UCP Journal *of* Law & Legal Education
Vol. 1, Issue 2 (January-June 2023)

Considering a New Rule: When Best Practice is Law Student Practice

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Abstract

The right to legal representation for indigent litigants is established in rules promulgated by the Pakistan Bar Council. Yet, state and non-governmental mechanisms are not necessarily available to implement these rights. The problem has been viewed largely as one of a limited pool of advocates, and the shortage is particularly serious for those accused of crimes and misdemeanours. The access to justice gap is not unique to Pakistan. This article aims to explain how law students can help alleviate the lack of legal aid—whether due to a shortage of affordable lawyers or an underfunded and/or poorly managed legal aid system. Consistent with best legal educational practices, university legal clinics under lawyer supervision and state-sponsored or bar association internship programs are the first steps in ushering in student access to the courtroom; thanks to practical training and allowing limited assistance to low-income clients. An even better step would be to introduce a formal student practice rule whereby students and interns are able to augment the corps of lawyers available to assist litigants who would not otherwise have representation in court. However, opposition by the bar association, judiciary and universities must be taken into account, as well as the means for overcoming this opposition. Beyond the immediate objective for the benefit of the most disadvantaged, Clinical Legal Education (CLE) introduces students to the idea of public service and instils in them an understanding of law, justice, and fairness.

Keywords: Legal Education, Law Students, Clinical Legal Education, Pakistan Bar Council, Legal Clinics, Legal Aid

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Article History: Received May 23, 2022; Received in revised form February 5., 2023; Received with Second Revision June 13, 2023; Accepted June 22, 2023; Available online July 21, 2023

Introduction

For "poor and destitute" Pakistanis, legal representation is a right set out in government gazettes and international briefing papers. However, in the words of one renowned law professor, "[I]s the right worth the paper it is written on? What State and non-governmental mechanisms are available to implement these rights?" (McQuoid-Mason, 1999, p. 237). The shortage of advocates is especially serious for criminal defendants' misdemeanours. Several years ago, High Courts Advocate Yasser Latif Hamdani (n.d.) catalogued a number of other legal aid setbacks, on behalf of Insaf Network Pakistan, ranging from underpaid advocates to procedural delays, and from bar and bench corruption to unprofessional conduct.

The problem is not unique to Pakistan. In 2012, the United Nations weighed in on the question of maximizing legal aid to indigent litigants, in particular, criminal defendants. The UN General Assembly adopted principles and guidelines on Access to Legal Aid in Criminal Justice Systems (Resolution 67/187, 2012) as part of a "comprehensive approach" that could include agreements with legal associations, bar associations, and law schools to provide legal assistance. The resolution also urged States to take measures to encourage law students to participate "under proper supervision" in a university legal clinic (Resolution 67/187, 2012, secs. 71-72). It also called for action to develop rules "in consultation with and accepted by the competent courts or [regulatory] bodies" allowing students to practise law in court under the supervision of competent lawyers or law faculty staff (Resolution 67/187, 2012, sec. 72(c)).

Whether due to an insufficient number of (affordable) attorneys or a poorly managed or underfunded legal assistance scheme, a law student practice protocol can help alleviate the lack of legal aid to indigent clients——and uphold justice and fair play. The first step in facilitating courtroom access is through the establishment of attorney-supervised university legal clinics and State-sponsored or bar association internship[1] programmes in

[1] The terms "internship" and "externship" are used interchangeably to refer to a field placement outside the law faculty where the student intern/extern represents clients or performs other professional roles under the supervision of practising

which students receive practical training and low-income litigants are offered limited assistance. The trend in contemporary legal education, in the Global South, as well as the Global North, is to give students practical experience and to engage in advocacy on behalf of real-world, marginalized clients —*during* their years of legal studies. (Bloch, 2011; Desnoyer, 2021). Most legal educators would consider this to be best practice. (Santow & Wachira, 2011; Maranville, et al, 2015; Mkwebu, 2020).

A formal student practice rule enables students and interns to supplement the corps of lawyers available to assist litigants who would otherwise lack representation before the court. However, overcoming opposition by the bar association, judiciary, or universities must also be taken into account.

