



Right to access justice: A pragmatic view of legal aid system in Pakistan

¹ Jawwad Riaz, ² Zakia Suleman

¹ Assistant Professor, University Law College, University of the Punjab, Lahore, Pakistan

² LLM, Diploma in Taxation Laws, Diploma in Labour Laws Advocate High Court, Lahore, Pakistan

Abstract

This paper will showcase the concept of legal aid and its significance towards access to justice for all. The treatise would dig out the scheme of free legal aid in the Common law. During the course of analysis, the paper will explore how the Government of Pakistan has taken up the responsibility of discharging its duty to provide justice for all. The paper posits that execution of the law and not the law remains the primary root cause of the problem.

Keywords: legal aid, justice, civil, criminal, litigation, justice, Pakistan

Introduction

History of the concept of legal aid can be traced back in 1851, in France, where first ever law was introduced to regulate and provide the services of free legal aid to those reckoned as the weakest of the week and the poorest of the poor^[1]. Poverty is a concept, ambiguous and much used^[2]. It can be pertinently portrayed as the converse of the welfare and well-being. In the history of form of governments, a conscious endeavor to shield the basic human rights and their welfare is very much visible. Ruling political gospel of 19th century, the laissez-faire theory and its failure to ameliorate the deplorable plight of social justice kindled the idea of a welfare state. Doctrine of “welfare state” has direct nexus with the Englishmen’s endeavors to establish a social security system to overhaul the then existing greater disparity of opportunity as well as resources after WW11 in 1945^[3]. Notion of “welfare state” is based upon the “equality of citizenship” and “dispensation of benefits of law to all” evenly. A system of extending legal aid voluntarily existed in England informally but by the end of WWII that system had become unworkable and worn-out. Therefore, a dire need to design a systematized framework of legal aid was felt. Under such compelling circumstances, a committee was established by the then Lord Chancellor of U.K, Lord Simon in 1944, when the WWII was heading towards its closure^[4]. The Committee presided over by Lord Rushcliffe presented its considerable recommendations on the basis of which two statutes were enacted. First was to be applicable in England & Wales “The Legal Aid & Advice Act, 1949” and Second, to be applicable in Scotland “The Legal Aid and Solicitors (Scotland) Act, 1949^[5]. These two enactments were the first ever legislations in U.K on the subject of legal aid. These Acts provided for legal representation by a lawyer free of charge. Currently, “The Access to Justice Act, 1999” regulates the law of legal aid in U.K. Part 1 of the said Act provides for the constitution of “Legal Services Commission” which heads and regulates “the Community Legal Service” as well as “The Criminal Defense Service”^[6]. Normally, In the commission, there are minimum seven and maximum twelve members; nevertheless, a discretionary prerogative lies with the Lord Chancellor who can enhance the number of members as well as lessen them. Lord Chancellor can also substitute the Commission with two bodies to discharge the above mentioned

tasks of the Commission. These two bodies maintain funds to finance the free legal assistance to the eligible litigants. To meet the eligibility criteria, firstly, person seeking for legal aid should have a “Probabilis Causa Litigandi”^[7]. Secondly, litigant should not have more than 31,884 pounds maximum annual gross income and not more than 2,657 pounds monthly income. Thirdly, disposable income is also taken into account which should be less than 8,796 pounds annually and 733 pounds monthly after deduction of necessary subsistence allowances, child support, national insurance and payable taxes etc. English law of legal aid in civil covers family disputes, for example, divorce and custody of children etc. immigration, asylum issues, employment, housing, personal injury and mental health disputes^[8]. Legal aid is a concept prevalent across the globe and is thought to be a panacea to cure the inability of the poor and the weak to present their stance in the court of law. Justice P.N. Bhagwati has rightly called the legal aid “equal justice in action.” Cambridge English dictionary has defined legal aid as “A system of providing free advice about the law and practical help with the legal matters for people, who are too poor to pay for it.” Legal aid is an idea central to an accessible justice system.

