

PAPER PRESENTED

BY

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ON

**ACCESS TO JUSTICE IN THE CONTEXT OF
CONSTITUTIONAL REQUIREMENTS**

AT THE

INTERNATIONAL JUDICIAL CONFERENCE

18TH – 19TH APRIL 2014

AT

ISLAMABAD

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(i) **COST:**

The first hurdle is the cost of justice. The ordinary litigant enthusiastically [and misguidedly?] initiates litigation only to find that the judicial process is all-consuming and increasingly expensive. The pursuit of justice often requires the ordinary litigant to travel great distances at personal cost, even for prosecution of criminal cases, and the litigant will find that these costs are repeated. Meaningful access to justice requires that costs of the process be related to the income of the ordinary man and be affordable. In large part this could be achieved by reducing the systemic delays in the judicial process. The experience of the ordinary litigant shows that he is likely to engage

ACCESS TO JUSTICE IN THE CONTEXT OF CONSTITUTIONAL REQUIREMENTS

In its 2008 Report titled “Making the Law Work for Everyone” the UNDP estimated that over 4 billion people did not have access to legal representation and that the overwhelming majority of such people live in developing countries. Access to justice is defined more by its breach than in any positive manner. Lack of access to justice leads to fragmentation of society and retards the development of a country. Access to justice is crucial for the creation of an enabling environment in order for Pakistan to compete and prosper. Access to justice is the lynchpin of democracy. Alan Greenspan has remarked that a “bill of rights enforced by an impartial judiciary is what substitutes for the central planning function as the guiding mechanism of a free market economy”. In Pakistan today it is of crucial importance for us to alleviate poverty and implement a programme to bridge the ever-widening the gap between the wealthy and poor.

2. The role of access to justice and establishment of rule of law in terms of poverty reduction and the fostering of growth cannot be under estimated. The Nobel Laureate Milton Friedman in his preface to Economic Freedom of the World: 2002 Annual Report observed that even more crucial than privatization was the role of law to ensure the success of free enterprise.

Access to justice requires predictability of outcomes and efficiency in the administration of justice in order to attract investment and achieve economic growth and create an environment where it is possible to enforce contractual and property rights. There are many facets to access to justice which range from the mundane physicality of the premises of a judicial complex and the facilities therein to the more ephemeral aspects such as judicial policies or the strengthening of the legal profession. Access to justice is often better understood with reference to the barriers thereto. These can be divided into **subjective barriers** such as intellectual and physiological barriers e.g. age, physical or intellectual deficiency, the attitude of state functionaries and objective barriers e.g. physical barriers, geographical distances, etc. This paper is not meant to be an academic or theoretical discourse on the access to justice. It is meant to be a practical and realistic discussion of what is meant by and required in terms of access to justice in the context of the constitutional provisions in Pakistan.

3. An entire Chapter of the Constitution of the Islamic Republic of Pakistan 1973 is devoted to fundamental human rights and read together almost each one can be directly or indirectly related to and taken to have a bearing on access to justice. This paper concentrates on the provisions of Articles 3, 4, 9, 10, 10A and 14 of the Constitution. These Articles protect

and provide the rights of the public to be given their due without discrimination, to be dealt with in accordance with law, to enjoy security of person and right to life, to be safeguarded against arbitrary arrest and detention, to be entitled to a fair trial and due process and to enjoy dignity respectively. Economic development is increasingly measured with reference to qualitative indicators with respect to the lives of a country's citizens. Therefore, securing citizens and their assets in their daily lives is critical from the point of view of economic development. The protection and enforcement of property rights and predictability in terms of resolving contractual disputes is essential to fostering confidence in the judicial system.

4. Right to life as enshrined in Article 9 has been interpreted by the August Supreme Court of Pakistan, most notably in the Shehla Zia case cited at PLD 1994 SC 693, in a broad and all-encompassing manner to mean that a person's right to life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally such as proper food, clothing, shelter, education, healthcare, clean atmosphere and environment. In Muhammad Nadeem Arif case cited at 2011 SCMR 408 the August Supreme Court interpreted Article 9 so as to include the right to be treated according to law, the right to a fair and proper

trial and the right to an impartial court. The right to livelihood has also been held to fall within the ambit of the right to life.

5. In the *Shabeer Ahmad v Kiran Khursheed* case cited at 2012 CLC 1236 the Honourable Lahore High Court observed that Article 10A morphs Article 4 into a more robust fundamental right, covering both substantive and procedural due course. The judgment goes on to state that while substantive due process provides a check on legislation and ensures the protection of freedom guaranteed to a person under the Constitution, procedural due process provides that each person shall be accorded certain ‘**process**’ if they are deprived of life, liberty or property, the question thus focuses on the nature of the ‘process’ that is “due” e.g. (i) fair forum and (ii) notice.