Status of Legal Aid in Pakistan

Pakistan has a constellation of constitutional, statutory, and regulatory provisions for the representation of poor and other marginalised people in criminal and civil matters. In broad yet ambiguous language, the Constitution of 1973 declares that the State shall "ensure inexpensive and expeditious justice" (Art. 37 (d)). The practice of law is governed primarily by the Legal Practitioners and Bar Councils Act (1973). Under a mandate to provide free legal aid specialized services for the awareness, promotion, and enforcement of human rights, the Pakistan Bar Council has adopted the Free Legal Aid Rules (1999). A decade ago, the Law and Justice Commission of Pakistan promulgated the District Legal Empowerment Committee (Constitution & Function) Rules, (2011). In 2020, the Pakistani Parliament established a nationwide Legal Aid and Justice Authority special unit (Act No. XVI (2)(g), 2020) to provide pro bono legal and other social services to individuals and groups. It is unclear how this new Authority will be integrated with other legal assistance schemes for indigent litigants, except to the extent it allows the

lawyers or they observe or assist practising advocates, lawyers, or judges in their work (Stuckey, 2007, p. 166).

country to tick off an item on its UN Sustainable Development Goals (SDG) implementation agenda for 2030 (Jinnah Centre for the Rule of Law, 2018, p. 6; Peace & Justice Network Pakistan, n.d., *Pakistan SDG 16 agenda 2030*, p. 26).

Under the Free Legal Aid Rules (1999), committees are to be established at the national, provincial, and district levels to provide legal services to "deserving" litigants—including "the poor, destitute, orphans, widows, indigent, and other[s]… who [are] entitled to *Zakat*[2] or [whose] financial position and income resources are not sufficient" to pay an advocate to litigate on their behalf (Free Legal Aid Rules,1999, Rule 2(2)). The Law and Justice Commission's district-level committees are also intended to assist deserving litigants in "protecting [their] genuine legal rights or interests, involved in litigation" through payment of professional fees or appointment of advocates. (Free Legal Aid Rules,1999, Rules 2(c) & 5; Pro Bono Institute, 2019, pp. 4-5). These rules provide little guidance about the distinction between "legal aid" and "legal empowerment." Moreover, negotiating this regulatory labyrinth presumes an acute awareness of one's rights. Finally, the jurisdiction between civil, carceral, and criminal authorities at the provincial and district levels may not be readily apparent.

Despite the regulatory framework, the funds allocated to legal aid institutions and committees are seriously underutilized, which suggests "a lack of will and resolve" (Pro Bono Institute, 2019, p. 1). Anecdotal and documentary evidence also suggest that the system is mismanaged by both the bar councils and the executive, that advocates are underpaid, and guaranteed representation is more often honoured in the breach (Hanif, 2018; Ziauddin, 2019).

Local and international NGOs, along with a few domestic law firms, and local government initiatives, fill the gap in service delivery (Pro Bono Institute, 2019, p. 1). For example, in 2017, The Legal Aid Project was established in Sindh, with UN support and US State Department funding, to assist the "most deserving" litigants, including detainees awaiting trial in the provincial

[2] Under Islamic law, *Zakat* or almsgiving is an obligatory payment made for charitable and religious purposes.

prison department (UNODC, 2021). In 2018, a Punjab provincial subcommittee approved "the first ever" legal aid agency to provide free and adequately compensated counsel to poor defendants in criminal actions as well as litigants in longstanding civil suits. (Hanif, 2018). Rather than deliberate, sustainable and well-publicized services for the poor, this patchwork of *ad hoc* and redundant legal assistance appears to be more of a substitute for a dysfunctional comprehensive government programme.

Among the many legal and justice institutions designated for implementation of SDG Goal 16—to "provide access to justice for all and build effective, accountable and inclusive institutions"—there is no mention of Pakistani law faculties, Ministry of Federal Education and Professional Training, or the Higher Education Commission (Peace & Justice Network Pakistan, n.d., *Pakistan SDG 16 agenda 2030*, p. 26). The absence of law schools in the country's acknowledged pantheon of justice institutions may be explained by holes in the national LLB curriculum. The education commission's most recent report on curriculum reform extended the period of study to five years, with there is only a brief reference to the importance of "develop[ing] the intellectual and practical skills necessary for employment in the legal profession and other careers." (Higher Education Commission, 2015, pp. 15-17, 24). The current mandated framework for the LLB programme does include courses and credit for skills development and a compulsory 10-to-12-week internship for upper-level students. (Higher Education Commission, 2015, pp. 17, 24-25). There is room for more national guidance on specific skills and experiential settings. However, law faculties are presumably free to experiment, in partnership with the bar, bench, and civil society.

