

Notes

Gender Bias in Society and Judiciary in Pakistan

Habiba Hasan

The lives of millions of women in Pakistan are circumscribed by traditions which enforce extreme seclusion and submission to men, many of whom impose their virtually proprietorial control over women. For the most part, women bear traditional male control over every aspect of their bodies, speech and behaviour with stoicism, as part of their fate. Exposure to media, the work of women's rights groups and a greater degree of mobility have seen the beginnings of women's rights awareness seep into the secluded world of women. But if women begin to assert these rights, however tentatively, they often face more repression and punishment; the curse of honour killings has risen parallel to the rise in awareness of rights. State indifference, discriminatory laws and the gender bias of much of the country's police force and judiciary have ensured virtual impunity for perpetrators of honour killings.

Women are disadvantaged from the moment they are born. The birth of a girl child is frequently met with disappointment, and even anger, and the blame is usually placed on the mother. As a rule, the girl child receives less food, less access to education and less health care. The girls as a result are more likely to die of childhood diseases and later to maternal mortality during childbirth. School enrolment of girls is low, and the dropout rate is high. Girls are kept at home to do household chores or to look after younger children when required by the family.

It is ironic that Muslim states today are among those countries that have lowest literacy. The first word of the Holy *Quran* revealed to the Prophet Muhammad (pbuh) was 'Read'. And this 'Read' was not for men alone. Unfortunately, we are seeing in the past few years a proactive effort to close down schools for girls in Afghanistan and the adjoining areas of Pakistan.

There is a well-established trade in women. The victims are mostly poor village girls from Bangladesh, Nepal, India, Pakistan and Afghanistan, who are abducted or lured with promises of employment and a better life. They are used in domestic labour, forced marriage and

prostitution. The cross-border trade in women is not possible without the connivance and active collaboration of police and border security forces.

Women in the tribal areas faced religious and social censorship when they sought to exercise their right to political participation. Inhabitants of the tribal areas of Pakistan were granted adult franchise in 1996 but many men prevented their female relatives from voting. A tribal council decided that the house of anyone who permitted women to cast their vote would be burned down. Consequently few women dared to vote. The same threats were repeated at the next elections. However, the government took no measures to prevent these intimidating practices.

Much of domestic violence in Pakistan is meted out to women in a habitual manner, arising from a male conviction that women deserve no other treatment. However some violence is deliberate and punitive, intended to punish a woman for perceived insubordination, which translates into an unpardonable transgression of a family or tribal norm. Two main factors contribute to violence against women: women's commodification and conception of honour.

Women are considered the property of the males in their family irrespective of their class, ethnic or religious groups. The owner of the property has the right to decide its fate. The concept of ownership has turned women into a commodity, which can be exchanged, bought and sold. A woman is equated with money, but although she has monetary value, her worth is essentially that of a commodity and this view goes far towards creating a situation when she may be butchered if she transgresses the conditions under which she is bound to a man for life. She may also be freely traded or given away as part of a *karo-kari* settlement.

Ownership rights are at stake when women are to be married, almost always in Pakistan by arrangement of their parents. While women are usually forced to accept such marital decisions made by their fathers, men have the possibility to marry a second wife according to their liking and lead a life in the public sphere where they can find fulfillment.

The commodification of women is also evident in marriage. Marriage in tribal society involves payment of the bride price (*vulver* in NWFP and Balochistan and *vekro* in Sindh). The bride price varies according to the status, age, health and beauty of the woman and, like other possessions, the bride subsequently adds to the honour of the groom. Sometimes the bride price is taken in the form of another woman. Men exchange their daughter, even grand daughters, for new wives for themselves.

A major consideration in the landed class is the young woman's future inheritance rights over family property or assets. They are married to cousins 10 to 20 years younger and if none is available to the *Quran*!

The commodification is also the basis of the practice of *khoon baha*. The standard price to settle a conflict in Sindh is one girl above the age of seven years of age or two under seven.

An out of court settlement for murder in accordance with the tribal tradition of *swara* in Peshawar decided to hand over the daughter of the murderer to the aggrieved party. The High Court judge hailed the decision stating 'what a great tradition we have that spares a man's life'; little understanding what torture the girl will endure for the rest of her life, and that to take a decision affecting another individual, without consent of that person, is against all norms.