6. It is clear that constitutional requirements for Pakistani citizens to be treated in accordance with law necessarily requires that there be **meaningful** access to justice and the same has been elaborated by the Superior Judiciary in Pakistan. The question arises; have these judicial pronouncements resulted in meaningful access to justice for the ordinary man?

7. Access to justice is a concept rendered meaningless without prior awareness and knowledge of their legal rights by the public at large. There are many NGOs and the like working to raise the common man’s awareness

of his legal rights. This work takes many forms such as training paralegals in the community and the provision of legal aid centers where members of Bar Associations provide *pro bono* services. I would commend those individuals and institutions such as the Asian Development Bank and its long-term Access to Justice Program which have played their part in this work. Once people are made aware of their legal rights, then the demand for justice becomes apparent.

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the legal services of a counsel who will charge on a per hearing basis. This in itself exponentially increases the costs of the litigant.

(ii) **DELAYS:**

Reduction of delays is crucial for access to justice. The trite saying “justice delayed is justice denied” has a new and harrowing meaning in terms of the backlog of undecided cases across Pakistan. The pendency and disposal rates for the cases in the criminal jurisdiction of Punjab for the year ending 31.12.2011 show that there were 91,822 cases already pending and that 388,345 cases were instituted. Out of a total of 480,167 cases 393,012 cases were disposed off. The balance of 87,155 cases means that the backlog was not significantly reduced¹. It is not possible for the limited number of Civil Judges and Judicial Magistrates, District and Sessions Judges to avoid delays when the workload in terms of the daily cause list is unsustainable and unrealistic. Consequently, there are delays which increase not only the costs of litigation but also the ordinary litigant’s frustration with the process. It may be trite but it bears repeating – “justice delayed is justice denied”.

¹ Source: Judicial Statistics of Pakistan 2011 Published by the Secretariat, Law and Justice Commission of Pakistan.

(iii) **INFRASTRUCTURE:**

Physical infrastructure: for the ordinary litigant the experience of the court room is a difficult and fraught one. The seeker of justice arrives in court, after a lengthy and expensive journey – having often incurred the opportunity cost of lost wages from a day spent in court, to find that a judicial officer is on leave or more likely there is a strike called by some Bar Association or other or for a number of other reasons the case is adjourned. In terms of criminal cases the police officers more often than not do not file the challans within statutory time limits and carry on lengthy investigations. For women the trauma of the court room experience is aggravated by facing discrimination and often being disbelieved, especially in the cases of violence against women. In terms of infrastructure, there are no waiting areas and dirty, if any, latrines and they have to share the space with other under-trial prisoners moving about in chains and shackles with their police handlers. Women obliged to bring young children for meetings with their father at the family courts are subjected to emotional meetings in full view of curious strangers as there are few courts equipped with separate family rooms for the weekly visits. The Islamabad Civil Courts, subject to the recent terrorist attack on 3rd March 2014, are

based in the F-8 Markaz. The court rooms were originally meant to be shops. The judge, reader, steno, about 10 – 12 lawyers and munshis at any given time, as well as small children with their mothers are to be found cramped into ‘court rooms’ of 10 x 14 feet room. The lack of suitable facilities in terms of infrastructure amounts to a failure of access to justice. There is a real need for the ‘judicial experience’ to be made physically more comfortable through the provision of dedicated buildings and amenities such as latrines and waiting rooms.

(iv) **JUDICIAL TRAINING:**

Judicial training is another aspect of access to justice. Whilst judicial training is required across the entire gamut of cases this paper shall address the topic with particularity to the issue of access to justice for rape victims. Rape is an underreported crime in Pakistan for a number of legal, institutional and socio-cultural reasons. In terms of the judicial training as well as the training of police officers and medico-legal staff; woman often find persistent barriers to justice in the form of police who are prone to disbelieve or dismiss the accounts of rape by women, especially where the rape is incestuous. There are not enough women in the police service, the public prosecution service or

the judiciary. The experience of rape victims is that perpetrators are often allowed bail and they return to the community to harass the victim and her family. Judges try and broker “compromises” and medico-legal reports are based upon the ‘Modi’s Medical Jurisprudence and Toxicology’ [as adapted in Pakistan] which makes several adverse observations and biases against women. The solution is to ensure that there are more women’s police stations and greater numbers of women police officers within all police stations alongwith a larger number of women within the judiciary and public prosecution service. However, the presence of women alone, without greater and more exacting levels of training and sensitivity will prove fruitless. Even today many police stations only have the forensic capacity to distinguish between human and animal blood. The domain of criminal justice requires that better investigation, training and facilities in the forensic realm be provided in order that Pakistani police forces can investigate crimes in line with the accepted norms and practices of the developed world. An effort also has to be made to engage religious leadership/Ulema of this country in the scientific advances in criminal investigation such as the role of DNA etc so as to preempt the

pronouncements such as those of the Council of Islamic Ideology's decision that DNA may not be used against the perpetrators of rape.

