Journal of Law & Social Research (JLSR)
Vol. 1, No. 1 (2009-2010) pp. 1-25

Journal of Law and Social Research

Volume 1, Number 1, 2009- 2010

A Research Journal Anchored

by

Gillani Law College,
Bahauddin Zakariya University, Multan, Pakistan.

Journal of Law and Social Research

A Research Journal Anchored
by
Gillani Law College, Bahauddin Zakariya University, Multan, Pakistan.

Volume 1, Number1, 2009- 2010

Journal of Law and Social Research

A Research Journal Anchored by

Gillani Law College, Bahauddin Zakariya University, Multan

Volume 1 **Number 1** **2009-2010**

Contents

'*Urf*' And Custom In Common Law And Islamic Law: Common Law Marriage, *Zawag Orfi* And *Zawaj Misyar*

Muhammad Khalid Masud[1]

Islamic legal tradition is discursive; it developed through discourses at two levels, one between jurists and society, and the other between jurists and state. The part played by differences of opinion (*Ikhtilaf*) and juristic reasoning (*Ijtihad*) cannot be overstressed. It provided strong basis for legal pluralism and accommodation of social practices, especially in the area of marriage and divorce. State efforts to centralize law did not meet the approval of the jurists. Since state had no direct role in the development of *fiqh*, the systematization of *Fiqh* and Law Schools was achieved through consensus. Looking back at the history of Islamic law, we find that local practices in various cities like Medina and Kufa generated diverse legal doctrines and gradually produced more than nineteen schools of law (*madhhab*); about seven are still in practice today. The distinct mark of the development of *fiqh* in this period is the diversity of views among the jurists on almost each and every doctrine. This diversity was welcomed by Islamic legal theory as a valid manifestation of *Ijtihad*. It is typically usual in the *Fiqh* texts to mention more than one view on almost every point. This is evident even in *Fiqh* texts like *Fatawa Alamgiri*, which were designed as a guide book for the qadis. Instead of giving just one doctrine of law, these texts refer to different opinions. It looks strange, but the underlying concept seems to be that it was not for the jurist, to choose between these varying opinions.

It was the discretion of a Mufti or a Qadi to select one of these opinions when he or she was dealing with a specific case. Some jurists assigned this role also to Imam (or state), but majority of the jurists allowed this prerogative to Imam only through the qadis. In fact, the early jurists when resisting official adoption of one school text as normative law explained that such a move would undermine the difference of opinion.

It is generally in the domain of marriage and divorce that social practices vary and often pose challenge to the legal system. In this essay I want to take up recent examples of common law marriages in the Western countries and *Zawag Orfi* and *Zawaj Misyar* in Muslim countries and show how these marriage practices came to be recognized by law. An analysis of these specific examples requires a detailed overview of the jurisprudential aspect of normativity in common law and Islamic law. The question is: how custom and *Urf* are accommodated? Is it an issue of legal pluralism or religion, ethics and norms?

1. Jurisprudence

1.1. Common Law and Jurisprudence

Jurisprudence as a subject in the teaching of law in the Western Universities began only in 1656. Still, teaching of jurisprudence in the law faculties remained usually marginalized. It is only recently that the jurisprudence gained significance. In English speaking countries, jurisprudence is still, however, synonymous with philosophy of law.

---

[1] Former Chairman, Council of Islamic Ideology Islamabad, Pakistan; Director, International Institute for the Study of Islam in the Modern World, Leiden University, Netherlands

It largely remains focused on political philosophy, logic and epistemology. In fact, it is since the social theory, especially anthropology, began exploring the domain of law that the jurists have come to realize the complexity of the normative aspects of law and have begun to pay attention to the relations between legal and social practice.

With the dominance of political philosophy and positivism, the jurists viewed law necessarily as a political institution and believed that it cannot exist without a state. Sanction, courts and codes came to be known as the hall marks of law. These were the anthropologists who explored law and order in societies without a state and found that law has a much wider sense than a state law. The contribution of the social scientists, particularly in exploring the aspect of normativity in legal order has clarified the idea of legal pluralism and the significance of studying legal practice in Muslim societies (Dupret 2002). As I understand, the social sciences help us to shift the emphasis from abstract to concrete. Law is not only a body of rules but also a social institution that regulates a society.

1.2. Islamic Law and Jurisprudence

Malik b. Anas, (d. 796), the founder of the Maliki school in Medina opposed Caliph Mansur's (d. 775) move to adopt Malik's compilation *al-Muwatta'* as state law, because it would undermine the other views (Ibn Sa'd 1983, 440). Malik did not like to privilege one school over the others, because they were also equally valid.

The doctrine of *taqlid* (adherence to one of the Schools of law among the Sunnis and to follow one expert in Islamic law among the Shi'a), although apparently an attempt to restrict *Ijtihad* and diversity, had significant influence on the development of Islamic law. Qadis from different schools of law were appointed and Muslim judicial systems continuously recognized the legitimacy of these schools as diverse sub-systems of Islamic law. The people had a choice to go to the court of their choice. *Fiqh* also recognized parallel existence of state enactments in several areas like criminal, fiscal, and administrative laws, though extraneous or supplemental to *Shari'a.* This sense of pluralism that we have described above is supported by Islamic legal theory, *Usul al-Fiqh*.

1.2.1. *Usul al-Fiqh*

Although in Islamic legal education *Usul al-Fiqh* enjoyed the status of the "queen of sciences", but often in conjunction with theology. Gradually, however, *Usul al-Fiqh* came to be known more as a science of the sources of Islamic law than that of legal method, and thus gained more focus on theological aspects. While *Usul al-Fiqh* could make valuable contributions to the contemporary jurisprudence in the domain of textual analysis, legal reasoning and cultural implications of legal concepts, it has been reduced to a science of sources and justification. It does not interact with current legal thinking and practice, not to speak of playing a leading role. Let me now turn to an analysis of the term 'normativity' and the related ideas in *Usul al-Fiqh*.

2. Normativity

2.1. Western Legal Thought

Generally, the term 'norms' is used to mean accepted conventional ways of accomplishing a task. The semantic field of this term denotes a 'standard' that is binding,

authoritative, and regulatory. The usage of the term is, nevertheless, ambiguous. On the one hand it is a statement of justification; e.g., 'P is normative' means that it conforms to a norm, a standard. On the other hand, it is a statement of obligation; 'P is normative' means that it is obligatory. The ambiguity is created by a missing step between these two statements: Why is P obligatory? It is obligatory because one has agreed that if P conforms to the norm one shall abide by it. This agreement is a pre-condition, but it is a missing step in the argument. Norm is, thus, ultimately a social construction and implies a social agreement. Normativity is the reason and understanding that informs this social agreement.

Obedience to a sovereign command could be explained by the fear that the sovereign could punish for disobedience. But this fear alone does not make it normative; there must be some social understanding that justifies that fear. For example, some Muslim theologian jurists, lawful need not be justified as just and reasonable, it was sufficient to say that it was a divine command. For others, *Shari'a* was not a command without any purpose. It was not designed merely to test obedience to God, but it was rather for the welfare of mankind.

As recent social theories have demonstrated, law is one of the various normative orders, which regulate the daily life of an individual in a society. Normativity of law is thus informed by several normative orders. There are at least two types of norms: legal norms and social norms. Both are connected with each other but operate on different levels and different ways. However, they must support each other, if there is a conflict between them the system collapses. Recent discussions on Normativity in the fields of ethics, law and social theory have revisited this question in a modern context.

2.1. 1. *Ethics*

Christine M. Korsgaard opens her analysis of normativity with an interesting remark: "It is striking about humans that they have 'values'" (Korsgaard 1996, 1). She explains that these values have a normative sense because they not only describe what is good but also make claims on us. If an action is right, we ought to do it. However, why is this claim normative? She observes, "[T] he issue of how normativity can be established has seldom been directly or separately addressed as a topic in its own right" (Korsgaard 1996, 10). The question was generally explored as reason or philosophy behind laws, and usually traced to God or Nature. According to her, Hugo Grotius is often identified as the first modern moral philosopher because he asserted that human beings would have obligations even if God did not exist to give us laws (Korsgaard 1996, 21). This observation implies that modern thinking seeks a human internal and rational source of normativity rather than from outside, e.g. divine or nature. However, the positivist legal philosophy continued to look for sources of normativity in sovereign authority, and replaced God and Nature by State.

Korsgaard finds four main approaches in philosophy and ethics to the questions about sources of normativity in modern ethical thinking: Voluntarism, Realism, Reflexive Endorsement, and Appeal to Autonomy. Voluntarism explains obedience in terms of will of an authority whose command must be obeyed. Hobbes and Pufendorf, for instance, argued that it takes God or God like sovereign to impose moral obligation, because human actions are by themselves morally indifferent (Korsgaard 1996, p. 21). Nature, as

claimed by some philosophers to be the source of normativity, is indifferent and mechanical. It does not assign moral values to acts.

The problem with this theory is that it distinguishes also between law and morality. It does not regard obedience, which is based on moral values. Obedience to sovereign is prompted by sanctions. The difficulty lies in the fact that obedience, unless internalized, is not voluntary.

The second approach to the question is Realism. Samuel Clarke, Richard Price, G. E. Moore, E. D. Ross, and Thomas Nagel, the main proponents of this approach argue that moral values are real; they do not depend on external authority to define their goodness or obligation. These values exist in these actions themselves. Human beings act in a certain way because they are confident that it is right. They obey an authority because they are certain about its legitimacy. Korsgaard finds that this approach also cannot answer the normative question (Korsgaard 1996, p. 48). Not every human being feels obliged to obey laws per se. This obedience evolves through a certain process of reflection.

The third approach, Reflexive Endorsement, claims that human nature is essentially moral. It looks at actions in terms of good, bad, right, and wrong. Francis Hutcheson, David Hume, John Stuart Mills, and Bernard Williams approach the problem of normativity in this manner. Korsgaard explains, "[N] ormativity is a problem for human beings because of our reflective nature" (Korsgaard 1996, p. 49). The reflexive approach differs from the Realism approach in the sense that while Realism is concerned with the substantive aspect of normativity, the reflexive approach distinguishes between substantive moral values and human moral disposition. Human disposition could be natural or cultivated by social life and pragmatism (Korsgaard 1996, 78).

The fourth approach, The Appeal to Autonomy, looks at normativity, as an active process of human will, rather than as a mechanical or passive process. According to this approach, which goes back to Kant, philosophers like John Rawls, find the source of normativity is in the agent's own will, or autonomy. The reflective structure of human consciousness makes it possible for human beings to distance from themselves and the actions and to question them. It gives them authority over themselves to make laws to be obeyed (Korsgaard 1996, 130).

Korsgaard's analysis explains how certain acts are considered normative. This theory of normativity explains that certain actions become norms as well as normative due to the autonomy of human mind to reflect and to oblige her. This explanation presupposes essentially a very moral mind. It does not tell us how members of a community come to agree on a set of norms. Firstly, it does not explain normativity in legal and social norms per se. Second, it implies an elitist sense of obligation and normativity. It means that only selected persons would be able to reflect autonomously and to objectively make laws for themselves. A considerable number of people cannot or do not approach the question of obligation in that manner. Does it mean that they must follow the elite or the elite must force them to adopt these norms? The issue of normativity in the context of society and state remains unresolved.

2.1. 2. *Law*

Richard D. Schwartz explores the question of normativity in the context of social organization. First, he distinguishes law from a normative order. He defines norms as "standards of behavior held as shared attitudes by a society or by substantial segments of it", and laws as "standards of behavior explicitly enunciated by specialists charged by the society with responsibility for the enforcement of social control" (Schwartz 1986, 66). Schwartz's distinction, however, arises from his idea of different stages of the evolution of social organization. He describes them both as standards, but not as norms. The differentiation is the product of transition from folk society to a complex society. The folk societies adhere to sets of mores and enjoy a normative consensus. At this stage, no legal system or authority is required. The disputes are resolved at the most by a mediator who only refers to the normative consensus.

Complex societies, which evolve due to social changes that produce normative diversity, require integration of these varying normative orders. The social evolution causes a decline in the normative consensus and generates a need for normative integration. At this complicated level of social organization, legal authority emerges to fulfill this need. It not only integrates these norms, but also enunciates new norms for settling future disputes and for further integration of social norms. These norms, in the form of laws, deal with the existing norms in several different ways: selecting and absorbing some of them, replacing some by formulating new ones, and often just facilitating the formation of norms in the society (Schwartz 1986, 64).

Schwartz explains that the traditional theories of law emphasized either absorption or authority of law in normative integration. For instance, Eugen Ehrlich found that "law fails sufficiently to incorporate the norms of living law" and emphasized their absorption (Schwartz 1986, 67). Austin, on the other hand narrowed the province of law by excluding any reference to nature and morality. Law was the command of the sovereign. The positivist theory defined normativity in terms of sanctions. Schwartz prefers a mutualist approach, saying that law and norms affect each other in this process of integration. He concludes, "When norms and law do not correspond at all, that is, when they reach an extreme of incongruence, law loses its effectiveness as a regulator of behavior and an integrator of the society" (Schwartz 1986, p. 67).

Schwartz has very clearly shown the correlation between norm and law, but he avoids using the term legal norm because he assumes that normative order is a primitive stage in the evolution of society. Law, by implication is not a normative order; legal obligation is different from moral obligation. Modern debate over the question of normativity seems to be concerned with 'value' and 'power'. I would like to look at norm simply as a standard in a very basic sense. If it is accepted as a standard, this acceptance makes it normative. Social norms are socially constructed standards but they become acceptable through a social process of consensus that provides them normativity. Similarly law also constructs its norms or standards by which laws, rules and regulations are measured. A law or rule is legal if it conforms to that standard. In this sense legal norms may differ from one legal system to the other. We may call this the normativity of justification; a law or a decision is legal, lawful i.e., justified to be so because it is in accordance with the norms. We speak of normativity in legal matters in another sense as well. A law may be justified as a legal norm but it may not be a just law. In this sense we are referring to the close relationship between law and society, or legal and social norms,

or better between legal and social practice. Schwartz speaks about the integration of social norms into law, but to understand this integration we have to accept that law is also a normative order.

2.1. 2. 1. ***Custom in Common Law***

Common law grew out of customs, but gradually the idea of a unified law excluded customs from the domain of law. In England, people were governed by unwritten local customs that varied from community to community. It was in 1066 William the Conqueror imposed institutionalized stability that common law began to evolve. Common customs were assimilated in thirteenth and fourteenth centuries into a state law. The customs that were not common were allowed but their application was restricted as 'special' customs. Blackstone theorized this practice classifying customs into General and Special customs. Only special customs were valid and their recognition was subjected to following conditions: it does not conflict with common law, it must be reasonable, certain and continuous. Its continuous practice must be from immemorial time, for which the year 1189 was fixed as the most ancient. The legal positivist thinking even postulated that only developed societies had laws; the other had customs. It was on this presumption that the Europeans as colonial powers treated the laws of their colonized people as customs, special customs with limited application.

Studies in the origin of custom also began from this presumption. Historians like Henry Maine explored customs, particularly in India and the Middle East, to understand the evolution of law. Although the basic presumption continued, i.e., non-European laws were no more than customs, but the quest that studies of these customs may explain the origin of law, provided important insights about the evolution of law, for instance its growth from status to contract. Historians and anthropologists also offered a better understanding of normativity. For instance, historians of law explained that habit played a central role in primitive communities and habits of the community created norms. Customs grew by the desire of an individual to satisfy public opinion about these norms. Llewellyn and Hoebel, the anthropologists of law observed that norms were created out of the conflict between three elements in a society: group, divergent desires and claims of some members against others in the group. Norms grow to settle this conflict. According to them, norm was a very local phenomenon; there were no universal norms. The implicit distinction between norm and custom refers probably to the development of norms as proto law.

Historians of law made it clear that law is not created from anew; customs are the raw material for law. The anthropologists showed that reverence for code could be traced to reverence for custom. Furthermore, the coercive aspect of law is also traceable to customs. Custom is not always just; it is often supported by force. In fact the main difference between law and custom is that if custom is recognized by a court, or enforced by the state it transforms into law without any problems. In fact, as illustrated by the example of common law marriages, when a custom becomes common it almost gains the capacity to be transformed into law, even though law does not meet the conditions prescribed for the validity of a custom.

2.1. 3. ***Social Theory***

That law is a social and normative order became obvious with anthropological studies of law. In 1930s Malinowski showed that primitive societies were familiar with

the institution of law, although they did not have the institution of state. The basic function of law is social control, and in this sense law did exist in these societies. In 1940, Ehrlich found further evidence of the existence of non-state law. He coined the term living law to distinguish it from state law. To him, law stands for normativity. In 1971, Popsils expounded that law is not restricted to state. Law functions in societies at several legal levels. During1989-1995, Boaventura de Sousa Santos developed the idea of legal levels further. He calls this phenomenon "Inter-legality". He finds that there different legal spaces in a society that are superimposed on each other. He points out that basically there are six clusters of laws that relate to the following six areas: family, labor, commerce, society (social laws), state, international law. This view of law gives due consideration to the practice of law and how it is closely connected with social practices. In1997, Brian Tamanaha explained more clearly that legal norms have foundations in social behavior and practice.

I presented this very sketchy overview of the anthropological studies of law (See for details Dupret 2002), to note that normativity is a social fact and law is closely related with this fact. Further, legal norms arise from legal practice in the same ay as social norms emerge from social practice.

Let me now turn to a thorny question about normativity. Why do certain acts or values become normative? Legal philosophers explained normativity in terms of collective interests and common good. Law regulates individual interests to serve these collective interests. From this perspective, pursuit of self-interests is regarded as selfishness and contrary to the purpose of common good. It presents a paradoxical situation. In order to become common good, a good has first to be perceived as good for an individual. One cannot deny, therefore, self-interest. These theories tried to solve this paradox in terms of moral and ethical obligation; one has to sacrifice personal benefits for the collective good.

Shifting emphasis from social morality to individual interest, modern law stresses right rather than duty or obligation. Modern legal theories assign more active role to the individual and demystify the concept of normativity. Yet, the conflict between individual and collective interest, and common good, seems unresolved. The concept of right necessitates an institution, e.g. state, to enforce rights, otherwise only the mighty will be able to exercise their rights. Dismissing common good as a source of normativity, role of individual in creating norms remains ambiguous.

Habermas's communicative action theory explains how through discourse individuals form interest groups and subgroups. These groups continuously develop agreements among themselves by further discourse. The consensus reached in this way creates norms for law. An example of this social process is custom, but the positivist theories have not been able to view this institution from this perspective. Let me explain this point

2.2. Islamic Legal Thought

Use of the term normative in the discourses on *Shari'a* is even more complex. The issue of normativity arises with reference to the *Shari'a* in two ways in the modern debates on law. First, in contemporary usage, the *Shari'a* is described as a normative set of rules in order to distinguish it from law in the positivist sense. The positivist

distinction between law and morality, the latter being normative, suggests a problematic view of normativity. It implies that the law enforced by the state is not normative. Does it mean that normativity is a social construct and state law is not? Legal positivist fixation on the deconstruction of traditional authority and the separation of law from morality has unnecessarily resulted in the denial of normativity outside the law. The communicative action theory has redressed this weakness by suggesting the role of self-interest in normativity.

It needs no explanation that language plays a very essential role in this process. In the past, a very complex use of language in the *Shari'a* writings limited the discourse among the experts. In modern media, where the Ulama had to communicate with masses this complex language obstructed them to reach a layperson. It is often complained that not to speak of a common person, even a person learned in other sciences finds it difficult to read a *Shari'a* text. Consequently, laypersons were advised to consult jurists even in reading the books that the Ulama wrote for public consumption. In one of his treatises on the issue of judicial divorce, Mawlana Ashraf Ali Thanawi, who is known for his efforts for the promotion of education among Muslim women, advised his readers to not to read the book unaided by an expert and pious Muslim (Masud 1996, 199). The Shari'a writings share this problem with law books in general. It is thus not surprising that in modern times the Muslim writers who gain popularity were either journalists or began writing in journals. The public sphere in modern times has questioned this closed expert approach to law and stressed the need for a more communicative language.

Mass education and new communication media have enhanced the need and role of communicativity. The new media have introduced new voices in the public debate on the *Shari'a*. It is no longer the exclusive domain of the religious scholars (the Ulama or Fuqaha); engineers, medical doctors, lawyers and journalists are also participating in the debates. Second, the debate is no longer confined to mosques, Madrasas and scholarly publications; the *Shari'a* issues are being discussed in the press, on television, in public forums, assemblies and on Internet.

As elaborated above, the normativity of the *Shari'a* is based on idea of the common good. The common good remain very general and abstract unless the interests of the common man measure it. It becomes normative when a society comes to accept it in concrete terms, which are known by an ongoing consensus. Communicative action presupposes the idea of common good, but the details are continuously defined discursively. Their acceptability depends on how a society comes to define *maslaha/masalih*. Accepted practice is in fact the result of discourses that help to construct this practice. Discourse requires the participation of non-experts; otherwise it will be only a convention or a special custom of a group of experts. Communication act is not a sufficient condition but it is necessary to bring about acceptability, as it defines normativity, and explaining how a certain practice is reasonable. Political power can facilitate the construction of a certain group to dominate but they do not become normative unless they demonstrate their communicability. They remain the social construction of a certain group but do not gain acceptability unless other groups also find that construction suitable to their interests. Various other strategies in the form of education and enactment of laws create a favorable environment but a consensus, even if a silent one develops after a negotiation of various interest groups. Public sphere provides a space for forming or influencing public opinion.

In the above discussion we have seen that both liberal (1961), and Islamized (1979-1984) constructions of *Shari'a* were introduced with the help of state power; in fact both by Martial law ordinances. They were challenged by the affected groups in the third sets of contentions and helped to remove the misunderstanding that state legislation creates norms.

In Islamic legal thought, the problem of normativity arose quite early in the tenth century as a question whether the human reason can discover the values of good and bad by itself or they are known only by Divine revelation. Mu'tazila, a rationalist school of Muslim theology, claimed that the values of good and bad in things are known by human reason, and that the revelation is not contrary to human reason because God is just, which means that His laws are just as well as justifiable. The Asha'ira, another school of theology, opposed this view declaring that the knowledge of what is good and bad is based only on revelation (*Shar'*). The jurists explore the question of normativity also with reference to customs and social practices. They recognize the normative value of social practice and custom *Sunna* is the practice of the Prophet Muhammad. A large number of pre-Islamic practices became part of *Sunna* under the category of *Sunna taqriri* (tacit approval), i.e. those practices that the Prophet did not reject explicitly. The jurists also discussed the normativity of Companions' practices (*fi'l al-sahabi*), and of earlier religious traditions (*shara'i' ma qabl al-Islam*) as *Shari'a* norms. Malikis argued in favor of the normativity of the practice ('*amal*) of Medina. Later, when other Muslims from non-Arab cultures joined Muslim community, their customs and practices also came under discussion, hence the place of '*urf* (customs) and '*ada* (practices, habits) was investigated by the jurists. The Hanafi School is particularly known to recognize the normativity of customs. Ibn 'Abidin (1884) wrote a treatise explaining the validity of customs in Islamic law. The Hanafi maxim *al-'Adatu muhakkimatun* (Custom overrides) is very well known.

In *Usul al-Fiqh*, the jurists explored the questions of legal obligation and obedience as issues of normativity in Islamic law. As these discussions are quite relevant to the subject of normativity, let me illustrate it by summarizing the views of Abu Ishaq al-Shatibi (d. 1388) and Shah Waliullah (d. 1762).

2.2. 1. *Abu Ishaq al-Shatibi* (d. 1388)

Abu Ishaq al-Shatibi, who lived in the fourteenth century in Granada, is the most frequently quoted jurist in modern debates on *Shari'a* (Masud 1996, 2000). He refuted the idea that *Shari'a* is to be obeyed only as a command of the Lawgiver. He argued that all laws aimed to protect universally recognized five basic human interests: religion, life, family, property, and reason (Shatibi 1975). He called these interests *maslaha*, which were the objectives (*maqasid)* of *Shari'a.* He defined *maslaha* saying, "I mean by *maslaha* that which concerns the subsistence of human life, human livelihood, and that what emotional and intellectual faculties require of human beings in an absolute sense" (Masud 2000, 151). Shatibi developed a model of Islamic law consisting of three concentric circles.

The innermost circle deals with the essential laws (*daruriyat*) concerning the five basic interests. The second circle (*hajiyat*) covers those laws and practices that are not directly related to the above-mentioned laws but are assimilated into *Shari'a* because of

public needs. The third, outermost circle (*tahsinat*) consists of laws informed by finer elements of the social practices such as modesty, cleanliness and other cultural norms.

Shatibi explains that *maslaha*, or good, does not exist in a pure and absolute form. It is always mixed with discomfort, hardship, or other painful aspects because the world of existence is created from a combination of opposites. Human experience determines what is good and bad in view of that which predominates in a given act. If the good elements are overwhelming, it is called good. Shari'a endorses these criteria and confirms the findings of human reason (Shatibi 1975, 2:307). Shatibi finds that in the absence of Divine revelation (*fatra*), human reason could perceive what was good and bad (Shatibi 1975, 2: 307).

In Shatibi's view, cultural considerations come to play a significant role in normativity. For instance, cultural perspective (*tahsinat*, the third circle mentioned above) requires preventing free mixing of sexes in order to protect family (*daruriyat*, the innermost circle) and hence the social norms of modesty (*satr al-'awra*) are introduced (Shatibi 1975, 2:11-12). Shatibi, however, finds that the Shari'a laws assimilated from customs, when universalized and adopted into the *maqasid* structure, they become norms of *Shari'a*. They cannot change.

Shatibi's examination of the concept of obligation (*taklif*) provides valuable insight into his idea of normativity. Instead of asking why one is obliged, or ought to do things required by law, he examines whether humans are obliged to do things beyond their capacity. The need for this investigation was generated by the conceptions of normativity propounded by philosophers, literalist jurists and the Sufis who insisted on a sense of obligation that denied any role to the human capacity to understand and obey the command. For instance, in Shatibi's days, the Sufis demanded that during prayer, a person was obliged to free his mind from all thoughts other than that of God. Shatibi argued that this was not real obligation. A real obligation is what a common person can undertake and perform without hardship.