The possession and control of desirable commodities, especially *zan*, *zar* and *zamin* is closely linked to the perception of a man's honour. *Izzat* bases itself on possession, wealth and property. A man's property, wealth and all that is linked with these is the sum total of his honour value. Therefore when the rights of a woman are transferred from her father to the man she is marrying, the guardianship of honour shifts as well. Honour in the traditional setting is a male prerogative; it is men who possess *zan*, *zar*, *zamin*, which allows them to hold their heads up; women have no honour of their own.

Women's bodies must not be given or taken away except in a regulated exchange, affected by men. Women's physical chastity is of uppermost importance and by the merest hint of 'illicit' sexual relationship a woman loses her inherent value as an object worthy of possession and therefore her right to life. In most tribes, there is no other punishment for a woman accused of 'illicit' sex but death.

The logic of tribal tradition turns conceptions of victim and perpetrator, right or wrong on their head: women who are killed or flee a killing are not victims but the guilty party in the tribal setting. The man to whom a woman 'belongs' has to kill to restore his honour. He is the victim as he has suffered loss, first to his honour and then of the woman whom he has to kill. He becomes *ghairatmand* and is morally supported by his kinsmen.

Expressing a desire to choose a marriage partner and actually contracting a marriage with a partner of one's choice, or seeking divorce are considered major acts of defiance. They are perceived to shame their guardians leading them to resort to violence to restore their honour. Frequently fathers bring charges of *zina* against daughters who have married partners of their choice, alleging that they did not contract a

valid marriage. Often fathers use police to recover or unlawfully arrest and detain their daughters who married men of their choice.

A woman raped shames the community and dishonours the man – it does not dishonour the rapist!

The widespread abuse of women in their domestic spheres at the hands of their family members has continued unabated. Few women in Pakistan have been provided with information about their rights; fewer even have the means to seek their implementation.

Male control does not only extend to a woman's body and her sexual behaviour but all of her behaviour, including her movements, her language and her actions. In any of these areas, defiance by women translates into undermining male honour and ultimately family and community honour. Severe punishments are reported for bringing food late, for answering back, for undertaking forbidden visits etc.

Majority of women are believed to be subjected to such violence, including being threatened, beaten, burned, strangled, or disfigured with acid. Woman's subordination remains so routine by custom and traditions, and even putatively by religion, that much of the endemic domestic violence against her is considered normal behaviour.

Domestic violence is considered a domestic matter, not subject to government 'interference'. Police is reluctant to register complaints saying that these are domestic matters. It is only when there are grievous injuries that complaints get registered.

Gender bias of the judiciary

Judges are part of the society in which they live, reflecting many of its cultural values and moral norms but also many of its prejudices. Nowhere is this more visible when it comes to gender equality prescribed by the Constitution of Pakistan. To rise above prejudice is a requirement of the law enforcement personnel but in reality this does not always take place. In fact, Pakistani judges, at the lower levels of the judiciary, sometimes even at the higher level, tend to reinforce discriminatory customary norms rather than secure constitutionally guaranteed gender equality.

Courts frequently side with the offenders and utilize the slightest element of doubt to acquit them. Police, if they register a complaint at all often accept bribes, then manipulate evidence and use sections of the penal code carrying lower penalties. Due to social pressure, witnesses rarely come forward, and the victims do not wish to charge family members they have to return to or who may make life difficult for their children. Even when guilt is established, the law of *Qisas* and *Diyat* facilitates compromise and protects the perpetrators from punishment.

As state institutions the law enforcement apparatus and the judiciary have dealt with crimes against women with extraordinary leniency and, as the law provides many loopholes for murderers in the name of honour to get away, the tradition remains unbroken. In fact more and more killings committed for other motives take on the guise of honour killings on the correct assumption that they are rarely and, if so, only lightly punished.

It is an unholy alliance that works against women: the killers take pride in what they have done, the tribal leaders condone the act and protect the killers and the police connive in the cover-up.

In societies in which the concept of honour killings is socially validated, the formal legal system will reflect this validation in spite of the textual provision of the law. The gender bias of many judges is evident in the way in which they use the defense of honour to mitigate sentences in cases brought before them. Mitigating circumstances are usually taken into account for men but never for women.