Legal Aid is a scheme of state funded litigation, shared and triggered by the perception of equal justice for all^[9]. Delivery of justice is the primary and the Constitutional imperative of a promising justice system. Courts are there to shield the private good, individual needs and to maintain equilibrium in a society of varying socio-economic conditions. Judicial infrastructure is built to serve all and sundry in a nation and to define, preserve, enforce and protect their rights^[10]. Nevertheless, a justice deficit is very much noticeable. One gigantic reason is inaccessible and expensive justice system which leaves indigent, unprivileged and relatively weaker segment of the society unrepresented in courts. This is big flaw of a justice system, if it fails to serve the very basic purpose of its formulation that is true dispensation of justice amongst all its citizens and to regulate a society where the rich and the poor all can enjoy equal protection of law.

It is not the idea of equal access to justice that all citizens have right to go to courts and present their grievances for redressal. If a party cannot engage a counsel owing to short of finances,

certainly its access to court will not be a meaningful and equal access to justice ^[11].

We are the observers of adversarial justice system which is featured for its non-interference, impartiality, justness, fairness and in which a judge reaches a conclusion solely relying on the evidence presented and arguments of the counsel made before him. This system compels the parties to hire a well reputed lawyer to present its case in court of law. This is how adversarial system has imposed cost of lawyer's fee on the litigants ^[12].

Right to counsel, right of equality before law, right of equal justice, right to access to justice, right to expeditious and inexpensive justice and right to have a fair trial are all envisaged in the Constitution of the Islamic Republic of Pakistan 1973 and reiterated through its interpretations by the superior courts of Pakistan, time and again. Preamble of the Constitution, which has become an operative part of the Constitution ^[13], provides that people of Pakistan shall enjoy the fundamental right of being equal before the law. Article 10-A and Article 25 of the Constitution of Islamic Republic of Pakistan are part of the fundamental rights. Article 10-A provides right to fair trial to the citizens litigating their civil as well as criminal rights. Similarly, Article 25 accentuates on the right of equality before the law. According to basic structure theory these rights are impregnable and cannot be taken away by the legislature. Article 37 clause (d) delineates that policies shall be formulated, feasible to extend an easy, expeditious and inexpensive justice to all citizens. Volume 5 chapter IV (e) of the High Court rules lays down that an accused who is charged with an offence entailing a capital punishment shall be provided with legal assistance at the expense of state. Section 340 sub-section 1 of the Code of Criminal Procedure (hereinafter CR.P.C) 1898 also guarantees that any person, who is being prosecuted, is to be defended by a pleader, as a matter of right. Moreover, Order 33 of the Code of Civil Procedure (herein after C.P.C) 1908 provides an extensive and elaborated procedure for the provision of legal aid. Article 14 (3) (d) of the "International Covenant on Civil and Political Rights" also guarantees: "Right to be tried in his presence and to defend himself in person or through legal assistance of his own choice, to be informed, if he does not have legal assistance right to have legal assistance assigned to him, in any case where interest of justice so requires and without payment by him in any such case if he does not have sufficient means to pay for it." Article 6 (3) (c) of "European Convention on Human Rights" also assures the right of legal assistance if the defendant does not have sufficient means.

But all these provisions, guarantees and assurances are of no avail if indigents, low income persons and illiterate ones find themselves helpless in vindication of their rights because of poverty ^[14]. As Charles de Montesquieu, a political philosopher has well stated that "in the state of nature..... all men are born equal, but they cannot continue in this equality. Society makes them lose it, and they recover it only by the protection of the law." Law comes to rescue the economically weaker segments of the society by providing them equal status and can only be achieved by extending them the benefit of free legal aid so that they may have equal opportunity of representation.