Shatibi extended the meaning of impossible obligation beyond the theological notion of *taklif ma la yutaq* (physically impossible) to *ghayr maqdur* (unfeasible) and *mashaqqa* (hardship). He argues that one is not obliged to intend for hardship as the objective of *Shari'a*, as some Sufis do. The standard for measuring hardship and impossibility is derived from '*Ada* (habit), if a certain act is not considered impossible in common practice it is normal, even though it may be hardship for some individuals. Here, Shatibi is not speaking about the cases where it is physically impossible for an individual to carry out a certain obligation (Shatibi 1975, 2:101).

On the other hand, the reality of normativity also recognizes the physical needs. For instance, the expressed objective of marriage is protection of family and reproduction. If a person intends to marry only to satisfy his sexual desire, the marriage should be allowed because it is part of the larger objective to fulfill lawful desires and to remove hardship (Shatibi 1975, 2:101).

Shatibi analyzed the notion of *hukm* as a legal value. Instead of taking the common view of five legal values (*wajib, mandub, mubah, makruh* and *haram*) as a starting point, he clarifies that the starting point is *mubah*, an indifferent legal value. The normative

categories are only *halal* and *haram*, in between is the area of '*afw*. *Mubah* is legally neither obligatory nor forbidden. All acts are in principle legally indifferent. *Shari'a* declared them *Haram* and *Halal* because of the evil (*mafsada*) and good (*maslaha*) for humans. For instance, an act is recommendable (*mandub*) when it is no longer indifferent and is found to be good. The *Shari'a* declares it obligatory when it is dominantly good (Shatibi 1975, 1:137).

2.2. 2. *Shah Waliullah* (d. 1762)

Shah Waliullah opens his work *Hujjatullah al-Baligha* refuting those who compared *Shari'a* with the commands of a master intending only to test his slaves' loyalty and sense of obedience. Like Shatibi, he argued that *Shari'a* laws are not revealed merely to test human obedience to God; they require obedience because they have human welfare as their goal (1879, 1:4). He devoted a chapter to the psychology of obedience entitled "Reasons that motivate the human mind to act" (Waliullah N.D. 1: 27-31). Although, according to him, the most powerful motivation comes from instincts, Shah finds that humans are motivated by several other reasons like experience, accidents, and reflection (*nazar*). He mentions that '*Adat* fashion human mind to perceive ideas and values. Shah distinguishes between religion and laws and explains that religion is based on the principle of unity, while laws are based on the principles of change and diversity (Waliullah 1879, 1:86).

2.2.3. *Maslaha*

Above, while discussing the concept of normativity, I referred to the idea of self-interest as an essential element in the social process of normativity. In Islamic thought debate over self-interest arose in at least two contexts: *hawa* and *huzuz*. I will discuss this point here very briefly, because I have treated it in detail elsewhere (Masud, forthcoming)

In Islamic legal thought, in order to establish the authority of *Hadith* and *Qiyas*, the independent opinions (*ra'y*) were denounced as *hawa* (desire, self-interest or selfishness). Refutation of the use of human reason as *hawa* was quite problematic for legal theory. The Shafi'i and Hanbali schools, which promoted this juridical theology of *Qiyas*, disproved Hanafi principle of *istihsan* that recognized the principle of goodness (*hasan*). Ghazali rejected both *istihsan* and *istislah* as invalid principles of reasoning: "*man istaslaha fa qad shara'a kama ann man istihasana fa qad shara'a*" (Whoever exercised the principle of *istislah*, he in fact invented *shari'a*, as he who exercised *istihsan* invented *shari'a* (Ghazali 1970, 1:315).

As mentioned above, Ghazali criticized the use of *maslaha* as self-indulgence. Shatibi found that an inductive study of the Qur'anic verses led him to conclude that protection of human interests (*maslaha*) is the main objective of *Shari'a*. These interests were interconnected with human natural desires, pleasures and pain. They are built on the instincts and passions, which motivate a person to protect these interests or demand them as rights. Even penal laws, are eventually meant to protect self interests (Masud 2000, 196 ff.). Shatibi found the doctrine of *tark huzuz* (denial of self-interest) contrary to the objectives of *Shari'a*. Since laws are meant to protect the human interests (*maslaha*), he stressed that individual self- interest (*hazz*) are not contrary to *maslaha*. In the pursuit of interests like protection of life, family and property, the personal motives cannot be denied; rather legal obligations cannot be performed without fulfilling them. They may

not be the primary objectives, but they are certainly included as secondary objectives (Masud 2000, 200-201).

2.2. 4. *Custom and Islamic Law*

Shatibi divides the *Shari'a* laws into '*Ibadat* (religious matters) and '*Adat* (other than religious matters). '*Ibadat*, according to him, are the laws that aim to protect religious interests. '*Adat*, which constitute most of the *shari'a* laws consist of laws relating to the protection of life, family, and property. While the benefits of '*Ibadat* laws are beyond human reason to understand, because their goodness cannot be decided by human experience, '*Adat* laws are within the scope of human reason, which discovers good and evil as learned in human experience. He elaborated that *maslaha* or good did not exist in a pure and absolute form; it was always found mixed with discomfort, hardship or other painful aspects because the world of existence is created as a combination of opposites. Human experience determines what is good or bad in view of their predominance in a given matter. If the good elements are overwhelming it is called good. The *Shari'a* endorses these criteria and confirms the findings of human reason (Shatibi 1975, 307).

2.2.4. 1. Custom and Family Laws

As to the Islamic family laws, the jurists never fail to emphasize that customs played a very vital role in these laws. Initially, the Qur'anic injunctions about family laws were largely based on the pre-Islamic Arab practices. In a recent study, Ibrahim Fawzi examines in detail the pre-Islamic norms (*Ahkam*) of family relations, which were assimilated into Islamic family law, even in the Qur'anic revelations. For instances he discusses that Islamic laws on Dower (*mahr*), Child marriage (*sighr)*, social compatibility (*Kafa'a*), guardianship (*Wali*), custody (*hadana*), prohibited relations (*muharramat*), verbal repudiation of marriage contract (*talaq*), *Ila'*, *Khul'* and delegation of the right of divorce (*tafwid*) were generally based on the pre-Islamic Arabian customs (Fawzi 1983, 47ff, 60f, 63, 76, 84, 88 ff).

Shari'a adopts these elements because they reflect reasonability and cultural preferences within a society. Shatibi explains that for instance, while going out without covering one's head is regarded as an offence in the East, covering one's head is not considered a virtue in the West (Shatibi 1975, 2:284).

There is very little discussion of substantive family laws in Shatibi's works because his discussion is focused on legal theory. Still, we find references to this area of *Shari'a* here and there. Firstly, he defines family (*nasl*) as one of the five necessities of life, which *Shari'a* aims to protect. The family laws thus belong to the innermost circle of essential laws. He repeatedly clarifies that family laws in the Qur'an are largely similar to the social norms, which already existed in the pre-Islamic Arabian society. The Qur'an confirmed them in general. Only those norms and practices were abolished or reformed that did not agree with the Islamic values (Shatibi 1975, 1:175, and Shatibi, 1915, 2: 42).

The essential pre-Islamic principle like distinction between *nikah* (marriage, lawful relations) and *sifah* (fornication, unlawful relations) serves as a legal norm in *Shari'a* family laws as well. Pre-Islamic practices like payment of dower (*sadaq*, *mahr*) and *wali* (marriage guardian) were assimilated into Islamic family law, because these practices supported the above principle. In case of dower, even the question whether it

should be paid promptly or be deferred was left to local custom (Shatibi 1975, 2: 285, and 2:11-12). Several pre-Islamic marital practices, such as marrying father's wife, several husbands sharing one wife etc. were disallowed (Shatibi 1975, 1:175).

For Shatibi, the criterion for the assimilation or rejection of social practices is the *maqasid al-Shari'a*. In family laws, the objective is the protection of the institution of family. He argues that the social norms such as right to shelter, mutual cooperation, lawful earning, enjoying beauty, fidelity, social status due to family standing were transformed into mutual rights of husband, wife and children because they serve to protect the basic objective of family laws. Shatibi cites the example of caliph Umar marrying Ali's daughter with a view to developing family ties with the family of the Prophet. This example illustrates the continuity of the pre-Islamic social norm of pride in *nasab* (lineage). Shatibi says that although this is not the explicit primary objective of marriage in *Shari'a* family law but it becomes acceptable because it was a social norm that strengthened the family institution (Shatibi 1975, 2: 396).

Shatibi's analysis of '*ada* deals with it as a dimension of normativity in it several aspects. One of them is the certainty of law in the meaning of predictability. To Shatibi, this aspect of normativity comes from the repeatability of the actions. This repeatability is the characteristics of '*Adat*, by which Shatibi means both habits and social practices. The acceptability of *Shari'a* laws largely depends on their conformity with the '*Adat*. Since '*ada* is a known fact, not arbitrary and imagined, it provide certainty to laws.

In order to define the concept of '*Adat* more clearly, Shatibi contrasts it with *Shari'a*, '*Aql* and '*Ibadat*. Shatibi elaborates on how '*Aql* and '*Adat* determine the good and bad and *Shari'a* endorses the results. Shatibi distinguished between '*Adat* and '*Ibadat* as two divisions of *Shari'a* laws. The *Ibadat*, or ritual obligations, protect religious interests. '*Aql* plays no role in the formulation of '*Ibadat* laws because their goodness cannot be decided upon by human experience. They are *ta'abbudi* and must be obeyed. The '*Adat*, the remaining *Shari'a* laws, are indeed within the scope of human reason. They are *maslahi* in which human reason plays an effective role. Change and innovation are acceptable only in the area of '*Adat*. The changes in '*Ibadat* are called *bid'a*, which are not permissible.

In other words, Shatibi restricts the meaning of *bid'a* to '*Ibadat*, a smaller area of Islamic law. Changes in Islamic family law are not counted as *bid'a* because these laws are not *ta'abbudi* in principle. That is why new social norms were often assimilated into Islamic family laws, sometimes even recognizing it as *bid'a*, e.g. *talaq bid'i* of triple repudiation.

Shah describes Prophecy and revelation of Divine laws as a process of reform. The prophets examined the laws in practice. They retained most of them and reformed only those that had lost their aspect of human good due to changes in social practice (Waliullah N.D. 1:124). Discussing the Islamic laws of marriage, Shah explained that the Prophet Muhammad retained most of the pre-Islamic Arab practices such as engagement before marrying, the dower, and wedding feast. Similarly, the Prophet retained the pre-Islamic penalties, which the Muslim jurists assimilated into Islamic law as *Hudud* (Waliullah N.D. 1:125).

Shah Waliullah expounded the theory of the evolution of society in four stages and found that social norms played a central role in the evolution of laws (Waliullah N.D. 1:49). Shah Waliullah stated very clearly that social norms constituted the major material source of *Shari'a*. He explained in particular how the pre-Islamic Arab social practices formed bases (*madda tashri'iyya*) of the *Shari'a* (Waliullah N.D. 1:124). Shah analyzes in detail the reasons (*asrar, hikma*) of the various family laws. He deals with the following laws and institutions of family: engagement, modesty, marriage guardian, marriage ceremony, dower, prohibited relations, fosterage, marital rights, divorce, and types of divorce, waiting period, and '*Aqiqa* ceremony. Throughout his analysis, if a practice existed among the pre-Islamic Arabs and if Islam retained it as it is, Shah explains the reasons for the continuity of this practice and for the Islamic reforms. It is not possible even to present a summary of his analysis here. I shall give a few examples to illustrate his analysis.

Shah explains that prohibition of marrying close relatives like one's parents, children and brothers and sisters was common among the pre-Islamic Arabs. He finds two reasons for the prohibition of marrying close relatives. First, among these relations living under the same roof, close relationship and continuous contact make it impossible to maintain complete privacy, which is usually required between the sexes. If marriage between such relations were not forbidden close living without marriage would lead to very difficult relationship. Even when married, due to close relations, rights and duties would have no meaning (Waliullah N.D. 1:131). Since this prohibition was required because of these reasons, it was not only introduced, as a law but was also cultivated as a cultural habit and instinct. It was achieved by a wider and definitive acceptance of the prohibition and by the condemnation of those who violated this prohibition (Waliullah N.D. 1:133-34).

On the issue of polygamy, Shah explains that this social practice may harm family system (*tadbir al-manzil*). The law is therefore required to look into such matters and take action. If a man has more than one wives and he tends to discriminates among them, to the extant of being unjust to some. That is why Islamic family law made justice a condition for polygamous marriage. Since it is not possible to do clear justice, the law must demand to stop clear injustice (Waliullah N.D., 2:137).

To sum up this analysis, Shatibi and Shah Waliullah both find *Shari'a* family laws closely connected with the social norms. Their analysis explains that normativity of *Shari'a* was derived from the acceptability and certainty of these social norms.

3. Marriage Practices

3. 1. Common Law Marriage

Common law marriage is usually defined as the intent to be married combined with living together and holding one's self out to the world as married. This type of marriage is recognized in several states in the US and Europe. For example, continued cohabitation as husband and wife may be regarded as a valid marriage by the court where this form of common law marriage is recognized. There are several requirements for the formation of such a marriage. For example, the couple must express mutual consent and intent to be married, and "must openly and professedly live as husband and wife".

Because a common-law marriage is not formally recorded, the couple, if challenged, may have to prove it.

Nowadays, many couples decide to live together without getting married. The reasons for such a decision include such as the following: uncertainty as to one's choice of partner, disillusionment stemming from a previous marriage and outright refusal to make a commitment. This has created several problems.

Jeremy Collingwood (1994) has published a study on this practice in Britain. He refers to earlier studies: Greg Forester, *Marriage Before Marriage? The Moral Validity of 'Common Law Marriage'* (1988) and Edward Pratt, Living *in Sin?* (1991). He finds that common law marriage is informed by these attitudes: casual sexual relationship, trial marriage, provisional relationship, and substitute for legal marriage. He observes that the trend of living together as husband and wife outside a formal marriage has increased over the years. In 1972, only 16% lived husbands prior to marriage, in 1987 the number became 50%. In 1990 28.3 % births took place outside marriage, and 73% births were registered by both parents as extra-marital. According to a survey undertaken that year, 43% favored living together before marriage, and 37% preferred going direct to marriage. Still, 81% British regarded marriage relevant. I am not discussing here cohabitation or living together, which is not intended to be a marriage, because that is not the subject of this paper. I am referring to a practice that avoids formality of a legal marriage for a number of reasons (e.g., polygamy, expenses, legal responsibility), but the couple does wish to present themselves as husband and wife. Some of them later choose to go for a legal marriage when they find that common law marriage cannot allow some rights (e.g., inheritance, taxes etc.,). One may even look at such marriages as a survival of old customary marriages before the law ceased to recognize them as valid. Legal marriage insists on certain formalities, like registration. Earlier in 1753, a church ceremony became mandatory to prevent secret marriages. In 1836 this requirement was withdrawn and civil marriage was allowed. Now, if the purpose of registration is to ensure a marriage contract, this objective can be achieved in several other ways, as we will say later in case of *Zawaj* '*Urfi* in Egypt.

3. 2. *Zawag Orfi*

Literally, *Zawag Orfi* [*zawaj 'urfi*] means customary marriage. This type of marriage takes place between two spouses who sign a marriage contract in the presence of two witnesses but it is not officially registered by the notary (*ma'dhun*) and transcribed in public records. The term *Zawag Orfi*, which originated in Egypt, is misleading. These marriages are customary but not entirely illegal. Largely, they are called so because they are not registered. But the reason why they are registered reveals their customary nature as they are used to avoid law of the country.

These marriages are concluded for various reasons. In case of polygamous marriage for instance the husband may wish to keep the subsequent marriage secret and not inform the first wife as required by Law No. 100 of 1985. This type of marriages is also used for minors who are not allowed to marry under law. Some times a couple also adopts this type of marriage to escape the high cost of marriage. Widows who want to remarry without forfeiting their widowhood pensions also use this marriage. Even more simply this form of marriage is opted to legitimate sexual relationships without concluding a formal marriage.

According to Egyptian law (Art. 99 § 4 of law 78 of 1931), no claim concerning marriage will be heard, when it is denied, unless it is supported by an official marriage document. A customary marriage, therefore, is not considered illegal, but in case the marriage is denied, the courts will be prohibited from hearing any dispute regarding such a non-registered marriage.

Zawag Orfi is, therefore, legally harmful to both spouses, but especially to the wives who cannot claim the right to divorce, alimony, maintenance or succession. With regard to children, though, the Explanatory Memorandum of Law 78 of 1931 had explicitly stated that courts could still hear suits for paternity. The main problem arises in case of contest between the spouses since the law forbids the judge to consider such non-registered marriages, making it impossible for the wife to ask for her divorce, to make her divorce effective (when she has been repudiated and her ex-husband comes back later on and requires her to resume their marital life), or to ask for the benefice of her subsequent rights.

Law No. 1 of 2000 introduces a very important change with that respect. Although Art. 17 al. 2 of the law reaffirms the non-admissibility of petitions concerning non-registered marriages, it gives the woman the right to use any written document to prove the existence of such marriage and to serve as the basis for her subsequent request in divorce (Art. 17 al. 1).

In Pakistan, the practice of *Zawag Orfi* does not exist, but since customarily often marriages are not registered for most of the reasons mentioned above. In addition to illiteracy and ignorance people resist registration on account of religious grounds. However, laws in Pakistan are lenient and proofs of customary and religious forms of marriage are acceptable. Serious situations arise in the absence of proofs and in case of those marriages, which are not recognized in law, for instance child marriages.

Zawag Orfi is comparable only in the sense that both are registered in law. *Zawag Orfi* nevertheless abides by the rules of formation of marriage contract under traditional Islamic law, and recognizes the rights and duties of the spouses under *Shari'a*. Common Law marriage is not a legal contract, and originally did not intend for legal consequences. Later, however, when complications arose the law began to protect the rights of the spouses married under Common law marriages.

3.3. *Zawaj Misyar*

While *Zawag Orfi* is generally attributed to Egypt, *Zawaj Misyar* is often assumed to have originated in Saudi Arabia. The Saudi muftis maintain that this form of marriage is not morally correct although it is legally valid. It is also claimed that *Misyar* marriage has been practiced in Egypt since 1825. These claims are hard to establish. In modern times, it is officially legalized in Saudi Arabia and Egypt.

The confusion about this form of marriage continues also on account of its literal meaning. Some writers consider the term derived from *sayr* (travel) and translate it into English as Travel marriage. In that sense it is often compared with the *Mut'a* marriage allowed in the Shi'i law. Others trace it *yusr* (easy) and translate it as Marriage of

convenience. Literally, *misyar* may also be derived *musayara* meaning adoption, accommodation and adjustment.

Zawaj Misyar is a marriage contract between a man and a woman, in which the woman waives some of the rights she would have in a normal Islamic marriage. These rights specifically relate to living together, and husband's duty to provide maintenance and house to live.

Women adopt this marriage for several reasons. One reason may that a woman when she gets older find it increasingly difficult to marry. She may then choose a husband who is not able to fulfill the normal marital duties like financial maintenance, or spending adequate time with her, for example. She considers that marrying such a husband is better than remaining unmarried. A young couple that cannot settle down due to their limited resources may also opt this marriage as a temporary solution. It is not comparable with *Zawag Orfi* or Common law marriage because it is legally concluded. *Zawaj Misyar* is conclude with a contract which requires consent and agreement of both parties to the terms of the contract, two witnesses, and payment of *mahr*.

Nor is it comparable with *Mut'a* because the contract does not stipulate a specific time period. A possibility of divorce is there but that also exists in normal marriage. Further, the wife in the *Misyar* contract is not barred from reclaiming her normal rights; in that case the husband has the option to agree to her demand or negotiate a divorce. We reproduce below extracts from the *fatwas* by the three muftis about *Zawaj misyar*: Shaykh Yusuf al-Qardawi (Qatr), Shaykh al-Azhar Muhammad al-Tantawi (Egypt), and Mufti Muhammad ibn Adam al-Kawthari (UK).

3.3.1. Yusuf al-Qardawi

Misyar marriage should be viewed as a form of legal relationship between man and woman regardless of any description attached to it. This is pursuant to the juristic rule: "What matters most in contracts are motives and meaning, not the wording or structure."

Therefore, in determining the legal nature of this marriage, we should not judge things according to names, for as we know, people feel free in naming or describing something.

Stipulating certain details in the marriage contract on both sides is acceptable. For example, some scholars maintain that a woman has a right to determine the timing of marriage; i.e., it can take place at day or night, however, she can also waive this right.

Therefore, based on what has been mentioned, we can state that *misyar* marriage, or something in similar form, has been in practice from time immemorial. It also serves the purpose of some women, who, for instance, may be rich but happen to be unable to marry at the proper time. So, such women can opt for this kind of marriage. Therefore, if anyone seeks my opinion on this marriage, I must reply him saying: What do you mean by *misyar* marriage. Then, if … all the Islamic legal requirements are met, then the marriage is valid. Those requirements are: an offer and acceptance from both parties; a specified dowry, according to the Qur'anic verse:[And give unto the women, (whom ye marry) free gift of their marriage portions] (An-Nisaa' 4: 4), and that the

contract wins the consent of the guardian. Thereby, no one has the right to brandish it as unlawful.

There is no doubt that such marriage may be somehow socially unacceptable, but there is a big difference between what is Islamically valid and what is socially acceptable. This issue, therefore, needs a cautious approach. One should not feel free to condemn an act as absolutely forbidden, merely on social repugnance. Rather, one needs to have convincing evidence to determine the legal nature of each particular act (Qardawi 2006).

3.3. 2. Muhammad Tantawi

Sayyid Muhammad Tantawi made the following remarks in the Federal Territory Mosque, Kuala Lumpur on June 1, 2006.

According to Islam, a marriage was solomnised once "*ijab dan kabul*" (marriage vow), "*mas kahwin*" (dowry) and public proclamation were endorsed and there was no coercion. If the two parties mutually agree to absolve their entitlement (under normal marriage), a man and a woman can live harmoniously as husband and wife under *misyar* marriage." he said after giving a talk at the Federal Territory Mosque.

That *misyar* marriage was victimization of women's right was wrong for it took place with the agreement of the men and women. With *misyar* marriages, divorcees or widows can continue to take a righteous path consummated by their husband.

A *misyar* wife agrees not to ask for financial or material support as she is financially independent, he said, adding that the husband must visit her at least once a week to meet her sexual needs.

Misyar marriages are appropriate for women who like to be on their own, living together with their children (Tantawi 2006).

3.3. 3. Kawthari

Fatwa by Mufti Muhammad bin Adam al-Kawthari, from Darul Ifta, Leicester , UK, provides the Hanafi view in more details than others.

The term "*Nikah Misyar*" (translated sometimes as "travellers' marriage" or "marriage of convenience") is not found in the Qur'an, *Sunna* or classical works of Islamic jurisprudence. It is a term that has been introduced recently by those discussing a specific type of matrimonial arrangement. However, the concept of such an arrangement can be found being discussed in the works of classical Muslim jurists (*fuqaha*).

In order to understand the correct Islamic viewpoint regarding *Nikah Misyar*, it is essential to first be familiar with the exact meaning of this term, as understood by those who have discussed it.

Definition

A *Misyar* marriage can be defined as an official marriage contract between a man and a woman, with the condition that the spouses give up one, two or several of their rights by their own free will. These include: living together, equal division of nights

between wives in cases of polygamy, the wife's right to housing (*sukna*) and financial support (*nafaqa*). In some cases, only one right is relinquished by the spouses, such as living together, but the husband is still required to provide housing for the wife and maintain her financially, whilst in other instances, the wife gives up all her rights including housing and financial support. The bottom line in such arrangements is that the couple agrees to live separately from each other, as before their *Nikah* contract, and see each other to fulfill their needs in a lawful manner when they so desire. At times, a *Misyar* marriage is contracted on a temporary basis, which ends in divorce on the expiration date of the contract.

As for the Islamic ruling concerning such marriages, there are two issues to consider:
1) Validity and permissibility;
2) Appropriateness.

I. Validity and Permissibility

If all the basic requirements for an Islamic marriage contract are fulfilled, then this type of marriage arrangement is permissible and valid, and the couple will not be guilty of being involved in an unlawful illicit relationship. The basic requirements for a valid marriage according to *Shari'a* are the following:

a) Offer (*ijab*) from one party and acceptance (*qabul*) from the other in one session (*majlis*), and that this offer and acceptance is verbal and thus heard and understood clearly. In other words, the agreement of both parties.

b) The presence of at least two male witnesses (*shahidayn*), or one male and two female witnesses, who hear and clearly understand the offer and acceptance. (*Mukhtasar al-Quduri* 2/140 & *Fath al-Qadir* 3/190)

c) The consent of a legal guardian of the woman (*wali*) is also a necessary requirement according to the Maliki, Shafi'i and Hanbali Schools of Sunni Islamic Law. However, according to the relied upon position in the Hanafi School, the marriage of a free, sane and adult woman without the approval of her guardian (*wali*) is valid if the person she is marrying is a "legal" and suitable match (kuf') for her. Conversely, if the person she is marrying is not a legal match for her, then her marriage would be considered invalid. (*Radd al-Muhtar ala 'l-Durr al-Mukhtar* 3/56-57 & *I'la al-Sunan* 11/69 in the chapter: "Having a guardian is not a pre-requisite for the validity of an adult woman's marriage". For more details, please refer to the answer previously posted on this website titled: "Divorced woman marrying without her guardian's approval").

d) The absence of a fixed time-period. It is a basic requirement of a valid marriage contract that it does not entail any agreement of it being limited to a specified time such as two moths or five days, since it is essentially the *Mut'a* marriage that has been explicitly prohibited by the Messenger of Allah (Allah bless him and give him peace).

