governmental Organisation (NGO).

In Pakistan, a large section of the population is unable to access the formal legal system mainly for want of financial resources and general lack of awareness of the law and legal rights. Although the State recognises the need and importance of legal aid to ensure access to justice for the needy by incorporating provisions of legal assistance in some laws and rules but a lot more needs to be done. A review of the current legal aid system shows that there is no comprehensive and uniform legal framework for legal aid meaning that accessing the formal legal system is still an unaffordable luxury for majority of people in Pakistan.

Pakistan is signatory and has ratified a number of International Covenants and Conventions that obligate the State and governments to ensure access to justice via legal aid to needy persons both citizens and non-citizens.

Article 37 (d) of Chapter 2, Principles of Policy of the Constitution of Pakistan requires the State to provide 'inexpensive and expeditious justice'. Article 10(a) of the Constitution of the Islamic Republic of Pakistan 1973 guarantees the 'Right to Fair Trial' as a fundamental right. 'Equality before the law' is another fundamental right guaranteed by Article 25 of the Constitution. The three references from the Constitution of Pakistan establish that access to justice is a fundamental right and both the State and governments are bound to ensure this right to each individual.

It is thus an undeniable fact that the State recognises the need for legal aid and has allocated some nominal funds for this purpose but the distribution of services is not systematic for the reason that its framework is scattered and defective.

Section 13(1-a) of the Legal Practitioners and Bar Council Act, 1973 deals with the provision of legal aid. This section came into operation when in 1999 Pakistan Bar Council notified the Free Legal Aid Committees Rules, 1999. The Free Legal Aid Committees Rules, 1999 provide for legal aid committees at the centre, provinces and districts. Each legal aid committee maintains two lists of lawyers' panels; lawyers who offer services on pro bono basis, and those who offer services on low bono basis. The Free Legal Aid Committees Rules, 1999 require each member of Pakistan Bar Council and Provincial Bar Councils to conduct at least one case each year assigned to the member by the Legal Aid Committee. There is no secured funding source and mostly committees rely on funding from the Pakistan Bar Council and sometimes grants from governments, NGOs and individuals.

The Public Defenders & Free Legal Aid Ordinance, 2009 was a progressive step towards a sustainable legal aid system in the country. The Ordinance provided for setting up a Public Defender's System. The Chief Public Defender was heading this office at the Provincial level and ran legal aid work through the offices of District Public Defenders and Defenders for Legal Aid Committees. However, this Ordinance could not evolve into a law and became history.

The District Legal Empowerment Committees (Constitution & Functions) Rules, 2011 is another source which provides for establishment of the District Legal Empowerment Committees to provide legal aid. Under the rules, District Legal Empowerment Committee exists at the district level under the chair of District and Session Judge (Zilla Qazi) who acts as the Chairperson of the Committee. Other members are Deputy Commissioner (Political Agent), Superintendent Jail and a representative of the Civil Society (as co-opted member).

The Civil and Criminal Procedure Codes also contain provisions dealing with legal aid. Order 33 of Code of Civil Procedure, 1908 (CPC) makes a provision on 'Paupers' in case the plaintiff establishes that he is unable to pay court fee. Section 340 of Code of Criminal Procedure, 1898 (Cr.P.C) provides for counsel at State expense.

The Destitute Litigant Fund Rules, 1974 provides for legal assistance in constitutional matters to destitute litigants. The rules define a destitute person as 'one who has no means to pay the court fee or other charges in respect of a writ petition. This assistance is provided on the application of the concerned party to the Deputy Registrar (Judicial) or other authorised person in this regard. The Deputy Registrar (or the authorised person) has to conduct an inquiry into the matter to establish whether the person comes within the definition of 'destitute' or not. Under the Rules, the government

allocates funds for each High Court.

The above discussion establishes that there are laws and rules on the subject of legal assistance for the poor and vulnerable segments of society. Whether the regimes so created comprehensively meet the needs of the people who fall within the deification or not are discussed in detail in this paper.

Further review of the materials available identifies serious issues in the operation of these laws and rules. As mentioned above all the laws and rules have different custodians. The Pakistan Bar Council deals with its Free Legal Aid Rules and operations of the Committees at the Central, Provincial and District level. While the Law and Justice Commission of Pakistan (LJCP) maintains and supervises the District Legal Empowerment Committees (DLECs) at the district level. The judiciary, prosecution office and law department all have their own mechanisms of legal assistance for cases of support services in civil and criminal matters.

The above discussion therefore identifies multiple actors who have provision of legal assistance as their responsibility, but even then most of the needy litigants and some other segments of society in Pakistan are deprived of access to justice.

## Introduction

This position paper briefly describes the existing situation of legal aid in Pakistan, its legal and administrative framework as well as the issues and challenges in the smooth implementation of this framework, for example, delivery of legal aid services to indigent litigants. This paper provides an analysis of the existing laws as well as those that have lapsed.

The Paper is divided into parts. Part A describes international standards of legal aid, fair trial and legal representations covered under different covenants, treaties and other international instruments. This part also gives a situational analysis of legal aid in three South Asian countries namely Pakistan, India and Sri Lanka.

Part B provides an overview of existing situation of legal aid services in Pakistan. This part mentions the existing law and rules framed by different bodies to provide access to justice through legal aid to indigent litigants. This part is divided into sub parts, which analyse laws including the District Legal Empowerment Committees Rules, 2001, The Free Legal Aid Rules, 1999 of Pakistan Bar Council, The Public Defenders Ordinance, 2009, The Destitute Litigants' Fund, 1974 and other provisions under the Criminal and Civil Procedure Codes.