This "gap between theory and practice" was called out a few years ago by a senior law student as "one of the main flaws" in the Pakistani legal education system. Writing in *Courting the Law*, he urged that the gap be bridged in the final year of school with "mandatory practical training including ethical grooming" (Saud, 2017). In a study of the Bar Council's Legal Education Rules, promulgated in 2015, two Malaysian academicians made a number of findings about the state of legal education under the aegis of the Council and the Higher Education Commission. Among other things, they elicited views from anonymized legal

expert respondents who believe that the bachelor of laws syllabus should include more compulsory practical subjects, such as clinical legal education (Shah & Dhanapa, 2019, p. 64).

In its "advocacy toolkit," the Peace & Justice Network Pakistan (n.d., *SDGs Goal 16*,) recognizes that implementation of the SDG 16 agenda calls for the nation's law schools to play a part in furthering access to justice. Beyond a call to "[m]ake legal services affordable and equally available for all," this civil society organization envisions a legal aid system with "incentives to motivate and attract the involvement of a new generation of legal aid activists" and a "legal education [curricular scheme] that supports the implementation of legal aid" (p. 15).

Collaboration between the Law Faculty and the Bar

The lawyer should be conceived as a partner "in building and maintaining a national good—the legal education system—and not simply as a courthouse tour guide or the patron of low-cost legal assistants" (remarks of Paris lawyer and clinician Maître Benjamin Pitcho, as cited in Rosenbaum, 2018, para. 13). Yet, it is not uncommon for students, lawyers, and teachers involved in new internships or practical training programmes to have only a rather vague idea of what is expected of each of them (Wizner & Aiken, 2004, p. 1008). According to one long-time legal clinician, "[e]ffective supervision" depends on a range of skills that transcend the fields of professional practice and education (Giddings, 2016, p. 31). Through this practical training, the law student will learn that the role of the advocate is not only to advise, analyse, and plead, but also to inform and raise awareness. This is where oversight by the Pakistan Bar Council and/or provincial bar councils would be useful.

Law faculties in North America, Europe, and Australasia no longer have a monopoly on interactive teaching methods or CLE (Bloch, 2011). Moreover, global evidence suggests that clinical experience during legal studies imbues students with practical lawyering skills, sensitise them to the needs of marginalised and diverse communities, and engenders long-term commitment to the rule of law, professional ethics, and public service (The Myanmar CLE Programme Consortium, 2016, pp. 24, 26, 41).

Simply defined, clinical education is "learning law by doing law…a method of instruction in which students engage in varying degrees in the actual practice of the law" (Ojienda & Oduor, 2002, p. 49). The learning process is interactive, reflective, and experiential. Regularly placing students in the role of lawyers, in which they draw on skills used in legal practice or similar professional settings, allows for the integration of theory and practice (Thomson, 2015, p. 20). In addition to introducing students to the idea of public service and giving them an opportunity to analyse and reflect on the relationship between the law and access to justice, the clinic's immediate benefit is for vulnerable clients (Jabyn & Sterling, 2015, p. 2; Evans et al, 2017, p. 100).

Together with *pro bono* attorneys, students can be trained in the professional skills necessary for representation in courts and for interviewing, advising, and informing the public of their rights. Even if they are not permitted to appear in court, the classroom can be a perfect incubator for students to practise "how to interact effectively with courts and administrative tribunals" (Marsh & Ramsden, 2015, p. 236). Skills include: explaining legal principles or solutions to clients or potential clients, identifying, analysing, researching, writing and advocating for a hypothetical client (*Ibid*, p. 240). The question remains for the university, the bar, and the judicial branch to determine to what extent the objective of free legal representation for disadvantaged populations can be achieved. National standards could be adopted by the Higher Education Commission and the Pakistan Bar Council.

Student Participation in Court Practice

Law student participation in courts of first instance and other tribunals is now a well-established practice in many jurisdictions. Its main purpose is underscored by two veteran clinicians who write that students are "intensively engaged in the development of skills, in understanding how to behave ethically as an advocate and fundamentally in assisting not just the advancement of justice, but their visceral recognition that they have an actual role to play in achieving that goal" (Evans & Hyams, 2008, p. 66).