Classical jurists (*fuqaha*) have clearly stated the impermissibility and invalidity of time-limited (*mu'aqqat*) marriages. Imam al-Haskafi, the renowned Hanafi jurist, states:

> "A *Mut'a* and time-limited marriage (*nikah mu'aqqat*) is invalid, even if the period [of marriage] is unknown to the wife or is prolonged..." (*Radd al-Muhtar ala 'l-Durr al-Mukhtar* 3/51. Also see for the Shafi'i School: *Mughni al-Muhtaj Sharh al-Minhaj* 4/231, for the Hanbali School: *Kashshaf al-Qina'* 5/96-97, and the Maliki School: *Hashiyat al-Dasuqi ala 'l-Sharh al-Kabir* 2/238-239)

As for when there is no explicit mention of the marriage being limited to a specified time, but both or one of the spouses intend to terminate the marriage some time in the future, the position of the majority of classical scholars is that such a marriage is valid, and the couple will not be guilty of involving themselves in an unlawful relationship.

It is stated in *al-Fatawa al-Hindiyya*, a renowned Hanafi reference work:

If a man marries a woman unconditionally [i.e. without it being limited to a specified time], and it is in his intention to remain with her for a time that he intends [and then divorce her], then the marriage is valid..." (*al-Fatawa al-Hindiyya* 1/283)

Likewise, Imam Ibn al-Humam (Allah have mercy on him) states in his *Fath al-Qadir*:

As for when the husband marries and it is in his intention to divorce her after a period that he intends, then the marriage is valid." (*Fath al-Qadir*, 3/152)

The Shafi'is also state that if one marries, and it is in his intention to divorce the wife after a period of time he has in mind, the marriage is considered valid. As for the Hanbalis, they have explicitly stated that if a person marries with the intention of divorcing the woman, even without stating it explicitly in the marriage contract itself, then the marriage is invalid, because it is a temporary marriage, which is invalid by explicit primary texts. (See: *al-Mawsu'a al-Fiqhiyya*, Kuwait)

Since Islam emphasizes upholding marriages, the couple will not be obligated to terminate their marriage according to their intention, rather they must not resort to divorce without a genuine reason. Marrying with the intention of ending the marriage after a given period is disliked according to *Shari'a*, and as such, a marriage contracted with such an intention in mind is also disliked, although valid per se. (Mufti Taqi Usmani, *Fiqhi Maqalat* 1/258)

So, the basic minimum requirement in order for a marriage to be considered Islamically valid is that there be a valid offer from one party and a corresponding acceptance from the other, in the presence of two male (or one male and two female) witnesses who are able to hear clearly and understand what is happening. The offer, acceptance and the presence of the witnesses must all take place in the same session and at the same place, and there must not be any explicit mention of the marriage being limited to a specified time. The consent of the woman's guardian is also necessary according to the three Schools, and in some cases, according to the Hanafi School also. As for the payment of dowry (*mahr*), this is the woman's right and should be stipulated at the time of the marriage contract, but it is not a pre-requisite for the validly of the marriage.

As such, if the above necessary factors are met, the marriage is valid according to *Shari'a*, even if it is a "*Misyar*" marriage. Thus, if the *Misyar* marriage is limited to a specified time, it is invalid, and the couple's relationship will be unlawful and sinful. Men who sometimes enter into a "temporary" *Misyar* marriage while on holiday must realize that if this is explicitly mentioned at the time of contracting the marriage, then it would make such a marriage invalid and unlawful, and more akin to *Mut'a.* If there is no explicit mention of this, but the man marries with the intention of divorce, then it is disliked, and unlawful [but valid] if it entails harm to the woman.

Giving up Rights

As mentioned earlier, the basic feature which distinguishes *Misyar* from a standard marriage is that the spouses, and more specifically the wife, gives up one or several of her rights by her own free will.

Islamically, it is permitted for both parties to mutually agree upon relinquishing one or several of their rights, which they would otherwise be entitled to in a standard marriage. The wife may forego her right to housing, spending time with her husband and/or financial support. The husband may give up the right of his wife living with him at his residence.

Sayyida A'isha (may Allah be pleased with her) relates that Sawda bint Zam'a (may Allah be pleased with her) gave up her [right of spending the] day [with the Messenger of Allah] to A'isha, and so the Messenger of Allah (Allah bless him & give him peace) used to give A'isha both her day and the day of Sawda (Allah be pleased with both)." (*Sahih al-Bukhari*, no: 4914)

Sayyida A'isha (may Allah be pleased with her) relates that in his fatal illness, the Messenger of Allah (Allah bless him and grant him peace) used to ask, "Where will I be tomorrow? Where will I be tomorrow?" wanting the day of A'isha. His wives gave him permission to be wherever he wished, so he was in the room of A'isha until he passed away by her..." (*Sahih al-Bukhari*, no: 4185)

It is stated in *al-Fatawa al-Hindiyya*:

"It is not wrong to marry a woman on a day-time basis (*nahariyyat*). This means that the man marries her on the condition that he will spend the day with her but not the night." (*al-Fatawa al-Hindiyya* 1/283)

It should be noted, however, that if a wife gives up her rights, she is entitled to reclaiming them. She may ask her husband to fulfill all her rights, including that he provide for her financially. The husband can also demand that she move in with him at his residence.

Imam al-Haskafi (Allah have mercy on him) states:

> "If a wife grants her right of spending time with the husband to her co-wife, then this is valid, but she has the right to reverse her decision in the future if she so desires." (See: *Radd al-Muhtar ala 'l-Durr al-Mukhtar*, 3/206)

II. Appropriateness

The above discussion was regarding the permissibility and validity of a *Misyar* marriage. As for whether such a marriage is appropriate according to *Shari'a*, generally speaking, the answer would have to be no, since it goes against the spirit and objectives of marriage, which is to establish a long-term relationship as a family, and raise righteous Muslim children. The children raised by their mother in a home from which the father is always absent may well suffer psychologically and spiritually.

It is even worse in a situation where the man is only concerned about his own sexual desires and has no regard for his wife. He does not hesitate in marrying and divorcing women as and when he so desires. Some irresponsible men go on holidays to poor countries and marry young women by offering them money, riches and a lavish lifestyle, only to divorce them after a few weeks or months. They do this on a continuous basis, marrying women and then divorcing them, without any regard for the creation of Allah Most High. As a result, the wife finds herself abandoned and leading a solitary life as before the marriage, but traumatized by the experience, while her social status and reputation degraded. Harming and deceiving others are both great sins in the eyes of the *Shari'a*.

On the other hand, a *Misyar* marriage may be the only option in certain situations. Some women, as they get older, find it increasingly difficult to marry. In such cases, the woman may marry a man who is not able to fulfill the normal marital duties like financial support or spending adequate time with her. Marrying such a husband is better for her than remaining unmarried.

A young couple may be engaged to one another and have the consent of their respective guardians (wali) to marry. They wish to marry as soon as possible, because they genuinely fear committing *Zina*, but the man does not have the financial resources to support his wife. This type of marriage could meet their needs allowing them to marry whilst living with their parents until they are ready to move in together.

Some divorced or widowed women, who have their own residence and their own financial resources, genuinely cannot, or do not, want to marry again in the normal manner. Some women, who are burdened with heavy duties and responsibilities, are unable to live with their husbands and serve them. A *Misyar* marriage may well be suited to them.

In fact, some classical scholars such as Imam Abu 'l-Faraj ibn al-Jawzi (may Allah have mercy on him) have suggested that it may even be healthy for the marriage if both spouses mutually agree to spend time apart from one another or sleep separately, and be together occasionally in order to maintain a high level of sexual passion for one another. (*Sayd al-Khatir*, P: 605- 606)

As such, in conclusion, whether a *Misyar* marriage is appropriate or not, this depends on each individual case and scenario. One should thus discuss the particulars of one's case with a knowledgeable and God-fearing scholar. As for its validity, if all the basic requirements for a standard Islamic marriage are fulfilled, it is valid, keeping in mind that the wife is entitled to reclaiming her rights that she gave up at the time of marriage whenever she so desires. And Allah knows best (al-Kawthari 2008).

4. Concluding Remarks

The above discussion and *fatawa* on some recent types of marriages practiced in the western and Muslim countries offers a valuable insight into the normativity of law. On the one hand it shows how legal norms sometimes fail to respond to social needs and how society and social practice offers solutions that become socially accepted. The social normativity makes it then possible to transform into legal norms. The above discussions have also suggested a tension between legal, social and moral understanding of social practices. Often, even though legal the moral aspect of the social practice makes it objectionable in the eyes of some law experts.

The main point of discussion is the concept of legal norm that legal positivism offers; a legal norm is defined by grund norm or a specific law-making procedure adopted in a legal system. This perspective separates moral and religious aspects of normativity. However, we have seen that not only the positivist legal system stands morally responsible for the efficacy of social practices in order that these practices or customs do not deprive the persons involved of their basic rights, but that as the practices persist the legal system finds ways to accommodate them.

In case of Islamic law, due to its rich juristic heritage of centuries it is always possible to find some opinions that are relevant to the case in question. *Zawaj Urfi* is a non-issue for the Islamic law experts and practitioners. It is nevertheless a difficult issue for reformists, policy makers and the legal and judicial system. It has posed questions and the system has to frequently accommodate these practices. *Zawaj Misyar* has been an issue for the Muftis for some time, especially for the Sunni experts who compared it in the beginning with Shi'a temporary marriages. Later on, however, Muftis found precedents of women giving up their rights in early Islam.

One finds in *Fiqh* and *Tafsir* literature interesting discussions with reference to the Qur'an 4: 128. The verse stipulates:

And if a woman has reason to fear ill-treatment from her husband, or that he might turn away from her, it shall not be wrong for the two to set things peacefully to rights between themselves, for peace is the best and selfishness is ever present in human souls (4:128).

It is significant that this verse was frequently interpreted from a patriarchal perspective, giving advantage to husband. Most of the jurists rule that in cases when husband ill-treats the wife then she is allowed to live with him by giving up some rights. The reasons given for her husband's ill treatment include wife getting old, ugly, poor or bad mannered. The verse could also be interpreted to mean peaceful settlement for divorce. In the above translation, 'ill-treatment' refers to the Qur'anic term *nushuz*. It is interesting that in another verse when the Qur'an uses this term with reference to woman (4:33), it is translated as 'rebellion' and 'misconduct' and the interpreters go for husband's right to discipline her (See for details CII 2009).

Taken together, the Qur'anic verses stipulate that besides the essential conditions of the marriage contract, the couple settle the terms of contract between themselves as long as the objective of the contract is not violated. The understanding of the objective of

the contract evolves with the social change and the concept of basic rights. The idea of the male being the provider and sustainer is undergoing social change. The law should adopt to it but never at the cost of one of the parties to the contract

Bibliography

Collingwood, Jeremy. (1994) *Common Law Marriage: The Case for a Change in the Law*. Nottingham: Grove Books.

CII (Council of Islamic Ideology) (2009) *Muslim 'A'ili Qawanin Ordinance 1961, Nazr Thani awr Sifarishat*. Islamabad: Council of Islamic Ideology.

Dupret, Baudouin (2002) " Legal Pluralism, Plurality of Laws, and Legal Practices, Theories, Critiques, and Paraxiological Remedy", paper presented at the conference " Laws and their Environment: Legal Plurality and local dispute resolution in the Middle East", Department of Ethnography and Social Anthropology, University of Aarhus, Moesgaard, Denmark, June 2002.

Fawzi, Ibrahim (1983) *Ahkam al-usra fi'l-jahiliyya wa'l-Islam*. Beirut: Dar al-kalima li'l-nashr.

Habermas, Jürgen (1996) *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*. Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats. Translated by William Rehg. Cambridge: Polity Press.

Ibn 'Abidin. (1884) *Nashr al-'urf fi bina ba'd al-ahkam 'ala al-'urf*. Damascus: Dar al-Ma'arif.

al-Kawthari, Mufti Muhammad ibn Adam (2008) http://www.darulifta...onID=q-21475354, posted on 21.8. 2008.

Korsgaard, Christine M (1996) *The Sources of Normativity*. Cambridge: Cambridge University Press.

Lispon, Leon and Santon Wheeler (1986) *Law and Social Sciences*. New York: Russel Sage Foundation.

Masud, Muhammad Khalid (1996) *Shatibi's Philosophy of Islamic Law*. Islamabad: Islamic Research Institute.

Masud, Muhammad Khalid (2005) "Communicative Action and the Social Construction of Shari'a in Pakistan", in Armando Salvatore and Mark Levine, *Religion, Social Practice, and Contested Hegemonies, reconstructing the Public Sphere in Muslim Majority Societies* (New York: Palgrave Macmillan, 2005), pp. 155 – 179.

Qaradawi, Yusuf. (2006) http://www.islamonline.net/servlet/Satellite?pagename=IslamOnline-English-ask_Scholar/FatwaE/FatwaE&cid=1119503544160#ixzz0uI2Ar2Ce

Schwartz, Richard D (1986) "Law and Normative Order". In Lispon 1986. Pp. 63-107.

Shatibi, Abu Ishaq (1915) *Al-i'tisam*. Cairo: Mustafa Muhammad.

Shatibi, Abu Ishaq (1975) *Al-Muwafaqat fi usul al-shari'a*. Cairo: Al-Maktabat al-Tijariyya.

Tantawi, Muhammad (2006) http://www.dailyexpress.com.my/news.cfm?NewsID =42349

Waliullah, Shah (1879) *Hujjatullah al-Baligha*. Lahore: al-Maktabat al-Salafiyya, N.D. reprint of Cairo: Bulaq.

Understanding Daughter's Traditional Share in Patrimony

Sisters and Wives in the Pakistani Punjab

*M. Azam Chaudhary[2]

Introduction

The sisters in the Pakistani Punjab particularly in the rural areas do not claim their 'official' share in the properties of their fathers. Their legal share in their father's property is anyway half of that what their brothers get. The sisters however don't claim even this 'half' share. Why the sisters do not demand this 'legal' share? The common perception is that the fathers/brothers do not give daughters/sisters their due share. To block the transfer of the property daughters/sisters are generally given in marriage to the cousins particularly father's brothers sons. Among the feudal and people belonging to higher social hierarchy the daughters/sisters are kept unmarried if a husband is not found in close family. Such women may even be married to the Quran for keeping their property in the family[3]. Exchange marriage is said to be another way to block transfer of the landed property. Agriculture land is very dear to the Punjabi farmers because it does not only provide them with subsistence and it is also a major source of honour to them with the result that they may go to any extent to protect it.

Shaheen Sardar Ali[4] a prominent Pakistani lawyer and activist in the field of women rights and status in Pakistan provides us very interesting analysis of inheritance claims of the women from the record of the higher courts in Pakistan. She writes that: "From 1947 to date we find that whenever a woman has approached the superior courts for protection of her right to inherit, she has met with a very positive response" (Ali 1997:220). She raises the question: why in spite of favorable decisions by the courts there are so few cases for patrimony keeping the fact in view that almost no women receive their share? Answering this self raised question she notes that the pressure from both family and society to forego one's inheritance is so compelling for women that they are simply unable to raise their voices and are forced to settle out of court (Ali 1997: 220).

This is, in my view, a gross oversimplification of a very complex phenomenon embedded in the kinship and social structure of the Punjabi society. The primary reason for *biradary* endogamy especially cousin marriage is not the concern for property details later) but the welfare of the daughter/sister same as the marriage of a woman to the Quran (for detailed analysis of marriage to the Quran see Chaudhary forthcoming). Sardar Ali's argument that women do claim their share because of the pressure from her family and society is also not very convincing in the light of the fact that after her marriage she lives in the family of her husband. One could ask why there is no pressure or the women do not bow to the pressure from the family of her in-laws, as a matter of legal fact her real family, for bringing her share of the patrimony?

---

[2] Associate Professor, National Institute of Pakistan Studies, Quaid-i-Azam University, Islamabad, Pakistan.

[3] Marriage to the Quran are "devised to deny women their rights of inheritance and out of fear of property being passed on to outsiders through the daughters or sisters [i.e. their spouses or children]" (Al-Shafey 2007).

[4] She was a member of Shirkat Gah, Lahore and the international network Women Living under Muslim Laws, entitled "Women and Law in the Muslim World" of which the author was a Research Co-ordinate for Pakistan.

The given social and the kinship structure of the Punjab in general and the rural Punjab in particular is such that not claiming a share in the patrimony is more (this includes social capital) than the legal half share (compared to their brothers) they have a claim to. In order to explain this it is important to understand the husband-wife and brother-sister relationship in the Punjabi society which will help us understand the basic nature of this society. I argue that the ideal/kern relationship in the Pakistani Punjabi kinship is the brother-sister relationship and not the husband-wife relationship. The husband-wife relationship which may also be termed as contract relationship because it comes into being as a result of a contract is in the Punjab is a relationship of mistrust, competition, almost enmity. Whereas the brother-sister relationship is a kinship and status based relationship which in the Punjab is an ideal relationship which is of care, love and trust. The brother-sister relationship is also different from brother-brother and sister-sister relationship. Claiming the share by the sisters would mean taking away from brother (women generally do not have their own separate accounts and properties) and handing over to the husband which is said to be a relationship of three words – talaq pronounced three times. This is supported by the statistics provided by Sardar Ali. She writes that:

> "We came across more than a 1 000 cases concerning substantive issues of dissolution of marriage, dower, maintenance, divorce, etc. On the other hand, one does not see more than 100 cases reported concerning succession and inheritance.[5] (…). This is in-spite of the fact that every woman is entitled to inheritance and as we know very few get/are given this inheritance" (Ali 1997: 220).

The cases of dissolution of marriage, dower, maintenance, divorce are cases against husbands. In the net calculation for every one case against brothers there are ten cases against husbands. One could draw the conclusion from this that women in the Punjab are ten times more likely to go to the court against their husband compared to their brothers. As a matter of fact whenever I talked to women including highly educated urban based ones and they criticized men the criticized their own husbands or brothers of other women seldom their own. My view is that if we want to replace the traditional law of daughter's patrimony with the official/Islamic law the kinship base of social structure has to be changed. In other words for implementing official share of daughter in the patrimony we need to change the marriage practices, modification if not replacement of the present joint/extended family system with a nuclear family to achieve individualism to make the husband-wife relationship the supreme of the kinship system. The question is not only if such changes are possible the more important question is if these changes are desirable as destination. I am personally not very sure if the Western styled individual based 'contract' society is a preferable alternative to the 'status' based kinship society. The idea that change could be brought in one area i.e. law of inheritance without affecting the other i.e. the nature of social structure and kinship system may not be possible.

---

[5] It is important to mention about these figures that it is an average based on data about all Pakistan. The break down on the basis of provinces would have been very interesting. In my view there should be more women among Pushtoons who get their share of patrimony than in the Punjab. Relatively more women should be claiming their inheritance in urban the Punjab than in the rural Punjab. This is just my assumptions that need to be investigated.

The official/Islamic Verses Traditional Law of Inheritance

There is a wide gap between the theoretical official/Islamic law of inheritance for the women and the customary law. The following verses from the holy Quran lay down the foundation of the Islamic/official law of patrimony in Pakistan.

> 'Allah chargeth you concerning (the provision for) your children: to the male the equivalent of two females, and if there be women more than two, then theirs is two-thirds of the inheritance, and if there be one (only) then the half.' … (The Quran Surah Al Nisa: 4: 11).

The practice in the Punjab especially in the rural areas is that the daughters or sisters do not claim any share. The prevalent practice is that the daughters/ sisters relinquish their patrimony rights especially landed property rights by signing away their inheritance to their brothers. The village where I did my fieldwork only two sisters had claimed their inheritance and both of them were married and lived in the same village and as a first instance had conflicts with their brothers.[6] The question is what do the daughters/sisters instead get? Before answering this question let us explain the brother-sister and husband-wife relationships in the Punjab.

Brothers and Sisters in the Punjab

The brother-sister relationship has to be understood in the light of the marriage rules and family system of the Punjab. The folk tales in this case tales of folk romance in my view may help us understand the ideal values of society. The most famous love epic of the Punjab, Mirza Sahiban may help us in this regards. According to the details relevant for us Mirza (the Punjabi hero) came to take Sahiban (his beloved) away before her family married her of to somebody else. Sahiban tells Mirza on their way how cruel and strong her brothers were and that they would kill both of them if they found them. Mirza proudly told her his marksmanship with his bow and arrows. As a demonstration he successfully aimed at the peak of a flying dove. During their further journey Mirza got tired and they stopped for a rest where Mirza fell asleep. As soon as Sahiba saw her brothers approaching she broke the head of all the arrows. Sahiban's love for her brothers overtook her love for Mirza or even love of her own life. I think this love epic reflects the ideals of the Punjabi kinship.

In several M. Sc. classes at the Quid-i-Azam University, Islamabad I asked female students as to who among them would demand her share of the patrimony? The response average ranged between zero and one among on the average ten female students. The male students of the class on the contrary voted for giving share to the sisters. 'The most cruel person turns into wax for daughters and sisters', goes a saying. Daughters and sisters are called 'guests' (*prouhnian*) at the homes of their parents. Thus, parents start preparations for their daughter's departure, i.e. marriage, right after their births. The issue of the daughter's departure is so emotionally charged in the Punjab that fathers start weeping or at least get moisture in their eyes when this topic is mentioned, for example, while listening the folk wedding songs like: *Dhian taee dhan praya be bawla tun piayar kiyun aina paya be bawla* ('Daughters belong to the others why did you fell in love them oh father'). There are similar songs of daughter's complains of being married of to places

[6] The case of one of these two women who claimed and got their share has been dealt in detail in another article published in the book form Chaudhary 2008.

far away from the homes of their father and brothers: *Bawal da baira shad ke wieran tu door challi …* ('Going for away from the courtyard of the father and brothers, far away from toys and joys'). Much of these might be ideals but they shape the nature of Punjabi society. The closest relationship for a woman in the Punjab is that to her brother. The other most loveable relationship in the Punjabi kinship system is of *mammon* i.e. of mother's brother. The maternal grandparents, particularly the grandmothers, are famous for their love of the children of their daughters, though parents are more worried if their sons do not get children, especially male.

The daughters continue affecting the life in the houses of their brothers long after their marriage at least as long as their parents live. If sisters have quarrels or difficulties with their husbands, the wives of brothers face the same. This is most clearly the case in exchange marriages. Women even after their marriage call their natal villages and families as their 'real' (*sada pend* or sada *ghar*) villages and houses. From daughters/sisters the women directly become mothers – consanguine relatives - without ever becoming wives in the Western sense. This becomes evident in the case of death of the husband. If the husband dies, the woman will be kept in that household only if she has children, particularly sons; otherwise she goes back to her parents' house. Only by becoming mothers, particularly of sons, women get their permanent place in the household of their husbands. A woman with sons can hardly be divorced.

Husband-Wife Relationship

A wife is considered an outsider who comes and destroys the family which is ideally joint and extended. This is expressed in proverbs like: *Ooan prayan jayan laraon sakyan bhayan* ('the alien come into the house and make the brother fight each other'). The relation between the family of the groom and the family of the bride is of antagonism and mistrust. This may be observed at the time of marriage ceremony. The groom's party enters the village of the bride shooting in the air, using crackers for making noises, beating drums, riding cars resembling an attack on the village as if it was a 'marriage by rob'. The groom and his people could be asked to perform a challenging job that could include things like shooting at a difficult aim, solving a puzzle, or a challenge in riding, etc. before they are given the hand of the bride.

Marriage negotiations that take place before the actual marriage are also full of mistrust. Both parties exaggerate in matters, for example, relating to economic status, education, age, etc. of the spouse. All the social networks are used to reach the truth. This mistrust continues after the marriage, at least the first years. The mother-in-law fears that the bride wants to establish an independent household, i.e. try to disintegrate the joint family of her sons. She therefore does not want her sons to be intimate with their wives. Thus, it is a common value in the village that the men of honor and prestige spend little time at home with their women folk. They come to their homes only for short whiles and even eat preferably at men's places like *dera, hawaili and thara*. The mothers and sisters have a great influence on their sons/brothers who listen to their mothers/sisters complaints and obey their advices. The wives fear being divorced and robbed of their dowry including the costly golden jewellery. In the worst case the relation of husband and wife is said to be a three words relation ('divorce, divorce and divorce') and woman is often compared to shoes which one wears if they fit[7].

[7] Original Punjabi saying goes: "Aurat te paer de juti ae puri aie te palaie neh te badal laie".

Brother-brother relationship is very different in nature from the brother-sister relationship. Brothers are called *sharik* (in meaning synonymous to enemy) and their children became *sharika* which is feared and respected. It is at the level of *sharika* that most of the competition for honor and prestige takes place. Brothers have to divide what is actually in most cases undividable like the family honor, lands, animals, even family relations. It is between the children of the brothers that most of the fights and conflicts in a village take place. These conflicts relate to the land and property. According to the villagers it is the wives of the brothers who are the cause of these conflicts. The sister-sister relationship is cordial except that they compete for brothers. The difference between brother-brother and brother-sister relationship becomes most evident in the Punjabi system of gift exchange known as *vartan bhaji*.

Vartan Bhaji

That the relation of brother and sister decides the nature of the Punjabi family and society is also evident from the system of gift exchange called *Vartan Bhaji* in ethnographic literature on the Punjab. *Vart*an *Bhaji* consists of two words: *Bhaji* usually translated as 'sweats' and *Vartan* as 'distribution' or 'dealing', combined 'dealing in or distribution of sweats'. This is a very elaborate system of gift exchange that Eglar called 'dealing in relationships' (1960: 105). *Vartan bhaji* though literally means sweats only but it may be used to elaborate the whole gift exchange. Focusing on the sweats first it is the sweats a woman brings from her parent house, i.e. actually the house of her brother, for her in-laws. These are meant for distribution in the s*harika,* i.e. patrilineage of her husband, which is actually also her *sharika*. Thus women in the Punjab loose their *sharika (bradary*) after marriage and become a part of their husband's *sharika*. This is why people say that women have no *zat, no bradary* or *sharika* of their own.