Part C deals with overarching issues and challenges in the existing legal aid mechanisms including its operational and implementation issues and shortcomings in the rules. This part also describes how a scattered legal aid system is preventing indigent litigants from obtaining access to the mainstream legal system.

Part D provides some general recommendations to address the issues and challenges in the existing legal aid system in the country for consideration at the policy level.

## **Part A - International and Regional Legal Framework- Specific Examples of India and Sri Lanka**

### **International Covenant on Civil and Political Rights (ICCPR)**

The right to legal assistance has been recognised under customary International Law. The International Covenant on Civil and Political Rights (ICCPR) is the key international legal instrument obligating states to provide legal aid to the public. Legal aid is recognised as a basic human right in the ICCPR's provisions on minimum guarantees in the determination of criminal charges against individuals. These minimum guarantees include the right to defend oneself through legal assistance of one's own choosing, and to have legal assistance assigned to one in any case where the interests of justice so require and without payment in such case if the person does not have sufficient means to pay for it (Article 14).

The United Nations' General Comment No. 28 on the ICCPR, which addresses equality between men and women, holds that State parties should take measures to ensure that women have equal access to legal aid and in family matters in particular. Provision of free legal assistance is also directed or recommended in other UN Conventions, general comments, and general recommendations in particular areas such as children's rights, racial discrimination, migrant worker rights, and housing rights.<sup>1</sup>

The UN Basic Principles on the Role of Lawyers state:

"Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources." (Principle 3.3)<sup>2</sup>

The UN Standard Minimum Rules for the Treatment of Prisoners provides that an untried prisoner shall be allowed to apply for free legal aid, where such aid is available, for the purpose his or her trial.<sup>3</sup> The UN

Rules for the Protection of Juveniles Deprived of Their Liberty reiterates this right for juveniles under arrest or awaiting trial.<sup>4</sup>

### **Legal Aid Under the European Convention on Human Rights (ECHR)**

Article 6 of the European Convention on Human Rights deals with the right to 'Fair Trial'. Art 6 (1) deals with the access to court and Article 6 (3) (c) with legal aid in criminal matters. Article 6 (3)(c) states that legal aid is available for the defendant to 'to defend himself in person or through legal assistance of his own choosing or, he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.

### **General Right to Legal Aid**

#### **The European Court of Human Rights**

Under the ECHR State parties are bound to provide assistance aid to those requiring it. In *Artigo v Italy* [(1981) 3 EHRR 1] the European Court of Human Rights (henceforth referred to as the Court) held that legal representation should be both practical and effective, it was mentioned that nomination of a counsel to represent is not enough as "Article 6 (3)(c)

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***Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources***

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1. International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966 entry into force 23 March 1976, in accordance with Article 49. <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.
2. Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba 27 August to 7 September 1990. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfLawyers.aspx>
3. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977. <http://www.ohchr.org/Documents/ProfessionalInterest/treatmentprisoners.pdf>.
4. United Nations Rules for the Protection of Juveniles Deprived of their Liberty Adopted by General Assembly resolution 45/113 of 14 December 1990. <http://www.unrol.org/files/TH007.PDF>.

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speaks of 'assistance' and not 'nomination'" and if the lawyer fails to perform for a variety of reasons and the State is notified of the situation it should replace him or cause him to fulfil his obligations.

In subsequent cases, the court has watered down the effects of the Artigo case. In *Kamaniski v Austria* [(1991) 13 EHRR 1] on question regarding the quality of legal aid provided, the Court held that though nomination was not enough, the State is not responsible for every shortcoming of the legal aid lawyer, but the decision was based on the fact that *Kamaniski* had during the trial, not put the authorities on notice regarding the alleged mishandling by the counsel.

In a recent case, arising out of a defamation matter the court went to the extent of holding that denial of legal aid can be viewed as a denial of justice (*Airey v Ireland*).

### **At What Stage Does the Right to Legal Aid Accrue?**

Article 6 (3)(c) provides that anyone facing a trial on criminal charges has the right to 'legal assistance'. Generally, legal assistance or advice is needed, particularly in serious cases much before the person is charged, sometimes perhaps at the initial investigation stage.

In *Granger v UK*, [(1983) 35 DR 75] the State argued before the European Commission of Human Rights (henceforth referred to as the Commission) that the right to legal assistance would be available only when it was clear that a trial will be held, which is after the person has been charged. However, the Court found that Article 6(1) (Access to Court) and Article 6(3)(c) (Legal Aid) should be read together and if it would be apparent to an objective observer that a fair hearing could not take place without legal advice then both [rights under Article 6(1) and Article 6(3)(c)] would be violated.

The *Granger* principle was taken a step further in *Imbrioscia v Switzerland* [(1994) 17 EHRR 441] with the Court holding that there is nothing in Article 6(3)(c) preventing the State from providing legal assistance in pre-trial matters, but the Court refrained from making it a rule and observed that 'it would depend on the special features of the proceedings and circumstances of the case'.

### **The Legal Aid Counsel - Choice and Duty**

The ECHR states that it is the duty of the State to ensure that defence counsel provided by the State is capable of defending the case [*F v Switzerland*, (1989) 61 DR 171] but it has been consistently held by the Commission that the legally aided defendant does not have the absolute right to choose his or her legal representative [*Rengeissen v Austria*, (1979-1980) 1 EHRR 455].

