"The Crisis of Legal Aid in Pakistan"

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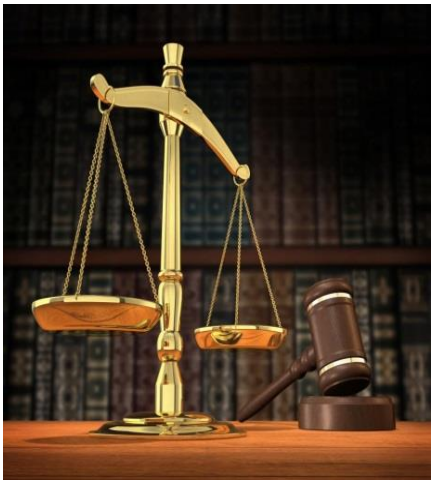

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Pakistan is a highly litigious society. However, most of the litigation, it may be emphasized, is not that which deals with the determination of legal and constitutional rights. The courts are used less as an option of last resort and more as a tool for leverage. Pakistan's constitution provides, "The State shall ensure inexpensive and expeditious Justice"[1]. However, it is clear when one observes all that goes on in our courts, more often than not, the reality is quite the opposite of this. Much of the criminal litigation in Pakistan is a series of retributive legal actions and as such the courts are left with the onerous and uninspiring task of sifting through the cases to determine which ones are genuine and which are not. Since a very small percentage of litigants are tried for malicious prosecution, the trend of using the law to settle scores is very common and is deployed with great tact and skill. Similarly, arduous civil litigation is made even more cumbersome by the delaying tactics that are employed by lawyers in these cases. As such, civil litigation has become a practice that is widely used by disputing parties as another means of "bargaining", i.e. the process usually entails favourable *status quo* orders[2], followed by a deliberate delay. The Police in Pakistan is notorious for being a bully and a force that is used to control the people instead of protecting them. Historically, the police was used by the colonial administration as a means of implementing its own policy. Inevitably, the victims of police brutality in Pakistan are those without patronage or support of the influential and more often than not, these are the people most in need of legal aid. The limitations in this country with regard to access to legal aid, especially for women, but also more broadly for the poor and vulnerable, are highlighted in recent research by Insaf Network Pakistan, titled *"Voices the of Unheard: Legal Empowerment of the Poor in Pakistan."*[3]According to the research, of the poor

[1] Constitution of Pakistan 1973, Article 37 (d)

[2]Temporary injunctions under Order XXXIX are the legal device of choice in these matters. The culture of misuse of these orders is passed on from one generation of lawyers to another. Getting a stay order is usually considered a win; what follows is dalliance between the bar and the bench and delaying tactics of the worst kind.

[3]This Study was conducted by INP-UNDP in 2012; it included a random survey of 10,322poor households across all 4 provinces and GB, 92 Focus Group Discussions with 1,120 participants, 5 Workshops with supply-side stakeholders and 3 Case Studies on urban slums and 5 consultative workshops

households surveyed, the percentage that had received free legal aid in each area were:3% in Punjab,25% in Sindh, 16% in Balochistan, 5% in Khyber-Pakhtunkhwa and 4% in Gilgit-Baltistan. This situation is further compounded by low awareness of legal rights and procedures, thus the poor and vulnerable find themselves disconnected from the formal justice system resulting in a glaring trust deficit.

It is important to highlight these issues because the entire nature of the legal system as it exists now is attuned towards delaying justice at all costs. This obviously means that the entire definition of what constitutes a good advocate turns on the issue of whether the advocate can curry favour with the judge to obtain a stay order; then, how long the lawyer can delay the matters, in order to force the other party to come to the table. With such schemes in play, the whole edifice of free legal aid collapses. Judges – it must be said, to our collective shame- facilitate the advocates in such endeavours, by granting innumerable adjournments and by showing a willingness to entertain frivolous and often scandalous applications (usually in civil cases) which tend to linger on in the process for a very long time. Similarly, the case load on both civil and criminal sides is so high that most cases are indubitably and inevitably kept in a permanent state of limbo. Consequently, thousands of cases are currently pending before almost every bench of every High Court in the country, without any real end in sight.[4] This is not counting those cases which have become "infructuous"[5]because the litigants have passed away and the cause of action has ceased to exist.