One could also argue from a different point of view that the women actually lay the foundations of the *sharika*. The one time brothers, through their wives, become *sharik* (enemy) in the form of their sons. The foundations of this new relationship are laid down by the sister's brother in the form of sweats. This relationship between sister's brother and her husband is very ambivalent. Thus, on the one hand, the sister's husband is the most important guest for any Punjabi family. As a matter of fact, when Punjabis introduce somebody as 'our guest' (*prouhna*), they mean that he is their sister's or daughter's husband. In case of any trouble for the sister or daughter he becomes the worst enemy. The term for wife's brother is *sala* which is actually also an abuse. This is a person who is actually robbing that (sex of the sister) what the Punjabi brothers protect even at the cost of their lives. The *Bhaji* relationships between brothers, patrilateral parallel cousins, patrilineage at the extreme end i.e. the whole *bradary* are of equality, fraternity hence of competition that eventually turns into enmity. The relation of *Vartan Bhaji* between brothers and *biradary* brothers are dealt with by the women, i.e. wives, and then transferred to daughter-in-laws. Here lies the crux: Wives are strangers between the brothers and due to competition and mistrust the brothers become enemies in the form of cousins.

Married sisters also get their share of the *Bhaji* that their brothers' wives bring from their brothers' or fathers' houses. *Bhaji* with sisters/daughters is, however, not operated by the wives but is dealt with by their mother, father or brothers themselves. The gifts which the sisters/daughters get are called *Thehi Tehan, an expression which can*

be translated as 'giving to the daughter'. On occasions such as religious festivals (*Eids*), marriages of brothers, birth of sons, their circumcision, or later on the sad occasions of parents' deaths, in short every time the daughter/sister visits her family she comes packed with gifts. These gifts are the main topic of talks between women.

Every time there is a celebration in the family of the married daughter the parents go loaded with gifts for the whole family. The most celebrated occasion is the marriage of the children of the daughter. Her parents if still alive and brothers bring what is known as *nankishak* and which covers almost the biggest part of the bride's dowry especially the marriage of first daughter. The parents once their children have been married start collecting dowry for daughter's daughter if there is one. When the brothers establish their own independent households or when the parents are dead the role of father is taken over by the brothers. The sisters are said to become 'daughters' of the brothers after the death of the parents. Thus, Punjabis say that brothers are never younger than their sisters and that the elder brothers are like fathers to them. Hence all brothers are like fathers and therefore they give *Theh Thehan*. This does not mean sisters do not give gifts. They also bring gifts for their sisters-in-law and brothers' children but they receive many times more. The women, I mean sisters, relate to neighbours the inflated stories of gifts and other assistance their brothers have given for the running of the daily affairs of her household.

In my view, the traditional rights of the daughters/sisters in the Punjab are compatible with their position and role in the family and society. The State/Islamic law reserves the share of the daughter in the property of her father. It is my assumption that the daughters do not claim their official/Islamic share in the property of their fathers/brothers because what they have to give up is more than what they would get. What she has to sacrifice against her legal share is her right on the natal family. In other words if a women claims her part of inheritance she will have to do it at the cost of her claim of return to her stem family. This is particularly important for her in a society where women can be divorced without any claim on the property of their husbands. The women return to the family of their parents/brothers in case of the death of their husbands in case the couple was still childless. There are hardly any examples and possibilities of women to live alone, i.e. without men who are her fathers, brothers, husband and sons. However, a woman who claims her legal/Islamic share of her parental property decides for such a fate for her. In other words she becomes a brother instead of a sister[8]. Now we turn to the last point before conclusion i.e. the cousin marriage. My claim is that cousin marriage is not a mean to stop transfer to property from the family.

Cousin Marriage

Endogamy is practiced in most parts of Pakistan. This in contrast to exogamy may be defined as marriage with one's own people. Incest taboo that covers the categories of close relatives that cannot be married like mother, father, mother's sisters, brothers and father's sisters and brothers and one's own brothers and sisters, etc. defines limits of endogamy. Beyond the incest the general principle seems to be the nearer the preferred – for instance mother's brothers/sisters children and father's sisters/brothers children are preferred forms of marriage practiced in Pakistan. Of course other considerations also

[8] Most of the above details in this section have been reproduced here from an earlier article (Chaudhary 2008).

play not so insignificant a role for instance the economy, the nature of personal relations within the preferred categories, sometimes the wishes of children, etc. If no match is found in the first preferred category the next ring of relatives is considered and so on. The status of wife givers is in general considered lower than the status of the wife receivers. To explain my point about the reason and nature of cousin marriages in the Punjab I would like to present here the case of Qadir's family that highlights different factors that affect marriages and strategies that are adopted in arranging them.

Marriages in Qadir's Family

Qadir's family consists of two brothers and four sisters. He is married to the fathers' brother's daughter (called *dadke*) and his younger brother is married to the mother's brother's daughter (called *nanke*). Three of his four sisters are married outside the close relatives but in their own *biradary*. The last sister is married to the mother's sister's son. Both brothers live in a joint family along with their children including the married ones. (The latest information is that the families of two brothers have finally separated). This is a farmer family originally hailing from the village but now mainly works as shopkeepers in their own shops in a city. Qadir is the elder of the two brothers who has started shop keeping business. Ashaq, his younger brother, has three sons and one daughter and Qadir has three sons and two daughters. Two sons of Ashaq are married with Qadir's daughters and one son of Qadir is married with the daughter of Ashaq. One son of Ashaq is married outside of the close family because (as Qadir told) there was no girl in the close family. One of the two sons of Qadir is married to the mother's sister daughter. The last is still unmarried.

Qadir explains: In an in-depth interview I asked Qadir different questions relating to issues like the role of property in endogamy, his views about genetical disorder in close relative marriages, the marriage to the Quran with special relation to the marriages in his family. In response to the question if he did not know about the genetical problems related with cousin marriages he told to know fully well but he still arranged the marriages between his and the children of his brother. He said the choice for him was between miserable life for his daughters with no genetical disorder for the future generations and a good life for the daughters with a rare chance of genetical disorder in the future children. He chose later and he is happy with this choice.

The main reasons for close cousin marriages in his family he said were the bad experiences with the out of family marriages of his own sisters. Three of the four sisters of Qadir were married outside the close family. All three sisters live a miserable life with their husbands' families. Their husbands beat them and do not give them money to buy clothes, eatables, and necessities of life. He told in tears that one sister very recently came to him with cancer prognoses. The husband did not spend a rupee on her treatment. Qadir and his brother spent all the money in the best possible hospitals for medical tests and thanks God finally it turned out to be TB. This sister lived with Qadir for treatment and left a few days ago. All the sisters get money from him to meet their day to day expenditures. After this experience the youngest sister was married with Zulfiqar, the mother's sister's son. Zulfiqar was first trained in shop keeping business and then was helped in establishing an independent shop. This is the only sister who is leading a normal and happy life.

Qadir explained that in the light of these bad experiences with the marriages of the sisters. He prepared for a long time and managed successfully to marry family daughters in the close family. He explained that their (both brothers) daughters were not very beautiful – two are very short in height and all have a very dark complexion. He told as far as he knows about the beauty standards of the modern youth their daughters had no or slight chances of getting a husband. Whereas they had such beautiful sons he pointed towards the sons of his brother and his own. Strong and economically well off. If he had not married these girls with the brother's sons and other way round no male acceptable to him and brother would have accepted these girls in marriage.

He explained further that as the children grew in marriageable age he once calculated the total expenditures on at least four marriages that were due at that time. According to his estimate it would have cost them half of their business. His younger brother agreed to his suggestions and they silently arranged the day for their marriage. Qadir told that it was not so easy to arrange these marriages. The biggest challenge and trouble were the two wives of them the brothers. They belonged to the traditional opposition if not right away the enemy sides. His wife was from his father's family and his brother's wife from their mother's side. Both these he said were traditional enemies. The wives want to keep close relationships to their families at the cost of the husband's family. The wife of Qadir's brother was the biggest barrier. She tried her best to convince her sons to revolt against the betrothal arranged by him. She did not succeed because Qadir had been very near to his nephews who had seen how fair and caring he was to them and how he loved them more than his own sons. They did not listen to their mother's advice. They were wise they also saw the consequences of such refusals. All the children whose marriages he has arranged were happy and the business prospers.

All Qadir's sisters have withdrawn their claim of property in favour of their brothers. The shops he has already transferred to the names of the sons. Daughters he said should not get any share. Marriage to the Quran he said at the start of our conversation was done by the rich people to save their properties from being transferred to other families. He confessed later that after the experience with his sisters he would rather marry his daughters to the Quran than giving them in marriage to strangers.

It is not unusual that Qadir was grieved over the misery of his sisters and that he does his best to improve their lot. He is moved to the extent that he exchanged married his daughters to the sons of his brothers and takes the daughter of his brother as a bride for one of his sons. The marriages of other sons and daughters of his and his brothers he and his brother sought spouses in next nearest possible relatives. This is not uncommon in an endogamous marriage system. That he did not give his sisters and daughters their share of the property is also not a very uncommon practice in the Punjab. Similarly the cost of marriage and other economic factors are important in the arrangement of marriages is also quite common behaviour in this part of the world. The importance of these factors may even dominate in certain cases – people may refuse a close relative their daughters and vice versa if they get an economically sounder offer.

The first case shows that sisters and daughters are at the core of these institutions. The well being and honour of a person is very closely related to the well being of the sister/daughter. This case shows the multiple sides of the relationship of man with his sister/daughter. The brother is worried about the well being of his sister. Qadir cried

when he told the misery of his sisters. The objective of life of a man is to arrange such a husband with whom they could live in peace. Qadir married the daughters of the family (his and his brother's) to their cousins. He knew about the genetical defects that may be caused by such marriages yet he preferred them. But he was at the same time concerned with his business. The cousin marriages in this case were cheaper. Almost nothing was spent and no money property moved out of the house/business. Similarly he did not give the share of the sisters in the patrimony. He similarly distributed his business among his sons without giving anything to his daughters. Such cousin marriage is considered the safest for both the women and also the aging parents. Because there is no other system of old age insurance. This does not mean there are no conflicts or problems relating to the marriage with cousins. For a detailed ethnography of such conflicts see Chaudhary 1999.

This means marriages have to take place within the same *biradary* on the first place but women may also be given in the *biradary* higher than that of the women but never in lower *biradary*. Marrying within the same *biradary* could also be explained as hypergamy because the bride givers are considered of lower social status. The different *biradary*s or ethnic groups are organized hierarchically in the Punjab/Sindh and people are very sensitive about their social position and status. There may be difference of opinion which group belongs to a higher status between members of different ethnic groups but there is no dispute that there is hierarchy. The status of some groups is very clear and beyond debate and in other cases it is contested. For instance there is no debate about the highest social status of the syeds and lower status of the artisan groups. Other *biradarys* like jat, Rajputs, Araeen, etc. may quarrel about the place of their *biradary* in the social hierarchy which is again different in different regions.

According to Pfeffer (2007) the Pakistani Punjabi society originally belonged to the North Indian type which consisted of numerous local bands of patrilineal ancestry lacking clear cut descent lines linking them to the conical founding ancestor. These bands were exogamous and practiced exchange prohibition and repetition prohibition for four generations. The exchange prohibition meant that a bride could not be taken from a clan where a sister or a clan sister had been given as a bride. The repetition prohibition forbids a bride from the clans of four grandparents of the groom. Brides were given dowry and bride givers were considered socially lower to the bride takers. After Islamisation several changes took place among the Muslim Punjabis, particularly in aspects relating to exchange prohibitions and repetition prohibitions (Pfeffer 2007). In short according to Pfeffer's views Pakistani Punjab as a result of Islamisation became *biradary* endogamous with most of the marriages taking place within close relatives such as the children of the brothers and sisters. But in spite of these changes many of the old practices were still prevailing. The practice of dowry, the lower social status of the bride givers, antagonistic relationship between the affine as also *vartan bhaji* and *theh thehan* (simplified as gift exchange) are typical aspects of exogamous marriages.

Discussion and Conclusion

This article discussed the customary share of daughters/sisters in the patrimony in Pakistani Punjab. This article tried to argue that the customary practice has a logic which can only be understand if embedded in the Punjabi social and kinship structure. This is at divergence from the Islamic and the state law. This custom looks very odd when looked at from the Western or modern feminist perspectives. This may serve as an example of the problems of the rule of law in Pakistan. The rule of law requires unity of law which is

achieved in the form of state law. Pakistan is legally plural having state law, customary law and Islamic law being practiced here. The dominantly practiced law in Pakistan could be safely said to be the customary law. We wrote in the case of daughter's share in the patrimony that the theory of the official law is very different from the prevalent customary practices. This phenomenon is not limited to the daughter's patrimony alone, it is found in many other fields too. Daily newspapers frequently report stories relating to the marriages where the customary practices still prevail despite ruling of the Supreme Court of Pakistan for the reverse in case of the so called love marriages[9].

We know from other enumerable cases that the court verdicts have almost no validity. The families of the women are ready to go to any length for acting upon their custom. Many couples have been killed in-spite of the verdicts of the superior courts. Another important area to mention is related to honor killings and blood feuds in Pakistan. According to the report a famous *Jirga* (council of village elders) in Sindh met to decide an old blood feud. In its verdict the *jirga* ordered some innocent girls to be given in marriage to the aggrieved family. The interesting aspect of this case was that a Member of the National Assembly, the District Mayor and the *Tehsil* Mayors (all of them are supposed to represent the state and uphold the state law) were members of this *jirga*.[10] This is by no means an exceptional case.[11] Exceptional is perhaps that the Supreme Court of Pakistan took a *suo motu* action, cancelled the verdict of the *jirga,* and declared that it was an illegal, parallel system. The next day there was a "province wide crackdown against the *jirgas* by the police"[12].

The giving of girls in marriage to end blood feuds, usually of ancient origin, is known as *Swara* or *Vanni* and is an age-old practice in the tribal areas of North West Frontier Province, Sindh and Balochistan. The *panchayats*/*jirgas* are headed by powerful, influential, aged and respectable personalities. In the above case the *jirga* included political leaders from almost the highest level in the area. The meetings of the *Jirgas/Panchayats* are made on the request or by the consent of the parties involved and most of their decisions are compromises arrived at after discussion with these parties. The decisions of these *panchayats*/*jirgas* in my view reflect the values/traditions/culture of the people. The decision of the court is made keeping in view the laws which have their

---

[9] A daily newspaper "The News International" in its editorial on 30th May, 2009 writes:
"Even a decade after the Supreme Court ruled that an adult woman had a right to choose her spouse, the issue lingers on. The latest case to come up before the LHC involves Kulsoom Baloch, a 25-year-old who has a post-graduation degree, and her husband Fazal Abbas. Abbas and his family have faced repeated harassment since he wed Ms Baloch last year. The LHC ruled after hearing his wife that the latest FIR lodged against him, accusing him of kidnapping Kulsoom, was a false and ordered that he be released from police custody. The court upheld the right of the couple to live where they please". (http://www.thenews.com.pk)

[10] "Chaudhry intervened in the decision of a traditional tribal council called *jirga*. It had ruled that five little girls aged two to six were to be handed over to a rival party in the context of a dispute settlement. The *jirga*, by the way, was headed by Hazar Khan Bijarani, the country's current education minister." (Saigol 2009: 208).

[11] Reports of such cases can be found on daily basis in newspapers such as: ("Minor girl handed over in compensation": The Dawn June 10, 2009, page 9).

[12] "LARKANA: Sindh Inspector-General of Police Jahangir Mirza has said that no *Jirga* will be allowed henceforth and anyone daring to do so will be dealt with severely. Instructions have been issued to the police to proceed against *Jirgas*, he said while responding to queries from newsmen at the DIG Larkana Office during his first-ever visit to the city on Saturday. The IGP said the Supreme Court has ruled that the *Jirga* system is a parallel judiciary system that has no provision in the Constitution." (The News 2.7.2006).

origin in the West and which as Moore wrote "examine one distinct dispute under 'laboratory conditions' (Moore 1985: 6) following the western values of individualism, universal human rights, women right, etc. Nothing against them but since they are not according to the local values hence they remain rather an empty slogan.

The fact is that people do not accept laws, courts, official law if and where it is against their values. Coming back to the case study what did the Supreme Court of Pakistan ban, and was its ban effective? According to the local custom the consent of women is not sought for their marriages. It is a duty at one level and a prerogative at another of the family or parents to marry off their children. Women who arrange their own marriages are considered almost whores. Such marriages are conducted in secret, and the families of such women loose all honor and respect among fellow villagers. They register cases with the police declaring that their daughters have been abducted. These couples are hunted down and, when they are found, killed (in so called 'honor killings'), except when sometimes the women are ready to go back to their families and declare in the court that their absence resulted from abduction. In the social context of such practices, if parents are ready to marry off their daughter to somebody without her consent, the Supreme Court cannot prevent it. Moreover, *jirgas* are constituted informally, without either fixed permanent members or written proceedings. And *Jirgas/panchayats* are everywhere – in a literal sense, whenever five people meet to decide something this is a *panchayat/jirga*. Besides that, decisions of the courts very often remain unimplemented in Pakistan. The government of Pakistan may want to ban *Swara*, *Vanni*, and honor killings, but enjoys the support of only a small section of the society, primarily NGOs and some women's organizations. The society at large still approves the traditional customs.

Bibliography

Ali, Shaheen Sardar (1997) A Critical Review of Family Laws in Pakistan: A Women's Perspective. In: Women's Law in Legal Education and Practice in Pakistan: North South Cooperation (eds.) Rubya Mehdi and Farida Shaheed. Copenhagen: New Social Science Monograph.

Chaudhary, M. Azam (1999) Justice in Practice: Legal ethnography of a Pakistani Punjabi Village. Karachi: Oxford University Press.

Chaudhary, M. Azam (2002) Scharia und pakistanisches Rechtssystem. In: *Länderheft Pakistan;*
Weltmission Heute 44. Breklum: *Evangelisches Missionswerk in Deutschland (EMW),* Breklumer
Druckerei.

Chaudhary, M. Azam (2005) The Mullah as different - the Mullah as same: A Local anthropologist's reflections on the Lebenswelt of Mullahs in the Pakistani Punjab. In:
Ethnoscripts; Analysen und Informationen aus dem Institut fuer Ethnologie der Universitaet
Hamburg. 7: 57-84.

Chaudhary, M. Azam (2007) Law as Cultural System: Chaudhary, Mullah and Judge in Pakistani

Legal Culture. In: Law and Religion in Multicultural Societies. (Eds.) Rubya Mehdi, Hanne Petersen and others. Copenhagen: DJOF Publishing.

Chaudhary, M. Azam (2008) Cultural Analysis of Politics, Law and Religion in Pakistan: Some Essays in Interpretative Anthropology. Koeln: Ruediger Koeppe Verlag.

Cohen, Bernard C. (1989) Law and the Colonial State in India. In: History and Power in the Study of Law: New directions in Legal Anthropology. June Starr and Jane F. Collier (Eds.) New York: Cornell University.

Cohen, Bernard C. (1967) Some Notes on Law and Change in North India. In: Law and Warfare: Studies in the Anthropology of Conflict. Paul Bohannan (Ed.). New York: Natural History Press.

Eaton, Richard M. (1984) The Political and Religious Authority of the Shrine of Baba Farid. In: Moral Conduct and Authority: The Place of Adab in South Asian Islam (ed.) by B. D. Metcalf. London: University of California Press.

Eglar, Zekiye (1960) A Punjabi Village in Pakistan. New York: Columbia University Press.

Khan, Hamid (2007) The Islamic law of Inheritance. Karachi: Oxford University Press.

Mehdi, Rubya (!994) Isalmization of the Laws in Pakistan. Richmond, Britain: Curzon Press.

Mehdi, Rubya (1997) Introducing Women's Law in the Legal Education in Pakistan. In: Women's Law in Legal Education and Practice in Pakistan: North South Cooperation (eds.) Rubya Mehdi and Farida Shaheed. Copenhagen: New Social Science Monograph.

Moore, Sally F. (1989) Law: In: The Social Science Encyclopedia ed. by Adam Kuper (Original published in 1985, rep. 1989). Lahore: Services Book Club.

Moore, Sally F. (2001) Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999. In: Royal Anthropological Institute 2001. J. Roy. Anthrop. Inst. (N.S.) 7.

Pfeffer, George (1995) Manliness in the Punjab: Male Sexuality and the Khusra. In: Sociologus 2007 Verwandtschaft als Verfassung: Suedasien als Beispiell. Unpublished.

Flying Kites in Pakistan: Turbulences in Theory and Practice

Werner Menski[13]

Introduction

This article focuses on global legal theory in the twenty-first century and explores where we stand today in relation to legal theorising that should be globally applicable rather than serving eurocentric agenda, state-centric positivist orientation, or some other type of myopic vision to the exclusion of other forms of law. Some wider comments link this to identity construction and illustrate the complexity of Pakistan's current struggles to come to terms with plurality, diversity and difference. The article then shifts focus specifically to connect theory and practical application, culminating in the model of a kite, a familiar image in Pakistan, which people may not immediately associate with law.

I am not alone in writing about Pakistani law using the kite image and linking this to identity. Several decades ago, Professor J. N. D. Anderson (1967: 139), a late colonial expert on Islamic law, South Asian Muslim law and specifically what he called Anglo-Mohammedan law, examined to what extent Pakistan was an Islamic state. Notably, he concluded his assessment by comparing the people of Pakistan with boys flying a kite on a misty day: 'They cannot see it; they cannot tell where it is going; but they certainly feel the pull'. Except that Pakistan has now grown into a rather patriarchal adult and could no longer be depicted as a crowd of children, the identity crisis continues, and the role of Islam in the legal system of Pakistan remains of much scholarly and practical interest (Lau, 2006). The present article picks up this kite image and uses it for the central argument that without skilful legal kite flying, the still rather young nation and Islamic Republic of Pakistan will crash rather than prosper. Carefully considered recognition and acknowledgement of legal pluralist methodology in today's global context, rather than simplistic and now outdated reliance on Western-style positivist methodology or religiously underpinned reliance only on Qur'an and Sunna, thus becomes a critical survival skill for the entire nation, its leaders as much as its common people.

According to many assessments the skies over Pakistan have become more clouded and the recent massive floods led to further questions about good governance and the role of law.[14] I link such debates here particularly with the task of a nation and its people to find their own culture-specific identity, which the Japanese scholar Chiba (1989) called 'identity postulate'. Legal theory, this illustrates, can certainly teach us important lessons about the crucial ongoing challenges for Pakistan and offers sustainable suggestions for remedial action. But it will undoubtedly and necessarily be a kite journey with lots of turbulences.

---

[13] Professor, School of Law, SOAS, University of London, UK.

[14] See e.g. 'How to fix flood-hit Pakistan', BBC News South Asia 7 September 2010. http://www.bbc.co.uk/news/world-south-asia-11200179?print=true.

The Need to Find One's Identity

In Pakistan the kite is now a banned symbol. This is really sad and quite short-sighted. But the ban may have the opposite effect, as it makes more people realise that banning something does not actually make it non-existent, it only changes the legal status of what is being banned. A simple example of the limits of law, it is also an illustration of the lack of plurality consciousness that has characterised much of legal development in Pakistan. The banned kite image exists now in people's minds as a cultural symbol and a localised memory in an agrarian society, rather than being seen in Pakistan's skies at certain times of the year when people used to enjoy flying kites.

It is somewhat bad timing that I now equate flying kites with thinking about law, especially after having earlier worked in Pakistan over ten years until 2001. I always encourage my students to explore the rich pluralities of legal analysis. Banning something through strategic use of law and power could lead to more open discussions of how damaging a symbolic ban on anything, whether *burqas* in France and other places, or kite flying in Pakistan, may actually become. Do law makers really think about the consequences of their actions, or do they just enjoy the prerogative of making law? Specifically in a big nation like Pakistan that still struggles to find its identity after more than 60 years of independence from colonial and other subjugations, this kind of ban is a crucial legal intervention with many potential consequences. If France is afraid of *burqas* now, and Pakistan of kites, these are indications of deeper crises of identity, above all of unease about recognising socio-cultural pluralism as a fact of life.

Anywhere in the world, pluralism is not a new phenomenon, or simply a consequence of globalisation. It has ancient roots, as Muslims know from the early history of Islam itself. In the early twenty-first century, we seem to have become so fixated on certain powers of law that many people blindly believe that outlawing something will make it non-existent and will help to influence a whole nation's identity formation. From a legal theoretical perspective, doubts are in order whether such legal interventions are constructive, in other words, if they are 'good law'.

Globally we are everywhere facing theoretically similar issues over acceptance of diversity, of 'the other' in more fashionable scholarship terminology. Muslim 'others' are rightfully but perhaps too aggressively claiming a place in European identity today and I have started talking about *Eurosharia* and *Eurodharma* recently to remind my European colleagues that we have not only clear evidence of *angrezi shariat* in the UK (Pearl and Menski, 1998), but also other multiple manifestations of hybridisation among Asian and African migrant populations in Europe. These are different from place to place, with certain 'glocal' and 'ethnic' key elements in them. But if Muslims in Europe and other migrants and their descendants rightly question various assimilationist forces within Europe, and it is still not easy being British, as Tariq Modood (2010) now posits forcefully (see earlier Modood, 1992), then questions also need to be asked about pluralist co-existence in Muslim countries, where 'others' often have a much older history of sharing a common space. In today's interconnected world, where accounts of new atrocities travel worldwide within seconds, we cannot have one form of recognition or accommodation without the other. While every country should have the right to determine its own identity, the various people(s) in those countries also have a voice; relevant claims need to be exercised with circumspection and in a spirit of plurality-consciousness (Menski, 2006).

Chiba (1986) taught us persuasively that law is everywhere a combination of 'official law', 'unofficial law' and 'legal postulates', the latter being various kinds of value systems, including religion, which are critical in identity formation. The general pattern appears to be that if a country is at ease with its identity and its people respect others and acknowledge various forms of difference, everybody has a higher chance to lead a peaceful life together and the nation, no matter how large, will prosper. In a scenario of fierce struggles over identity, even in a small group, there will be tensions, much stress at all levels, even forms of 'honour killing' and, at a larger scale, civil war. If things get out of hand, a country may turn against itself and self-destructs.

