

Gender and Access to Justice: Pakistan Case

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Abstract

This paper is divided into two parts. The first part includes a synopsis of constitutional amendments and points out its effects on women's rights. It deals in detail, with the process of Islamization of laws and shows how earlier legislation such as Muslim Family Law ordinance, 1961 which is generally recognized as an ameliorated piece of legislation for women, conflicts with and is subverted by the Adultery (enforcement of Hudood) Ordinance (Adultery, Fornication and Rape Laws), 1979. The Qanun-e-Shahadat (Law of Evidence), 1984, 'Qisas' and 'Diyat' Ordinance (offences Against the Human Body), 1990, and Conflicting case law on the Ordinance are also discussed.

The second and final part of the paper outline the case studies deals with the case of wali, another case demonstrating complications arising out of a conflict between the Muslim Family Law Ordinance, 1961 and the Adultery Ordinance, 1979 and the case study showing a liberal interpretation given by the courts concerning the women's right to 'Khula' (release from marriage contract). In this way, case studies are selected to reflect both negative and positive aspects of the judicial system of Pakistan.

Keywords: *Islamization, Gender, Family Laws, Justice, Discrimination, Hudood Ordinances.*

Introduction

In Pakistan the female literacy rate is 30%. A majority of the women involved in legal disputes and undergoing penal punishments come from poor and illiterate backgrounds. These women have no access to legal aid except through certain Non-government Organizations providing legal assistance to poor women. Lawyers are expensive, the law wrought with contradictions and conflicts and the male dominated judiciary biased and unsympathetic. The reality of the legal system is such that the trial period often outruns the actual sentence. For example, in Karachi Central Jail, Rahima waited for trial for four years: when finally convicted her sentence was four months imprisonment. In view of this, for women in Pakistan access to justice poses myriad hazards.

Gendered justice simply put means that men are preferred to women. In some instances the law itself is discriminatory while in other cases the outcomes or decisions by courts privileges men and subordinates women. Why is this so? Research on legal and judicial processes has revealed the biases in the treatment of women in courts as witnesses, accused and as lawyers; in the selection of judges and the procedures used in courts. While revealing this kind of research took place in a liberal context, in other words, within the understanding that we are all fundamentally undifferentiated. However, we have to go beyond this liberal understanding to comprehend why judicial outcomes are gendered.

Background: The Constitutional Position of Women in Pakistan

Several Orders and Ordinance promulgated by the late President General Muhammad Zia-ul-Haq between 1977 to 1985, violated rights granted to women under the 1973 Constitution. For example, Article 34 of the 1973 Constitution reads “Steps shall be taken to ensure full participation of women in all spheres of national life.” And Article 25 (2) guarantees “There shall be no discrimination on the basis of sex alone”. But this position was reversed under Article 270-A of the Constitution (Eighth amendment) Act, 1985. This includes a series of Ordinances passed severely curtailing and violating the rights of women such as the Hudood Ordinances, 1979 and the Qanun-e-Shahadat, 1984. The Eighth Amendment, which gives supra-constitutional status to General Zia’s Martial Law Orders, was passed by Mr. Muhammad Khan Junejo’s government in 1985 and to this day remains unchallenged in Parliament.

With the imposition of martial law, Zia suspended all fundamental rights guaranteed in the Constitution that had been adopted in 1973, including the right to be free of discrimination on the basis of sex. He then introduced a series of laws that gave legal sanction to women’s subordinate status, including the Hudood Ordinance, which changed the law of rape and adultery and made fornication a crime for the first time in the country’s history; and the Qanun-e-Shahadat Order (Law of Evidence Order), which relegates women to inferior legal status and, in some circumstances, renders the testimony of a woman equal to only half the weight of a man’s. Zia also proposed laws regarding *Qisas* and *Diyat*, Islamic penal laws governing compensation and retribution in crimes involving bodily injury. Zia reinforced the legal strictures he imposed on women with a series of informal regulations and unwritten policies designed to curtail women’s personal liberty, visibility, and participation in public life.