This question was also considered by the Court in *Croissant v Germany* [(1993) 16 EHRR 135] [where it was held that though a defendant had the right to choose a counsel, under Article 6 (3) (c), "... it is necessarily subject to certain limitations where free legal aid is concerned".

"When appointing defence counsel the national courts must certainly have regards to the defendant's wishes. However they can override those wishes where there are relevant and sufficient grounds for holding that this is necessary and in the interest of justice".

Under the ECHR the legal aid counsel is under an obligation to represent the defendant effectively. That would necessarily mean to represent the defendant in accordance with his or her wishes and instructions. But to this rule a caveat was added in *X v UK* [(1980) 21 DR 126] where it was held that the defendant cannot insist that his or her case be conducted in an unethical manner.<sup>5</sup>

5. European Convention on Human Rights, 1953. [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

## Legal Aid in South Asia

### Legal Aid in India

Legal aid evoked the attention of the legal community in India as early as the 1950's. The first Indian Law Commission thoroughly debated the issue and in its 14th Report suggested that free legal aid is a service, which should be provided by State, and the State must accept this obligation by making provision of funds for legal aid. The report stated that:

'...if laws do not provide for an equality of opportunity to seek justice to all segments of society, then they have no protective value and unless some arrangement is made for providing a poor man the means to pay Court fee's, advocates fees and other incidental costs of litigation, he is denied an opportunity to seek justice'.

The Commission also mentioned that lawyers themselves need to play a pivotal role by accepting the responsibility for working on legal aid schemes.

In the 1960's the Union Government of India did put forward recommendations on legal aid structures but their efforts bore no fruit, as the State Governments did not show any enthusiasm for funding the initiative.

The Government of India formed an Expert Committee for Legal Aid in 1972, with Justice Krishna Iyer as its Chairman. The Committee came to be known as the Justice Iyer Committee and submitted its report in 1973. The report stated that:

'...law and Justice cannot be regarded as two separate wings any longer and that it had become necessary that they together work towards restoring the faith of the poor man in the legal system by providing him with adequate legal assistance'.

The recommendations of the Committee have formed the basis of the legal aid system in India.<sup>6</sup>

The Committee suggested an elaborate plan for setting up Legal Aid Committees, and included recommendations for law clinics be set up at universities and urged the lawyer community to help out with the legal aid scheme.

The recommendations of the Krishna Iyer Committee also directly resulted in free legal aid being recognised

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as a right under Article 39-A of the Constitution of India 1950, albeit in the non-justiciable Directive Principle of State Policy Chapter, by the Constitution (42nd Amendment) Act 1976.<sup>7</sup>

To give effect to Article 39-A of the Constitution, in 1980 the Government of India appointed a Committee "for Implementing Legal Aid Scheme" (CILAS) which was headed by Chief Justice P. N. Bhagwati with the task to implement uniform legal aid scheme throughout the country.

It is also important to mention that by late 1970s the Superior Courts too have recognised the right to legal representation, although, in a narrow sense, as a fundamental right by a liberal interpretation of Article 21 of the Constitution, which relates to the protection of life and liberty. This principle has since been reiterated by the Supreme Court of India in *Sunil Batra v. Dehli Administration* (1978 4 SCC 494).

In 1987, the Parliament passed the Legal Services Authorities Act 1987, which gave a statutory base to legal aid services throughout India on a uniform pattern. The Act, however, was only fully enforced in November 1995.

The National Legal Aid Services Authorities Act, 1987 envisaged creation of the National Legal Aid Authority, which was constituted in November 1995, however it became functional only in 1998.<sup>8</sup>

6. A Brief History of Legal Aid. Written by: Varun Pathak- fourth year student- Amity Law School, New Delhi. <http://www.legalserviceindia.com/articles/laid.htm>.

7. The Constitution of India, 1949 (Updated upto (Ninety-Eighth Amendment) Act, 2012).

8. Legal Service Authorities Act, 1987 (39 of 1987). <http://lawmin.nic.in/la/subord/nalsa.htm>.



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The Act provides for the establishment of legal aid authorities and services at four levels.

#### **The National Legal Aid Services Authorities Act, 1987**

At the national level is set up the National Legal Aid Services Authority (NALSA), with the Chief Justice of India as its Patron in Chief and a retired judge of the Supreme Court as its Executive Director.

The NALSA is the apex body constituted to lay down policies and principles for making legal services available under the provisions of the Act and to frame the most effective and economical schemes for legal services. It also disburses funds and grants to State Legal Services Authorities and NGOs for implementing legal aid schemes and programmes.

#### **State Legal Aid Service Authority**

At the State level, the State Legal Aid Service Authority operates with the Chief Justice of the respective High Court as its Patron in Chief and a retired judge of the High Court as its Executive Director. The State Legal Services Authority is constituted to give effect to the policies and directions of the Central Authority (NALSA) and to give legal services to the people and conduct Lok Adalats in the State.

#### **District Legal Services Committee**

At the District level is the District Legal Services Committee with the District Justice as its Ex-officio Chairman. The District Legal Services Authority implements Legal Aid programs and schemes in the district.

#### **Taluk Legal Aid Services Committee**

This Committee functions at the Taluk level, with the Senior Civil Judge as its Ex-officio Chairman. The Taluk Legal Aid Services Committee coordinates the activities of legal services in the Taluk and organises Lok Adalats.