When Pakistan and Bangladesh divorced in 1971, one found precisely such a scenario. After this acrimonious break-up, the former West Pakistan, which certainly saw itself as the dominant partner in that failed marriage of convenience, had to find its own identity as Pakistan, minus those Bengali 'others'. Suddenly it became even clearer that not all Pakistanis are Panjabis. East Pakistan as Bangladesh also continues to face turbulences over the modalities of acknowledging its own internal diversities as another Muslim country with significant non-Muslim minorities.

Chiba (1989) stressed that every country has to develop its own identity postulate, which may be a painful journey. One observation seems obvious for a German (for I am not a former colonial officer of the Raj like Professor Anderson, but a global scholar with central European origins), namely that any country that tries to find its identity by abusing law in various forms instead of recognising the realities of social, cultural, religious and also legal pluralism, may bring on itself and its people a violently turbulent scenario.

If a state does not get the balance right in managing the various conflicting pulls on the kite of law, there is bound to be trouble not only in national identity formation, but we also find much violence in communities, on the streets and even in homes. Horrid dramas of that kind are increasingly visible in case law that few people read and are aware of. Such fallout is far too superficially discussed as political turbulences by political scientists, and as social strife by various social scientists who tend to blame 'culture', 'tradition' and patriarchy, while lawyers seem to claim innocence about the consequences of their interventions. Not only lawyers, but all social scientists had better learn that their respective field of study is actually a vast plurality, an interdisciplinary arena in which all kinds of normatively competitive entities constantly make conflicting claims. Social scientists like to think that they are better at theorising this than lawyers, and they may be correct. In practice all fields of academic analysis remain marred by theoretical confusions and politicised turbulences, and we all struggle with handling the troublesome phenomena of diversity and difference.

Sadly, since the field of law is damagingly often seen as a separate entity altogether, especially by social scientists, the cherished power to simply make one law for all does not get challenged with sufficiently robust interrogation. Legal uniformity is a fake axiom, even in Britain (Pearl and Menski, 1998). While social scientists are not automatically wiser than lawyers, lawyers are not more powerful simply because they know how to throw their rule books at problems. A pattern of bad management of law and of social sciences, and of their interactions, significantly contributes to stresses in a state's identity construction, which then often directly generate disturbing consequences

at regional and local levels, creating individual mental turmoil that leads to much further violence and self-destruction. Huge loss of life, unhappiness and selfish fights over property arise in scenarios where people often desperately need each other's support to survive on a day-to-day basis. Pakistan cannot afford such destructive wastage.

Current scholarship worldwide is now beginning to recognise that boundary crossing between state law and non-state laws (Hinz and Mapaure, 2010), private and public spheres (also for Pakistan see Yilmaz, 2005), formal and informal types of law (Mehdi et al., 2008; Grillo et al., 2009; Foblets et al., 2010), and law and religion (Ferrari and Cristofori, 2011) is a hugely important area of legal analysis. The boundaries of public law and private law are now seen to be crossed in many more ways than was earlier imagined. An important multi-volume global *Encyclopedia of Legal History* emphasises the multiple links between law and culture (Katz, 2009). Acknowledging this already represents one important step forward, since interdisciplinary and comparative area studies have simply not received enough sustained attention. Following up such studies requires what Muslims might call scholarly *ijtihad* of various types, since that technical term also denotes a plurality of pluralities and is not merely a reference to the exertion applied by religious scholars.

A pluralist methodological approach in law requires from lawyers and social scientists, first of all, an ability to distinguish between different kinds of law that frequently operate in competition with each other. Law is not just law, then, it is a plurality of pluralities in itself. Today we are learning again that we need to be engaged much more seriously in complex theoretical discussions about the basic nature of law. Too much emphasis has been given to selfish boundary drawing, verbose protection of the cabbage patches of law, ascertaining what is – and what is not – law. More attention needs to be focused on the actually quite predatory tendency of law to colonise other entities when it suits a particular legal player. How far can law go? Religion, ethics and morality often claim legal force; society and culture assert their power as law; today's states are struggling to protect their cherished legal authority against international conventions and various regional legal arrangements. Everywhere, thus, law is inherently plural, is its own 'other', easily corrupted by power and skilful in avoiding accountability. Often there is too little awareness of the scope for sustainable compromises that allow various diversities to co-exist. Power, of course, is tempting, not only in patriarchal social contexts or for lawyers. However, if life itself is plural, legal approaches that seek to deny plurality will have to resort to dodgy techniques like symbolic official bans of *burqas* or kites to achieve highly questionable objectives of excluding certain forms of diversity. The key issue then becomes what should be our criteria in law for making certain choices, but not others. At the start of the new millennium, global legal scholarship on legal pluralism has become increasingly aware that more academic attention to interdisciplinary practical application is a really tough testing ground for legal scholarship of the highest quality.

This article is thus also an urgent plea for countries like Pakistan to improve and update legal education systems. Whether we like it or not, law is a critically important superstructure (in a non-Marxist sense) that impacts on all our lives every single moment of our existence. If even lawyers do not understand this internally plural phenomenon of law properly, as it manifests itself at global but also at glocal, local and even individual level, neither they nor the people or bodies they work for or interact with will

comprehend the world around them. Nor will they understand themselves as individual agents that are at the same time a legal, social, religious, cultural and psychological entity. Lack of awareness of such internal pluralities, coupled with abuses of power and privilege by those who do know, but unfairly exploit this advantage, could be major reasons why the Pakistani kite still faces serious turbulences regarding identity formation. It is not good enough to blame colonial interventions for present troubles. Too few lawyers today are well-educated; everyone plays politics with law, causing multiple havocs. As individuals, members of families and local communities or as citizens, people in Pakistan will continue to face disorientation and massive confusions, ultimately unable to lead a good life if the basics of pluralist legal management are not understood and are not exercised responsibly. For law is about life, as much as it seeks to regulate life; the two are interconnected. This, I am increasingly convinced, is a globally valid message that an ageing law professor who seems to have turned into a rambling philosopher or, as some now say, a psychologist, should share before it is too late. I find myself concurring in this regard, too, with my much-respected colleague An-Na'im (2008: vii) who speaks explicitly as a Muslim, while I address closely related issues more from the perspective of global legal theory.

The Phenomenon of Global Law and Our Deficient Knowledge

So let us open our eyes widely, wherever we are and scrutinize the world around us and look inside ourselves as well. Law is everywhere manifestly not simply state law, though we seem to be living in the age of state-centric positivism, whether we think of the Anglophone concept of Austin's law as 'the command of the sovereign', or the civil law image of Napoleon making his code by candlelight. There are different cultural patterns of *mentalité*, as Pierre Legrand (1996: 237-238) calls this. In late modernity, the realisation that legal positivism is itself an internally plural concept and needs other types of law to succeed as good law is finally striking home, reaching a stage which may well be called post-modernity. Whatever we call it, this phase of pluralist re-awakening builds on the past, but is also our own lived presence, and lays foundations for the future. We are then, as thinking humans, ultimately equal interconnected beings, travelling together on a slow train of history. Looking out of the window, we perceive the world around us and those stratified connectivities in different culture-specific ways. We often call this perception 'religion', because matters of belief and conviction are involved, not just simple visions or social practices. While more is said about religion as law below, the key point here is that lawyers, the legal passengers on that train of history, like to think that they control the world and their interventions can cover and dominate the entire field. In its extreme form of positivist hubris, this becomes legocentric fantasy and potential terrorism in the name of law. Lawyers have hijacked the global train, it seems, and wear different masks.

Similar risks of impaired vision of complex theories and deliberate distortions when it comes to legal scholarship and its day-to-day application arise from the current global fashion of viewing law increasingly just through the lenses of international law and human rights. This perspective now dominates many law schools (Cane and Conaghan, 2008), but is by itself also not a feasible method to understand and manage law's complexity worldwide. Some scholars are beginning to realise that international law is itself a plurality of pluralities (Wagner and Bhatia, 2009). Like in Chiba's (1986; 1989) case, one should wonder why there are always significant Asian voices in this plurivocalisation of legal discourse.

Acknowledging the inherent limits of a legal mono-perspective regarding state law and international norms, however, we then also need to realise and admit that looking at law only through the lense of religion cannot be feasible, either. It is just as unfeasible as perceiving law only bottom up, from the chthonic perspective (Glenn, 2006), through the lense of social norms at micro levels. More dangerously, regarding religion, the risk of confusing the Holy Qur'an with state-made legislation needs to be raised here. Many scholars of Islamic law, Muslims and non-Muslims, lack clarity on this particular crucial point in their writing. For Muslims, this would mean an inbuilt necessity to be conscious and honest about the fact that Allah, as the power centre of this system of global connectivity, is not merely some kind of power-hungry Napoleon, but laid down, as received by the Prophet, an entirely different kind of law, which is ultimately all-encompassing, but thus also internally plural. God's law, this means, is a different kind of law than state law. Good Muslims themselves taught me that this should certainly be seen as a form of natural law. Natural law, every law student knows, is not the same as positive law. Many scholars and Muslims, however, seem to ignore the consequently cogent basic message that a good Muslim, at the end of the day, is then of necessity a pluralist (Menski, 2006: 281).

The worldwide so-called resurgence of religion and 'fundamentalism' takes many forms today. It does not only reflect the growing prominence of Islam but also the emergence of Islamisation as one specific form of globalisation (Glenn, 2006), competing with others. This competitive scenario simultaneously challenges the concepts of state-centric positivism and of international human rights, leading to huge debates and tensions about past and future alike (Hallaq, 2009; An-Na'im, 2008). The input of religion as a perennial manifestation of natural law is now taken more seriously again by global legal scholarship, and 9/11 may have something to do with that. It seems that we have now digested a little better the consequences of the Enlightenment. Jűrgen Habermas, it appears, speaks in the context of Critical Theory of the 'unfinished project of modernity' (Borradori, 2003: 15). But do lawyers care to read Habermas? Notably, this discourse takes the same direction as taken by Jacques Derrida, who famously stated that justice is always in the making (*à venir*), a position acknowledged recently by Amartya Sen, too. The modern world has not become a rich paradise, but is a globe full of gloom and poverty. Various ambitions, famously fixed into Millennium Goals, lie partly shattered by the forces of nature and unscrupulous mismanagement of increasingly scarce resources.

Renewed pessimism about global development needs to be seen in conjunction with the rising recognition of the power of religion as law. The state-centric promises of linear progressive development were ambitious, quite often fake. Poverty eradication and good governance cannot be decreed by legal dictates; there are limits to what law can achieve (Allott, 1980); morality and ethics remain relevant to legal processes. This reluctant awakening to the inherent pluralities of law involves also an acknowledgement, in secular post-colonial but still Western-dominated times, that religion is not irrelevant, but of course faith itself cannot feed people. In these same times, also the age of post-modernity, we discover now that Eurocentric post-Enlightenment secularism has silently turned into another form of religion that sought to dominate the globe in a different way than before. If colonialism was partly about some Christian 'civilising mission', modernist secular globalisation was supposed to promote 'good governance' through law as a tool of social engineering. Obviously, various 'others' were going to protest about such new colonising game plays. As the world experienced the end of the colonial era,

the slow-moving train of history slithered like a snake in new skin into an era of post-colonial reconstruction that has now turned out to be yet another conflict scenario. So it is not surprising that today's fashion industry among lawyers is post-conflict reconstruction. The question still remains why those conflicts arose, and whether we actually know a sustainable way forward. Offering cheap solutions remains a speciality of dodgy positivist legal advisers on fat fees, a form of leakage. Poorly developed legal theorising feeds intellectually impoverished lawyering that promises global uniformity, but leads us all into new forms of conflict, which in turn require more human rights plumbing. The major beneficiaries, always lawyers and policy makers, often act also as politicians and all become rich in the process, while many Pakistani children remain behind, illiterate and underfed.

We see the awful consequences of such circuitous abuses of resource allocation, power and knowledge all around us. We do not seem to agree on anything anymore and confusion generates more legal profit. Some players resort to prophetic promises and appeal to religion; others stubbornly rely on rule of law concepts and the secular religion of positivist power. Serious conflict analysis through pluralist methodology frightens many people, including remarkably many human-rights activists. Rather simplistic allegations that pluralism allows anything without moral limits are advanced to frighten keen enquirers. Deep pluralist methodology is, however, seriously concerned to identify what, in any particular and specific situation, may be 'the right law'. This is what irritates lawyers who prefer uniformity and precedent. Pluralist methodology works from case to case; it is not based on submission to a universal decree from above or a permanently binding rule. This is why religious fundamentalists of all types loathe it, too, since it highlights especially the situation-specificity of *shari'a*, while not actually undermining belief in God. Plurality-conscious forms of legal *ijtihad* seek to empower the glocal, the local, the group, and ultimately the final unit of accountability, the individual, but this approach runs the risk of being given *kafir* status. There is deficient recognition – and much self-serving reluctance to admit - that none of these entities and legal players can actually ever operate without awareness of the interconnectivity of all aspects of human life.

Since this particularistic pluralist approach also often tells the state to respect the informal law-making powers of various allegedly 'extra-legal forces', we realize in addition that legal pluralist methodology comprehensively interrogates and undermines the exclusive authority claims of legal positivism. Legal pluralism, then, seriously challenges any form of mono-vision of law. That is why, among other reasons, talking of legal pluralism – and of kite flying - upsets so many lawyers. They are put in a tight corner when abuses of power in the name of law become apparent for all to see, but still find verbose explanations to justify legal monism.

The fears that 'anything goes', regularly thrown as wild allegations at even preliminary attempts to cultivate pluralist analysis, therefore really just mask the speaker's fears of losing power and control over something that cannot be fully controlled but may be easily misused. The hidden agenda is often desire to drive development, even of the whole world - an entirely unrealistic but rather common human ambition. Deep down, many lawyers are like missionaries, then, wanting to impose their own values on all others. Claiming to be right, they simply occupy the moral high ground. Tony Blair, notably a trained barrister, was evidently a master of this strategy.

Politicians like Blair rejected claims for a role of Islamic law in English law while introducing Islamic finance regulations around the same time. Public allegations that pluralist methodology leads to confusion and terror distract us from noticing self-interested use of pluralism when it suited the state's agenda. Other fraught discourses simply mask disappointment with the uncomfortable fact that global universality would actually mean a monstrous threat to individual human rights and a refusal to recognize such basic truths (Menski, 2006: 13). There are few academic Pakistani voices telling us explicitly that state intervention is perceived as potentially monstrous (see excellently Chaudhary, 1999). We urgently need more plurality-conscious scholarship that analyses justice in practice.

In South Asia, as in some other parts of the globe, under banners of 'War on Terror' or *jihad*, people are killing each other, even closest kith and kin, in the name of so-called 'honour' (Welchman and Hossain, 2005) or some other ideology. It seems as though we have learnt no lessons from history other than that power is powerful, knives and fire can be used for all kinds of purposes, and the biggest bombs are likely to cause the most massive damage. Mutual accusations of being totally misguided and evidence of directly clashing Truth claims have precipitated the world into a spiral of violence and poisonous rhetoric, causing havoc also in Pakistan. Self-seeking symbolic actions such as the recent threat to burn the Holy Qur'an in some little American church will of course generate further violence at street level in Pakistan and Afghanistan, or lead to other foolish symbolic action, now reported from South Africa,[15] where skilled legal kite flying has evidently become a tool in national reconstruction and pluralist re-balancing.

While desperately outraged depictions of violence have become big media business, among academics and policy makers mere descriptions and critiques of horror and terror dumb braincells and darken the horizons of hope. They also reflect and reinforce a victim mentality that fails to offer sustainable solutions for pluralist compromises; it is actually another form of seeking refuge on the moral high ground. Insufficient intellectual and policy attention is given to analysing why and how such conflicts arise out of competing perspectives in the first place. Instead of reflecting in more depth on how to manage those various competing perspectives, acrimonious complaints are often really just verbal attempts at blacklisting and banning 'the other'. Since that 'other' will not simply go away because someone protests about their existence, we seem to be running around in circles and everyone is getting more stressed by Islamophobia, communal riots and related violence all over the world.

We also seem to ignore at our peril the need for what one of my brightest PhD students, a deeply religious secular young Turkish Muslim, simply calls 'altruism', an ultimately self-interested recognition that one needs to leave room for various forms of 'the other' if one wants to live in peace with oneself. This goes for entities like the Turkish state as much as for individuals anywhere in the world. In many British and other courtrooms, harrowing cases of asylum seekers disclose that this basic message is lost on far too many people, who engage in mindless interpersonal violence, even within closely knit families, and seem to push the limits of cruel sophistication of terror rather than

[15] Apparently, according to the *Weekend Argus*, a man called Mohammed Vawda wanted to declare 11 September 'Burn the Bible Day', but was stopped by another Muslim who as attorney for 'Scholars of the Truth' won a court injunction to the effect that freedom of expression in South Africa is limited.

exploring possibilities for the peaceful management of pluralist co-existence. Here, too, the public/private boundary is a major arena of conflict.

The Necessity of Pluralist Legal Analysis and its Relevance for Religious Discourse

This is why the image of the kite has become so instructive in analysing global legal theory. Law is not just state law or religious law, viewed in a closed box (Twining, 2000). Rather it is a vulnerable dynamic structure that floats in the air or moves in water,[16] constantly subject to turbulences and strains, both in theory and practice. The inherent dynamism of law is confirmed by such images and models. Refusing to acknowledge this, anywhere in the world, amounts to refusing the presence of pluralist lived reality. Law is indeed, everywhere and in many forms, a powerful tool and a wonderful means of manipulating all kinds of processes. Being so dynamic, it remains slippery and subtle, constantly challenged to prove its worth in terms of feasibility and sustainability, easily subject to devious manipulation and abuse in the name of power, religion, or simply some pig-headed egoism.

In all of this turmoil lawyers - and also many judges therefore - have too easily forgotten that law is also a social science and that there are now billions of people on this globe, their lives vicariously affected by how we handle global legal theory. If we fly the kite of legal theory wrong, it may crash. Far worse, many individual kites will face destruction, because we are simply all kites ourselves, subject to predictable and unpredictable turbulences at any moment of our own interconnected lives. We exist on strings that may become invisible. We are not, as the Enlightenment purported to claim, ever totally autonomous individuals. Everywhere on the globe, in their own culture-specific ways, people as individuals, within their families and societies, continue to make and apply laws, every single moment of their lives, quietly and often peacefully sailing along like kites on a nice day. This constant process of applying law goes largely unnoticed and is not being picked up by legal radars, mainly because we programmed those radars to distinguish the legal from the non-legal, and did so far too narrowly. To dismiss most of the reality of 'living law' as 'extra-legal' turns out to be a rather dim-witted denial of the massive presence of non-state law as an inevitable part of human existence. We may indeed know that, but the practical implications of such recognition have somehow been kept off our mental radar screens.

So we are forced to re-learn in this post-modern age that law is plural and has definite limits if we think of it primarily as a state-centric tool of social engineering or a technique to make loads of money or to rule over others. The most wonderful book on this topic, in my view (Allott, 1980) is sadly out of print.

We have more popularly learnt to speak of alternative forms of dispute settlement and have coined fashionable acronyms for this like ADR, or speak of the contrast of SLS and NSLS, state legal systems and non-state legal systems. We juggle with such concepts, but fail to apply them properly and are simply not radical enough in discussing non-state laws, which impact so directly on everybody's daily lives. The reason for this deliberate silencing is not far to see: Talking about the critical importance of non-state law further challenges positivist indoctrination and questions various 'rule of law'

[16] Intriguingly, I found that the Japanese word for kite, *tako*, also means octopus, so a kite in water.

mythologies, which provokes again those frightful images of 'anything goes'. In reality, however, we all are subject to the ubiquitous phenomenon of 'living law' (Cotterrell, 2008; Melissaris, 2009), which is much more than the old concept devised by Eugen Ehrlich (1936), a local bureaucrat who realised that 'his' people in some backwater area of the Habsburg empire at the early part of the twentieth century (Ehrlich first wrote in 1913 in German) did not simply follow state law, but constructed their own 'living law' as a hybrid.

As this takes place largely invisibly, law indeed becomes a matter of psychology and of informal, invisible self-regulation in many cases. The kite flies silently, just as construction of *shari'a* as the right path is an ongoing process in the individual believer's brain as well, invisible to the outside world. Seeking to understand the interaction of the various types of competing law that dynamise the movements of the kite or the construction of that path, we cannot ever shut out any of those four competing elements that have been identified above. But we are simply not told by most legal and religious scholars that this is what law and religion are all about. DIY law would certainly be bad for the legal fraternity. DIY religion raises other eyebrows. It is not the case that we do not know how internally plural and ever-present law and religion are. We are simply not supposed to know, so that lawyers and politicians can manipulate our lives and fly our kites for us, and religious scholars can do similar things and enjoy elevated power and status in a religion that likes to claim that everybody is equal. So much for democracy and empowerment, endangered ideals in relation to law as well as religion. In a country with a democratic deficit, the reverberations of such deviations from the ideal are magnified.

Law and religion are everywhere seen under pressure to achieve various ideals of justice and to help find the right path, a concept which Muslims call *shari'a*, and for which there are many equivalent terms in the world. Understanding this inevitability of plurality is actually not at all difficult for Muslims. It is part of Muslim identity and of *fiq* construction itself, the development of Muslim jurisprudential thought, particularly if one highlights *ikhtilaf*, the concept of 'tolerated diversity' with its sobering explicit recognition that no human can ever fully understand God's intentions, as evidence of Islamic legal pluralism. The concept of *ikhtilaf* does not challenge God, but rightfully questions all human interpretations. Clear-cut realisation of the limits of human understanding in fact continues to save Islam from self-destruction and has allowed it to grow globally in very different socio-cultural contexts. Internal plurality despite belief in one God is at the same time amazingly simple and yet has been made so immensely complex and confusing that it could be readily politicised. Abused as a form of positive law, the foundations of Islamic natural law have become turbulence generators operated by some dark forces that now cause havoc in the name of religion and seem to oppose law. But at the same time these forces use law to achieve their objectives. One should not be surprised that the Pakistani state itself feels now challenged by such potentially violent and destructive forces.

There are many other reasons for such dangerous turbulences, many of them now involving international relations, of course a field closely connected to law and legal theorising. It may well be that law as a global science, driven largely by Western theoremes, as though others did not think about the same issues in their own times and places, has forgotten to remain global and to fully include the non-Western 'other'.

Earlier talk of 'families of law' gives that particular game away (see de Cruz, 1999), showing that even comparative lawyers remain Eurocentric and get away with it. Law beyond the Bosporus is, from a Eurocentric perspective, just not known (Menski, 2007) and this restricted *mentalité* continues despite globalisation.

Boxed into certain patterns (Twining, 2000), which helps those who claim the right to rule, parochial narrow-minded law is thus often and all too easily misused as a tool of terror and exploitation. The biggest abusers of law, not only in South Asia, are actually states themselves. Despite well-sounding constitutions, they seem to have no real interest in telling people how to hold their rulers accountable. It fits this pattern that legal pluralism is widely dismissed as a dirty subject, or irrelevant social science talk. Apparently even our own students are not supposed to learn how to question the superiority claims of any of the four major law-making entities to steer the various kites to the exclusion of all the others. How, then, do we even begin to understand ourselves and our own role as legal kite flyers?

Waking up to the reality of global legal pluralism becomes an interdisciplinary challenge. Teaching about global legal pluralism asks questions about oneself, one's own identity and position in relation to everything in the world. Studying law is clearly not just learning to fix some leaking pipe, which of course law schools must also teach to fulfil professional requirements. Studying law properly as a science, however, leads almost inevitably to holistic appreciation of the complexity of human life and of pluralist forms of co-existence in the global world of the twenty-first century. Notably, it also re-connects law and religion.

Some people continue to insist that this pluralist approach to law throws the baby out with the bathwater. Even the most recent writing from that corner remains hostile to legal pluralism and quite sarcastic about the reality of dynamic 'living law' (Tamanaha, 2010). The troublesome key issue here becomes simply the old trick question: where is the boundary of law? But do we really need to answer that particular unanswerable question to live peacefully and successfully? Or should we rather analyse which kinds of law we are actually using when we play particular legal games to make money, or when we live our daily routine lives? Starting from the presumption that law is something fixed and defined is problematic when in fact it is a really fluid and dynamic plurality of pluralities. Law may be a rule, or a whole system of rules, or a physical concept (Allott, 1980), but law is also a process, a combination of lots of different things, just like a kite is not just made from one kind of material. For Muslims, there is God's law, but that is not the whole picture. Human application of the law is a daily necessity, so in fact one could say that kite flying is an Islamic obligation. The ban on kites, seen in this light, is a futile attempt to rid the skies above Pakistan from polluting cultural baggage that might have attached itself to the Islamic kites that are crowding the skies.

In Pakistan, there remains much need for plurality-conscious management of competing pulls of legal theory, as I see it now between four corners of the legal kite, namely traditional *shari'a* law as natural law, the socio-cultural normative systems of local societies, hence *riwaj* and all that comes with it, the state and its various manifestations of *qanun*, and now also the expectations of international law and human rights as new natural law in competition with all these the older systems. I have already shown that lack of depth of understanding 'law' as an internally plural phenomenon leads

to continuing dangerous turbulences for the legal system of Pakistan and for its people. It is evident that more honesty and openness is required to construct a successful legal order.

Jurisprudence as Flying Kites

Asking what kite flying is about, we find very different perceptions. Khaled Hosseini's (2003) *The Kiterunner* focuses on Kabul in troubled Afghanistan. Here kite flying is portrayed as a deadly contest involving much pride and *izzat*. The aim appears to be that at the end of a specific day of kite flying, there should be only one kite left in the air over an entire city. This is hardly a reflection or celebration of pluralist co-existence, but a brutal image of a violent contest, cutting the strings of all other kites in a macho show of strength to gain power, esteem and status. This method seems to bread violence rather than encourage skilful and plurality-conscious navigation, as the novel shows when the 'wrong' person wins the contest. So much is sure, however: There is simply no one way of flying kites.

