



Sociology & Cultural Research Review (SCRR)

Available Online: <https://scrrjournal.com>

Print ISSN: 3007-3103 Online ISSN: 3007-3111

Platform & Workflow by: [Open Journal Systems](#)



Barriers to Women's Access to Justice and the Mediating Role of Senior Advocates and Female Judges in the Superior Judiciary

Komal Khan

M. Phil Political Science

Komalkhan9420@gmail.com

Dr. Abida Hassan

Assistant Professor, (Law), Dr. Muhammad Iqbal Law School, Government College University, Lahore.

dr.abidahassan@gcu.edu.pk

ABSTRACT

Access to justice has been narrowly understood as access to lawyers and courts, and broadly as an equal right to access to all institutions where debate, development, discovery, organization, administration, interpretation and application of the law take place. The issues that stand in way of women's access to justice are explored in this article and how these issues can be overcome by the increased number of senior women advocates and female judges in superior judiciary. It first clarifies competing definitions of "legal needs" and "access to justice" and comes to conclusion that people do not have a need for legal services per se, but for the outcomes they achieve through legal services: remedy, reconciliation, or fairness and closure. It then outlines a typology of the financial, information, procedural, cultural, geographical and institutional barriers to access and discusses the specific and reinforcing barriers to access for women: the lack of information and legal literacy, widespread gender stereotyping by police and courts, discriminatory practices of customary and informal justice systems and financial dependence, which creates a significant imbalance of power. The article, based on the deliberations of the Committee on the Elimination of Discrimination against Women and its General Recommendation, as well as socio-legal literature, proposes that, although greater participation of women as advocates and judges is necessary (but not sufficient) to remove these barriers, especially in decision-making roles. It shows that a comprehensive approach of representation, gender-sensitive training, procedural changes and structural assistance is the most convincing way to move from recognition of discrimination to its eradication.

Keywords: Access To Justice, Women's Rights, Gender Stereotyping, Female Judges, Legal Aid

1. Introduction:

Women have a pivotal role in the development of a country, not only because of their capacity to nurture and educate children, but also because future of a country lies in them. Justice is one of basic pillars of any society and shall be expected from the government, both men and women, old and young, and if it is not there, concept of a civilized social order is under threat. The old saying "an educated mother makes for an educated nation" reflects the broader fact that the role of women in society, including their role in the legal system, affects the future of the community as a whole (United Nations Women, 2011).

But equal justice is still not achieved, as many women still find it unattained. Access to justice is not guaranteed simply because rights are declared or because courts exist it requires that women can in practice exercise those rights and access those courts and that they can get meaningful remedies. The focus of this article is the difference between the right to enjoy and the right to be entitled. Women face a combination of barriers: financial, informational, procedural, cultural and institutional, which work together to exclude them from the effective

protection of the law, both in general and particularly in developing and post-colonial legal systems (Committee on the Elimination of Discrimination against Women [CEDAW Committee], 2015).

The article has two related goals. The first is analytical, aiming to reduce the meaning of 'access to justice' and 'legal needs' and to draw a picture of the obstacles to access for women in particular. The second is reformative, to consider the part played by senior women advocates and female judges in the superior judiciary as a mediating force to break down those barriers. The discussion is taken from the conceptual foundations, a general taxonomy of barriers, to a more focused examination of barriers specific to women and then to the issue of representation and reform. It draws on the deliberations of the CEDAW Committee, on the CEDAW Committee's General Recommendation No. 33 on women's access to justice and on other socio-legal literature.

2. Conceiving Access to Justice and Legal Needs:

Access to justice and legal needs are not easily defined. They are often interchangeably used and sometimes without a clear explanation of their meaning in socio-legal research (Law and Justice Foundation of New South Wales, 2003). Yet, there is a compelling reason to consider "legal needs" to be the narrower concept. On this view, legal needs are limited, and relate to actions that can be taken within a particular legal system to access, or enforce existing, legal rights, whereas access to justice relates to aspiration for a legal system, or justice system, that may or may not be able to be accessed in the way that is desired. In practice, these two ideas are often intertwined, especially with regard to their functions. People do not need legal services in and of themselves; what they need are the ends that legal services can bring about. This outcome can be formal (such as a specific legal remedy) or personal (such as a reconciliation with the other party) or as simple as fairness or closure after conflict (Law and Justice Foundation of New South Wales, 2003). This functional understanding is important for the analysis that follows, because it shifts the discussion from the question of whether women can get to a court to whether they can get the substantive results that justice is supposed to produce.