#### **Eligibility Criteria**

Section 12 of the 1987 Act prescribes detailed criteria for eligibility for receiving free legal aid. It defines an eligible person as:

"Every person who has to file or defend a case shall be entitled to legal services under this Act if that person is:

1. A member of a Scheduled Caste or Scheduled Tribe; or

9. Ibid

2. A victim of trafficking in human beings or beggar as referred to in Article 23 of the Constitution; or
3. A woman or a child; or
4. A mentally ill or otherwise disabled person; or
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; or
6. An industrial workman; or
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; or
8. 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); or
9. In receipt of annual income less than rupees nine thousand or such other higher amount as may be prescribed by the State Government., 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 Government., if the case is before the Supreme Court."

The Legal Services Authorities after determining the eligibility of the applicant to receive free legal services and the existence of a prima facie case in his or her favour provide a counsel at State expense and pay the required Court Fee and all other legitimate incidental expenses. The legal aid recipient is not required to make any nominal or partial contribution once the case is taken up by the concerned Legal Services Authority. Over the years work by the legal aid authorities at all levels has identified several areas where more effort were needed. NALSA has taken several initiatives to address these issues. These include

1. Publicity for legal aid services;
2. Getting NGOs to conduct Legal Literacy and Legal Awareness campaigns;
3. Setting up Legal aid facilities in jails;
4. Setting up of Counseling and Conciliation Centres in all Districts in the country;
5. Training of Paralegal volunteers and engaging them in the front offices of Legal Services Institutions and starting legal aid clinics at the village level; and
6. Initiating Legal Literacy Programmes in schools and colleges.



The scheme provided under the 1987 Act is quite extensive in its reach and quite ambitious in its goals, yet on ground it has not been able to achieve all it envisioned.

NALSA has been criticised for being dominated by judges, a fact which has hampered its development into a true legal aid or legal empowerment programme. It has so far not been able to provide universal and effective legal aid services to eligible persons in India, the fees provided to legal aid lawyers are meager and hence the services provided not very effective.<sup>9</sup>

#### **The Sri Lanka National Legal Aid Framework**

Article 13(3) of the Constitution of the Republic of the Democratic Socialist Republic of Sri Lanka 1978 guarantees the right to a fair trial by a competent court, and the right to be heard before such a court to all persons. Although the right to legal aid is not explicitly included, Article 13 of the Constitution provides for due process of law. Constitutional experts agree that right to Legal Aid can be implied from reading of these articles.<sup>10</sup>

The Legal Aid Act, 1978 institutionalised legal aid in Sri Lanka and established an independent Legal Aid Commission (LAC) in Sri Lanka. The objectives of LAC are set out in Section 3 of the Act:

"...to operate an effective legal aid scheme by providing legal advice, funds to conduct legal and other proceedings for and on behalf of deserving persons, to obtain the services of attorneys at law to represent deserving persons, and to provide any other assistance that are necessary to provide legal aid to deserving persons."

The LAC grants assistance in civil litigation and fundamental rights cases, and in obtaining bail for those in remand for over a year. The LAC's primary focus is on non-criminal matters, which likely stems from the fact that legal aid in criminal cases is (at least in principle) already provided for by the Sri Lankan Code of Criminal Procedure, as noted above.

The LAC consists of nine members; three appointed by the Minister of Justice, and six nominated by the Bar Council of Sri Lanka (the governing council of the Bar Association of Sri Lanka) from among its members. The LAC delivers legal aid services through regional or district committees or clinics. The LAC determines

guidelines for the administration of the national Legal Aid Scheme and allocation of work and funds, taking into consideration that such imperatives as the need for legal assistance are to be readily available and easily accessible to deserving persons.

The Legal Aid Act, 1978 has also created the Legal Aid Advisory Council, whose role is to advise the Minister and the LAC, "on the provision of legal aid services, their nature, scope and extent," and to examine and comment on all reports submitted by the LAC (Sections 14-16). The Council is made up of the Chief Justice, who is its ex officio Chairman, and 30 other members. The Advisory Council includes nine members of the Legal Aid Commission, three nominees of the Bar Association of Sri Lanka, six nominees of the Chief Justice (representing the judiciary), and 12 members nominated by the Ministry of Justice to represent groups having an interest in the provision of legal aid. The Advisory Council is mandated to meet at least once in every six months.

While the LAC's main focus is legal aid, its mandate extends beyond the provision of legal aid services, covering such areas as legal awareness, training and reform. These include developing "experimental programmes," law clinics, and special projects and carrying out legal education programmes for members of the legal profession and members of the public with "special needs".

The Legal Aid Act also establishes a Legal Aid Fund, which is controlled and operated by the LAC. The fund consists of funding received from the State as well as other donors, and is used for the work of the LAC. Since its inception, the Sri Lankan Government has only made a modest contribution to the Fund, with the bulk of funding coming from international donors.

The LAC has been very effective spreading legal aid activities to all parts of Sri Lanka, before the Act most legal aid activities were limited to the Colombo area. It is a very comprehensive programme and goes beyond traditional legal aid services by providing for awareness raising activities (on legal rights) and setting up of clinical legal education programmes.

All these constitutional provisions read together would require the State to provide free legal aid, at least to the indigent litigants, as a matter of right.<sup>11</sup>

10. Constitution of Sri Lanka, 1978. <http://www.priu.gov.lk/Cons/1978Constitution/1978ConstitutionWithoutAmendments.pdf>.

11. The Legal Aid Sector in Sri Lanka: Searching for Sustainable Solutions. A Mapping of Legal Aid Services in Sri Lanka, 2009. The Asia Foundation UNDP Equal Access to Justice Project UNHCR Ministry of Constitutional Affairs and National Integration Ministry of Justice and Law Reform <https://asiafoundation.org/resources/pdfs/SriLankaLegalAid.pdf>.