Judicial decisions: Judicial decisions reflecting insensitivity to women's concerns are reflected in some of the cases related below:

Zainab Noor, married in the tradition of *watta-satta* in 1987 to her cousin Qari Sharif, was permanently impaired in February 1997 when her husband thrust an iron rod into her vagina and connected it to electricity. Her vagina, rectum and bladder were destroyed. With the help of a women's rights group, she filed a complaint. A Rawalpindi anti-terrorism court sentenced Qari Sharif to 10 years imprisonment for each of the destroyed organs, to be served consecutively, and Rs. 210,000 for each damaged organ. Upon appeal, the Rawalpindi bench of the Lahore High Court ordered that the three sentences be served concurrently, thereby reducing the sentence to 10 years imprisonment but it specifically denied Qari Sharif the benefit of section 382 of the Code of Criminal Procedure, according to which convicts may be entitled to remission.

In January 2001, Qari Sharif was released from Rawalpindi's Adiala Jail after the Qarshi Foundation paid the compensation to which he had also been sentenced. A spokesperson for the Foundation said it had made a collective payment of Rs. 10 million for those convicts who were languishing in prison due to their inability to pay compensation. The list of deserving beneficiaries, which included the name of Qari Sharif, had been collated and submitted to the Foundation by the Adiala Jail authorities.

Zainab Noor appealed against the remission and Qari Sharif's release to the Supreme Court. It is not clear if the compensation reached

Zainab Noor. Shahnaz Bokhari of the Progressive Women Association in Islamabad said in February 2001 that Zainab Noor had not received any money and had on account of her poverty ceased buying colostomy bags for the removal of body waste and was now washing the bags with her own hands.

The Lahore High Court in July 1997 overturned an earlier sentence of life imprisonment of a man convicted of murdering two persons and awarded a five-year sentence instead. It argued that the man had been ‘gravely provoked’ and humiliated when he believed his wife to have had an affair. Courts by institutionalizing ‘honour killings’ encourage murderous assaults on people on the pretext of being humiliated; instead they should deliver their judgments in accordance with the law rather than their perceived sense of morality. By allowing people to take law into their own hand, the honourable courts will only promote disrespect for the law. Honour and dishonour are relative terms.

The courts have not always been very understanding in cases of women marrying partners of their choice despite judgments by the higher judiciary that adult women can contract marriages without seeking the consent of their male guardians. On September 1996, a single bench of the Lahore High Court consisting of Justice Abdul Hafeez Cheema ruled that a Muslim woman may not marry without the consent of her *wali* or male guardian – usually the father or grandfather – and that any marriage contracted by her without this consent is void. The judgment implies that men are free to marry or remarry without anybody’s consent except that of the prospective wife while no woman, whatever her age, may validly contract her own marriage without the consent of the *wali* or act as the *wali* for her daughter.

The judgment came in cases brought by two women, Ayesha Ijaz of Toba Tek Singh and Shabina Zafar of Faisalabad who had married men of their choice. Their fathers registered cases against the two women alleging that since they had married without their wali’s consent, the marriages were void and they had committed the offence of *zina*. The two women then moved the court to have the cases quashed, arguing that they were *sui juris* (i.e. had the legal capacity to act independently after attaining majority) and competent in law to get married with partners of their choices. The judgment upheld that the couples be prosecuted for *zina* as the marriages had been consummated. The Supreme Court on 23 October 1996 suspended the judgment following the admission of the appeal; the court returned the women to their fathers’ custody but restrained the fathers from arranging their daughter’s marriages to anyone else before a Supreme Court decision.

However, in another similar case, a three-member bench of the Lahore High Court on 10 March 1997 split 2-1 in a majority decision that the consent of the *wali* is not required for a marriage to be valid. Her father whose consent she had not obtained when she contracted her marriage had challenged Saima Wahid's marriage to Arshad Ahmad. She spent 11 months in a women's shelter for fear that her father might kill her.

Clearly the ruling of Justice Cheema and the opinion of the dissenting judge in the judgment of 10 March conflicts with Article 25 of the Constitution of Pakistan which states: 'All citizens are equal before law and are entitled to equal protection of law'. Article 27 states: 'There shall be no discrimination on the basis of sex alone'.

