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Gender Justice in ADR: Do Informal Mechanisms Protect Women's Rights in Pakistan?

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Abstract

In rural and peri-urban Pakistan, many civil and family disputes are settled through informal dispute resolution, such as jirgas, panchayats and community elder councils, without any formal legal structures or processes being involved. These mechanisms have a strong cultural basis and provide a rapid and easily accessible means for dispute resolution, but have been variously documented as places of systematic gender discrimination, where women's rights as defined by statutory law are often subordinate to customary norms that are rooted in patriarchy. The article looks at the structural aspects of informal ADR, which create gender unequal outcomes, reviews the constitutional and statutory protections, and empirical evidence of women's experience of informal dispute resolution in Pakistan, and discusses formal ADR institutions offered by the ADR Act 2017 as a possible gender-just alternative, and suggests a framework for gender-sensitive reform of ADR through Pakistan's constitutional obligations.

Keywords: Gender Justice, ADR, Jirga, Panchayat, Women's Rights, Pakistan, Informal Dispute Resolution, Family Mediation, Constitutional Rights

Introduction

Issues of gender justice and the interaction with alternative dispute resolution are among the most controversial issues in current ADR scholarship and policy. From another perspective, ADR, especially mediation, has great potential to be a process with a different focus, one focused on communication, interests and relationships, rather than on legal rights and adversarial arguments that might provide a forum for women to express their needs and priorities in ways that the formal legal system does not. From a different perspective, however, ADR is a place of structural risk for women because it is not publicly accountable in the court arena, the neutrals involved may not be subject to the same gender critique as the parties,

and the results are shaped by power imbalances in the dispute, not by rights in legal waters (Menkel-Meadow, 2011).

The tension is particularly heightened in Pakistan, where for millions of rural and peri-urban women, informal methods of dispute resolution such as jirgas, panchayats and community elder councils are the primary means of resolving disputes. Many Pakistani women simply cannot access the formal court system: it is far away, costly, cumbersome, culturally remote and spoken in a language totally different from the one used by many rural women. The informal mechanisms for dispute resolution that are available geographically, economically, and culturally are based on principles that often violate the rights of women guaranteed under the Convention on the Elimination of All Forms of Discrimination Against Women (CEW) that Pakistan ratified in 1996, the Pakistan constitution, and the Muslim Family Laws Ordinance 1961 (MfLo), as well as under the Family Courts Act 1964 (FCA) (Human Rights Commission of Pakistan, 2020).

The two enactments, the ADR Act 2017 and the Punjab ADR Act 2019, leave us with a very specific and important question regarding the formal institutions of ADR: Do they provide a gender-just alternative to informal dispute resolution, or do they recreate the power imbalances in a more formally institutionalised context? The gender sensitivity of the mediation workforce, the way mediation is designed, the safeguards provided for vulnerable parties, and the extent to which the formal ADR process does not undermine but rather protects women's statutory rights will all help answer this question. Each of these dimensions is discussed systematically in this article.

In Section 2, gender-discriminatory features of the informal dispute resolution are analysed. Section 3 discusses the constitutional and statutory provisions protecting women's rights in dispute resolution. Section 4 looks at the empirical evidence on women's experience of informal ADR in Pakistan. Formal ADR institutions are analysed from a gender justice perspective in Section 5. Section 6 outlines a framework for reforming the ADR system to be gender sensitive. Section 7 presents conclusions.

2. Structural Features of Informal ADR That Generate Gender-Discriminatory Outcomes

Jirgas and panchayats are groups of elders, usually old men from the dominant kinship groups or social classes, who resolve conflicts based on tribal customs, norms and their own collective power and influence and not on any written law

or constitutional rights. The structural make-up of these bodies also creates gender bias in favour of men: women are not members of jirgas or panchayats, seldom allowed to speak in the proceedings themselves and are regularly represented by male members of the family who may not necessarily have the woman's interest at heart and may even have a conflicting one. A woman challenging the conditions of her divorce or custody of her children in a jirga has no voice of her own in proceedings which will decide the most crucial aspects of her life (Human Rights Commission of Pakistan, 2020).

The informal dispute resolution institutions that are utilised in most parts of Pakistan routinely discriminate against women in the types of disputes they are likely to encounter. Customary laws often restrict women's ability to divorce as provided for in the Dissolution of Muslim Marriages Act 1939 and the Muslim Family Laws Ordinance 1961, and may automatically award custody of the children to fathers instead of what is in the best interests of the children, and consider ownership of a woman's mehr as subject to negotiation when it is legally a contractual obligation. Customary rules often limit women's rights to inherit property, which is illegal based on Islamic teachings and the Pakistani constitution. This is especially the case in inheritance disputes over agricultural land in Punjab and Sindh, where women are not entitled to inherit it (Sourdin, 2016).