## **Part B - Legal Aid Framework in Pakistan**

### **Constitution of the Islamic Republic of Pakistan 1973**

The Constitution of the Islamic Republic of Pakistan 1973 endows the State with responsibility for provision of inexpensive and expeditious justice, without any discrimination. The international human rights standards unequivocally regard inexpensive and speedy justice and right to fair trial, as essential elements for human development. The right to fair trial has in its content, inter alia, the right to equal protection before law and the right of defence before a legal forum. Ideally, it is the responsibility of State to ensure easy, accessible, efficient, speedy and inexpensive justice to all its inhabitants without any discrimination. However, the importance of the right to fair trial and thus to legal aid, necessitates comprehensive and concerted efforts for provisions of legal aid, not only on part of States and governments, but national and international NGOs also.<sup>12</sup>

### **District Legal Empowerment Committee**

The District Legal Empowerment Committees (Constitution & Functions) Rules, 2011<sup>13</sup> were enacted to establish 'District Legal Empowerment Committees', which would provide legal aid by utilising funds allocated from 'Legal Empowerment Fund Window of Access to Justice Development Fund' and other grants and donations by the federal, provincial and local governments.

These rules are framed under Section 9 of the Law and Justice Commission of Pakistan Ordinance, 1979 and were notified vide SRO No. 684 (10)/2011 dated July 2, 2011.<sup>14</sup>

### **Definition of indigent person**

Under Section 2 (c) of the Rules, a deserving person is "a litigant who might otherwise may not be able to obtain legal aid or assistance for protecting his genuine legal rights and interests, involved in litigations, on account of his financial resources."

### **Constitution of the Committee**

A District Legal Empowerment Committee (DLEC)

has representation at the district level. The District and Session Judge or the Zilla Qazi acts as the Chairperson of the Committee who chairs and supervises functioning of the Committee in his or her respective district. Other members of the Committee are District Coordination Officer (or Political Agent or Deputy Commissioner), Superintendent Jail and a representative of the civil society as co-opted member.

### **Support to indigent litigants**

This DLEC shall extend funds for provision of legal aid to indigent litigants. This support is explained as payment of lawyers' fee, court fee, copying charges, process, etc. The DLEC extends funds for the following: payment of professional fee/honoraria of lawyer, payment of court fee, copying charges, process fee and any other fee as the Committee may deem appropriate.

### **List of Panel Lawyers**

The DLEC shall maintain a list of legal practitioners. The panel is to be appointed in consultation with the Vice Chairperson of Provincial Bar Council, District Bar Association and approval of Chief Justice of the relevant High Court.

### **Evaluation of the Performance of Panel Lawyers**

The DLEC has the power to evaluate and appraise the

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***The Constitution of the Islamic Republic of Pakistan 1973 endows the State with responsibility for provision of inexpensive and expeditious justice, without any discrimination. The international human rights standards unequivocally regard inexpensive and speedy justice and right to fair trial, as essential elements for human development***

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12. The Constitution of Islamic Republic of Pakistan 1973. [http://www.na.gov.pk/uploads/documents/1333523681\\_951.pdf](http://www.na.gov.pk/uploads/documents/1333523681_951.pdf)

13. The District Legal Empowerment Committees (Constitution & Functions) Rules, 2011. [http://www.ljcp.gov.pk/R\\_P/DLECs/index.html](http://www.ljcp.gov.pk/R_P/DLECs/index.html).

14. Ordinance no. XIV of 1979. Ordinance to establish a Law and Justice Commission of Pakistan. <http://www.ljcp.gov.pk/Menu%20Items/Statutes/LJCP/ljcp-ordinance.htm>.

performance of a panel lawyer on an annual basis. It has verification powers with regard to cases assigned to a legal practitioner through observing records of cases of the court concerned.

#### **Application to DLEC**

Any deserving person can file an application for legal aid with the Committee. The Committee after reviewing such an application will determine the eligibility of the applicant. The Committee will then refer such cases to lawyers out of the list it maintains.

#### **Funding of DLEC**

The funding source for this Committee is the Legal Empowerment Fund Window of Access to Justice Development Fund' and other grants and donations by the Federal, Provincial and local governments.<sup>15-16</sup>

#### **The Pakistan Bar Council Free Legal Aid Rules, 1999**

Section 13 (1-a)<sup>17</sup> of the Legal Practitioners and Bar Council Act, 1973 provides for Legal Aid Services; the section became operational in 1999 when the Free Legal Aid Committees Rules were notified.

#### **Constitution of Legal Aid Committees**

The Free Legal Aid Committees provides for the Legal Aid Committees at the central, provincial, district level.

#### **Central Free Legal Aid Committee**

The Central committee consists of five elected members of the Pakistan Bar Council, with at least one member from each province.

#### **Provincial Free Legal Aid Committee**

The Provincial Committee consists of two members of Pakistan Bar Council from the respective Province - nominated by Pakistan Bar Council - and two members of Provincial Bar Council - nominated internally - and Presidents of the High Court Bar Association and High

Court Benches and Circuits.

#### **District Free Legal Aid Committee**

The District Committee consists of one member of Provincial Bar Council from the respective district, as well as the President and Secretary of District Bar Association from the respective district.

#### **Panel of Lawyers**

All the Committees have to maintain two types of lawyers' panels. These include lawyers who offer services voluntarily without charging fee and pro-bono lawyers who offer services by charging fee or a portion of fee.