Legal theory links into our dynamically lived experience and highlights what the great Austrian jurist Ehrlich (1936) called 'living law'. The fact that Brian Tamanaha (2010) now claims that he wants to rescue Ehrlich from his own theory is a rather bad example of scholarly politicking driven by US-centric legal reasoning that should have been overcome in this day and age. In real life, all over the globe, there is constantly much need to navigate, to find solutions to problems and answers to questions, visible and invisible. The ongoing private and public manipulations of legal, socio-economic, ideological and political systems suggest that the image of kite flying, subtle navigation of a quite vulnerable structure in a potentially turbulent atmosphere, helps to illustrate in all its troublesome diversity what we are constantly doing while using law and legal processes as individual people, members of social groups, citizens of a state or foreigners, or as office bearers in official positions.

The global skies, then, are full of kites of different shapes and sizes, with many colours and culture-specific ornaments. Assuming that there are no invisible boundaries in the sky, to avoid massive collisions and crashes of kites we have to be hyper-sensitive about pluralism and extremely skilled in handling competing pulls from different corners of the kite.

My earlier critical analysis of comparative law (Menski, 2006) emphasised that people teaching and studying law are everywhere wasting precious time trying to define what law is and what it is not, while there is manifestly no globally agreed definition (Menski, 2006: 32; Katz, 2009. IV: 17-23). Since 'law' can mean so many different things in various contexts, to make sense of it as a globally valid phenomenon and to devise a globally applicable model turns out, on closer inspection, to be a feasible task in principle and theory, but an impossible challenge in practice. Law, then, is not just Austin's famous 'command of the sovereign' or the Qur'an virtually understood as God's *Code Napoleon*. It is indeed limitlessly plural, and comprises all aspects of life, in the same way that Muslims tend to argue that the Qur'an as God's word reflects an effort and an expectation to regulate the entirety of existence.

I suggest that a major task for comparative legal studies in today's globally plural religious-cum-secular environment is simply to find the right balance between competing

pulls of different types of law. This expectation, at any moment of our lives, is the critically relevant key element of the challenge to be human and to be accountable, at the end of the day, to Judgement Day. The image of trying to keep a kite flying in the air even in wind or rain fits that expectation of the constant challenge. If one does not manage this journey or path – for which Islam knows the word *shari'a* – well and properly, the kite may crash. Individuals may fail to handle specific problems and then kill themselves, or may turn violently against other people. A state may not function properly and become what is termed a 'failed state'. Finding the right balance of individual self-regulation, social control or governance at the level of states and even international law is clearly also a constant challenge. A country like Pakistan could never ignore Islam and its expectations, but one also has to acknowledge that the country is not only composed of Muslims, a fact that will need to be reflected in the management of the entire legal system. If law is at the same time natural law AND positivism, AND socio-legal norms AND international norms, then these four competing and internally plural entities need to be constantly balanced. None of the four elements in pure form is 'the right law' by itself. This illustrates that one does not manage diversity by denying it; one needs to address the problems by applying pluralist methodology.

My pluralist model of law, presented in 2006 as a simple triangle (Menski 2006: 185-9), therefore turned out to be a productive development of seminal discussions about the nature of law by the Japanese jurist Masaji Chiba (1986, excerpted in Menski 2006: 119-28). But thinking about the practical challenges of legal pluralism has significantly developed since then. The kite model is simply a visual representation and refinement of this strong recognition of the reality of legal pluralism. The basic principle, namely that all four voices of law in the semi-autonomous social or legal field should be heard and recorded in some form, and that no one type of legal theory can totally exclude all the other types, is the key to understanding global legal pluralism. Readers of Menski (2006) will understand that this realisation helped me to add a fourth corner to the structure of the original triangle. International law, then, is clearly also a form of law that needs to be built into this pluralistic model, and cannot be left outside it.

Given the paucity of space, I thus swiftly conclude this section by adding two models, an illustration of the older triangle (Figure 1) and the new kite model (Figure 2). Readers who are not clear about this recent progression of the intricacy of pluralist legal analysis are referred to the main study in which this was first explained (Menski, 2006), and in which a number of graphic models are found to assist comprehension. Figure 1 here is designed to convey that the internally plural field of law has everywhere porous boundaries that connect law to life in all its various aspects.

Figure 1:

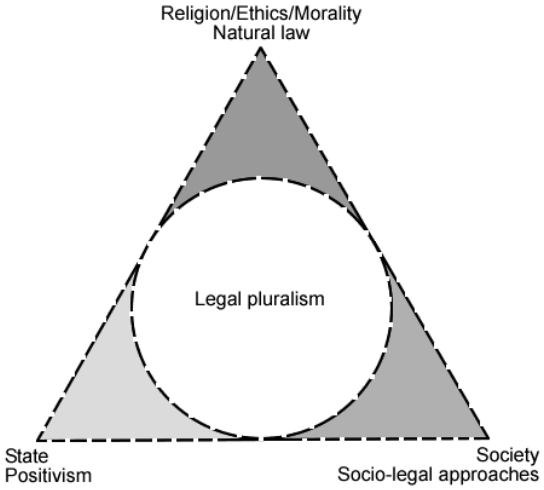
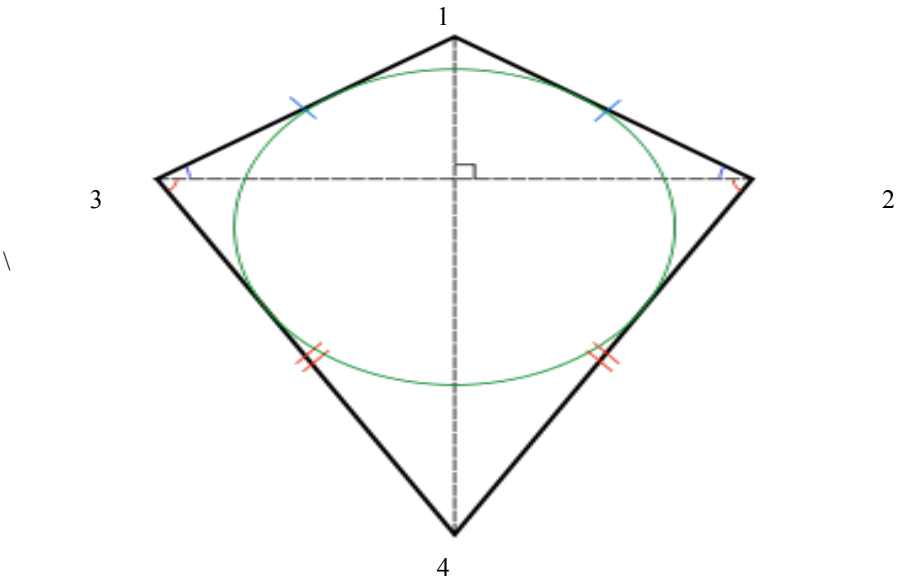


Figure 2 is still at this moment a model in the making and seeks to convey that law everywhere is composed of four major, but always internally plural elements, namely (1) natural law perceptions, (2) socio-cultural approaches, (3) state-centric regulation, and (4) various forms of international norms, perceptions and ideals that might clash especially with corner (1), but also signify tensions with the other power points at the periphery of the model.

Figure 2:



Conclusions

As a legal theorist with a realist's eye for practical implications, I thus see and argue that legal pluralism and 'living law' will remain contested everywhere, but also remain everywhere prominent in practice and absolutely critical in countries' identity formation. Simple bans of one element or entity do not work, as law constantly needs to be re-negotiated between competing perspectives. Every individual has not only the right, but a human obligation, to make sense of this pluralist challenge. Pakistan urgently needs to teach itself to imbibe such basic global lessons from legal theory while retaining an Islamic identity. Managing this under the umbrella of *siyasa shariyya* is indeed a pluralist challenge, part of the task of constructing 'living law' and finding *shari'at* for individual Muslims. All of these are complex pluralities of pluralities. It seems God wanted things to be like that. This could be read as a global message as much as a very clearly Islamic concept. There is no contradiction, at the end of the day, only conflicts of competing perceptions.

One can see clearly, thus, where the key problems lie for Pakistan as an Islamic Republic, but Pakistanis themselves must learn to manage those issues. The key requirement will be to develop respect for the respective 'other', as much in terms of jurisprudential theory as of daily practice. Neither religion, nor social forces of patriarchy, nor the state law, let alone international intervention, can dominate the future trajectory of Pakistan to the exclusion of the other voices. For a successful kite journey, elements of all four sub-pluralities are required, and they need to be managed by Pakistanis themselves as responsible navigators of their own future.

Bibliography

Allott, Antony N. (1980) *The Limits of Law*. London: Butterworths.

An-Na'im, Abdullahi Ahmed (2008) *Islam and the Secular State. Negotiating the future of Shari'a*. Cambridge, MA: Harvard University Press.

Anderson, J.N.D. (1967) "Pakistan: An Islamic State?." in R.H.C. Holland and G. Schwarzenberger (eds.), *Law, Justice and Equity*. London: Sir Isaac Pitman and Sons, pp. 127-36.

Borradori, Giovanna (2003) *Philosophy in a Time of Terror. Dialogues with Jűrgen Habermas and Jacques Derrida*. Chicago and London: The University of Chicago Press.

Cane, Peter and Joanna Conaghan (2008) *The New Oxford Companion to Law*. Oxford: Oxford University Press.

Chaudhary, Muhammad Azam (1999) *Justice in Practice. Legal Ethnography of a Pakistani Punjabi Village*. Oxford: Oxford University Press.

Chiba, Masaji (ed.) (1986) *Asian Indigenous Law in Interaction with Received Law*. London and New York: KPI.

Chiba, Masaji (1989) *Legal Pluralism: Towards a General Theory Through Japanese Legal Culture*. Tokyo: Tokai University Press.

Cotterrell, Roger (2008) *Living Law. Studies in Legal and Social Theory*. Aldershot: Ashgate.

De Cruz, Peter (1999) *Comparative Law in a Changing World.* 2nd ed. London and Sydney: Cavendish.

Ehrlich, Eugen (1913) *Grundlegung der Soziologie des Rechts*. Műnchen and Leipzig: Duncker & Humblot.

Ehrlich, Eugen (1936) *Fundamental Principles of the Sociology of Law*. Cambridge, MA: Harvard University Press.

Ferrari, Silvio and Rinaldo Cristofori (eds.) (2011) *Law and Religion in the 21st Century: Relations Between States and Religious Communities.* Farnham: Ashgate. [Forthcoming]

Foblets, Marie-Claire, Jean-François Gaudreault-Desbiens and Alison Dundes Renteln (eds.) (2010) *Cultural Diversity and the Law. State Responses from Around the World*. Brussels: Bruylant and Ėditions Yvon Blais.

Glenn, H. Patrick (2006) *Legal Traditions of the World. Sustainable Diversity in Law*. 3rd ed. Oxford: Oxford University Press.

Grillo, Ralph, Roger Ballard, Alessandro Ferrari, André Hoekema, Marcel Maussen and Prakash Shah (eds.) (2009) *Legal Practice and Cultural Diversity*. Farnham: Ashgate.

Hallaq, Wael B. (2009) *Shari'a. Theory, Practice, Transformations.*Cambridge: Cambridge University Press.

Hinz, Manfred O. and Clever Mapaure (eds.) (2010) *In Search of Justice and Peace. Traditional and Informal Justice Systems in Africa*. Windhoek: Namibia Scientific Society.

Hosseini, Khaled (2003). *The Kiterunner*. London: Bloomsbury.

Katz, Stanley N. (Editor-in-Chief) (2009) *The Oxford International Encyclopedia of Legal History*. Volumes 1-6. New York: Oxford University Press.

Lau, Martin (2006) *The Role of Islam in the Legal System of Pakistan*. Leiden and Boston: Martinus Nijhoff.

Legrand, Pierre (1996) "How to Compare Now", *Legal Studies*, vol. 16, no. 2, pp. 232-242.

Mehdi, Rubya, Hanne Petersen, Erik Reenberg Sand and Gordon R. Woodman (eds.) (2008) *Law and Religion in Multicultural Societies*. Copenhagen: DJØF Publishing.

Melissaris, Emmanuel (2009) *Ubiquitous Law. Legal Theory and the Space for Legal Pluralism*. Farnham: Ashgate.

Menski, Werner (2006) *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*. Second ed. Cambridge: Cambridge University Press.

Menski, Werner (2007) 'Beyond Europe'. In Esin Őrűcű and David Nelken (eds.) *Comparative Law. A Handbook* (pp. 189-216). Oxford and Portland, OR: Hart Publishing.

Modood, Tariq (1992) *Not Easy Being British.* Stoke-on-Trent: Trentham Books.

Modood, Tariq (2010) *Still Not Easy Being British.* Stoke-on-Trent: Trentham Books.

Pearl, David and Werner Menski (1998) *Muslim Family Law*. Third edn. London: Sweet & Maxwell.

Tamanaha, Brian Z. (2010) 'A Vision of Socio-Legal Change: Rescuing Ehrlich From "Living Law"'. *Washington University in St. Louis, school of Law. Legal Studies Research Paper Series*. Paper No. 10-10-05. (Electronic copy at http://ssrn.com/abstract=1689669).

Twining, William (2000) *Globalisation and Legal Theory*. London: Butterworths.

Wagner, Anne and Vijay K. Bhatia (eds.) (2009) *Diversity and Tolerance in Socio-Legal Contexts. Explorations in the Semiotics of Law*. Farnham: Ashgate.

Welchman, Lynn and Sarah Hossain (eds.) (2005) *'Honour'. Crimes, Paradigms, and Violence Against Women*. London: Zed Books.

The Protection of Women (Criminal Laws Amendment) Act, 2006 – A Challenge to the 'Divine Sanction' in Pakistan?[17]

Rubya Mehdi,[18]
Postscriptum: *Abdul Aziz Khan Niazi*[19]

Introduction

The theme of this article is the process of creation of the Protection of Women's Act (PWA) 2006, a legal instrument which is at the forefront of some positive indications regarding legislation on women's rights in Pakistan. Despite the generally conservative social and legal environment for human rights in general, and women's rights in particular, the reforms of 2006 show that Islamic legal processes are sites of negotiation of social orders. While laws may be contradictory, reflecting multiple interests and institutions, or even ineffective in protecting women, the process of reform demands serious analysis.

It is important to situate these reforms in the broader context of Islamic legal processes worldwide. As Law has been a major instrument used by Islamist for contesting the legitimacy of the secular state and society and for reconstructing the society according to their vision.

Moreover, this point not only to the liberal or conservative tussle discussed later in this article but also to contradictions within the state itself, where on one hand it claims to work for the protection of women and on the other hand takes away the protection through this or other similar clauses. The PWA 2006 is not the only example of the passing of "compromising" laws regarding women in Pakistan as there is a more recent example in the form of the Prevention of Domestic Violence Bill 2009. Prior to this domestic violence Bill, a woman abuse and harassment case was not legally recognised in Pakistan. In August 2009 the Domestic Violence Bill was set to become law[20], a welcomed step to strengthen women's human rights. However, the bill passed is far from satisfactory for the women and civil society of Pakistan. The following is the most objectionable section of the proposed bill: "Penalty for filing a false complaint: Whoever gives an application to the court containing information the commission of domestic violence which he knows "or has reason to believe to be false, shall be punished with simple imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees or with both" (section 25 Domestic Violence (Prevention and Protection) Act, 2009). The civil society in Pakistan fears that practically no aggrieved party, victim or complainant will ever file a case of violence against women for the fear of reactionary punishment or that they will be accused as under the *zina* ordinance.

---

[17] An earlier version of this article appeared in Droit et Cultures, 59, 2010/1

[18] HEC Visiting Professor, Gillani Law College Bahauddin Zakariya University Multan, Pakistan/ Senior Research Associate, University of Copenhagen.

[19] Advocate Supreme Court of Pakisan/Visiting Faculty Member, , Gillani Law College, Bahauddin Zakariya University Multan.

[20] Domestic violence, hidden in nature and considered as a private matter involves physical, sexual, emotional, social, economic and physical, sexual, emotional, social, economic and physiological abuse committed by a person. There is a need to provide legal mechanism for protection of victims of domestic violence inline with the provision of the Constitution of the Islamic Republic of Pakistan. To address this alarming issue a proposed Domestic Violence against Women and Children (Prevention and Protection) Bill, 2007 was being forwarded to the Cabinet for approval that was passed and has become an Act now in 2010.

Since 1972, seven countries Libya, Pakistan, Iran, Sudan, Northern Nigeria, United Arab Emirates and Kelantan (one of the federal states of Malaysia) have enacted legislation to re-introduce Islamic criminal law; Indonesia is in the process of passing similar laws on adultery, fornication and rape.[21] Saudi Arabia is the unique example of a Muslim country where application of Islamic criminal law has been in place without interruption by western influences.

In this context, recent developments in Pakistan require critical study, for it is the only country where steps were taken to reverse the controversial Islamization of the criminal laws dealing with adultery, fornication, rape, and the false accusation of these crimes. The need to study these reforms becomes even more important when considered from the perspective of reversing the enactment of Islamization of laws. While illustrating the process of reforming the above mentioned laws in Pakistan, this article argues that the reforms are half-hearted, feeble and full of lacunas.

Hudud Ordinances, Human Rights and Women

Before the implementation of the *hudud* Ordinances in 1979, most of the laws, since 1947 in Pakistan, continued from the British period. Prior to promulgation of Ordinance, adultery was an offence under which if a man had intercourse with the wife of another person without his permission, within the meaning of Pakistan Penal Code such a person was required to be punished for adultery. Punishment for such adultery was imprisonment for a term which may extent to five years or with fine or with both as per section 497 of the Pakistan Penal Code, 1860. Women were not punishable for this form of adultery i.e. the offence of adultery did not prescribe any punishment for the female co-accused. The offense of adultery was "…only applicable to married men who had engaged in extra-marital sex with a married woman without the direct permission of her husband. Only the victim – the husband whose permission had not been sought - could file a complaint of adultery. Women could not file complaints against their husbands nor could they themselves be charged with adultery" (Chadbourne 2001: 12). Moreover adultery was a matter for private complaint and did not leave the police free to take action. It was a bail-able offence and the complainant could withdraw the allegations. As far as the fornication was concerned it was not regarded as crime at all. Both these acts were made crimes and made punishable under *zina* ordinance 1979. These are again made punishable under Pakistan Penal Code by way of Criminal Law Amendment (Protection of Women) Act 2006.

The enactment of the *zina* ordinance all Pakistan Penal Code sections which dealt with adultery and rape, replacing it with the new law prescribed in the ordinance itself. Despite its failings as legal instrument, the great significance of the Protection of Women Act (PWA) of 2006 is that ironically it has shattered the myth of the infallibility of *hudud* ordinances by initiating an amendment. The "myth of infallibility" has its roots in the whole doctrine of *hudud* (singular: *hadd* meaning limit) which points towards specific offences like drinking of alcohol, theft and unlawful sexual intercourse, etc. for which

[21] Indonesia's province of Aceh has passed a new law that imposes severe sentences for adultery, rape, homosexuality, alcohol consumption and gambling. The legislation was passed unanimously by Aceh's regional legislature. The law will be effective in 30 days with or without the approval of Aceh's governor. However, the latest news is that the national government of Indonesia may review this new law.

limits and fixed punishments have been defined in the Quran and tradition of the Prophet. Another element has been added to this definition is that *hadd* crime is a violation of a public interest (deterrence from acts that are harmful to humanity) which is differentiated from claims of men like homicide and wounding which requires retaliation. Sentences for *hadd* crimes are regarded as fixed by God and therefore considered to be immutable and infallible.

The Muslim jurists have claimed that the corporal strict punishments are not meant to be implemented but exist only as a warning or rhetorical device while people should not be punished with fixed but discretionary punishments (*tazir*). The fact that *hadd* punishments are not meant to be implemented is reflected in the difficult standard to obtain a conviction under *hadd*. This is achieved by 1) the strict rules of evidence for proving these crimes 2) the extensive opportunities to use the notion of uncertainty as a defence; and 3) defining the crime very strictly, so that many similar acts fall outside the definition and cannot be punished with fixed penalties, but only at the *qadi's* discretion (*tazir*) (Peters 2005: 54-55).

On the other hand the *hudud* laws were enacted in the form of "ordinances" in Pakistan by the military regime of General Zia ul-Haque, with the wider message that these laws were immutable as they are given by God and God's laws can not be changed. The salient feature of the law of *hadd* crimes was completely overlooked in Pakistan that they are there not for implementation but for deterrent purpose and a very high standard was to be met before its implementation. In Pakistan as well as some other Muslim countries the corporal punishments are widely employed for transgressions of norms of personal conduct and honesty with regard to sex, alcohol and property. They have been controversial because of the corporal nature, unequal application especially with regard to women, and their reliance on accusation by another person that is not always verifiable. Since its implementation in some Muslim countries where it has made women victim of these laws it has not only become controversial within the Muslim countries but also it has become a symbol of Islam as a repressive religion.

In Pakistan the various regimes have been reluctant and resistant to redress legal injustice created by the *hudud* ordinances. Even the so called 'democratic' governments (Pakistan Peoples Party and Pakistan Muslim League – Nawaz group) took no steps to remove these laws from the statute books because of the fear of right wing parties. This was the reason that in spite of serious concern for women the *zina* Ordinance has been the law in Pakistan for 27 years. *Zina* is the offence of illicit sexual relations i.e. sexual intercourse between persons who are not married to each other. This term includes adultery, fornication, prostitution and homosexuality.

PWA 2006 was initiated under the military regime of Pervaiz Mushraf promulgated in order to redress the legal injustices that were created by the *zina* Ordinances. It took almost a full year for the Women Protection Act 2006 to pass. It was not an easy process to draft and propose the PWA 2006. During the process, many compromises were made with the conservative viewpoints, and therefore, the PWA 2006 has been able to address only some aspects of the glaring injustice and discrimination meted out to women. Many other reforms are left out in the process of compromises.

A Brief Introduction to *hudood* Ordinances

The *hudood* ordinances were introduced in 1979 by General Zia ul Haq during his drive for Islamization in Pakistan. On 9th February 1979, five presidential decrees were enacted that included Offences against Property (Enforcement of *hadd*) Ordinance, 1979; Offences of *Zina* (Enforcement of *hadd*) Ordinance, 1979; Offences of *Qazf* (Enforcement of *hadd*) Ordinance, 1979; Prohibition (Enforcement of *hadd*) Ordinance, 1979. The last ordinance marks the execution of the Punishment of Whipping Ordinance, 1979, that set out the procedure for public lashing. This was repealed in 1996 by the Abolition of Whipping Act, that abolished whipping for all offences except those mentioned in the 1979 *Hudood* Ordinances (Peters 2005: 156). These laws were drafted under the guidance of Ma'ruf al-Dawalibi who was adviser to the king of Saudi Arabia (Interview Justice Majida Rizvi July 2008).

It should be noted that previous to Islamization of laws, inherited pieces of legislations (Pakistan Penal Code of 1860, The Criminal Procedure Code of 1989 and the Evidence Act of 1872) from the British colonial rule have been the statutory basis of the criminal law of Pakistan. In the civil law side, the Muslim Family Laws Ordinance 1961 was a progressive piece of legislation. This legislation reaffirmed the reforms made during the British rule in India and made further reforms. The Muslim Family Laws Ordinance before and after its enactment has been challenged by the Islamists and during the Islamization of 1979, it again became a point of opposition. The civil society and progressive women consider the period of Islamization as two steps backward for women's rights in Pakistan (Mumtaz, Khawar and Farida Shaheed 1987).

Immediately after Islamization in Pakistan, judicial institutions were set up to support/implement the new legal framework. In 1980 a Federal Shariat (Shari'a) Court (FSC) was established to hear appeals in *hudud* cases. Later a Shariat (Shari'a) Court was also granted the jurisdiction to strike down laws found to be repugnant to Islam and to lay down guidelines for Islamizing the law under review.

The offences of *zina* (Enforcement of *hadd*) ordinance, 1979, and offences of *qazf* (false accusation of *zina*) (Enforcement of *hadd*) ordinance, 1979, were the two ordinances which dealt with sexual crimes. All sex outside of marriage was made a serious penal offence punishable with heinous punishments under the *zina* ordinance, while false accusations of *zina* (sex outside of marriage) were made punishable under the *qazf* ordinance. The important impact of PWA in 2006 reforms and amendments was made in offences of *zina* (Enforcement of *hadd*) ordinance, 1979, and in offences of *qazf* (Enforcement of *hadd*) ordinance, 1979. All the other ordinances remain un-amended. Now the question is: What made it possible to amend these two ordinances? Or what was the problem with the *zina* (Enforcement of *hadd*) ordenance 1979 and *qazf* (Enforcement of *hadd*) ordinance, 1979?

Zina ordinance is an extremely important law, both for those who favour its implementation and opponents because:

1) The worst thing in the *zina* Ordinance was that if a woman reported a case of rape she was prosecuted for adultery.
2) Pregnancy as a basis for conversion of rape claims against women
3) Stigma of being charged with *zina* leaves no place for a woman to live in a Pakistani society, especially rural

4) The misuse of the law in such cases has made it an instrument of oppression in the hands of vengeful former husbands and other members of society

There were various problems in the substantive as well as the procedural parts of *zina* ordinance. In their practical application, in Pakistan as elsewhere, these laws have been used in fact to deny women access to justice, further victimize them and exert extreme gendered inequalities in the social regulation of sexuality.

The offence of rape provided by the pre-*zina* ordinance under PPC (Pakistan Penal Code) was identical to *zina-bil-jabr* under the *hudood* ordinance[22]. The old law of rape was given in section 375 of the Pakistan Penal Code. It read as: "A man is said to commit rape that, except in the cases hereinafter accepted, has sexual intercourse with a women under circumstances falling under any of the following description. First, against her will. Secondly, without her consent and thirdly, with her consent when her consent has been obtained by putting her in fear of death, or of hurt. Fourthly, with her consent when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly, with or without her consent, when she is under (fourteen) years of age. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. Exception: Sexual intercourse by a man with his own wife, the wife not being under (thirteen) years of age is not rape." As is said before that it was fairly similar to *zina* ordinance law with three exceptions. The *zina* ordinance did not have a marital rape provision which was provided under the PPC as forced intercourse, even when it was said to have occurred within the context of a valid marriage. Under the PPC sex consensual or non-consensual, even within marriage with girls under the age of fourteen was considered as rape which was not the same under *zina* ordinance. Lastly only the men could be charged for rape under the PPC while *zina* ordinance permits accusation of rape against both men and women.

