

Public Defenders and Legal Aid Office Ordinance, 2009

Highlights

1. The establishment of a Public Defender Office will not serve the purpose until and unless there is a proper Legal Aid Authority (an umbrella) for incorporating all the legal aid efforts throughout the country.
2. The definition of indigent litigant in the ordinance is narrow therefore it should include complainants in criminal matters and plaintiff/petitioners and defendants/respondents in civil matters.
3. Appointing another cadre of government paid legal aid providers will only undermine the scope of legal aid in country.
4. The Ordinance deals with accused and criminal matters only ignoring need for legal aid in civil matters.
5. Civil society organisations can support the system through legal awareness campaigns, generating funds and development of a robust monitoring and reporting system.
6. The ordinance completely ignores the pro bono services by lawyers who can extend the scope and utility of the ordinance.
7. There is no reference to coordination with Bar councils and Bar associations; without their active participation the system can't function smoothly.
8. Coordination should be established with the bar councils and bar associations, Non-Government Organisations (NGOs) and projects to get support in legal awareness and bring the system at par with the international standards.

Current Status

In Pakistan, a large section of the population is unable to access the formal legal system mainly for want of financial resources and a general lack of awareness of the law and legal rights. Although the State and Governments recognise the need and importance of legal aid to ensure needy persons' access to justice by incorporating provisions of legal assistance in some laws and rules, this effort is not sufficient enough to address the issue of access to justice, therefore much more needs to be done.

Access to justice, equality before law and equal protection of law and the right to fair trial have been recognised as fundamental human rights in international human rights regimes as well the Constitution of the Islamic Republic of Pakistan 1973. The Constitution of Pakistan endows the State with a responsibility for provision of inexpensive and expeditious justice, without any discrimination. International human rights standards unequivocally regard inexpensive and speedy justice and right to fair trial, 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. Principally, 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 provision of legal aid, not only on the part of States, governments, but national and international Non-Governmental Organisations (NGOs) also.

The Public Defenders and Legal Aid Ordinance 2009 (hereinafter PDO 2009) was promulgated to fill the gap in the legal aid system in the country. Being an Ordinance it needed to be passed by both houses of Parliament. In 2010 an attempt was made by the then ruling party but it finally lapsed in the Senate. Subsequently no attempt was made to reintroduce the Bill in Parliament. The reason could be shortage of funding or the involvement of the governments in peace and security issues.

A brief review of the 2009 Ordinance reveals that though it was a progressive step towards a sustainable and uniform legal aid system in Pakistan, this law has inherent shortcomings. One of the key shortcomings – if this attempt is compared with the legal aid model of Sri Lanka – is that the PDO 2009 was designed in isolation without creating pillars for support considering the situation in the Pakistan. As this law had no umbrella to protect and provide a cover where it could function on a sustainable basis incorporating itself into all existing models. This umbrella could come only with the establishment of a legal aid authority under which the public defenders model could have functioned. However, without any ground-work this was promulgated as an ordinance and later on tabled in Parliament where it lapsed. If the same effort is compared with Sri Lanka there they first passed the Legal Aid Act of 1978 under which an independent legal aid commission was formed, an advisory council was constituted and established a legal aid fund. In the current scenario and the pitfalls of the ordinance reintroducing a failed attempt will not serve the purpose at all. It will just further delay the process towards a sustainable and durable legal aid system in the country which is the ultimate solution.

About the Legislative Brief

The objective of this Brief is to review the Public Defenders and Legal Aid Office Ordinance, 2009 and identify the shortcomings and propose recommendations. Another objective of the brief is to increase awareness of the media, citizens and organizations enabling them to participate in the process.

Acknowledgement and Disclaimer

The legislative Brief has been commissioned by PILDAT and authored by Dr. Suhail Shahzad, Professor of law at Hazara University. The views expressed in the brief are those of the author do not necessarily reflect the views of PILDAT or DAI.

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Executive Summary:

The prevailing situation of access to justice shows that most vulnerable segments of the society face serious impediments and challenges in accessing the formal justice system due to poverty, lack of awareness, and especially since the system of justice dispensation is expensive and time consuming. Finding a solution for a portion of problem will not serve purpose; therefore keeping in view the lessons learnt from Pakistan and other countries a uniform legal aid system, which will encompass all existing models and efforts both by government and non-government entities is needed.

An analysis of existing legal aid models show that without a Legal Aid Authority, setting up a Public Defenders' Office, a Legal Aid Fund, a Community Legal Awareness Programme, a Robust Monitoring, Reporting and Accountability Program under the authority is not possible. The establishment of a Public Defender and Legal Aid Office was a progressive step to enable poor and marginalised communities to access the courts.