#### **Condition of one case per year**

Under the rules each member of the Pakistan Bar Council and Provincial Bar Councils has to conduct at least one free legal aid case during each year assigned to him by the Committee.

#### **Funding source**

The Free Legal Aid Committees are funded by Pakistan Bar Council and other grants by the government, NGOs or individuals.

#### **Public Defender and Legal Aid Office Ordinance, 2009**

Public Defenders and Free Legal Aid Ordinance, 2009 was another mechanism for free legal aid. The Ordinance could not become a law but it is important to mention its structure here.

#### **Constitution of the Public Defenders' offices**

The office of Public Defender consists the Chief Public Defender, Additional Public Defenders and District Public Defenders.

#### **Appointment of the Public Defenders**

The Chief Public Defender, Additional Public Defenders and the District Public Defenders are to be appointed by the Government.

15- District Legal Empowerment Committees (Constitution and Functions) Rules, 2011.

16- One-Day Workshop on: Mapping Existing Legal Aid Providers & Mechanisms held at Swat on 11th August 2012, organised by United Nations Development Programme (UNDP). The workshop was attended by Bar Councils, Bar Associations, Judiciary, Prosecution and Civil Society Organisations.

One-Day workshop Legal Aid Finding Sustainable Solutions held on 23rd June 2012 at Islamabad, organised by United Nations Development Programme (UNDP). The workshop was attended by Law and Justice Commission, Pakistan and Provincial Bar Councils, Bar Associations, Civil Society Organisations and judiciary.

Two-Day Consultative Workshop on District Legal Empowerment Committees Rules, 2011 held on 19-20 September 2012, organised by United Nations Development Programme (UNDP) in collaboration with the Peshawar High Court. The workshop was attended by the Law and Justice Commission of Pakistan, Provincial Bar Councils, Bar Associations, Civil Society Organisations (CSOs) and judiciary.

17- Pakistan Bar Council Free Legal Aid Committees Rules, 1999

### **Office of Public Defender**

The Chief Public Defender is the provincial head of the office. He will be a person who is not less than 45 years of age, has a record for high performance and his integrity is beyond doubt with experience of at least 15 years as an advocate of the Supreme Court or High Court. The Additional Public Defenders and District Public Defenders have to report to the Chief Public Defender while performing their duties.

### **Chief Public Defender**

The Chief Public Defender shall exercise overall management and administration of the office under the supervision and control of government; allocate work to the Additional Public Defenders and District Public Defenders; share information with the government, evaluate progress of the Additional Public Defenders; District Public Defenders and Public Defenders. The Chief Public Defender may make a representation in court, give legal advice or advice in case of an indigent person and refer cases of indigent persons to the Additional Public Defender, District Public Defender and Public Defenders.

### **Additional Public Defenders**

The Additional Public Defender is appointed by the government who must have at least 10 years of experience as an advocate of the High Court. The Additional Public Defender may make representations in court, give legal advice or advice in case of an indigent person and refer cases of indigent persons to the Additional Public Defender, District Public Defender and Public Defenders.

### **District Public Defenders**

District Public Defenders are appointed by the government who have at least 7 years of experience as advocates of the High Court. The District Public Defender functions to assist the Chief and Additional Public Defenders and visits jails for identification of indigent persons; represents an indigent person in court; and determines the eligibility of an indigent litigant.

### **Public Defenders**

The Government may appoint at least one Public Defender in every Tehsil keeping in view the workload in the particular district. The Public Defenders shall represent an indigent person in court; determine the eligibility of an indigent litigant; provide legal advice to that person; and assist the District Public Defenders in performance of their duties.

***The Chief Public Defender shall exercise overall management and administration of the office under the supervision and control of government; allocate work to the Public Defenders and share information with the government, evaluate progress of the Additional Public Defenders; District Public Defenders and Public Defenders***

### **Application for Legal Aid**

Any person who claims to be an indigent person can submit an application for legal aid to the Government or to the Chief, Additional, District and Public Defender. In case an indigent person is in jail he can send his or her application through the Superintendent Jail. In case the indigent person is below the age of 18, the application for legal aid and legal advice can be submitted through a person interested in the welfare of the person. Such an application shall be accompanied by an affidavit, which will be treated as sufficient evidence that the person is an indigent. There will be no further inquiry on the determining whether the person is indigent or not. The court can also direct the Defenders to represent an indigent person in court at any stage of proceedings.

### **Reporting**

The Public Defenders shall submit report to the District Public Defenders, who must submit reports to the Additional Public Defenders and he will further report to the Chief Public Defender. The Chief Public Defender is to submit an annual audit report to the government within three months of the end of the financial year.<sup>18</sup>

### **Destitute Litigant Fund Rules, 1974**

The Destitute Litigant Fund Rules, 1974 provides for legal assistance in constitutional matters to destitute litigants.

18. Public Defenders & Free Legal Aid Ordinance, 2009

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### **Definition of Destitute Person**

The Rules define a destitute person as 'one who has no means to pay the court fee or other charges in respect of a writ petition' (Constitutional Petition).

### **Application for assistance**

Any person can submit an application to the Deputy Registrar (Judicial) or other authorised person for assistance under the rules. The Deputy Registrar or the authorised person is required to conduct an inquiry into the matter and on his satisfaction can accept the application.

Under the rules an applicant who is seeking assistance out of the fund shall accompany a schedule of both his moveable and immoveable property, if any, belonging him or her, with estimated value thereof and any other source of income along with a copy of the writ petition with enclosures intended to be filed in the Court.