The Convention on the Discrimination of all forms of Discrimination against Women's (CEDAW), Article 5, also state 'Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'. CEDAW Article 16 further states: 'State Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations' and in particular shall ensure, on a basis of equality of men and women:

- a) The same right to freely choose a spouse and to enter into marriage only with their free and full consent.
- b) The same rights and responsibilities as parents.
- c) The same rights and responsibilities with regard to guardianship.
- d) The same rights and responsibilities during marriage and its dissolution.

Courts do not always ensure the implementation of their orders; yet do not initiate contempt of court proceedings when their orders are ignored. Zakia married Zafar against her father's wishes who then filed kidnapping charge against Zafar. The Multan bench of the Lahore High Court stated that they could live as married couple and asked them to contact the police in relation with the abduction charge. Despite obtaining pre-arrest bail, they were arrested and held in police custody for over a month till they succeeded in informing the SP in Khanewal who ordered their release and suspended the sub-inspector of police who had ignored the court orders. No criminal charges for arbitrary arrest and detention nor contempt of court proceedings were brought against the police officer.

Apart from specific judgments, judicial indifference to gender issues is also apparent in the way courts habitually fail to exhaust relief for women such as release on bail, parole and probation, despite the overcrowding of prisons. Women do not ordinarily have independent means to provide surety, nor do they often have a relative who will stand surety for them 'to the satisfaction of the court' as the law prescribes. The scarcity of women prisons also contributes to the problems women face in obtaining bail in surety, as it should be provided by a person living within the jurisdiction of the trial court but women detainees may be transferred to women jails far away from places of residence.

Parts of the judiciary appear convinced that any interference in the patriarchal structure of society will disrupt society and that it is its duty to guard against such an upheaval. However, this attitude ignores that the existing structure of society perpetuates discrimination on gender grounds, which deprives one half of the population of basic rights. This points to an important issue of self-perception of judges.

By reflecting and upholding traditional conceptions of rights, the judiciary in Pakistan is forsaking an important role which the judiciary in other parts of South Asia has adopted where it is leading the way of reform and progress in the area of personal liberty. Courts can either choose to reflect existing and broadly accepted norms of society or they can use the law as an instrument of change.

Solution

Solution lies in the state realizing its duty to defend the most fundamental right to life and freedom from torture and ill treatment. It should ensure the full protection of these rights, where necessary moderating tradition through education and law. Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudices are incompatible with the dignity and worth of the human person and must be eliminated.

Dr. Faqir Hussain, Secretary of the Pakistan Law Commission, said at a seminar in Islamabad in October 2000 that the Hudood Ordinances had been enacted as a 'political ploy' and not in fulfillment of a genuine mission aimed at enforcement of Islamic law. They had been passed but, before hand, no debate took place, no discussions or deliberations were held, and no analyses of pros and cons were made. He added that the draft of the law had been defective in text, its application was a cause of concern and its implications were severe enough to warrant a prolonged clamour for review. It had the potential for being abused by the investigating and prosecuting agencies and in its present form discriminates on the basis of gender, age, faith and is

violative of fundamental rights and norms of international human rights law.

Ratification of CEDAW was accompanied by minimum publicity for fear of an adverse reaction from certain obscurantist elements in the country. Another fear was that it would bind the government to take measures to eliminate many of the laws or discriminatory aspects in laws which had been introduced in the garb of Islamic laws, a sensitive and controversial area that most governments are extremely reluctant to touch however much they might deplore them. As a result most members of the government, including the judiciary, are unaware of the substance of the CEDAW or the strategies or the measures discussed therein.

Human rights education and gender education have to be broad-based: if women are to be empowered, men have to be alerted to possible changes and the need to rethink roles and identities. There is a need for sustained and repeated gender sensitization programs and a continued dialogue between key institutions and personnel and women's groups to effect lasting education on gender issues and the integration of an awareness of gender issues in all areas of planning and policy making.

Gender sensitization has to be done proactively so that society as a whole condemns violence against women. The judiciary, police, bureaucracy and media are the key institutions where this process must be initiated to bring about an attitudinal change in society.