Now let us look at the problems that occurred under the *zina* ordinance. First, the rape or sex without consent (*zina bil jabr*), and adultery or sex with consent (*zina bil raza*), were placed on the same footing subjecting both to the same kind of proof and punishment. This invariably has facilitated abuse where a woman who failed to prove the crime of rape was often prosecuted for *zina*. The requirement of proof for the maximum punishment of rape (*zina bil jabr*) being the same as that for sex with consent (*zina bil raza*). The victim of rape had to produce four pious, honest, upright (who meet the requirements of *tazkiya ash-shahud*) and adult male Muslim witnesses to prove the offence; in reality it was impossible for a victim of rape to prove her case against the perpetrators. As no rapist would commit the crime in front of four male witnesses, moreover men rarely speak out against other male members of a community.

The major issue for judicial process is verification of a woman's rape accusation. Other issues include ambiguity in what is allowed, and in the definition of marriage.

[22] Asifa Quraishi has strongly criticised the identical element of PPC and *zina* ordinance regarding the law of rape, She says: "Did the Pakistani legislators, in writing the *zina-bil-jabr* law, simply relabel the old secular law of rape under the Muslim heading *zina* (as *zina* by force-*jabr*), and re-enact it as part of the *hudood* Islamization of Pakistan's laws-right along with the four-witness evidentiary rule unique to *zina*? If so, this cut-and-paste job, albeit a well-intentioned effort to retain rape as a crime in Pakistan's new *hudood* criminal code, reveals a limited view of Islamic criminal law which, as illustrated, ultimately harms women" (Quraishi 1997: 303)

Where a case of rape against a man had failed for dearth of required proof but sexual activity was confirmed by medical examination or on account of pregnancy or otherwise, the woman was punished for *zina* her complaint, at times, was deemed a confession. As a result, in a vast number of cases victims of rape were imprisoned and punished under accusations of *zina*. In other cases the women were punished for *zina* not as *hadd* - four pious male eye witnesses were not made available by the victim of rape- but as punishment of *ta'zir*. *Ta'zir* is the discretionary power of a Muslim judge which he can use for offences where *hadd* or fixed punishment does not apply. In some cases, her complaint, at times, was deemed a confession. As a result, there were a vast number of cases where victims of rape were imprisoned and punished under accusations of *zina*. After the promulgation of this ordinance women had become more reluctant than before to bring a case of rape into court. View the following example of two famous cases that illustrates the nature of the problems faced by women victims of sexual abuse.

In 1982, fifteen-year old Jehan Mina became pregnant as a result of a reported rape. Lacking the testimony of four eyewitnesses that the intercourse was in fact rape, Jehan was convicted of *zina* on the evidence of her illegitimate pregnancy.[23]

A similar case came later in 1982. Safia Bibi was a blind girl who became pregnant as the result of a rape. Her father registered a case of rape against her employer and employer's son. The two men were acquitted due to lack of evidence while Safia was found guilty of illegal sexual relations on account of her pregnancy. Her bringing the case to the court was taken as a confession of Safia's crime. She was sentenced to three years imprisonment, fifteen lashes in public, and a fine of 1,000 rupees. Safia was sentenced while she was pregnant; later, her child died in jail soon after birth. [24] An other similar type of case is that of Zafran Bibi who was sentenced to be stoned to death. She accused a person for raping her as the result of which she became pregnant. She herself was married however her husband was in prison. The accused was acquitted for want of evidence while the trial court found her pregnancy a conclusive proof of her guilt. However on appeal, the Federal Shariat Court acquitted Zafran Bibi also because of the fact that legitimacy of the child was accepted by her husband. [25]

It should be noted that there are a number of cases where a subordinate court convicted a woman who came with a case of rape on the basis of her pregnancy; however, such convictions were often set aside by the superior judiciary. Moeen H. Cheema, a professor of law says: "Repeated errors by the trial courts are due in part to the continuing inability of the Federal Shariat Court (FSC) to harmonise its jurisprudence. The FSC has continuously failed to refer to its own previous judgements, indicating that the relevant precedents have not been widely publicised, studied and brought to the court's attention by advocates" (Cheema 2006).

---

[23] Jehan Mina v. The State, PLD 1983 Fed. Shariat Ct. 183

[24] Safia Bibi v The State PLD 1985 FSC 120, Safia Bibi v The State PLD 1986 SC 132.

[25] Mst. Zafran Bibi v The State PLD 2002 FSC 1.

However another writer has articulated the matter more forcibly: "But what is more unsatisfactory is that despite the consistent pattern of reversals and admonishment by the appellate courts, the trend continues unabated as does the human suffering it entails. Complete disregard for basic human rights and social implications for the accused is the repetitive trend emerging from this research.[26] The constant stream of appeal cases where women's reputation are tarnished forever for being implicated in *zina* is made all the more stark where the male co-accused is acquitted for want of evidence while the woman is convicted for her pregnancy" (Ali, 2007: 398).

There are also examples of cases such as Sakina v The State[27] the court reversed the conviction for *zina* because in the absence of proof of her consent, she could not be held to have committed the offence of *zina*. These examples illustrate, among other things, that a penal statute must be clear and unambiguous. The object of enforcing an Act is to protect the unwary and unsuspecting citizens from unwittingly falling foul of penal laws. Instead of marking the boundaries between the permitted and the prohibited with clarity, the *zina* (Enforcement of *hadd*) ordinance, 1979, was ambiguous.

Another problem with the *zina* Ordinance was that it defined "marriage" only as a registered marriage while in most rural areas in Pakistan, both *nikahs* and divorces may not be registered. This makes it difficult for a person charged with *zina* to establish "valid marriage" as a defence. Non-registration has its civil consequences that are sufficient; and, failure to register a *nikah* or a divorce should not entail penal consequences. Similar issues are faced by women where a triple divorce or *talaq* was verbally pronounced. In such cases, the woman was made to return to her parental home. She went through her period of *idda* the standard period of time, which is usually three months, during which a woman should not remarry after divorce or death of her husband. The family arranged another match; and, the woman was to be re-married. Often at this point, the ex-husband came forward to claim that she was still his wife. Here, the local authorities do not confirm the divorce providing grounds for the ex-husband to launch a *zina* prosecution.

This is in consonance with the Islamic norm that *hadd* should not be imposed whenever there is any doubt about the commission of the offence. The misuse of the law in such cases had made it an instrument of oppression in the hands of vengeful former husbands and other members of society.

One of the procedural problems with the *zina* ordinance was that arrest warrants were issued when a complaint was filed with the police. This is why a large number of women complainants were imprisoned without any proof of their guilt. Many were accused by their annoyed husbands, fathers or brothers on account of the woman's desire to marry according to her own choice. In one case, for example, an FIR (First Information

[26] Rashid Ahmed v The State 1996 PCrLJ 612; Asghar Ali v The State 1996 PCrLJ 1678; Lala v The State PLD 1987 SC 414 (Shariat Appellate Bench); Abdul Majeed v Ghulam Yaseen 1997 PCrLJ 896 (Federal Shariat Court); Ayoob and 8 Others v The State 1996 PCrLJ 642 (Federal Shariat Court); Major Nasir Mehmood and another vs State and 9 Others 2002 PCrLJ Lah 408.

[27] Skina v The State FSC

Report) was registered by the father against his daughter and her husband for the crime of *zina* to punish his daughter who had married a man of her own choice. [28]

The offence of *qazf* Ordinance, passed together with *zina* ordinance which was promulgated by general Zia ul Haque as a safety valve which punishes against the false accusation of *zina* was weak and ineffective.

Comparative overview of *zina* (adultery & fornication) and rape in The offence of *zina* (Enforcement of *hadd*) Ordinance 1979

Division of offender into *Muhsan* (married) and non-*Muhsan* (unmarried)	Proof for *zina* and rape liable to *hadd* (Punishment for offences fixed by God)	Punishment for *zina* and rape liable to *hadd*	Proof for *zina* and rape liable to *tazir* (Punishment of offences not fixed by God)	Punishment for *zina* and rape liable to *tazir*
***Zina* (Consensual sex)**				
Muhsan Married offender (adultery)	Proof for *zina-hadd* a) Confession of the crime b) Four truthful adult male Muslim eye-witnesses	Punishment for *zina-hadd* Stoning to death at a public place	Proof for *zina-tazir* No standard of proof is provided; at the discretion of the judge	Punishment of *zina-tazir;* A maximum of 10 years imprisonment, 30 lashes & a fine
Non-*muhsan* Unmarried offender (fornication)	Proof for *zina-hadd* a) Confession of the crime b) Four truthful adult male Muslim eye-witnesses	Punishment for *zina-hadd* One hundred lashes at a public place	Proof for *zina-tazir*; No standard of proof is provided; at the discretion of the judge	Punishment of *zina-tazir;* A maximum of 10 years imprisonment, 30 lashes & a fine
***Zina bil jabr* (rape)**				
Muhsan Married rapist	Proof for Rape-*hadd* a) Confession of the crime b) Four truthful adult male Muslim eye-witnesses.	Punishment for Rape-*hadd* Stoning to death at a public place	Proof for Rape-*tazir*: No standard of proof is provided; at the discretion of the judge.	Punishment of Rape-*tazir* imprisonment for not less than 4 & not more than 25 years & 30 lashes

[28] Mst Humaira Mehmood v. The State (PLD 1999 Lah 494). Also see Lubna and others v. Government of Punjab (PLD 1997 Lah 180) and Qaiser Mehmood v. M Shafi and another (PLD 1998 Lah 72).

Non-*muhsan* Unmarried rapist	Proof for Rape-*hadd* a) Confession of the crime b) Four truthful adult male Muslim eye-witnesses.	Punishment for Rape-*hadd* One hundred lashes at a public place and other punishments including death sentence	Proof for Rape-*tazir:* No standard of proof is provided; at the discretion of the judge**.**	Punishment of Rape-*tazir* imprisonment for 25 years and 30 lashes

Reforms Implemented Prior to the Promulgation of Women Protection Act 2006

President Prevaiz Mushraf promulgated the Code of Criminal Procedure (Amendment) Ordinance 2006, followed by the passing of PWA 2006. An amendment to section 497 of the Code of Criminal Procedure entitled a bail in non-bailable cases with the exception of some offences. As a result, 1, 200 women were released from prisons across the country following a Presidential Order. On 8th of July 2006 the ordinance amended the Criminal Procedure Code so that a bail became the right of a woman accused of any crime except that involvement in terrorism, financial corruption and murder or a crime punishable with death or a minimum of 10-year imprisonment. A famous human rights jurist, Asma Jahangir says: "Both the government and the right – wing religious parties have expediently seized upon the PWA to lend weight to their populist agendas. The government has finally shown a plausible accomplishment to justify its claim of pursuing an agenda of 'enlightened moderation' (Jahangir 2006:6).

The fact is that the government used this event for political purposes rather than making it beneficial for women prisoners. It was a dramatic event where ceremonies were held in prisons for women who were to be released; and they were presented with clothes, bangles and sweets yet they received pittance for money in the name of allowance to begin new lives. Moreover, and more dangerously, families and the larger society were not sensitized to the needs and safety of the released prisoners. However, this was a good political strategy for Mushraf and his regime trying to win popularity by showing concern for thousands of women sitting in prisons some with their small children and awaiting justice. Since the *zina* ordinance was passed, the injustice it created was taken up by civil society, human rights activist, lawyers, and artist and writers. It has been the theme of many theatre plays and films but no change has been brought. Suddenly this act of Mushraf also shocked many that how to give credit to a military dictator for at least "partially reversing" the affects of *zina* ordinance.

In most cases, the released women refused to go back to their homes because of the fear of retribution, death or other difficulties that they were likely to face in a society that had earlier rejected them or was incapable of protecting them. A majority of such women were eventually handed over to the women crisis centres (*Darul Aman*: house of protection) as the stigma of being charged with *zina* leaves no place for a woman to live in Pakistani society, especially rural. It must be noted that a large majority of cases that were filed under the original *hudood* laws were filed by the close relatives of women that included parents against whose will the women had chosen to marry or husbands who wanted to get rid of their existing wives to re-marry. Such parents or husbands are known

never to visit imprisoned women, so it was highly unsafe for women to return to their families, and the larger society that had punished them with their own rules of 'honour' and revenge. Indeed there are examples where women were murdered by their families upon their return from the prison.[29]

What has the PWA 2006 done?

As is mentioned above, the Protection of Women Act 2006 has amended only two ordinances of *zina* and *qazf* while the remaining ordinances are still practiced in their original form. The worst thing in the *zina* ordinance was that if a woman reported a case of rape she was prosecuted for adultery. This has been stopped by the PWA 2006 through clear differentiation between *tazir* and *hadd* in the *zina* ordinance. All the clauses from section 11 to section 16, and some others dealing with kidnapping, abduction, prostitution, and buying/selling of women were omitted or taken away and added to the Pakistan Penal Code (PPC). These sections were a part of the PPC prior to 1979, and they have been restored back to the PPC.

The procedural changes introduced relate mainly to the procedure of filing a complaint for *zina* in order to discourage false accusation. Previously when a complaint was filed with the police, arrest warrants were issued. Now summons are issued so that, unless and until the crime is proved, no one is sent to the prison. Now through section 203(a) (b) and (c), the jurisdiction of the police has been taken away; and any complaint regarding *zina* or *qazf* has to go to the District or Session judge along with the statement of the four witnesses. If the judge finds that the complaint is genuine, only then the application is accepted, and summons are issued for arrest. This is a great relief for women, as previously any women could be accused of *zina* and put into prison until the case came to the court. Now women can no longer be arrested and imprisoned on mere accusations. As a result, false accusations of *zina* against women have dropped dramatically.

By contrast, the *qazf* ordinance has been amended in a slipshod manner and effectiveness of change is yet to be tested (Jahangir 2006a: 10).

Comparative Overview of reforms introduced by the Women Protection Act 2006

Ordinance	Crime	Hadd: Proof & Punishment	Tazir: Proof & Punishment	Protection of Women Act Impact
The Offence of *Zina* (Enforcement of *Hadd* Ordinance 1979	1) *Zina*	*Zina-Hadd*; Proof: a) confession b) four truthful adult male Muslim	*Zina-Tazir*; Proof: No standard of proof is provided; at the discretion of the judge. Punishment: 10	1) All offences except *hadd* punishment for *zina* moved to PPC 2) Made punishment for *zina* liable to *Tazir* punishable up to 5 years and made it bailable

[29] This amendment to the Code of Criminal Procedure invites another criticism where it is feared that the drug mafias are now using more women for drug peddling because a woman can get a bail within days of her arrest.

		eye-witnesses. Punishment: 100 lashes for minors & stoning to death for adult married people	years imprisonment, 30 lashes	
	2) *Zina bil jabr* (rape)	*Zina bil jabr* (rape) Same as above	*Zina bil jabr* (rape) Imprisonment for not less than 4 & not more than 25 years & 30 lashes	1) *Hadd* punishemt for rape repealed 2) All sexual act of penetration against females under 16 years to be considered rape 3) Marital rape becomes an offence 4) complaints of rape cannot be converted into charges of zina
	3)Kidnapping, abducting or inducing women to compel for marriage		Life & 30 lashes	Removed under Pakistan Penal Code
	4) Kidnapping or abducting in order to subject person to unnatural lust		25 years & fine	Removed under Pakistan Penal Code
	Selling person for the purposes of prostitution		Life and 30 lashes	Removed under Pakistan Penal Code
	Buying person for the purposes of prostitution		Life and 30 lashes	Removed under Pakistan Penal Code
	Cohabitation caused by a man deceitfully inducing a belief of lawful marriage		Imprisonment of 25 years & 30 lashes	Removed under Pakistan Penal Code
	Enticing or taking away or detaining with criminal		Imprisonment of 7 years & 30 lashes	Removed under Pakistan Penal Code

	intent a woman			

Is PWA 2006, A Step Forward to Strengthen Women's Human Rights in Pakistan?

The question that occupies my mind is as follows: Is there, or can there be, any step forward on the path to strengthen women's human rights while the country is ravaged by terrorism and Islamism on one hand, and is tormented by the worst form of economic crisis on the other. Amid this chaos, there seems to be steps taken for women in a positive dimension. This section presents an evaluation of these reforms.

The PWA 2006 is an important step in minimizing the damage done by General Zia's Islamization drive. However, the Act retains the overall frame work introduced by Zia. This is an unsatisfactory situation as women's rights activist have advocated that the ordinances should be totally repealed. Justice Majida Rizvi, who is known as pro-women's rights, points to the following three major shortcomings in the Protection of Women's Act of 2006 (Justice Majida Rizvi 2008).

Firstly, the definition of "adult" is the same as it was in the *zina* ordinance where a female adult is either 16 years of age or has "attained puberty". This is in contradiction with other prevalent laws of the country, for example, the age of majority under the family laws is 16 for females and 18 for males whereas the Majority Act prescribes the age of majority for males and females as 18 years. Moreover, The Act also does not distinguish between juvenile and adult offenders under its definition of "fornication".

Secondly, Women Protection Act 2006 retains legal discrimination against religious minorities whose status as witnesses under the *hudood* ordinances has been retained and cases of *hudood* offences cannot be heard by non-Muslim judges. In other words, the Protection of Women Act continues to discriminate against minority population groups who are not treated as equal citizens.

Thirdly, the PWA 2006 retains the corporal *hadd* punishment of stoning to death. Though stoning to death is never executed in Pakistan and the only punishment which in fact has been practised is lashing, but the fact that corporal punishment is in the statute books is a matter of grave concern. In the words of Asma Jahangir "Their endorsement justifies Zia's Islamization process and more importantly leaves the temptation for the orthodoxy to agitate for their implementation at an appropriate moment in time (Jahangir, 2006a and 2006b:9).

The steps taken by the PWA 2006 for improving the situation of women are very feeble. The laws passed are full of loopholes and lacunas. The enactment of the PWA 2006 gives rights with one hand and takes them back with another. Still in the PWA 2006 efforts are at least made to improve the situation of women. The main reasons for creating and instituting such feeble laws may lie in the strong tussle between the liberals pushing for reforms, and the conservatives bidding to block those reforms. There are various additional categories that have contributed to the liberal forces in this process but are not represented in the mainstream politics of the country; among them are the

secularists who demanded an outright repeal of the *hudood* Ordinances (Bari 2004, 2006). This resulted in half hearted reforms with compromises.

It should be noted that the civil society demanded the complete repeal of the ordinance. There were also clashes between the government and *Muttahida Majlis-i-Amal* (MMA) "United Front for Action", - a coalition of religio-political parties representing the conservatives and the clerics -, who opposed it, that began when the government gave indications of considering to repeal the laws; and, ended with efforts to create a 'consensus' on amendments. The Pakistan Peoples Party, The Awami National Party and the *Muttahida Qaumi Movement* (MQM) "United National Movement , - a middle of the road political party representing middle class based in urban areas of Sindh province – were all in favour of the original draft of the amendments (Criminal Law Amendment (Protection of Women) Bill 2006) proposed by the Select Committee. It should be remembered however, that after the draft bill was finalised by the Select Committee appointed by the Parliament, the government agreed to go for another round of negotiations and amendments through an extra-parliamentary forum.

This is the main reason why the 'civil society' of Pakistan blames the government for giving such liberty and license to the conservative viewpoint represented by right wing parties to meddle with the parliament-approved proposed amendments. It should also be remembered that NGO's supporting right wing parties also built pressure through protests and demonstrations against the passing of PWA 2006 Bill. Their protests contributed in creating a situation of uncertainty among the general public. The right wing though, not represent the popular opinion especially on the PWA Bill 2006 but the right wing parties were to a certain degree successful in hijacking the process of consultation.

This points not only to the liberal/conservative tussle discussed earlier but to contradictions within the state itself, where on the one hand it claims to work for the protection of women and on the other takes away the protection through this or another similar clause.

Postscriptum:

This article was finalised in 2008. Following are some comments of a practicing advocate, Abdul Aziz Khan Niazi, regarding the working of laws on rape, adultery and fornication since the years PWA 2006 was passed.

Though in newly created/amended law (PWA), almost litigation regarding Offences of *zina* has become a closed chapter but still as far as abuse of newly created law is concerned, practically police institution still has the heavy hand and as far as concerned judicial officers are concerned , there is likelihood that numerous cases be ended not in the manner providing the same protection to the women which has been claimed through change in law and reason for the same shall be the ambiguity which is merged in stepping stone of said law.

The law for the time being in force regarding rape, fornication and adultery is confused one. The demarcation in between these offences is so thin in practice that when a woman comes into court with a case of rape there is every likelihood firstly that she shall be humiliated within the people of vicinity as well as in the society as a whole and

secondly she might herself be convicted of fornication or adultery because of lack of evidence. The onus of providing the proof in case of rape finally rest with a woman herself. The presence of injury on the outer and inner side of the body of the victim i.e. female is a condition precedent to admit her deposition trustworthy and in this regard she is medically examined and in case medical officer do not observe any injury on thighs, legs, back and her buttocks she has no proof that she was raped by male as she was bound to sustain injuries like bruises, contusions, scratches or abrasions on different parts of her body as she was supposed to put up resistance. Her torn clothes and other injuries are also an important element in a case of rape. Therefore, actual physical violence is considered a proof by legal practitioner as well as the trial courts otherwise a rape victims fails to prove that she was raped and had gone through sexual intercourse to which she was not a consenting party.[30] "This stereotypical concept of women supposes that if a woman does not struggle against a sexual assault, then she must be a sexually loose woman – justifying a conversion of the charge to *zina*. This attitude unfairly generalizes human reaction to force and the threat of violence. And, this generalization works to the detriment of women who have been subjected to a rapist's attack and survived only by submitting without physical resistance" (Quraishi 1997: 304).

Bibliography:

Ali, Shaheen Sardar (2007) Interpretative strategies for women's human rights in a plural legal framework: Exploring judicial and state responses to Hudood laws in Pakistan In Anne Hellum, Julie Stewart, Shaheen Sardar Ali and Amy Tsanga (eds.) Human rights, plural legalities and gendered realities: paths are made by walking, Published by Sourthern and Eastern African Regional Centre for Women's Law (SEARCWL).

Bari, Farzana (2006) Politics of the Hudood Ordinance, The Daily News, 1 Oct 2006.

Bari, Farzana (2004) the Politics of Hudood. The News 12-10-2004

Chadbourne, Julie Dror (2001) Never your Shoes after Midnight: Legal Trends Under Pakistan Zina Ordinance, Pakistan Law Review, Vol 1, Number 1, pp 3-103.

Cheema, Moeen H (2006) Is pregnancy proof of *Zina*? Daily Time, 14 Oct.

Justice Majida Rizvi Interview (2008) July 2008 Herald.

Jahangir, Asma (2006a) What the Protection of Women Act does and what is left undone, In: State of Human Rights in 2006, Human Rights in 2006, Human Rights Commission of Pakistan, Lahore, Pakistan.

Jahangir, Asma (2006b) Why blame the MMA? Daily Times, 6th September 2006.

Jahangir, Asma. And H. Jilani (1990) The Hodood Ordinance: a divine sanction? Rohtas books, Lahore.

[30] See also Jilani (1992)

Jilani, Hina (1992) Whose Laws? Human Rights and Violence Against Women in Pakistan, In: Freedom from Violence, Women's Strategies from Around the World 63, 72 (Margaret Schuler ed.,).

Mehdi, Rubya (1994) The Islamization of the law in Pakistan, Curzon, Richmond.

Mehdi, Rubya (1990) The offence of rape in the Islamic law of Pakistan. International Journal of the Sociology of Law. Vol 18, Number 1, February.

Mumtaz, Khawar and Farida Shaheed (1987) Women of Pakistan, Zed Books Ltd, London.

Peteres, Rudolph (2005) Crime and Punishment in Islamic Law: Theory and practice from the sixteenth to the twenty-first century, Cambridge University Press.

Quraishi, Asifa (1997) Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective, Michigan Journal of International Law, Vol. 18, No. 2, 287-320.

Rehman, I.A. (2006) Drama over Hudood laws, The Daily Dawn.

The Council of Islamic Ideology (2007) Hudood Ordinance 1979, A Critical Report: Government of Pakistan.

Cases:

Abdul Majeed v. Ghulam Yaseen 1997 PCrLJ 896 (Federal Shariat Court)
Asghar Ali v. The State 1996 PCrLJ 1678
Ayoob and 8 Other v. The State (PLD 1999 Lah 494)
Lubna and others v. Government of Punjab (PLD 1997 Lah 180)
Lala v. The State PLD 1987 SC 414 (Shariat Appellate Bench)
Major Nasir Mehmood and anoter v. State and 9 others 2002 PCrLJ Lah 408
Qaiser Mehmood v M Shafi and another (PLD 1998 Lah 72).
Rashid Ahmed v. The State PLD 1996 PCrLJ 612
Safia Bibi v The State PLD 1985 FSC 120,
Safia Bibi v The State PLD 1986 SC 132.
Sakina v. The State FSC
Mst. Zafran Bibi v The State PLD 2002 FSC 1.