The Inquiry Officer may, if he is not satisfied with the evidence produced before him by the applicant, may call for a report from the Collector concerned with regard to the statement of the applicant of being a destitute.

### **Funding Sources**

Under the Rules, the government has to allocate funds to each High Court for provision of assistance to destitute persons.<sup>19</sup>

### **The Code of Civil Procedure, 1908**

The Code of Civil Procedure, 1908 (Order 33) provides the procedure for appointment of counsel for a litigant who is found to be a 'pauper'. The civil court itself determines if the litigant is a pauper.

### **The Code of Criminal Procedure, 1898**

Section 340 of Code of Criminal Procedure, 1898 provides for counsel at State expense. The High Court Rules (Vol. V, Ch. 4-E) also provide for legal assistance at State expense for an accused person charged with a capital offence.

19. Destitute Litigant Fund Rules, 1974



## **Part C - A Functional and Sustainable Legal Aid System- Key Issues and Challenges**

The overall situational analysis of legal aid in Pakistan shows that legal aid remains an ignored area. There are laws/rules but when they are passed through the practicability, efficiency and efficacy tests, one will know that they suffer from serious deficiencies.

These legal instruments are designed with the objective to ensure poor and vulnerable segments' access to the formal justice system, have inbuilt problems, which mostly slow down and sometimes stop their smooth operation.

### **1. Issue of sufficient and continued funding**

The availability and flow of sufficient funding is the pre-condition for the legal aid services. In absence of sufficient funding, continuity and sustainability in the provision of legal aid services cannot be guaranteed. In Pakistan funding for legal aid is meagre and does not meet the demand side. Furthermore, due to inbuilt weaknesses in the legal aid system and shortcomings in its framework, funds provided by the State have not trickled down to the people at the grass roots level. Thus the available funding is not even serving to benefit the proportionate number of indigent persons.<sup>20</sup>

### **2. Lack of proper mechanism for legal aid**

Although there is an interest amongst the lawyers, Bar Associations and Civil Society Organisations (CSOs) to provide legal aid services to indigent persons there is no proper mechanism available to provide legal aid in a systematic manner. This has left the provision of legal aid services to the discretion of legal aid providers. The rules are mostly static or the person/committee in charge for

some reason does not take the pain to use his discretionary powers to interpret the rules.<sup>21</sup>

### **3. Reliance is placed on the voluntary services of lawyers**

Most organisations claiming to provide free legal aid to indigent persons rely on the voluntary services of lawyers. The funds available remain mostly unutilised as in the case of District Legal Empowerment Committees because there of the lengthy approval formalities involved. This is because the rules do not provide for any proper mechanism for the utilisation of such funds.

### **4. Weak supply side**

The existing capacity of legal aid providers is negligible compared to needs of the indigent people. It is observed that only a small percentage of the population has access to mainstream justice system through legal aid.

### **5. Lack of coordination and cooperation between providers**

There is a lack of coordination between various legal aid providers and each provider is working in isolation disconnected from the other providers.<sup>22</sup>

### **6. Lack of monitoring and reporting mechanisms**

There is a lack of clear operating procedures, proper monitoring, reporting and evaluation mechanisms, which make it impossible to assess the scale and quality of the legal aid services provided to people.<sup>23</sup>

### **7. Lack of awareness amongst the public and lawyers**

There is general lack of awareness about legal rights, legal aid and remedies particularly amongst the poorer and marginalised sections of the population and even in some cases within the

20. One-Day Workshop on 'Legal Aid Finding Sustainable Solutions' held on 23rd June 2012 at Islamabad organised by United Nations Development Programme (UNDP). Representatives of the Law and Justice Commission of Pakistan and Provincial Bar Councils, Bar Associations, Civil Society Organizations and judiciary attended his workshop.
- Two-Day Seminar on Article 10-A 'Right to Fair Trial' Constitution of Pakistan held on 25-26 September 2013 at Islamabad organised by United Nations Development Programme (UNDP) in collaboration with Pakistan Bar Council.
- Two Days Workshop on 'Legal Aid: Devising Mechanism for Increased Access to Justice' held on 29-30 November 2013 at Lahore, organised by Pakistan Bar Council in collaboration with the United Nations Development Programme.
21. One-Day Workshop on 'Mapping Existing Legal Aid Providers & Mechanisms' held at Swat on 11th August 2012 organised by United Nations Development Programme (UNDP). Bar Councils, Bar Associations, Judiciary, Prosecution and Civil Society Organisations attended this workshop.
22. Two-Day Consultative Workshop on District Legal Empowerment Committees Rules, 2011 held on 19-20 September 2012, organised by United Nations Development Programme (UNDP) in collaboration with the Peshawar High Court. The workshop was attended by Law and Justice Commission, Pakistan and Provincial Bar Councils, Bar Associations, Civil Society Organizations and judiciary.
23. Two-Day Workshop on Legal Aid in Pakistan: the Next Steps held on 11-12 September 2015 at Lahore. The Workshop was organised by the United Nations Development Programme (UNDP) and Pakistan Bar Council.

lawyer community.<sup>24</sup>

**8. Lack of eligibility criteria**

There is general lack of clear eligibility criteria for legal aid. Different rules provide different standards which mostly revolve around the financial position of a person in need. How the financial position of a person is to be determined is difficult to ascertain.