Access to justice, in a more comprehensive sense as an equal right to access to every institution where the law is debated, created, found, organised, administered, interpreted and applied, is particularly important for women. It focuses not just on the courtroom door, but on the composition of the institutions of law: legislature, bar, bench, and agencies of enforcement. Broadly speaking, therefore, a system of law in which women are underrepresented among advocates and judges cannot be regarded as providing access to justice for women (Cappelletti & Garth, 1978). This observation foreshadows the later argument in the article regarding the role of women as mediators in the profession and on the bench. The contemporary access-to-justice movement, described by Cappelletti and Garth (1978) as a series of "waves": (1) legal assistance for the poor, (2) representation of diffuse and collective interests, and (3) broader interest in the design of procedures, institutions, and personnel aimed at the effective realization of rights. There are consequences for women with each wave. Legal aid removes the financial obstacle that disproportionately impacts economically dependent women; the second wave, a collective representation, challenges the system of discrimination; the third, institutional, wave carries the potential of questioning who is part of the justice system and how their processes affect women. This multi-layered knowledge is reflected in the taxonomy of barriers developed below.

3. A Summary of Collection of Data on Barriers to Access to Justice:

It is helpful first to identify the broad barriers which stand in the way of access to justice for any disadvantaged litigant, because women's problems in many cases are exacerbated versions of these general problems. The barriers can be categorised, for analysis purposes, as financial, informational, procedural, institutional and cultural, and geographical and physical barriers (although these barriers overlap and reinforce each other; Salyzyn, 2016; Law and Justice Foundation of New South Wales, 2003).

3.1 Financial Barriers:

Financial barriers are the most apparent barriers. These fees are directly connected to litigation (e.g., fees charged by the courts to file and copy files), charges for third parties (e.g., court reporters, expert witnesses) or fees for the service of process. In addition to these, there is the cost of legal proceedings and most importantly the uncertainty of legal costs – which may be so high that prospective litigants do not see the point in embarking on a litigation journey if they are not sure what the eventual outcome of the legal process will be. Finding these lawyers, or those who will agree to a limited-scope retainer or an alternative payment method, exacerbates the issue, as does the growing of law-school debt's effect on reducing the availability of affordable legal representation (Salyzyn, 2016) and the lack of interest of new lawyers in taking on public service or social justice roles.

3.2. Barriers to information and communication (3.2)

A second cluster is related to information and communication. Legal information is often unavailable, due to language and literacy or the medium in which it is conveyed. If the language spoken, read and understood by the person who has a legal problem is not the language that information and services are provided, a communication barrier exists that can be critical. Lack of clarity in completing documents or processes and pervasive misunderstandings about the legal system and what is actually achievable, further confuse those trying to get assistance. Inappropriate referrals can be made by intermediary helpers who don't have a sound knowledge of legal issues, and an overabundance of referrals may be demoralizing, make the individual feel defeated or lose interest before any real action is taken.

The presence of procedural and institutional barriers, including: Problems with procedures and institutions such as third type of barriers are procedural and institutional. The hours of lawyers, courts and government services may not be available for employment, and complex processes are often required for simple tasks. Some service providers have a gatekeeper mentality, thinking they are there to block access, impeding the very people they are there for. But conflict-of-interest rules that bar even the most summary advice when a conflict exists, and a risk-averse professional culture that can result in a situation where protecting oneself takes precedence over the public interest constrict the opportunities for assistance. Overburdened legal systems, under-resourced in staff, technology, and facilities, and courts less responsive to technological changes that might improve access to the justice system make it harder, as does an overreliance on the non-profit sector and the pro bono work of professional volunteers to fill the gaps. A culture of legal education also contributes: tuition levels and institutional cultures that foster homogeneity instead of racial, ethnic, and socioeconomic diversity contribute to a profession that is less representative of, and less responsive to, its communities.

The geographical, physical and motivational barriers are considered here. Geographical, Physical and Motivational Barriers is taken up here.

The last group is related to geography, physical access and motivation. Support services and/or needed legal services may not be provided where they are needed; too few lawyers

may be available in remote or rural areas; and even those available may be conflicted and/or ineligible to provide needed services. Services may be physically inaccessible owing to an individual's mobility, disability, or health. Negative experiences with lawyers in the past or present can erode trust, and a lack of motivation to implement or, worse, lose motivation during the process can make it impossible for a person to make a plan and follow through with the actions required to make it happen. While these barriers are general in nature, they are often particularly heavy on women because of their financial dependence, caring responsibilities and social status, which can often amplify their impact (CEDAW Committee, 2015).