Many women are not free to consent to the results of informal dispute resolution because of the power imbalance between men and women in Pakistani society, which is further exacerbated by women's economic dependence upon men, social pressures and fear of violence. A woman can't simply choose to waive the right to a legal claim to the mehr, her share of the inheritance, the custody of her children, etc., because she doesn't have the option to resist the pressure from her family and community to accept the jirga's decision. Where one party has much more power than the other, and meaningful choice is not possible for the weaker party, the concept of informed and voluntary consent in legitimate dispute resolution is deconstructed (Moore, 2014).

Honour-based violence and the prospect of social isolation are further structural aspects of the informal dispute resolution system, which obstruct women's rights. The formal availability of legal rights in communities where women who assert such rights against a jirga or the wishes of their male relatives risk violence or exclusion from the networks of the family and community that are crucial for their legal security is not a very effective guarantee of the latter. Many instances have been recorded wherein women who had refused to accept

the results of a jirga or had taken recourse to formal courts had been subjected to violence or forced displacement or other means of retribution (Human Rights Commission of Pakistan, 2020).

Perhaps the most extreme form of gender discrimination in informal dispute resolution is the practice of vani and swara, which is the resolution of disputes between families through the exchange of women in marriage and/or as compensation. The practices, clearly outlawed under the Criminal Law (Third Amendment) Act, 2004, are reported to be practised in certain parts of Khyber Pakhtunkhwa, FATA, and Balochistan, and are considered offences under the Pakistan Penal Code, and are sometimes even condoned by local jirgas. These practices continue despite their explicit criminalisation, reflecting the extent to which the existing formal legal system of dispute resolution is ineffective and what needs to be done for structural change to take place.

The geographic dimension of informal dispute resolution in Pakistan needs to be highlighted. The Jirga system is very entrenched in Pashtun customary law (Pashtunwali) and is almost as authoritative as the formal law enforcement in Khyber Pakhtunkhwa and the former FATA districts. The Panchayat is found in a feudal social system that prevails in some areas of Sindh and southern Punjab, where big landlords hold quasi-judicial powers over the tenants and labourers. Any reform effort for informal DR needs to be regionalised due to variations in the structure and authority of informal DR across regions, documenting local power dynamics and recognising that a single national answer/remedy will not suffice for all cultures, societies and communities (Aurat Foundation, 2018).

3. Constitutional and Statutory Framework for Women's Rights in Dispute Resolution

The Pakistan Constitution provides a solid foundation for freedom and rights, which are directly linked to formal and informal dispute resolution. Article 25 confers equality before the law and bans discrimination based on sex. Article 25A establishes the right to education, which is essential to women's experience navigating the legal system. Protection and care of the family, with special focus on the mother and child, are mandated under Article 35. Leading to 'Article 37 - the state shall make provisions for securing just and humane conditions of work and for maternity benefits to women engaged in employment'. Taken together, these create a constitutional mandate on the state with regard to the responsibilities to not only remove gender based discrimination from state institutions but also take positive action for making dispute resolution bodies

available to Pakistani women consistent with the constitutional equality assurance (Constitution of Pakistan, 1973).

One of the most significant pieces of legislation governing the most critical categories of family disputes affecting most Pakistani women is the Muslim Family Laws Ordinance 1961, which regulates marriage, divorce, custody, and maintenance. The Ordinance accords the rights to divorce through khul to women and rights to maintenance during iddat, mehr (contractual) and registration of marriage through the Union Council system. These rights can be asserted in the Family Courts created by the Family Courts Act 1964, which offer a judicial forum that is (relatively) easier to access and less formal than the civil courts. The Ordinance clearly exposes the customary laws which block the enjoyment of these rights. However, the dislodgement of custom is limited to women's access and willingness to utilise the formal law (Muslim Family Laws Ordinance, 1961).

Pakistan has been a signatory to CEDAW since 1996, which imposes an international duty to combat gender bias in every field of life, including the administration of justice and dispute resolution. CEDAW Article 15 calls upon states parties to give women equality with men before the law and in legal proceedings, which should include the same freedom of legal capacity and the same opportunity to access it. Article 16 prohibits discrimination in any arena concerning marriage and familial relationships. An objection is raised to some aspects of the CEDAW, specifically Pakistan's reservation "that the application of the dispute settlement procedures shall not result in any systematic discrimination against women and that no rights shall be denied to women under domestic law due to reservations. Pakistan has made reservations to some provisions in CEDAW. However, the reservation does not affect the core obligation to ensure that mechanisms of dispute resolution do not systematically discriminate against women or deny them any rights.