In Pakistan laws are very much there to extend the benefit of legal aid to the have-nots and destitute. Order 33 of the Code of Civil Procedure 1908 regulates the procedure of providing legal aid in civil litigation. It starts by defining the person who

can file an application for legal aid. A person, who cannot pay court fee owing to his financial inability, is an eligible candidate for the provision of legal aid. Where law has not prescribed court fee, touchstone to ascertain the pauperism of applicant is his net income. A person with the income of less than 25000/-. Rs is termed as pauper and the one eligible to file a suit in '*forma pauperis*'. Although, necessary wearing apparel of the applicant and suit property is excluded while calculating his net income ^[15]. In Pakistan, only an indigent plaintiff is facilitated with the legal aid. This right is not available to a defendant in civil litigation ^[16]. In contrast, during criminal proceedings; state provides the services of a free counsel even to an accused. In India, in civil proceedings too, legal aid is available to defendants, if they meet the eligibility criteria. Application to avail legal aid is filed in the same manner as a plaint in civil suit. It also encapsulates the detailed description of applicant's property be it movable or immovable with its estimated monetary value. Application needs to be signed and verified in the same manner as a plaint, in compliance with the instructions laid down under rule 14 and 15 of Order 6 of C.P.C 1908 ^[17]. Application is to be presented by the applicant in person. If applicant is unable to attend the court, an agent who can be well examined in order to ascertain the veracity of application, can present application for legal aid instead of applicant ^[18]. Examination of pauper applicant and applications is primarily based upon bipartite test. First test it involves is 'merit test', determines the nature of claim that it is meritorious or frivolous. Second test is 'means test'. It determines whether the applicant is poor enough to deserve legal aid. After concluding the bipartite test, if application proves to be a true account of facts, it is granted and is treated as a plaint ^[19].

However, court has the power to dispauper such person at any stage of proceedings on application forwarded either by the pleader or the defendant. Three broadly defined grounds of dispaupering a litigant are enlisted hereunder:

Firstly, he displays an improper or vexatious conduct during proceedings in court of law or is guilty of employing procrastination tactics to exploit the process of court. Secondly, he has acquired sufficient means to finance his lawsuit or his already existed resources are divulged. Thirdly, he enters into any champertous agreement in relation to the suit property ^[20]. If such eventuality does not accrue and pauper suit culminates into his victory, first charge on the suit property is court fee and it is recovered by the provincial government ^[21]. But, if pauper loses the lawsuit owing to his own negligence or mistake, for example he fails to pay process fee or remains absent from court without furnishing any good cause, just to frustrate the process of court, then again he shall be held responsible for the payment of court fee at the conclusion of lawsuit ^[22]. Where pauper dies during the pendency of a lawsuit, his suit shall abate, and the court fee shall be recovered from his estate ^[23]. Law also bars subsequent application to avail legal aid, if such application is rejected by the court once.

To aid the indigent or pauper litigants for agitating a matter in constitutional courts of Pakistan a distinct piece of legislation is there, designated as "Destitute Litigant Fund Rules, 1974 ^[24]. These rules first of all set a parameter for a person, who shall be regarded eligible for legal aid, as follows; "One who has no means to pay the court fee or other charges in respect of a writ petition." Mechanism to seek legal assistance under these rules is more like the procedure laid down under order 33 C.P.C 1908. Person desiring to seek legal aid forwards an application

to Judicial Deputy Registrar or such other person authorized for this purpose by the rules. This application by the person claiming to be a destitute shall contain a detailed description of his belongings, including his moveable as well as immovable property, any other income, source of that income and shall also reveal reasonably estimated value of the property. Moreover, application will be accompanied with the writ petition which the applicant intended to file in court of law. Authority receiving application shall hold an inquest to examine the veracity of the application. In case, officer inquiring the application finds the stated facts skeptical or untrue, he has the authority to call for the report of collector of concerned area, to corroborate the statement of applicant's privation of sufficient fund. If contents of the application are proved to be true it is granted by the authority after its satisfaction. Funds to finance the litigation of destitute persons in constitutional courts are allocated to each high court by the government^[25].