These are some of the problems that make justice a near impossibility in our legal system. In short this is the crisis of legal aid in Pakistan.

In 1999 the Pakistan Bar Council amended its Free Legal Aid Scheme of 1988 to include a newly devised set of rules, namely the Pakistan Bar Council Free Legal Aid Rules of 1999 (the "Rules")[6].The Rules envisage the existence of a system multi-tiered legal aid committees, on a central, provincial and district level, which can call upon members of the bar to take on one case per year free of cost. Under the Rules, to avail free legal aid, a litigant is required to make an application to the district committee and illustrate the need for free legal aid. The schedule to the Rules provides the requisite application form required to be filled out.

with supply side stakeholders; http://www.inp.org.pk/voices-of-the-unheard-LEP

[4] Many lawyers report that they have seen either the initiation of a proceeding or the middle and very rarely the end; cases continue notoriously for decades.

[5] This is a curiously South Asian invention, used in Pakistan, India and Bangladesh to denote cases where the cause of action has lapsed.

[6]In the creation of these Rules, The Pakistan Bar Council was acting in accordance with the powers granted to it, for the purposes of rule-making under Section 13 of the Legal Practitioners and Bar Councils Act of 1973.

Despite the Rules providing for the availability of free legal aid, advocates willing to take up pro bono cases are rare. For this reason, a schedule of fees is appended to the Rules, which provides for very nominal fees, payable to the advocates. For Supreme Court Advocates this fee is Rs. 5,000 (approximately US $50), while those appearing in writ petitions before the High Courts are to be paid Rs.3,000 (approximately US $30) for a writ petition and Rs. 2,000 (approximately US $20) for a bail. For lower court matters such as bails before the Court of Sessions, the payable fee is Rs. 2,000. These amounts are approved and paid for by the district committee or the committee most concerned with a particular case.

It is this point in the process where the seeds of the legal aid crisis in Pakistan can be found. No advocate is likely to represent a free legal aid client with full diligence and commitment, beyond a hearing or two, on the pittance that is paid under the Rules aforesaid. Accordingly, it is reported that only about two to three percent of poor litigants have received legal aid, and that too of a highly ineffective quality. As it is, a very significant number of litigants are wary of the legal aid they get even when they have paid for it.

The various issues that may be pointed out *vis a vis*the quality of legal help- both free and otherwise- are as follows:

- Capacity constraints of lawyers and judges (to take up cases)
- Corruption of lawyers and judges
- Unprofessional conduct of lawyers and judges
- Lack of security and protection for lawyers and judges in controversial or religiously or politically sensitive matters[7]
- Frequent adjournments and continuances without rhyme or reason. [8]

[7]In 1998, a High Court Judge was gunned down after he acquitted a blasphemy accused defendant. See http://www.newsweekpakistan.com/scope/265.

The need of the hour is to implement a comprehensive strategy in countering the capacity gaps in the legal system. Here are a few recommendations:

- First and foremost, the quality of the legal system must be improved by way of reform. This requires a revamp of the legal system and/or framework, as well as an introduction of the concept of the 'academic lawyer'. Pakistan woefully lacks good law reviews and journals, tools that can be major contributors to the development and expounding ofthe law.
- Bar and Bench must unite on the basic principle that the purpose of litigation is justice. Without effective coordination between the two, it is impossible to change the habits that have taken a century to develop.
- The civil society must step up and fund legal aid projects which would bring gainful employment to hardworking and enterprising lawyers, thereby improving the quality of free legal aid available in the country.
- There must be an increase in the promotion and organization of affordable alternative dispute resolution mechanisms that can be set up at the grassroots levels, in order to allow the poor litigants to resolve their issues outside the courts.