4. Barriers Specific to Woman's Access to Justice:

Structural inequalities and pressure from deep-rooted stereotypes limit women's access to justice. The lack of access to justice for women deters women from reporting and suing or prosecuting violations of their rights and is a key human-rights issue (CEDAW Committee, 2015). The issue was clearly brought to the fore by the general discussion convened by the Committee on the Elimination of Discrimination against Women, which attracted a full and engaged attendance of experts, States parties and civil-society actors, and was aimed at capturing ideas and recommendations for the development of a General Recommendation on women's access to justice (Women's International League for Peace and Freedom [WILPF], 2013). That led to the adoption of General Recommendation No. 33 which sets out the authoritative international approach to understanding and tackling the obstacles considered in this report (CEDAW Committee, 2015).

4.1. Insufficient resources to access information and legal advice

A large number of women have no knowledge of the processes available and the different ways they may obtain justice. Women's right to education is less than men's and they are less likely to read and understand complex legal language in many countries in the world, and their awareness of their rights is also limited. This lack of information means that women are effectively missing from the judicial processes and are unable to seek remedies and reparations for their own or to defend them (WILPF, 2013). It is especially hard for migrants to access information, and, where they do not speak the national language, cultural and linguistic barriers are a factor. Informational exclusion is therefore not an incidental restriction but a central way by which women are denied the protection of the law and it is a factor that affects each of the other barriers discussed here.

4.2 Gender Stereotyping and Dysfunctional System:

Gender stereotyping and a dysfunctional system are also connections that need to be made. Police officers often receive an inadequate amount of information and guidelines regarding women's human rights violations. (ICJ) They may therefore not know how to respond to violence against women, as they do not always understand what is considered a violation and there is an accompanying and crucial need to address this lack of education and information amongst the police (WILPF, 2013). This lack of information is not the only issue; there is also the problem of gender stereotyping. Often women face negative stereotypes, particularly when they try to report incidents to the police. The issue of women's willingness to pursue gender-based violence like marital rape is more a matter of them being discouraged from doing so, because of the belief that this is a personal matter to be handled within the family and not through the court.

Police officials, judges, and others often question the credibility of women as victims and witnesses, often rebuke women for what they wear or do that may be interpreted as "provocative. That scepticism of the judiciary and investigative, based on stereotype, not

evidence, undermines the fairness of proceedings from the start. Wrongful criminalisation of behaviour also has been highlighted, as on one hand abortion, sex work, behaviours associated with women are criminalised in many jurisdictions, while on the other the following behaviours they are not always recognised as violations and so may go unpunished: marital rape, forced marriage, honour killing. (WILPF, 2013).

Asymmetry is extreme: women are more likely to be caught as offenders than to be protected as victims.

These stereotypes are exactly why more women are needed to be involved within the judicial system as judges, as lawyers, and most importantly in decision-making roles in the police and the justice sector, working alongside other experts from the United Nations, State representatives and non-governmental organizations. This is considered to be a first step towards overcoming the stereotypes that affect the treatment of women, but should be accompanied by systematic training in gender equality (WILPF, 2013). Procedures that are more protective of women's rights and more respectful to women's rights are another aspect of the solution an example provided by the representatives of Australia and Brazil are specialized police units established in their countries to address family and women's issues. The measures below are anticipations of the central argument of the article the mediating role of women in the profession and on the bench.

4.3. Inadequate Awareness of Women's Rights in Customary Systems:

It is often easier for women and especially for indigenous and rural women to reach traditional and informal systems of justice than to reach the formal courts. However, majority of such systems are very discriminatory and work against the rights of women. Informal justice is present in many countries where it still plays a dominant role and has to be taken into consideration in order to avoid customary principles in conflict with CEDAW Convention or principle of equality (WILPF, 2013; CEDAW Committee, 2015). One positive suggestion made by *Avocats Sans Frontières* is to integrate customary justice actors into the formal justice system in order to promote collaboration between the two justice systems and not only to allow women to access justice, but also to end discrimination against women. Thus, the proximity and familiarity of customary forums is a double-edged sword: it is a good thing to be close to a forum and to be familiar with it, but not if the forum itself reinforces the inequality that the law seeks to eradicate.