Another special law has been legislated by the parliament to further the object of legal aid provisions and to render the system of legal assistance in Pakistan more accessible and vibrant. This special law is "Pakistan Bar Council Free Legal Aid Committee Rules" these rules gave effect to 13(1) (a)^[26] of "Legal Practitioners and Bar Council Act (1973)", which conferred the right of legal aid services. These rules provide forums at different territorial divisions throughout Pakistan for the persons fulfilling the eligibility criteria of legal assistance. At the Central, Provincial and District level committees were established under these rules. Pakistan's Apex Bar Committee is central committee consisting of five members. These members are elected by the Pakistan Bar Council itself and representation from each province is imperative while electing the member of central committee. Whereas Provincial legal aid committee consists of six members. President of the High Court benches and circuits, and president of the High Court Bar Association are ex-officio members of legal aid committee. While, relevant bar council elects two members whereas the remaining two members are nominated by the Pakistan Bar Council, but they must hail to that province for which provincial free legal aid committee is to be constituted. District free legal aid committee comprises of three members. President of the District Bar Association as well as its secretary are ex-officio members of the committee. One member of the provincial bar council hailing from the concerned district completes the quorum for district free legal aid committee. Free legal aid system is primarily funded by the state, N.G.Os, Pakistan bar Council and private individuals, and it is administered by the legal aid committees. All these committees are duty bound to maintain two panels of lawyers. One panel should be of lawyers, willing to extend their legal services voluntarily without monetary paybacks whereas the other panel should be maintained comprising of lawyers, who charge a full fee or portion of it for their services. Rules also provide that all members of Pakistan Bar Council as well as Provincial Bar Council are under an obligation to contest at least one case annually without charging any legal fee. These cases are to be allocated by the respective committees to the members of their bar.

Likewise, in 2011, "The Law and Justice Commission of Pakistan", constituted "District Legal Empowerment Committees". Constitution of these committees was again an attempt to provide a swift and efficient mechanism for free

legal aid. But, a pragmatic view reveals that all these legislations and mechanism are proving to be futile in terms of justice delivery. Practically, the concept of legal aid remains alien in courts. Statistics of a report reveals that round about 40% population of Pakistan is living below the poverty line^[27]. Thus, in the context of justice-provision and its easy access in a socio-political milieu where discrimination, poverty and deviance are deep rooted, the concept of legal aid has gained greater significance^[28]. Another survey report divulges that formal justice system of Pakistan has remained a failure in better dispensation of justice to the economically weaker and poorer segments of society, in the opinion of 98.2% respondents^[29]. Lawyer's fee has been pointed out by the 50% respondents as the stumbling block to the accessibility of formal justice system, in the above mentioned survey. "Civil Justice System" of Pakistan has been ranked at number 106 in the total of 113, while "Criminal Justice System" of Pakistan secures a slightly better position standing at number 81 in the list of 113 countries^[30]. Stringent implementation of laws is dire need of the time and prevailing circumstances. Laws provide for legal aid free of cost, infrastructure is also there nevertheless, lack of implementation is the primary drawback due to which our system lags behind many countries. As 59, 91, 69 and 95% funds allocated to the "District Legal Empowerment Committees" of the Punjab, Sindh, K.P.K and Baluchistan respectively remained unspent as ill luck would have it between the time span of 2012 to 2016. This poor state of implementation of laws and its consequences in terms of justice delivery is really frustrating and saddening. It calls for some extraordinary steps to be taken. For the betterment of this situation awareness should be dissipated amongst the masses about their legal right to free legal assistance. Illiteracy is also proving an Achilles' heel for our society as well as our justice system. Illiterate people are mostly poor strata of the society. This poor as well as illiterate class is suffering in prevalent establishment the most. Therefore, illiteracy should be abolished and constitutional and fundamental right of education should be extended to all in real sense of the word. Ignorance can be cured only by removing its root causes from the grass root level. A mechanism of checks and balances should be devised to improve the performance of legal aid committees and to enhance their efficacy and efficiency in terms of more accomplished justice delivery. A mechanism for the evaluation, reporting and proper monitoring should be formulated for the assessment of quality and scale of free legal aid^[31]. Endeavors are highly needed to render the system of free legal aid more pro-public.

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