Analysis of Public Defenders and Legal Aid Office Ordinance, 2009

ISSUES

A. Definition of Legal Aid

Definition of legal aid The definition of legal aid does not comprehensively respond to the situation. There should be a uniformed definition of legal aid covering support in pre-post trial stages and right to legal advice. Right to a counsel of choice at the time of arrest and investigation by police should also be incorporated in the definition. This will reduce chances of torture and mal-practices by the police and other investigation agencies.

B. Coordination Mechanisms

1. No role for Bar Councils and Bar Associations

The PDO 2009 altogether ignores the role of Pakistan and Provincial Bar Councils and Bar Associations who can reinforce limited support and resources to indigent persons. Therefore the Pakistan and Provincial Bar Councils and Bar Associations should be added within the scope of PDO 2009 and an adequate role should be given to them.

2. Role of Non-Government and Government Organisations/institutions

The PDO 2009 is also silent on the role of non-government and private entities that support the provision of legal aid to indigent people. There are a number of

projects underway and planned for future; it is imperative for such entities to be involved in the process of legal aid, legal awareness, advocacy, legal education and capacity building of the justice sector stakeholders. Similarly, there are several departments that are tasked to provide legal aid to indigent persons, for example, the Law and Justice Commission of Pakistan (LJCP), the law department, the Advocate General office and the High Court. There is dire need that for strong coordination should be established under the PDO 2009 with these departments and non-governmental organisations which can contribute in reducing duplication and malpractices.

3. No reference to pro-bono services

The PDO 2009 does not acknowledge the role of lawyers who are actively providing pro-bono services to indigent persons. The 2009 Ordinance is also silent on how to encourage lawyers, particularly youngsters to provide pro-bono services to indigent persons in their locality. Under the PDO 2009 a record keeping and reporting mechanism may be inserted to maintain up to date statistics on legal aid. This will also help in consolidating such information from all over the country.

4. No reference to panel lawyers

The PDO 2009 relies heavily on public defenders who are government employees. The Ordinance does not provide for a panel of lawyers in cases where public defenders lack expertise. Similarly determination of minimum and maximum fee for lawyers should be incorporated where pro bono lawyers are not available. The selection of lawyers should be assigned to an independent committee under the Legal Aid Authority.

C. Transparency and Accountability

1. No reference to scrutiny of applications

The 2009 Ordinance does not provide for a proper inquiry into whether the applicant is indigent or not. Without a proper inquiry mechanism there are chances that some segments may dodge the system. Therefore it is recommended that a proper inquiry mechanism should be provided in the 2009 Ordinance. However, special focus should be given to minorities, victims of human trafficking, women, juvenile, mentally ill, disabled persons, persons affected by militancy and terrorism, victims of natural calamities (floods, drought, earthquake) and persons living below the poverty line.

2. Lack of Monitoring and Evaluation

Under the overall supervision of a Board – which will manage all affairs of the Legal Aid Authority - a Committee or Department of monitoring and evaluation must be established. The Committee should include

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representatives of civil society, legal fraternity and government. In addition, every year an independent evaluation should be conducted to assess the efficiency, effectiveness, transparency, and satisfaction of indigent persons on the provision of legal aid services.

3. **No reference to Recovery of Legal Expenses**

There is no procedure to address the situation where a person misleads the office about his indigency and recovery of costs incurred by giving the person representation in court. In the absence of a provision regarding recovery, the system which is meant for poor and vulnerable persons will be misused which will lead to its towards failure.

4. **No reference to Change of Lawyer**

The system is also silent about where an indigent person is not satisfied with his or her counsel which undermines the utility of this Ordinance and therefore a provision regarding change of lawyer should be provided for.

5. **Transparency and Accountability**

The Auditor General of Pakistan should be given the charge to make annual basis audits under the overall supervision of the National/ Provincial Assembly.

D. **Devolution of the Legal Aid Services**

No office of tehsil and sub division

The 2009 Ordinance provides for the establishment of the office of Public Defenders at the provincial and district levels. There is no similar provision for Public Defenders at the tehsil and sub-divisional level. This will deprive most people living in rural areas of access to justice through legal aid. It is recommended that the offices of Public Defenders need to be established at the Bar Association level to ensure provision of legal aid to indigent persons at their locality in order to reduce their travel and other expenses incurred when they are forced to travel to urban centres.

E. **Lack of autonomy:**

1. **Autonomy to make Rules**

The PDO 2009 should provide sufficient autonomy to make rules, appointments and administer funds allocated to a particular province.