4.4. Financial and Economic Barriers, and the Inequality of Arms

Access to justice has several associated expenses, which many of the poorest cannot afford, and which disproportionately impact women living in poverty. There are numerous such women who are reliant on their husband for their livelihood and cannot pursue them if they violate. For women living in poverty, justice is an extraordinarily costly good not only in criminal cases, but also in civil cases; in the latter, free legal assistance is not always available, as observed by the United Nations Special Rapporteur on extreme poverty and human rights (Sepúlveda Carmona, 2013). The financial cost of participation is exacerbated by the practical costs of participating, such as risk of losing employment where employers will not give leave to attend tribunal sessions, and many cannot rely on others for childcare during proceedings. All these challenges come to a head in the form of a severe imbalance of arms. For instance, in cases of divorce, a man could be able to afford a competent lawyer, while a financially dependent wife is not, thus creating a significant unequal balance in the trial as well as in access to justice in general (WILPF, 2013). The result is that not only is a woman's rights violated in the original crime or wrong, but in the legal proceedings that should redress her. Women's access to justice is thus both obvious and urgent and a call to action, from

recognition to action, is needed. To this end, there has been a call from many experts and civil society endeavour to adopt a holistic and comprehensive approach and address the issue of discrimination against women, not just with regard to access to justice but in the daily lived experience of women – which is what the CEDAW process and its General Recommendation aimed to promote (CEDAW Committee, 2015; WILPF, 2013).

Senior Advocates and Female Judges are seen as having a mediating role.

Barriers discussed above are not inviolable. One of the most promising ways of reducing them is the greater representation of women in the legal profession and judiciary, especially at the most senior levels where the influence on the culture of the institutions and precedent is highest. The bar and the bench are themselves an aspect of access to justice, not only as a matter of professional equity (Cappelletti & Garth, 1978), because of the participatory notion of access to justice introduced above. This part of the book explores what senior advocates and female judges can do to address the obstacles women face, while recognizing the limitations of the representational approach.

5.1. Role of Senior Advocates as Mediators of Access:

Senior advocates are in a unique role in the justice system. They have a power to influence and mold individual case outcomes and the culture of the bar through their status before the courts, their knowledge of procedure, and their influence in professional bodies. Senior advocates can work on several of the barriers identified above when they take up the causes of women litigants, whether by pro bono representation or by mentoring young women lawyers, or by leading in bar associations. Skilled representation helps reduce imbalance of power that exists between less well-off and more well-off, as it can break down procedure into something easily understood, thus helping to ease informational disadvantage; and the fact that experienced advocates are present in gender-related litigation gives it credibility, even if stereotype would deny it. The fact that there are women with high rank among advocates adds more meaning. Women clients may be able to discuss matters with a woman counsel without fear, and may find in a woman counsel an advocate less prone to perpetuate stereotypes of larger system, especially when seeking counsel on issues related to gender-based violence or family breakdown. Senior women advocates are also role models and mentors for women joining and staying in the profession, which in most jurisdictions remains constricted by financial, cultural and institutional pressures discussed above. This elevation has been part of, and it has also helped to improve, the access to justice for women overall.

5.2 Women Judges in the Superior Judiciary:

Women's access to justice is mediated by women's on the bench and particularly in the superior judiciary in several ways. The first is symbolic but real: the inclusion of women in highest ranks of judiciary shows that the justice system is for women, as well as for men – and helps to change the perception of the court as a male environment to one that is open to women litigants who might not otherwise dare to seek justice (United Nations Women, 2011). The second channel is related to the adjudication process. It would be a mistake to assume that as a group, women judges make different decisions from men judges, but a diverse bench has more experience interpreting the law and assessing evidence, and, as a group, is less prone to stereotyping women as victims and witnesses. The verisimilitude of an accusing woman is much more difficult to challenge by dress or behavior before a bench which does not share the assumptions that lead to such challenges. The third channel is institutional. Women judges in superior judiciary are part of creation of precedent, setting of procedure, and court leadership and can therefore ensure gender-sensitive standards are woven into legal fabric. Judgments that find marital rape an offence, that question functioning of

customary fora on basis of guarantee of equality or that require access to legal aid for civil cases as well as for criminal cases have impacts beyond parties in court. The superior judiciary, with its supervisory and constitutional powers, can call lower courts and organs of enforcement into account for the stereotyping and neglect referred to above; and female judges are often at the forefront in this regard (CEDAW Committee, 2015). These considerations are expressly referred to in General Recommendation No. 33, which calls on States parties to ensure that women are represented in judiciary and in the justice sector, to train judicial officers on gender equality and on Convention, to actively identify and eradicate stereotyping in judicial reasoning (CEDAW Committee, 2015). The recommendation therefore does not just provide for representation for the women on the bench as an optional goal, but as a part of the State's responsibility to ensure justice.