As a whole, the laws prohibiting the practice of vani, swara, forced marriage and deprivation of inheritance rights (the Criminal Law (Third Amendment) Act 2004), and preventing harassment of women at workplaces (the Protection Against Harassment of Women at the Workplace Act 2010), stand as a massive piece of legislation to safeguard the rights of women in practice and in theory. The Anti-Women Practices Act, under which the above practices are strictly forbidden, has, however, a mediocre enforcement record, with hardly any convictions, and the underlying social and structural reasons that result in these

practices have not been adequately addressed by criminalisation. (Law and Justice Commission of Pakistan, 2021).

4. Empirical Evidence on Women's Experiences of Informal ADR

Compared with international empirical literature, the literature on the experiences of women in informal dispute resolution (IDR) in Pakistan remains relatively small, due to both the methodological difficulty of researching closed community processes and limited research investment in IDR. The evidence, largely from field research conducted by the Human Rights Commission of Pakistan, Aurat Foundation, UN Women and academic researchers, invariably reveals a repetition of the gender-discriminatory outcome based on a structural analysis, as outlined in Section 2.

The Human Rights Commission of Pakistan has reported the cases where women's rights under the law, such as Mehr, Divorce and Custody, were denied by the jirga determination in Punjab, Sindh and Khyber Pakhtunkhwa. In many of the reported cases, women had also sought help from the formal justice system. However, they were instead asked by the jirga and/or their families/communities to comply with the jirga verdict. An analysis of the HRCP's reports also records instances of women facing threats and pressure to drop their case when they tried to have the decision of the jirga overturned in court, which were tacitly or explicitly supported by male members of their families who had participated in the jirga proceedings (Human Rights Commission of Pakistan, 2020).

The Aurat Foundation's study on women's access to justice in rural Punjab revealed the common practice of women, in family conflicts, of trying to resolve matters through informal community methods before the formal court. The research revealed that the preference was not freely made in any meaningful sense of the word. However, it was an outcome of social pressure from male family members, economic dependence on them, a lack of awareness of their rights, and, of course, a lack of access to the formal court system. Not having male family members' support in accessing family courts often created practical problems for women, from hiring lawyers to attending court hearings to navigating a hostile court environment built for and largely controlled by male litigants and practitioners (Aurat Foundation, 2018).

Gendered empirical evidence of formal mediation through IMAC is scarce for a few reasons: first, IMAC is still new, and second, there is no gender-disaggregated data in IMAC's published reports. The limited qualitative evidence gathered as part of IMAC's early operations and implementation shows that

overall women exposed to the IMAC mediated proceedings experienced better proceedings than those that went through the jirga proceedings, with some key issues remaining regarding mediator gender sensitivity, power dynamic in co-session and the lack of protection/cover for women under family/community pressure on mediation outcome (Law and Justice Commission of Pakistan, 2021).

5. Formal ADR Institutions Through a Gender Justice Lens

Structurally, from a gender justice perspective, formal ADR (through the IMAC and the Provincial mediation centres) is superior to an informal approach. Mediators are trained professionals who abide by a code of conduct that mandates impartiality and explicitly bans IMAC mediators from engaging in discriminatory conduct based on sex. Any settlements must be agreed upon by both parties and not imposed by an “elders council.” The processes in mediation give some immunity from community pressures during the mediation. Where a mediated settlement is recorded, it can be made into a court decree, thereby conferring some finality and enforceability that the determinations of a jirga lack (Alternative Dispute Resolution Act, 2017).

But the present formal ADR system in Pakistan fails to bring sufficient protection for women in high-risk situations. IMAC's mediator training program, although very thorough in its teaching of mediation process skills, does not currently cover a modality-specific piece on the rights of women in mediation, recognising power dynamics and coercion in mediation, and mediation specifically geared to gender. An untrained mediator might emotionally support a process and produce a result based on the imbalance of power among the parties rather than on the fragile party's rights. Where domestic violence or coercive control occurs within family disputes, a joint mediation meeting between the parties to the dispute can be actively detrimental because it replicates the pattern of control within the mediation itself (Moore, 2014).

One specific concern is the gender composition of the IMAC mediators panel. Based on available data, women mediators are greatly underrepresented on IMAC's panel compared with the number of women who represent the mediation caseload. Women disputants, especially those in a family situation with a religious/cultural aspect, would like to see a woman mediator, and also feel that they have less confidence and are less likely to engage in the mediation process if they are unable to request a woman mediator. IMAC should be explicit about the percentages of gender parity it wants in their ranks of mediators and actively seek to recruit, train and support women mediators, particularly through scheduling

arrangements where they are more able to accommodate women's role of raising children and mobility limitations.

There is an aspect with the greatest risk for a gender justice point of view between formal ADR and domestic violence. True of the guidelines of the Australian Family Law system and England's Family Mediation Council, international best practice strongly recommends against mediation in cases involving domestic violence and/or coercive control, as mediation cannot effectively deal with the power imbalance inherent in situations of domestic violence and mediation may actually put the survivor at risk of further harm. There is no systematic process in IMA's current procedures that deals with domestic violence in family cases, and mediators currently do not have guidance and training on the signs of domestic violence and coercive control. Creating and implementing such protocols is key to the gender-sensitive reform of ADR.