(v) **DRAFTING AND AMENDING OF LEGISLATION:**

Greater access to justice requires in certain contexts the drafting and amending of legislation. The Qanun-e-Shahadat Order at section 21(j) states, with respect to Motive, preparation and previous or subsequent conduct – *“The question is whether A was ravished The facts that, shortly after the alleged rape she made a complaint relating to the crime, the circumstances under which and the terms in which, the complaint was made are relevant”*. Because of this provision of the Qanun-e-Shahadat Order 1984 the courts continue to draw adverse inferences whenever there is a delay in reporting rape cases. These delays are often occasioned by logistics and/or the trauma of the crime itself and its socio-cultural attendant attitudes. Section 151(4) of the Qanun-e-Shahadat Order 1984, with respect to impeaching the credit of a witness states, *“when a man is prosecuted for rape or an attempt to ravish it may be shown that the prosecutrix was of generally immoral character”*. In many, in fact the majority, of justice systems across the world the victim's own character or past sexual history are not relevant to the crime. In Pakistan we must amend this provision to

allow better access to justice to victims of rape. These are just two small examples of the way in which we need to review our legislation to ensure that we do not discriminate against women, the poor, minorities or indeed any group which may be marginalized in terms of access to justice in order to fully implement and give effect to the constitutional provisions and guarantees regarding access to justice to Pakistani citizens.

(vi) **ALTERNATIVE DISPUTE RESOLUTION;**

Alternative dispute resolution and the strengthening of the same are vital to providing access to justice to the common man. Many aggrieved persons never make it to court. Their first point of contact in the pursuit of justice is the village elders and/or panchayat. They choose this method of dispute resolution because of convenience and cost effectiveness and speed of the process. Given the extreme backlog of cases across Pakistan, every effort should be extended to ensure that people have alternative means to resolve disputes at the village or tehsil level. **However, efforts should be made to impart legal training to those involved in ADR at ground roots level to ensure that the decisions meted out are in keeping with principles of natural justice.** We find that because of the costs and delays in the

'formal' judicial system a number of commercial entities are increasingly resorting to ADR at dedicated dispute resolution organizations/bodies. However, it is important to note that ADR is not a replacement for the formal judicial system. Whilst ADR provides a viable alternative for certain disputes; it cannot be used as means of avoiding wholesale reform of the ills of the formal judicial system. Informal disputes systems such as village panchayat are often heavily controlled by local elites and are class and gender biased. Therefore, those already marginalized by society on the basis of gender or class may not find respite in these forums.

(vii) PAKISTAN'S INTERNATIONAL OBLIGATIONS

Pakistan is a signatory to many international treaty obligations. However, the full benefit of Pakistan's obligations under various treaties is not afforded to its citizens for the simple reason that many lawyers and judges as well as the citizens themselves are unaware of Pakistan's status with respect to said treaty obligations. A solution could be the establishment of a Division by the Law Ministry to bring Pakistani laws into conformity with our treaty obligations. Such a Division can ensure capacity building and workshops for stakeholders where they would be informed as to the ratification status and

harmonization of the said treaty(ies) into the national legal framework.

(viii) **ARTICLE 3 OF THE CONSTITUTION**

Article 3 of our Constitution enjoins the State to ensure the elimination of all forms of exploitation and the fulfillment of the principle from each according to his ability, to each according to his work, is almost poetic. This esoteric article may be read as the prime motivation for access to justice. Access to justice ensures transparency of public institutions and strengthens the resolve of the poor and underprivileged to make claims and demand accountability. Power imbalance can only be reduced when the marginalized segments of society are assured access to justice.

(ix) **JUDICIAL POLICY AND ADMINISTRATION**

Last but certainly not least, judicial policy and administration has a great role to play in meaningful access to justice. The National Judicial Policy 2009 as updated and amended in 2012 has addressed a number of issues which have been identified here and which contribute to denial of access to justice. Suffice it to say that greater efforts need to be expended to clear the backlog of cases and to reduce systemic delays.