For a long time, in Chile (Ley Num. 18.120 (1982), art. 2, Código de Procedimiento Civil (Annexe), as cited in Wilson, 2002) and The Philippines (Rules of Court, R.138-A, Circular No. 19 (1986)), law students have been allowed to perform certain legal acts on a voluntary basis, under the supervision of an attorney or notary. The same is true in the majority of states in the United States (*International Forum on teaching legal ethics and professionalism* (2022)) and most Canadian provinces (Law Society of Ontario, 2022, By-Law 7.1(2.1)); (Novak, 2009-10, pp. 61-64).

In jurisdictions where student practice is dependent on judicial discretion, the court should also consider how the public and potential clients regard such a policy, as well as the view of bar associations or individual lawyers regarding student competency. Some courts follow the more limited English "McKenzie Rule," which states that "every person has the right to have a friend present in court beside him [or her] to assist by prompting, taking notes and quietly giving advice" (*McKenzie v McKenzie* [1976] 3 All ER 1034 (CA) 1036, as cited in McQuoid-Mason, 2008, p. 591).

In certain Australian states and territories, the *ad hoc* practice of non-lawyers is permitted before designated courts, or with the authorisation of the judge (Campbell & Ray, 2003, p. 71). The words of one U.S. federal judge are as appropriate now, as they were prescient when he penned them almost forty years ago, during the early stages of North American clinical legal education:

> "It would be tragic indeed i[f] judges were to spurn student practice and its potential contributions or if students were accepted in principle but so hedged about with restrictions that their utility was greatly reduced. Student practice is not a favour to the students and the law schools, by any means. It is an arrangement that offers advantages to all those who participate in it, not least of all judges." (Greene, 1973, p. 278).

Student courtroom practice generally derives from a judicial rule, a legislative statute, or a rule of the bar association or law society. The Philippine rule, for example, adopted by that country's Supreme Court, is simple and serves well as a model. Practice is permitted for students enrolled in their final year of

law school, in any criminal, civil, or administrative matter. They must be under the direct supervision of a lawyer and any documents must be signed by the lawyer. Students must abide by law society protocols safeguarding confidentiality, and they cannot receive financial compensation (Rules of Court (1986), R.138-A, Circular No. 19).

Several countries provide that law students and recent graduates can take on some of the duties of lawyers–but without being allowed to appear before judges. In Uganda, for example, law graduates and first-semester master's students, who have good character and competence and know the rules of ethics, can help a client to draft pleadings, advise them, or prepare briefs and all the documents that form part of their case. Students must be supervised by an advocate whose quality of supervision may give rise to disciplinary control. They must also have the consent of the client and are subject to the same codes of conduct as advocates (Uganda Advocates (Student Practice) Regulations, 2004).

In South Africa, law graduates can provide limited assistance to clients under attorney supervision as part of their articling or candidate-attorney internship, as is the custom in the United Kingdom and many British post-colonial regimes. A "compulsory community service" requirement for candidate-attorneys, particularly those underrepresented in newly post-apartheid South Africa, was proposed several years ago in lieu of the articling, with the express purpose of providing free legal aid to underserved persons, particularly in criminal cases. However, even this modest rule was challenged by the South African bar. The legal establishment argued that there would be an insufficient number of attorneys to supervise students (Novak, 2009-10, p. 59) and "[t]he legal aid system should not be used as an avenue to allow disadvantaged students to have access to the profession…" (McQuoid-Mason, 2000, pp. S.138-39). Commentator Andrew Novak has suggested that a hybrid approach to service delivery, with a merger of law school clinics and post-law school community service, might be a more acceptable model. South African law school graduates would thus work in tandem with students to represent clients. However, given the "historically closed nature of the legal profession"

(Novak, 2009-10, p. 59), this proposal has so far remained on the drawing board.

Resistance to Student Practice

Arguments against student practice in court generally fall into three categories: (1) Competition with the private bar, (2) Student competency, and (3) Unauthorized practice of law and breaches of professional ethics (Novak, 2009-10, p. 46).

While such concerns are understandable, they are usually unfounded. First, there is no evidence of real competition. Moreover, some of these concerns are due to the fact that lawyers have an interest in maintaining a professional monopoly on the privilege of appearing before the courts. Objection to student consultation or representation is usually raised in the context of legal clinics. In the end, clinics do not compete with the bar but rather *complement* their services (Babcock, 2017, para. 32).