Even if letting women use IMAC's subsidised services, the financial cost of formal ADR is a challenge to those women who are economically dependent and don't have access to paying the fees for what may be a low-cost mediation. Rebating mediation fees set aside for women participants in a family matter requiring mediation services, whose employment status they are unable to pay the basic fee due to financial hardship, should be a part of ADR reforms in Pakistan, where the funds can be collected through a set-aside access to justice fund in the budget of IMAC. Whether the system is really accessible to the women who most require it – or whether it's a system for the wealthy who most often opt into it – is the real cost barrier to ADR (National Commission on the Status of Women, 2020).

6. A Framework for Gender-Sensitive ADR Reform

This article outlines five elements for revising ADR in light of gender sensitivity, which cover two aspects: formal ADR institutions and women's access to justice as a broader issue within ADR.

Firstly, all mediators in the IMAC and the provincial mediation centres must be trained in gender sensitivity, which is compulsory. The training module should include the legal rights of women in Pakistan to contest in family, property, and employment disputes; identifying power imbalance and coercive dynamics in mediation; dealing with co-presence of parties where there is a power imbalance between them; and either screening or suspending a mediation if specific indicators of domestic violence or coercive control are present. This training should form part of the accreditation requirements and be renewed periodically through CPD.

The second item is an "opt-in" domestic violence screening protocol for every mediation between family members. Each party to a family mediation should fill in a confidential screening questionnaire prior to the first joint session, identifying any family violence, coercive control or safety matters. If the screening identifies a history of domestic violence, or issues regarding safety are identified, the mediator should not immediately move to a joint session without first making a specific assessment of the appropriateness and safety of mediation in this context in consultation with specialised domestic violence providers and organisations, who have established appropriate guidelines. Where joint mediation is deemed unsafe, the case should be brought to the family courts for adjudication.

The third is the collection and publication of data on women and gender equality by IMAC and the provincial mediation centres. The annual report of IMAC should present statistics on the gender of parties, mediators, the results of mediations by the gender of the parties, and the results of post-mediation satisfaction surveys by parties' gender, for the categories of family and other mediations. This data will facilitate continuous monitoring of the gender justice outcomes and will serve as a basis for specific interventions, in the event of gender gaps, in outcomes.

The fourth one is targeted outreach and legal awareness-building for women in rural and peri-urban areas through IMAC's outreach programme, in collaboration with women's rights bodies, women's rights legal service providers, and the National Commission on the Status of Women. The programming should explain to women their legal rights in family, property, and employment issues, the existence of formal alternative dispute resolution (ADR) and court processes, as well as protections that are not available in informal dispute resolution but are available if they go to the courts. A precondition for consent to the result of a dispute resolution is legal consciousness.

The fifth factor is legislative change, which makes it clear that agreements arrived at through informal procedures that deny women any statutory right under the Muslim Family Laws Ordinance 1961, the Dissolution of Muslim Marriages Act 1939, and/or the Family Courts Act 1964 are meaningless. This reform, however, is based on the current Anti-Women Practices Act 2011, though it leaves authoritarian forms of informal settlement, especially regarding women's rights, less clearly defined. It would be good to have in the statute book a clear statement that an informal settlement runs counter to women's statutory rights

and is void and unenforceable, to provide a good legislative statement about the limits of informal dispute resolution.

7. Conclusion

It is not possible to determine in the abstract if ADR protects or endangers the rights of women in Pakistan. In its current form, as practised in the case of women, informal justice mechanisms such as jirgas and panchayats systematically deprive women of constitutionally and legislatively guaranteed rights. They are a basic failure of the state's duty to provide women with access to justice. Formal ADR, both in IMAC and the provincial centres, does not, to date, have gender-sensitive screening and training procedures that would make it a system genuinely serving women's interests.

This five-element reform agenda, laid out in this article, is comprehensive and workable in practice for resolving these gaps. It would make formal ADR more gender-sensitive and increase awareness of women's rights and options in ADR if implemented. These changes, in neither package, however, can replace the far more wide-ranging developments of economic, educational, and non-violent freedom of women which underpin the real basis for access to justice.

A gender-sensitive ADR reform is not meant to take the dispute resolution out of the communities where it takes place, but rather to ensure that, despite the continued reliance on informal or traditional mechanisms, access to dispute resolution is in line with the legitimate rights of all concerned and empowers those who are most affected by the power dynamics existing in the dispute resolution processes. This is what is required of Pakistan both in its constitution and because of international obligations, as enshrined in CEDAW.

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