There is a lot to learn from how other legal systems have overcome procedural delays and issues. The Woolf Reforms[9] in the United Kingdom are a case

[8]These are sought under Order XVII Rule 1 of the Civil Procedure Code 1908- a much abused provision of law. Order XVII Rule 3 provides for closing of evidence in the event of inordinate delay but is rarely used. At times the situation becomes hilarious in a court. Adjournments are sought for reasons as simple as "I had a headache last night" or "I didn't have time to prepare". This culture of dallying and delaying is all pervasive and many lawyers are known and marketed for their skill in delaying matters.

[9] *Access to Justice Final Report*, by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, *Final Report to*

in point. The Woolf Reforms gave birth to the Civil Procedure Act 1997, which conferred the power to make the 'Civil Procedure Rules' (CPR). Consequently the CPR was designed to improve access to justice by making legal proceedings cheaper, quicker, and easier to understand for non-lawyers.

The foremost solution to the crisis of legal aid in Pakistan is a thorough re-vamp of the procedural lacunas that favour delaying tactics and allow delaying tactics as a weapon of choice in the armoury of the unethical practitioner of law. Many such procedural delays have been sanctioned in established case law in the field.[10] This would require the introduction of 'block trial dates',a procedure whereby a trial would commence and finish within a period of two weeks (as set aside by the judge), instead of prolonging it over several dates and adjournments. This is – strangely enough- not without precedent in case law in Pakistan. A recent judgment of the Lahore High Court stated: Parties cannot claim adjournment as a matter of right. It is the prerogative and discretion of the Court to grant or refuse adjournment in terms of Order XVII, Rules 1 and 3 of the C.P.C. If sufficient cause is shown, the Court can grant adjournment in terms of provisions of sub-rule (2) of Rule 1 of Order XVII C.P.C. It has been provided that once there is evidence that the case has begun, then the hearing shall continue in day-to-day proceedings until all the witnesses in attendance have been examined. Under sub-rule (3) of Rule 1 of Order XVII C.P.C, when sufficient cause is not shown, it has been provided that the Court shall proceed with the suit forthwith. These provisions are not meant to enable the party to cause improper delay in the proceedings.[11]The other pertinent solution to the problem of provision of free legal aid is to create civil society linkage i.e.to form links with charitable legal organizations which can carry out research *and* fund litigators to take on cases.

There are very successful examples of charitable legal action firms and organizations, such as Reprieve UK in the West, which are providing this very important social service: getting the legal aid necessary to those who need it, where and when they need it. Insaf Network Pakistan ("INP") as an organization follows this model; INP works to facilitate other organisations in the provision of legal aid. A prime example of this is INP's Rule of Law & Legal Empowerment of the Poor in Pakistan (LEP) Programme[12], set up to ensure delivery of legal services to the most vulnerable sections of society.

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the Lord Chancellor on the civil justice system in England and Wales

[10]In the case of Mubashir Khan v. Javaid Kamran PLJ 2007 Lahore 1006 (DB), a division bench of the Lahore High Court addressed the question of both adjournment and adduction of evidence. Their Lordships stated that "Law regarding adjournments without objection by the opposing parties is firmly settled to the effect that in such cases, those should be adjourned under Rule-1 instead taking cognizance of those under Rule-3 of Order XVII CPC. Reliance in this behalf can conveniently be made to the judgment of the Apex Court in the case of Syed Tasleem Ahmad Shah Versus Sajawal Khan etc. (1985 SCMR 585) wherein it was held that in absence of any objection by the plaintiff, it would not amount to time being grantedto the defendants at his request in terms of the provisions under discussion and the Court was not justified to invoke those, for closing evidence of the defendant."

[11]Muhammad Aslam v. Muhammad Sharif PLJ 2010 Lahore 432

[12] Rule of Law Project – Access to Justice, INP; http://inp.org.pk/Rule%20of%20Law