Muslim Family Law Ordinance 1961

This Ordinance, introduced by the marital law regime of Field Marshal Muhammad Ayub Khan, has largely been viewed as a beneficial piece of legislation for women. Under the Ordinance child marriage was banned and the husband’s unilateral right to divorce was curtailed. And while a man could still contract four marriages at any given time, it became mandatory for him to seek the permission of his first wife or wives. Failure to do so could result in imprisonment and a fine but the validity of the second marriage remains legal.

In Section 7 of the ‘Family Laws Ordinance’, which seeks to prevent the dissolution of marriage by the unilateral and ill-considered pronouncement of *talaq* (divorce) by the husband and provides a period of reconciliation through the local council, the has come into severe conflict with Islamic laws introduced in 1979. This will be discussed in the light of the case study in the second part of the paper.

Conflicting case law on the Ordinance

Pakistani judiciary has had to set aside the condition of registration of *nikah* (marriage agreement) under Section 7 of the Muslim Family Law Ordinance in a number of cases where couples were saved from the punishment of stoning to death (not ordained by Quran). The Sindh High Court in 1988 decreed that since an unregistered *nikah* (marriage agreement) was acceptable under Shariat, the accused couple were not living in sin. Subsequently the

Federal Shariat Court, accepting the Sindh High Court verdict, ruled against Section 7 of the Ordinance. The Federal Shariat Court didn't have the mandate to adjudicate on Family Laws but in 1985 the 8th Amendment inducted the Objectives Resolution into the main body of the Constitution and gave the Court the justification to consider Family Laws too. In 1993, the Supreme Court refused to accept the Objectives Resolution as a supra-constitutional provision. The PML government wants to make Shariat the supreme law in Pakistan and was therefore in favor of the Federal Shariat Court hearing the Family Law case while defending the Ordinance.

While listening to the defence, the honorable Federal Shariat Court was pleased to set aside the Report of the Council of Islamic Ideology recommending that provisions against polygamy be further strengthened in Section 6 of the Muslim Family Law Ordinance. The ground taken by the Court was that the Report had no effect and therefore could not be considered as binding.

Instead of reinterpreting the quranic law and codifying it to suit the circumstances, the trend in Pakistan is to undo the progress made towards codification in the past. The assault on reform is intense and can be violent. The fundamental problem is that while men are free to be polygamous, women are not. Under the Ordinance the bride is required to state in the *nikah nama* (marriage agreement) that she is unmarried, but the bridegroom is not. Thus men are not held liable if they misinform about their marital status.

Hudood Ordinance, 1979

The Legal system in Pakistan, prior to 1979, was based on Anglo-Saxon principles of jurisprudence. The Penal Code, the Criminal Procedure Code and the Law of Evidence Act were derived from a colonial past. These laws were applicable to the whole country except the tribal areas where customary law prevailed.

In 1979, the first set of Islamic Laws, the Hudood Ordinances, was introduced by the martial law regime of General Zia-ul-Haq. The idea was to bring the criminal legal system of Pakistan in conformity with Islamic values. Prior to 1979, adultery and fornication were not the crime against the State. Under the Hudood Ordinances both are now serious offences liable for death punishment in the extreme.

The implications arising out of Hudood Ordinances are severe, and interpretations by the courts have led to serious miscarriage of justice. While Adultery effectively applies to adultery and fornication and *zina-bil-jabr* (rape), the onus of providing proof in a rape of a woman rests on the woman herself. If she is unable to convince the court, her allegation that she has been raped is in itself considered a confession of Adultery (sex outside marriage) and the rape victim effectively implicates herself.