**9. Lack of uniform definition of legal aid**

There is no uniformly accepted definition of legal aid in Pakistan. Legal aid is mostly defined as assistance in litigation. The Public Defenders Ordinance included legal advice in the definition of legal aid but that could not evolve as a law. There seems to be disagreement amongst the providers at which stage a deserving litigant could approach the committee for legal assistance. Could it be before a court of law is seized of the matter or only afterwards?<sup>25</sup>

**10. Lack of monitoring and evaluation system**

The legal aid rules do not provide for a strong monitoring system in the country to ensure fair delivery and maintain quality in services. There are some provisions, which mention the performance evaluation of legal aid lawyers and review of cases conducted but this could not transform into a proper monitoring and evaluation system.

**11. Lack of reporting system**

Except the Public Defenders Ordinance, which provides for reporting, the rest does not specifically provide for a reporting system.

**12. Lack of referral system**

The legal aid system does not provide for a clear uniform referral system. The cases are mostly referred for legal aid by judges or jails. This is particularly true about the District Legal Empowerment Committee.<sup>26</sup>

**13. Lack of screening mechanism for indigent litigants**

The rules lack sufficient details and guidance on the criteria and methods for the selection of cases and screening of deserving litigants.

**14. Lack of proper application receiving system**

Different rules provide different application templates and procedures to file applications for the public but no committee has set up any system for receiving applications.

24. Two-Day Workshop on Legal Aid and Access to Justice in Pakistan held on 18-19 August 2004 at Murree. The workshop was organized by United Nations Development Programme (UNDP) and Khyber Pakhtunkhwa Bar Council.

25. Legal Aid Declaration, 2013 passed at the end of a Two-Day Workshop on Legal Aid held in November 2013 at Lahore. This Workshop was organised by the Pakistan Bar Council and UNDP Pakistan.

26. Legal in Pakistan: A brief review of the functioning of the 'District Legal Empowerment Committees' in three districts of Khyber Pakhtunkhwa Province, April 2014 conducted by United Nations Development Programme (UNDP)

## **Part D - Recommendations and Way Forward**

1. The capacity of organisations that provide legal aid services needs to be enhanced in terms of scale, scope and quality. Proper coordination mechanisms need to be developed between Bar Associations, the Bench and Civil Society Organisations. Creating and increasing their capacity to provide proper legal aid services requires a detailed assessment of these organisations and development of working models.
2. Proper monitoring and assessment procedures need to be in place for improving the efficiency and accountability of the services provided.
3. Lack of awareness of legal rights, entitlements and forums available for redressal were flagged as major impediments to access mainstream justice, and therefore Legal Aid Centres and Legal Aid Desks must be established at every Bar Association level and be properly publicised. Further, awareness campaigns to raise public awareness regarding legal rights and their remedies must be organised, particularly for poorer and marginalised sections of the population.
4. Lack of proper record keeping was flagged as the most serious challenge, which hinders an assessment of the exact situation in the field, and therefore a proper record keeping system must be developed. Similarly, the absence of a proper reporting system was identified as another serious issue which prevents a proper assessment of the overall quality of legal aid services, therefore a proper reporting system should also be developed.
5. Clinical Legal Education programmes, both 'street law' and 'legal clinic' models at local or nearby law colleges could compliment both legal aid services and the public awareness efforts. These programmes can also help in preparing the next generation of human rights and legal aid lawyers. The Pakistan Bar Council should take concrete steps to make Clinical Legal Education compulsory in all law schools.
6. Capacity of lawyers has been highlighted as a key issue, which requires an assessment on the need for training. Thus compulsory continuing legal education may be introduced throughout the country aimed at the training and development of young lawyers. Young lawyer should be required to take apprenticeships with a senior lawyer for a certain time period. Young lawyers and Civil Society Organisations also need to be encouraged to support legal aid and legal awareness programmes.
7. The District Legal Empowerment Committees (DLEC) can be a step in the right direction and their success will depend upon adopting proper procedures, realistic goals, a combination of both pro bono and low bono services provided by the members of the Bar in their 'best tradition'. This 'model' if successful will go a long way in securing continuous and long-term funding for legal aid from the government.
8. It is recommended that uniform legal aid law and a legal aid authority should be established keeping in view all the existing and future legal needs of the people in the country.
9. It is recommended that a legal aid awareness programme aimed at understanding rights and laws should be introduced by involving volunteers particularly students.
10. It is recommended that there should be an efficient legal aid regulatory system with a permanent committee at Central and Sub Committees at the grassroots level. There should also be a body established to review the performance of legal aid lawyers.
11. There should be a proper mechanism of preparation and listing of legal aid lawyers. A list should be maintained both at the District and Superior Courts levels to enable easy and quick accessibility to legal aid services. The Bar Councils should also maintain a list of reputable lawyers, for the purpose of legal aid services, particularly in sensitive cases. While creating a list of legal aid lawyers, priority should be given to those with pro bono experience.
12. Criteria should be set for length of experience, which should not be less than 5 years for the court of Civil Judge/Judicial Magistrate; 7 years for the court District and Sessions Judge; and 10 years for the High Court. Young lawyers should be encouraged to come forward to provide legal aid services but under the supervision of senior lawyers which will ensure quality.



13. Eligibility criteria of beneficiaries should be well thought out. The beneficiary of legal aid must be a person who lives below the poverty line and cannot afford to pay the expenses of litigation, who must provide proof of his financial position such as a declaration of disposal income. There should be a proper inquiry mechanism for identification of beneficiaries; however, receipt of zakat should not be a factor in the determination of beneficiaries. The District and Tehsil Bar Associations may verify and recommend beneficiaries of legal aid.
14. There should be an information collection and dissemination system. An efficient system of data collection and IT support should be introduced, which shall be freely accessible to all. An interactive website may be maintained for this purpose.



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