2. **Autonomy to Utilise funds at the Tehsil and Sub-Divisional Level**

The tehsil, sub-divisional and district offices should be given sufficient independence to administer funds at the grassroots local level. This will reduce bureaucratic

practices and increase efficiency resulting in increasing satisfaction of people and restoration of trust in state institutions.

F. **Lack of mechanisms for legal awareness**

Clinical legal education

It should be made mandatory for law schools to initiate Clinical Legal Education and after training ,utilise law students to help in legal awareness and referrals under the supervision of law faculties and practitioners.

G. **Lack of Grievance Redressal Mechanism**

1. **No reference to Ombudsperson**

Any person who is not declared an indigent person can file an application with the relevant Ombudsperson to enable speedy disposition of the application.

2. **Lack of a Toll Free Hotlines**

A Toll Free Hotline should be established to provide victims, particularly of terrorism, gender violence, domestic violence, sectarianism and other persons in need a chance to request for legal assistance. This will also help reduce domestic and gender based violence.

H. **Limited Scope of Legal Aid**

1. **No reference to civil matters**

The 2009 Ordinance provides for legal aid to an accused or convict person in a criminal case but does not include the complainant. The Ordinance ignores the indigent plaintiff and defendant in civil matters including family and constitutional petitions. It is therefore recommended that the complainant in criminal cases and plaintiff and defendant in civil matters, as well as petitioners and respondents in constitutional matters and tribunals be included within the definition of the indigent person.

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GENERAL RECOMMENDATIONS

1. Establishment of a Legal Aid Authority

The establishment of a Public Defenders' Office alone will not address the issue of access to justice in a proper way. There is a strong need for a Legal Aid Authority. There should be either a single Federal authority or four separate legal aid authorities at the provincial level. It is proposed that the relevant legal aid authority should comprise of:

- a) A Public Defenders' Office responsible for the provision of legal aid to the indigent persons;
- b) A Board to take major decisions of the legal aid authority. The board members may include a judge of Supreme Court in respect of central legal aid authority, in case of province the respective high court, secretary law department, director general prosecution department, in case of central legal aid authority the secretary of law and justice commission, from Pakistan Bar Council and Provincial Bar Council, from law schools, civil society organisations, from commission on status of women. The board may by majority of votes elect one member as its chairperson;
- c) A monitoring department; and
- d) Other such Committees as may be required, that is, Committee for selection of lawyers' panels, scrutiny of application committees, fund raising committee, etc.; and d) legal awareness and advocacy department. The legal aid authority may be made responsible to the national assembly and in case of province to the provincial assembly.

Another expert opinion states that while there is need for a centralised Legal Aid Authority (along the lines, say, of the Sri Lankan model) the Public Defender Service can and should be established regardless of whether or not the Government can be persuaded to set up the proposed Legal Aid Authority. The effectiveness of the Public Defender Office and Service is not dependent on the prior or concurrent establishment of a Legal Aid Authority.

2. Public Consultations

The 2009 Ordinance must be presented before the Parliament or provincial assembly after a serious consultative process with civil society, lawyers, law schools, and other concerned stakeholders. In this regard the NGOs and UN agencies may be approached to support the process of consultation.

While the need for coordination is always there, and will be taken care of by a Legal Aid Authority as and when established, for the time being priority should be given to expanding the number and funding of existing and proposed legal aid services – the more such services are initiated, the better served will be needy litigants.

3. Amendment in Laws

The right to legal aid must be explicitly provided in all existing and newly enacted laws to ensure that the relevant law enforcing agencies, prosecutor, pleaders and judges are vigilant towards the right to free counsel as provided in the relevant law.

4. Abolition of scattered legal aid public sector legal aid mechanisms

With the establishment of a Legal Aid Authority, existing legal aid mechanisms including the District Legal Empowerment Committees (sanctioned by the LJCP) chaired by District and Sessions Judge, as well as the provision of legal aid by the Advocate General offices, High Court, and others can be unified. The current system creates confusion, duplication and undermines the utility of a Legal Aid Authority.

Experts suggest the Public Defender Office/Service should be confined, for the present, [as envisaged in PDO 2009] to criminal matters. Protection of legal aid in civil matters should be left, for the time being, to the Bar Councils, the District Legal Aid Committees, the Registrars of High Courts, NGOs and public-spirited lawyers.

An alternative opinion suggests that the enactment of PDO 2009, with or without amendments, will automatically establish a Public Defender Service at the Federal level. It will be even more important to establish Provincial Public Defender Offices and Services through similar provincial laws.

5. Power to generate funds

The Authority should be empowered to generate funds from government and non-government bodies. This will reduce budgetary implications for the government.