Zia's Islamization efforts had their greatest impact on Pakistan's criminal justice system. The potential for misuse of power by the police and jail authorities had existed since colonial times, and successive periods of martial law had further increased the powers of law enforcement agencies and eroded safeguards against abuses. Far from providing better protection for people with legitimate grievances, the effect of Islamization was to increase the state's power over the lives and liberties of its citizens, bringing more of them, particularly women, into contact with an already abusive and corrupt criminal justice system. Zia also undermined the independence of the civilian court system with, among other things, the

introduction at the High Court level of Shariat benches, reorganized and centralized as the Federal Shariat Court (FSC) in 1980, to review all laws to ensure that none was repugnant to the Quran or the Sunnah (exemplary sayings and directives of the Prophet Muhammad (P.B.U.H) and to hear appeals in certain criminal matters including Hudood cases.

The Ordinance provides new weapons to men against women by virtue of making Adultery i.e. adultery and fornication, crimes against the state, cognizable offences for which the police can take action. Previously that was not the case, for then adultery was a matter of personal offence against the husband by the male party to adultery and extra-marital sex was not a penal offence at all. Now where a wife leaves her husband, it has become all too easy for the husband to go to the police and file a complaint against her for committing Adultery whereupon the wife is arrested and jailed. Given police corruption and the interminable length of time that it takes for such cases to be adjudicated by courts of law (often years) the woman is effectively punished without even going through the due process of law. The husband can bail the wife out of jail. But when that happens she is totally at his mercy. For he would threaten to withdraw bail which would return her to prison. Thus the woman's position is made worse than that of a slave. It has now become common for husbands to file complaints of Adultery against wives desiring separation. There are hundreds of cases every year where women are arrested for Adultery on complaints filed by husbands' (SHE, March 1989: 81). It is likewise in cases of elopement, where a father refuses permission to his daughter to marry the man of her choice. The father brings charges of 'abduction' in such cases and the law presumes Adultery unless the couple can prove lawful *nikah* (marriage agreement) or marriage according to Islam.

Qanun-e-Shahdat, 1984

The draft law of the Islamic Law of Evidence or the Qanun-e-Shahadat Stated in section 6 that except in offences liable for had punishment and *Qisas* (murder or lesser offence against the human body) where women's evidence is simply not recognized in all other matters including financial matters the fact shall be proven by the evidence of two adult male Muslim witnesses and in absence of two adult male Muslim witnesses by the evidence of one male and two women. In this way the evidence of women was reduced to half of that of a man. However, the draft law was eventually revised because of pressure from women's organizations as well as the Pakistan Law commission. But what was eventually legalized as the Qanun-e-Shahadat circumvented the problem of clearly naming women as having half status as witnesses and instead in section 17 it reads the competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Qur'an and *Sunnah*.

Further Section 17 qualifies half status for women witnesses and restricts it to financial matters Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law – (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or by one man and two women, so that one may remind the other, if necessary, and evidences shall be led accordingly; and (b) in all other matters, the Court may accept, or act on the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant.

Under this law, women working in banks or the finance department of any firm as well as women judges have been rendered non-persons as far as attesting financial documents is considered.

Case Studies

Case 1: Conflict between Muslim Family Ordinance 1961 and Adultery Ordinance 1979.

A rather different type of case illustrates the way in which the law is used by male relatives or husbands to terrorize and control women. A young woman of 25, Shahida, got a divorce from her husband, Khushi Muhammad. The divorce deed was signed by the husband and was attested by a Magistrate. Under the law as it stands, however, the divorcing husband is then required to register the divorce papers with the local council. That he did not do. This was possibly a deliberate omission, which was to give him a hold over his ex-wife. Shahida, after spending the prescribed period of ninety-six days of waiting (*iddat*), as prescribed for a divorce, with her parents, married Muhammad Sarwar. Khushi Muhammad meanwhile decided that he wanted her back or, in any case, he would not allow her to marry again. So he took the matter to the law, charging her with Adultery. Although Shahida produced before the Court the attested copy of the divorce document, which was signed by Khushi Muhammad and attested by a magistrate, the Court did not consider it to be admissible, as it had not been registered with the local Council. The Court decided that the divorce was invalid and therefore that the second marriage illegal. As the two accused, Shahida Parveen and Muhammad Sarwar had 'confessed' to living together as husband and wife, the Court found them guilty, under the convoluted provisions of that extra-ordinary Ordinance. Accordingly they were both sentenced to stoning to death. Happily, due to campaigning by the women's movement that extreme sentence was eventually commuted.