5.3. The Limits of Representation:

Representation is required, but not a guarantee. Adding women to the bench and to the bar will not, in itself overcome financial, informational and structural barriers. A woman judge can provide legal representation to the poor, if it is covered by the budget, and a senior woman advocate can reach the poor litigant who does not know there is a remedy, if the budget makes it possible. Furthermore, women judges and advocates are themselves part of legal cultures that are defined by stereotypes, and may to an extent perpetuate very beliefs that they are intended to challenge, in absence of gender-sensitivity trainings. Representation, however, needs to be part of a broader reform agenda—of legal aid, of proceduralism, of gender training, of management of customary forums—to make it fulfil its mediating function. It is a lever, not a panacea, (Salyzyn, 2016; CEDAW Committee, 2015).

This strategy aims to bring about a more holistic approach. All above indicate a holistic approach to addressing women access to justice. It would involve two aspects of that: (1) increasing the number of women in representation and as judges, and deliberate (2) attention to the senior ranks within institutions where power is more concentrated. It would do this, secondly, by requiring and continuing education on gender equality among judges, lawyers and police, placing competence on par with representation which would raise the likelihood that competence would be reinforced by awareness. The third is to provide free or affordable legal assistance in civil proceedings as well as criminal proceedings, and the practical assistance, such as flexibility in scheduling, childcare, protection of employment, that would otherwise make formal availability of a remedy unattainable for far more women (Sepúlveda Carmona, 2013). Fourth, the strategy would directly tackle the informational barrier by providing legal information in accessible languages and formats as well as through community-based legal intermediaries who are able to direct women to the appropriate remedies. Fifth, it would tap into the customary and informal forums that many women go to, as opposed to ignoring them, and involve them in cooperative working relations with formal system while holding them accountable for equality as defined in Convention (WILPF, 2013). Sixth, it would introduce dedicated units and procedures (including the special police units already set up by several States to receive and respond to women's complaints without stereotyping) to address women's complaints. They all support each other and no one is complete without the others.

7. Conclusion:

Access to justice, viewed in its broadest terms, is the right to have access to all institutions in which law is created and put into effect. For women, that right is still blocked by a thicket of obstacles financial, informational, procedural, cultural and institutional, which interact and complement each other. Women are faced with lack of information, lack of legal literacy and

widespread stereotyping among the police and courts, discriminatory customary forums and unequal financial dependency creating a significant imbalance of arms. These are not individual failings, but symptoms of a system that, far too often, seems to be easier to get at when women are criminals than when they are victims. This is a real, albeit partial, way of balancing these obstacles through the involvement of women as senior advocates, and as judges of superior judiciary. Senior advocates can help de-escalate imbalance of power, help translate procedure, lend legitimacy to women's claims; female judges can help resist stereotype in adjudication, can incorporate gender sensitive standards into precedent and procedure, and have constitutional authority to oversee the lower courts and enforcement agencies through authority of superior courts. General Recommendation No. 33 properly considers such representation to be part of State's duty to ensure access to justice and not solely professional equity. Representation is a lever, and not a cure. It has to be integrated into an overall policy of developing women in profession and on bench, gender-sensitivity trainings, easy availability of legal aid, procedural changes, regulation of customary forums, and practical supports that enable formal rights to be implemented in practice. What is now required is to go from 'acknowledging' discrimination to 'ending' discrimination — to turn resolve to achieve access to justice for women into actions to achieve it. Only then will the plight of equal justice forthrightly proclaimed in principle become a reality for women in their daily lives.

References

- Cappelletti, M., & Garth, B. (1978). Access to justice: The newest wave in the worldwide movement to make rights effective. *Buffalo Law Review*, 27(2), 181–292.
- Committee on the Elimination of Discrimination against Women. (2015). General recommendation No. 33 on women's access to justice (CEDAW/C/GC/33). United Nations.
- Law and Justice Foundation of New South Wales. (2003). Access to justice and legal needs: A project to identify legal needs, pathways and barriers for disadvantaged people in NSW. Law and Justice Foundation of New South Wales.
- Salyzyn, A. (2016, March 23). Making a list: Barriers to access to justice. *Slaw*. <http://www.slaw.ca/2016/03/23/making-a-list-barriers-to-access-to-justice/>
- Sepúlveda Carmona, M. (2013). Report of the Special Rapporteur on extreme poverty and human rights: Access to justice for people living in poverty (A/67/278). United Nations General Assembly.
- United Nations Women. (2011). Progress of the world's women 2011–2012: In pursuit of justice. UN Women.
- Women's International League for Peace and Freedom. (2013). CEDAW general discussion on women and access to justice. <http://wilpf.org/cedaw-general-discussion-on-women-and-access-to-justice/>
- Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13.
- Universal Declaration of Human Rights 1948, UNGA Res. 217 A (III).
- International Covenant on Civil and Political Rights 1966, 999 UNTS 171.