Although the issue of student supervision is important, it typically faces the same criticism from the bar that is targeted against paraprofessionals. There will always be a diversity of opinion among professionals as to whether other qualifications and/or experience are necessary to undertake a specialised task. In this instance, it is the *lawyers* who lack confidence in the ability *of paralegals*, or in the field of paralegal assistance. There may be a concern about the quality of advice, or about negative repercussions for clients. It is difficult to distinguish a genuine concern for competent advice from the economic self-interest of lawyers. The bar's arguments are universal. For example, the same objections surfaced in the United States when law students were permitted to practise in clinics or other milieux (Rosenbaum, 2007, p. 322).

In general, practice rules, statutes, and policies adopted by the various jurisdictions account for concerns raised by opponents, insofar as they restrict the type of cases and clients that students can take on, the legal forum, and/or the degree of control by supervising attorneys or courts. The Pakistan Bar Council and/or Higher Education Commission would be well-placed to adopt rules or guidelines for law student practitioners.

For instance, a rule may limit student defence of those accused of major crimes, if an attorney is not present to supervise

or impose other restrictions. It may also prohibit the representation of those accused of homicide or crimes that could result in imprisonment or capital punishment. A rule could also prohibit any consultation or transaction by a student outside of legal proceedings and clarify the difference between the practice of law and unauthorized practice.

Oversight by lawyers and judges is generally an essential component of any student practice rule, ensuring competent representation. This can vary from direct supervision to general supervision. In some regimes, the lawyer must always be present in court. In other regimes, she does not need to attend proceedings before courts of first instance or other bodies.

The practice of clinics could also be limited to students in upper grades or those enrolled in a clinical education programme. There could also be a faculty or court examination or certification process (Novak, 2009-10, p. 69) based on proven skills, "moral probity," and/or prior experience. The certification could be in place for a fixed period, subject to an extension or a reasoned withdrawal.

Finally, in order not to compete with the bar, representation should be reserved for indigent people, and without remuneration, and the client must always consent to student representation.

American legal scholar George Walker (1980, p. 1157) has observed that students' participation in the courtroom is an opportunity for the court – not a threat. It is also an opportunity for the bar, for law faculties, and for higher education in general.

Conclusion

With transnational exchanges highlighting the experience of student practice and the development of legal clinics, the trend will continue towards adoption in other countries of a practice that allows a role for students in the courtroom. It will take more than the passage of legal reform laws to make this trend a reality. Rather, it will require grassroots implementation and collaborative and sustained public consciousness-raising on the part of all stakeholders. (Peace & Justice Network Pakistan, 2022, *About PJN*). Again, these stakeholders include the Pakistan Bar Council and Higher Education Commission.

It is often necessary to begin the legal education reform process with a "slow law" approach (remarks of US Law Professor Richard Boswell, as cited in Rosenbaum, 2012, p. 90), through the acquisition of skills and negotiations with the bar or judiciary. But, given the lack of legal assistance to indigent litigants in the civil and criminal justice systems in Pakistan, and in other countries where there is more rhetoric than reality on the availability of courtroom access, it is time to act now, with deliberation and determination.

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Appendix

Model Rule based on Circular No. 19, Rule 138-A (The Philippines) [3]

SECTION 1. *Conditions for student practice.* — A law student who has successfully completed their [3]d year of the regular [4]-year prescribed law curriculum and is enrolled in a recognized law school's clinical legal education program approved by the Supreme Court, may appear without compensation in any civil, criminal or administrative case before any trial court, tribunal, board or officer, to represent indigent clients accepted by the legal clinic of the law school.

SECTION 2. *Appearance.* — The appearance of the law student authorized by this rule, shall be under the direct supervision and control of a member of the Integrated Bar of the [country] duly accredited by the law school. Any and all pleadings, motions, briefs, memoranda or other papers to be filed, must be signed by the supervising attorney for and on behalf of the legal clinic.

SECTION 3. *Privileged communications*. — The rules safeguarding privileged
communications between attorney and client shall apply to similar communications made to or received by the law student, acting for the legal clinic.

SECTION 4. *Standards of conduct and supervision.* — The law student shall comply with the standards of professional conduct governing members of the Bar. Failure of an attorney to provide adequate supervision of student practice may be a ground for disciplinary action.

[3] The practice rule was re-promulgated by the Philippine Supreme Court in 2019 (https://sc.judiciary.gov.ph/4808/) but is embedded in a larger statement institutionalising law school clinics and externships. The fundamental elements of the original rule are still intact and serve as a model for legal regimes considering student practice before trial and appellate courts as well as quasi-judicial and administrative bodies.