Case 2: Marriage without the consent of wali

Two cases were filed in the Lahore High Court by the fathers of the two girls Ms Ayesha Aijaz (13 Yrs old) and Ms Shabina Zafar (19 Yrs old). Ijaz Ahmed lodged an FIR on 18-07-96 under section of 11 of the Adultery Ordinance that the one Shahid abducted his daughter Ayesha Ejaz. He claimed that he came to know about his daughter marriage on day third of her abduction. He declared that marriage was not acceptable to him. While Ayesha declared that she went to Multan and married to Shahid and registered *nikah* (marriage agreement) with the nikah registrar Multan.

In the second case: Shabina voluntarily married Muhammad Iqbal on 25-6-96. Her parents refused to acknowledge the marriage and called it a clear case of abduction.

Justice Abdul Hafeez Cheema pronounced the judgment in the Lahore High Court on September 25, 1996. The learned judge declared that both marriages void, as they did not have the consent of the respective *wali's* (guardian). He sent the two girls to Dar-ul-Amaan and stated categorically that no woman can marry without her *wali's* (guardian) permission.

A closer scrutiny of the text raised a number of questions. Why only women, why not men as well? What was the exact legal status of the judgment? Were the myriad marriages contracted down the ages without the *wali's* (guardian) consent or participation void? How to prove that one had one's guardian's consent at the time of your marriage since there is no

column in the prescribed *nikah nama* (marriage agreement) for the Who is the guardian if father is not alive, especially in the case of an older woman?

Case 3: Dissolution of marriage by way of Khul'a (Separation). Khurshid Bibi vs Bbaboo Muhammad Amin

The scholarly written judgment of the august Supreme Court in Khurshid bibi case, (PLD 1967 SC 95) holds the field where it has been held that the Court can dissolve the marriage by way of *Khul'a* (Separation) in circumstances where exists extreme discord, hatred and dislike between the spouses. The consent of the husband is not necessary in this regard. The woman, who is not in a position to maintain the limit prescribed by Allah, can approach the Court of competent jurisdiction, to get her marriage dissolved.

The Supreme Court relied on the *hadith* (saying of Prophet Muhammad P.B.U.H), "There is a hadith of the Prophet, concerning Barairah who was married to a slave, named Mughis. She did not live with her husband who followed her disconsolate and weeping, in public. The Prophet (P.B.U.H) advised her to go back to her husband. She asked, 'Is this an order?' The Prophet (P.B.U.H) said that it was merely a recommendation. She then declined to go back to her husband, saying, 'I have no need of him'. This shows that a woman cannot be compelled, if she has a fixed aversion to her husband, to live with him'.

Conclusion

Access to justice for women in Pakistan is set in a complex web of historic and cultural dynamics. This may be improved, perhaps complicated, by current transformations of governance in the country.

Internationally, Pakistan has ratified the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) on 12 March 1961. However, on issues of justice the country is unable to report on progress on CEDAW, since there are very few reliable statistics on these issues. The concern about access to justice has been expressed by civil society in Pakistan both women and men pressuring for change.

Basic principles promoted by the current government in its devolution reform plan, focuses on: 'people-centered, rights and responsibility based and service-oriented'. As part of the judiciary reform one of the ends is to 'bring justice to the doorstep'.

Civil society organizations are key players in assuring access to justice for women providing a range of services: legal aid, counseling, resources, advocacy, public education and direct assistance to women guiding them through the system. The problems identified by these organizations for women to access the justice system included social stigmas of reporting, lack of family support to use the system, women's lack of awareness about legal procedures and their rights and limited legal assistance for women to deal with the complicated justice process. It is found that women were ignorant about law and also felt helpless to do anything about negative situations. In general, the main challenges to developing awareness and mobilizing for change are the unreliable political system and the 'misuse of religion by both traditional conservative forces and emerging political groups (i.e. religious') for their own ends'.

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