Legislation

The Offence of Zina (Enforcement of Hudood) Ordinance 1979
The Offence of Qadfh (Enforcement of hadd) Ordinance 1979
The Protection of Women Act 2006
The Prevention of Domestic Violence Bill, 2009
Domestic Violence (Prevention and Protection) Act, 2009

"The Frontier is where the Jews Live": A Case of Israeli "Democratic Colonialism"[31]

Nicola Perugini[32]

The frontier is where Jews live, not where there is a line on the map. Golda Meir

Space and law, or rather the space of law and law applied to space were among the primary elements of Israeli colonial sovereignty in the Occupied Palestinian Territories (OPT) and of the forms of subjugation it employs to express this force. Through colonial practices that have systematically violated the borders of the very same international legislation that enabled 'temporary' Israeli occupation, and through the legal regularization of these violations, the landscape of the OPT has been gradually transformed into a legal arena in which colonial sovereignty works by means of a mixed system involving the application –and mutual integration– of increasingly complex laws and constant 'innovations' in government instruments and practices affecting Palestinian movements and areas. This historical process has become even more evident after the Oslo Accords, when the institutionalization of the separation between Israelis and Palestinians –without decolonization[33]– resulted in increased Israeli compartmentalization of the Palestinian landscape and the refinement of its techniques in doing so.

Like other colonized peoples, the Palestinians do not live so much in a real system of "suspended sovereignty" (Kimmerling 1982: 200) as in a situation where Israeli colonial sovereignty is continuously undergoing refinement, in a spatial and peripheral frontier in which the colonial encounter (Evans 2009) is the moment of the creation, application and re-activation of the colonial order. In such a context, what is interesting is not so much the question of the legality or illegality of the practices and rules that reify the occupation so much as that of their logic and of how they came into being through space. Space is in fact some of the main issues in colonial hierarchization and separation; it is not mere means, but materialization of policies.

In his analysis on how, in the West Bank, the distribution of legal rights among "Israeli citizens" and "Palestinian subjects" takes place – in the daily practices – along what he names "ethno-national lines", reproducing those very inequalities on which this differential legal order is founded, Thobias Kelly (2006: 172) sheds light on how colonial – spatial – compartmentalization and legal statuses are deeply intermingled:

---

[31] The studies on which this article is based were made possible by a grant generously awarded by the Fondazione Angelo Frammartino. The 5 maps and figures contained within the article have been created by Architect Samir Harb (Battir Landscape Office).

[32] Author is PhD in Political Anthropology, Siena University; Research Fellow, UNESCO, Ramallah and at Muwatin, Palestinian Institute for the Study of Democracy.

[33] On the institutionalization of the separation produced by the Oslo Accords and its paradoxes, Neve Gordon writes: "One cannot fully understand the replacement of the colonization with the separation principle without examining Palestinian space. Historically, the withdrawal of colonial powers from their colonies has entailed the abdication of control over the means of legitimate movement within and from the colonies. […] By contrast, [after Oslo] in both the Gaza Strip and the West Bank Israel has maintained its control over movement […], in reality it continues to control both the space that the Palestinians occupy and the legitimate means of movement" (Gordon 2008: 208).

Legal status [in the West Bank] is always a spatial practice, since the checking of documents takes place in particular locations. The Israeli state constantly moves between being a state of its citizens wherever they may be and a territorially bounded state. It has no legal boundaries, but instead delimits its reach through armistice lines, walls and checkpoints that are constantly shifting, by sometimes following bodies and sometimes taking shape within specific places and spaces.

Fundamentally, the territory of the West Bank has progressively been transformed into a proliferation of frontiers, in a space in which legal boundaries, "following bodies" or moving to specific places and spaces, have constantly shifted, shaping the constant and *unlimited* process of formation of the Israeli state. As Eyal Weizman (2006: 91) has pointed out, in such a context, state and non-state actors share the principles and the strategic objectives of an "organized chaos":

Criticized for their brutality, colonial powers have often claimed they lacked effective means to enforce their own laws on the periphery of their territories, or claim that the criminal actions carried out by their agents are exceptions that do not reflect the rule. Often, however, these powers profit in psychological effect and/or territorial control from the brutal and illegal "local initiatives" of armed settlers or rough soldiers, without having to take responsibility for the latter's actions. Colonizing states may excuse what is effectively the rule as an exception, and exceptions as the rule. […] When the frontier seems to degenerate in complete lawlessness, it is because its "organized chaos" is often generated from the center.

My article will focus on a specific area of this system of producing spatial and legal lines –Battir, West of Bethlehem, and the Gush Etzion colonial block. I will firstly attempt to reconstruct the main stages in the genesis of Israel's sovereignty over the area, the facts relevant to the process –still underway, still internationally unrecognized, but no less real for this– of creating spaces and rules of separation and annexation that have, bit by bit, resulted in an extension of the spaces of Israeli citizenship and a reduction of the spaces of Palestinian non-citizenship and subjugation. In the second part of the article I will present the case of one of the multifarious "operators" and "operations" (Foucault 2003) which has recently taken shape within the framework of the Israeli apparatus of control over Palestinian space. My aim is that of "de-centralising" the analysis of *state colonial law* and re-contextualizing it in the framework of action of one of the many examples of "operators" who embody the very essence of the Israeli colonial regime: settlers. This paper argues, through the analysis of the genesis of a legal case study in the Israeli Supreme Court, that new political assemblages such as *human rights* ("ethnically pure") *settler organisations* can act as repressive actors and make Israeli sovereignty and spatial forms of control more and more sophisticated in such a contemporary colonial frontier as Palestine. This case can highlight the historical excesses of Israeli colonial sovereignty –the extension of colonial sovereignty "where the Jews live"– and the *modus operandi* of these new expressions of power, whose final aim is that of perpetuating the production of colonial peripheries and constantly enabling the dispossession of Palestinians.

The Enclavisation of a Palestinian Area

Before analysing our case study of democratic colonialism, it is necessary to provide a synthetic reconstruction and contextualisation of how the Palestinian space in which our legal case saw the light has been historically enclavised. Prior to 1948, Battir and its surrounding villages looked to Jerusalem –culturally, economically and from the point of view of spatial practices. The inhabitants of the area, particularly known for its cultivation of vegetables, used to sell their produce at the town markets. Battir, Nahalin, Wadi Fukin and Al Walajeh are in fact characterized by a widespread system of irrigated terraces where vegetables are cultivated. The system of irrigated terraces played an important role not only in the economic life of the area but also in determining the mobility of its inhabitants, who travelled daily to the markets in the District of Jerusalem. It is important to draw attention to the genealogy of the connections and disconnections that have distinguished the history of our area of study. During the Ottoman period, Battir was connected to Jerusalem by an abundant series of valleys. A path which could be walked led the people from the village through these valleys directly to the Old City of Jerusalem. Until 1890 this was the main route to the Holy City. In 1890, the Ottoman administration built a railway line not far from the path. This railway would connect the villages to Jerusalem and Jaffa. After the construction of the railway and its connection to the main centres of the Arab world –Cairo, Damascus, Beirut, Mecca– the train became an opportunity for travel, and for new experiences –mostly for study and commerce– in the major Arab sites of culture.

Immediately after 1948, with the creation of the state of Israel, a patent process of fragmentation began to afflict the area of Battir and the surrounding villages situated south-east of Jerusalem: a process in which war, negotiations and official agreements between Israelis and the Jordanian administration, and planning of a differential use of the infrastructures of transport along ethno-national lines altered the shape of the area's territory.

After the Rhodes Agreement of 1949 between King Abdullah of Jordan and the first Israeli government, the Ottoman railway was renovated by the Israeli state, which subsequently decided to close the station of Battir and effectively eliminate the village's railway stop, preventing the local inhabitants from using the train. This policy of closure marked the start of a process of fragmentation, separation and restrictions that has increased steadily over the decades **(see Fig. 1)**.

Non-reification of the Green Line[34] into a boundary that separates Israelis and Palestinians, the Israeli army's campaign to occupy the West Bank and the building of civil colonial structures and infrastructures (the settlements) subsequent to 1967, are all factors that have further altered the geography, landscape and territorial-jurisdictional order of the area under analysis. The villages of Battir, Al Walajeh, Nahalin, Husan, Wadi Fukin and Jaba'a were the focus of the first intense Israeli colonization campaign since the Six Day War. The aim was to create a large colonial block south of Jerusalem: what is currently Gush Etzion.

[34] The Green Line has over the years become increasingly less permeable in the relations between Palestinians and Israelis. It has never become a real border and, as a result, it is subject to change, to political calculations, dreams of "territorial exchanges" in the so-called peace negotiations and to constant administrative and territorial amendment.

In 1967, encouraged by the radical messianism of certain rabbinic schools, the 'redemption' of Gush Etzion began, with the creation of the Kfar Etzion colony, blending socialist and messianic aspirations with those of a colonial sovereignty yet to be established, as can be inferred by the words of one of the rabbis from the orthodox cooperative that backed the operation: "the commandment […] that states that the Land of Israel must be in the hands of the Jewish people

1949 -1967

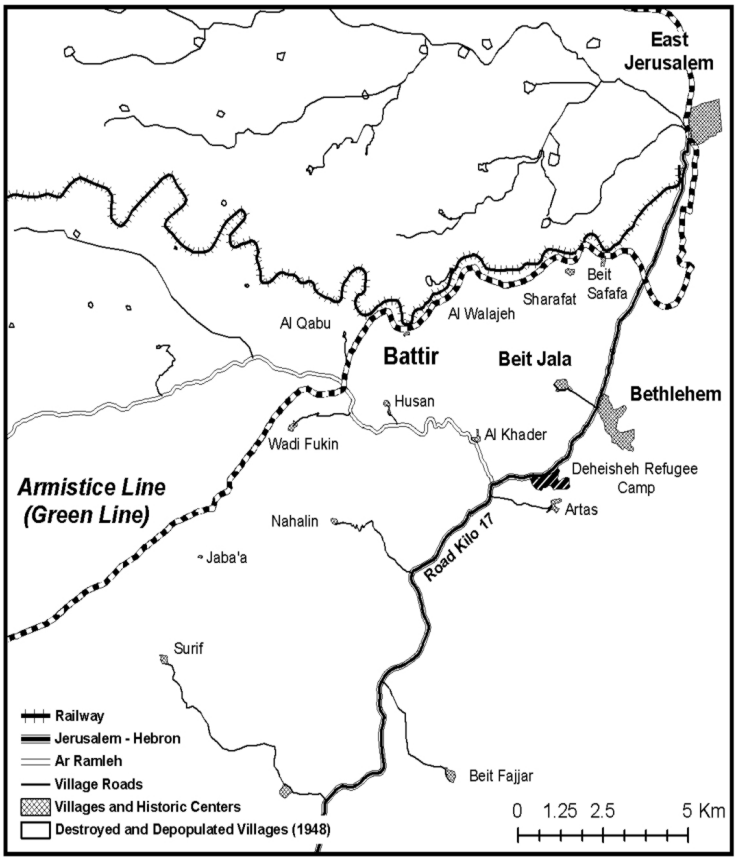


Fig. 1: beginning of the fragmentation in the area after the depopulation of the Palestinian villages and the Jordanian-Israeli Accords on the Armistice Line.

[does not only mean] that settlements must be created, but that [the Land of Israel] is under Jewish *sovereignty* [Italics are by the author]" (Gorenberg 2007: 107). After a long debate between various governmental and non-governmental figures, aspiring settlers, members of the National Religious Party of the Knesset, rabbinic schools and members of the Greater Israel Movement, at the end of 1967, even the Israeli Prime Minister Levi Eshkol accepted the idea of starting a campaign to colonize the West Bank. "Masking"

the colony as a "military outpost"[35], which would somehow have been tolerated by international law, the settlers and the government welded on the common strategic objective of expanding Israel's territorial sovereignty. Essentially, a varied group of figures not belonging to state organizations pushed a compliant government beyond the limits set by international law, in a complex legal and colonial scheme that crossed the Green Line for the first time and marked the start of one of the most considerable and historically stratified settlers' blocks in the West bank, later administratively formalized into a "Regional Council". A mixture between "*Utopian* imagination and planned *topian* praxis" (Efrat 2003: 61), therefore, contributed to the genesis of Gush Etzion, or the Etzion Block.

Over the following decades, well-organized architectural and legal procedures and brutal military orders resulted in the gradual expropriation of the Palestinian villages west of Bethlehem. In a dramatic escalation, the construction of these colonies[36] and infrastructures has, in many cases, irreversibly changed the landscape of the area. Battir and its surrounding villages witnessed the proliferation of legal and military mechanisms of dispossession and further enclavisation. Several thousands of *dunams* of land were confiscated and expropriated in the Seventies and the early Eighties by the Israeli administration in Battir and its neighbouring villages by applying military orders, and then declared "state land" by exploiting Ottoman law, which still represents, together with the Jordanian law, part of the basic framework of colonial law in the OPT[37]. While at the end of the Seventies the purpose of dispossession through military orders was, officially speaking, to create 'temporary' military structures (the outposts, as in the case of Kfar Etzion) rather than civil ones, during the Eighties this legal philosophy was flanked by new methods of state expropriation reinforcing the expansion of the Israeli state sovereignty over the area. After the "state lands" came those expropriated for

[35] This is how the Israeli journalist Gorenberg (2007: 116-118) described this historical moment in which the "temporary border" constituted Green Line has been obliterated and the Israeli colonization of the West Bank has been triggered in our area of study by state and non-state actors: "None of the actual characteristics of an outpost existed; the settlers were not soldiers and therefore were not serving in Nahal, a branch of the army; there were no officers, no uniforms, no military tasks such as conducting patrols of the area. Nonetheless, next morning's papers all dutifully reported the establishment of a Nahal security post. […] The myth of a reluctant Eshkol pushed by Orthodox settlers into reestablishing Kfar Etzion would later serve the purposes both of the Israeli left and the young Orthodox rebels. But […] Eshkol made a choice, knowingly evaded legal constraints, imposed his decision on the cabinet, and misrepresented his intentions abroad".

[36] Rosh Zurim (1969), Alon Sherut (1970), Har Gilo (1972), Tekoa and Migdal Oz (1977), Efrat (1980), Ma'ale Amos (1981), Neve Daniel and Nokdim (1982), Adora and Asfar (1983), Karme Tzur and Kedar (1984), Beitar Illit (1985), Bat Ayin (1989): over 2000 hectares of "municipal areas" (not counting the conspicuous amount of land expropriated and turned into various types of infrastructure for the settlers). As is evident from the chronology, most of these colonies were established before the Oslo Accords, but almost all experienced booming territorial expansion and infrastructures above all after the agreement. Source: Foundation for Middle East Peace: http://asp.fmep.org/app/settlement/ShowSettlementTablePage.aspx.

[37] Most of the expropriation took place in the lands that Ottoman law after 1858 defined as *miri*: these made up a 2.5 km ring around the Palestinian villages, and consisted of farmed land which alternated with uncultivated land. The ring formed a sort of hinge-like space between the various villages. The legal status of these areas was of lands owned by the State, which allowed Palestinian farmers right of use. A Turkish law of 1913 abolished any distinction between use and ownership, allowing the farmers who had registered their land full right of ownership. In 1967, only 30% of the lands were in the Land Registry, and much of the expropriation, later declared as "State lands", was concentrated in the remaining 70% (Bimkom 2008). On the incorporation through military orders of the Ottoman and Jordanian laws into the "infrastructures of control" of the West Bank after 1967, see Gordon (2008: 26-27)

"public use", and together with the "public lands" were those expropriated for "security reasons", the expedient which was progressively more frequently implemented after the Oslo agreement, especially after the Second Intifada.

This complex jurisdictional machine provided the state, the settlers and the military and civilian architects of the occupation in the area with a fundamental backbone for both further enclavisation of the Palestinian villages and exclavisation of the settlements. The "natural growth" of the colonies and their civilian infrastructures was made on this very articulated set of expropriated lands. So, the area was subjected, bit by bit, to further fragmentation: new infrastructures; new roads for "Jews only" – encircling the Palestinian enclaves and preventing their urban expansion and their possibility of planning –; a new system of tunnels "sterilizing" settlers' roads and separating the settlers and the Palestinian inhabitants of the villages through apparent measures of "traffic management" (**See Fig. 2**). This process can be defined as "shifting legal geography" (Weizman 2006: 91): a process of continuous refinement of a departmentalized space; a process of "masked apartheid" in which the expansion of the landscape of Israeli citizenship and the restriction of the Palestinian space of life were enabled both by the violence of the Army and the legal procedures of the Israeli Supreme Court.

It is within this framework of military and civilian measures that the present post-Oslo jurisdictional and territorial order of our space of enquiry was finally shaped **(See Fig. 3)**. The Oslo

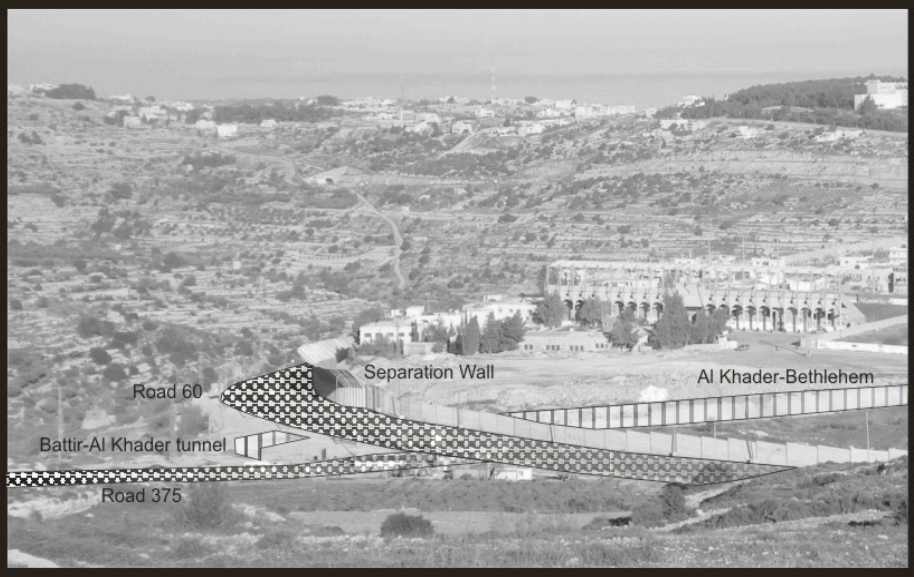


Fig. 2: the tunnel system.

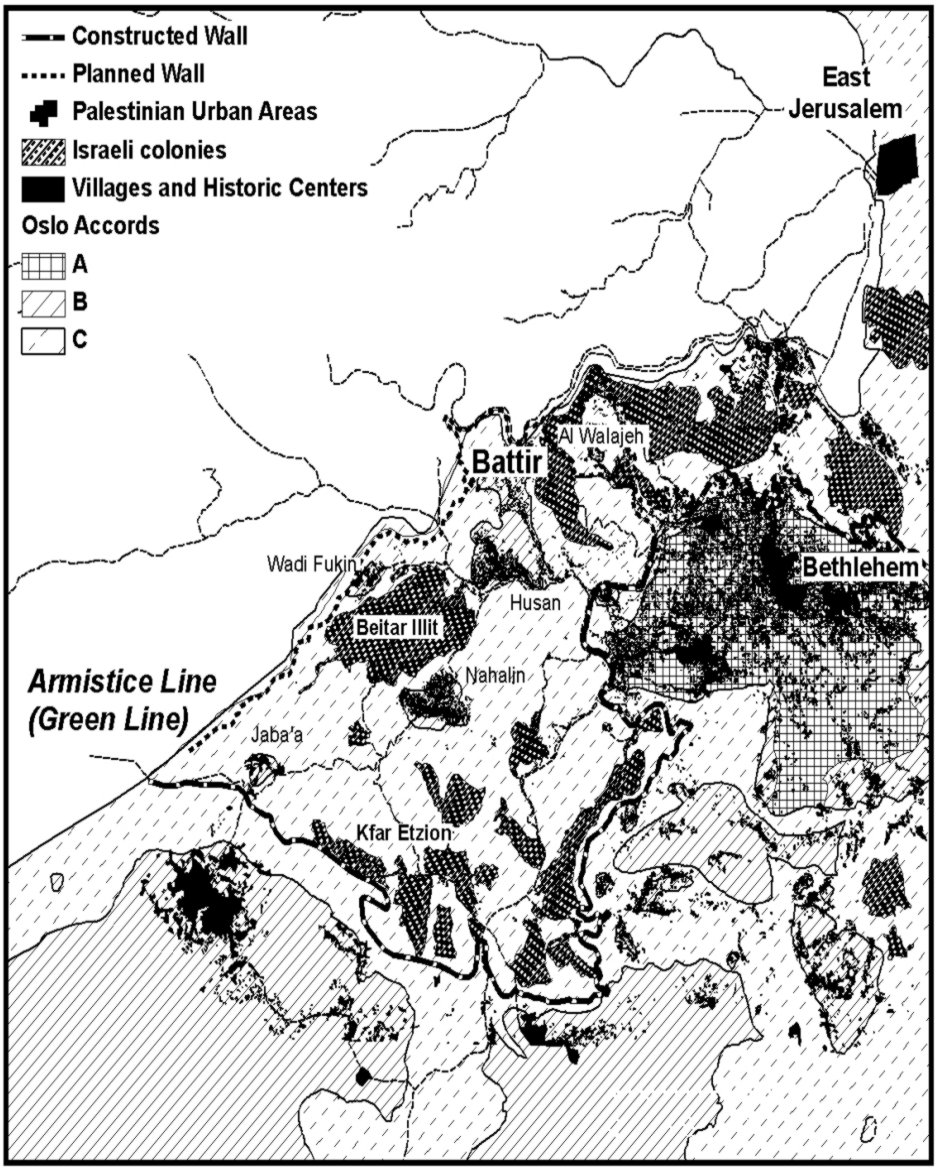


Fig. 3: the transformation of the jurisdictional-territorial order from 1967 to the post-Oslo period.

Accords (1995) further fragmented the territory of Battir and its surrounding villages into "B-C Areas"[38], enclavising the urban centers into the so called "Area B" (according to a

[38] "Areas A include major Palestinian centres in the OPT. Areas B consists of other Palestinian-populated regions of the OPT, including a number of small towns, villages and hamlets. Area C covers all remaining territory of the West Bank [and] area C is the only one that is [territorially] contiguous. Areas A and B form island of Palestinian jurisdiction […]. In Areas A, the PA has full authority over civil affairs, and internal security and public order, while Israel retains responsibility over external security. In Areas B, the PA exercises

demographic principle), and providing the Israeli Civil Administration and the Army with "temporary" administrative, planning and "security" powers over those very areas (C) on which confiscations and expropriations took place after 1967. Area C surrounding Battir and its closest villages has been the theatre of a constant proliferation of security infrastructures (fences, roadblocks, the Wall of separation), civilian infrastructures of connection of the settlements and disconnection of the territorial continuity between Palestinian inhabited areas (settler's roads, junctions, tunnels).

It is the game with this line – between B and C – that is becoming more and more the legal battlefield on which Israeli state and non-state actors, Israeli Supreme Court, Palestinian Authority, lawyers and human rights organisations are fighting to extend or combat the elastic colonial sovereignty of Israel.

The "Red Castle" and *Democratic Colonialism*

What is particularly interesting in the contemporary framework of the colonisation of the Palestinian Territories is what we could name the *democratic forms* that Israeli colonialism is assuming. The following legal case study – a case that has recently been brought in front of the Israeli Supreme court and that I had the opportunity of reconstructing during my research on the relationship between space and law in the village of Battir – and its genesis – so in the very etimological sense of the word, intended as the process of generation of a legal trial in the Israeli Supreme Court[39] – provide us with a clear example of what Michel Foucault described as *judiciability* (Foucault 1977) in a colonial context. Generally speaking, *judiciability* is the "sphere of what can enter the field of pertinence of a judicial action"; what is interesting in a contemporary colonial frontier as the one separating Area B and Area C in the village of Battir are the very "bottom-up" dynamics producing the effect of "magnetizing" the Palestinian non-citizens in the sphere of judicial action of a colonial instance such as the Israeli Supreme Court. What this legal case will show is that in an "ordered chaos" such as the one governing the Occupied Palestinian Territories, violent colonial actors – such as the settlers – can act as a NGO, claiming a monitoring function *vis à vis* what they perceive – in a specific historical circumstance, as we will see – as a non-democratic state (Israel), and proclaiming a "struggle for equality" which perfectly adapt to the political ecosystem generated by the model of colonial occupation promoted by that very state they are contesting. What in the classic conception of the political contemporaneity have been conceived as key actors – NGOs, human rights association, the so called civil society – in the creation of a balance for the excesses of the states, are becoming – in the specific form they assume within the Israeli ecosystem of the occupation – an important instance of reproduction and sophistication of the Israeli colonial sovereignty, beyond their apparent clash with the state.

---

civil authority and maintains a police force to protect "public order for Palestinians", while Israel retains "overriding responsibility for the purpose of protecting Israelis and confronting the threat of terrorism" […]. In Areas C Israel retain complete territorial jurisdiction." (Source, Palestine Liberation Organisation Negotiations Affairs Department, *Briefing Note*). 61% of the West Bank is Area C, 21% is Area B and 18% A. In the area of Battir more than 90% of the territory is area C, and there is no Area A, but only B and C. The A-B-C order should have last for five "temporary" years but a final Israeli withdrawal never took place.

[39] The Israeli Supreme Court is the highest judicial entity in Israel. As supreme organism of judgment of the state, it has somehow followed the path of extension of the Israeli colonial sovereignty, expanding its judicial activities to the Occupied Palestinian Territories.

The legal case study I intend to analyse is that of what the inhabitants of Battir, the Civil Administration and the associations of Israeli settlers by now call the "red castle". This case might be defined as liminal, on the border between what the Oslo agreement marked off as Areas "B" and "C", between the urban area of the village and the areas particularly hit by the historical Israeli policies of confiscation and house demolition.

As you enter Battir's main street, both sides of the main artery through the village are still in Area B. A few tens of metres along on the right hand side of the road, delimited by an invisible line, starts what Rabin's Israeli government and the nascent National Palestinian Authority recognized at Oslo as Area C (**see Fig. 4**). One of the most recent constructions, built at the beginning of the main road to the historical centre is the so-called "red castle" (*Qasr Aḥmar*), a luxury residence which takes its name from the nickname of its owner –a Palestinian from the Diaspora who emigrated to the United States, where he opened a supermarket chain– and from the colour of the stone the architects had initially chosen before the construction work began. What is of interest is not so much the luxury of the castle although, as we shall see it has become part of the

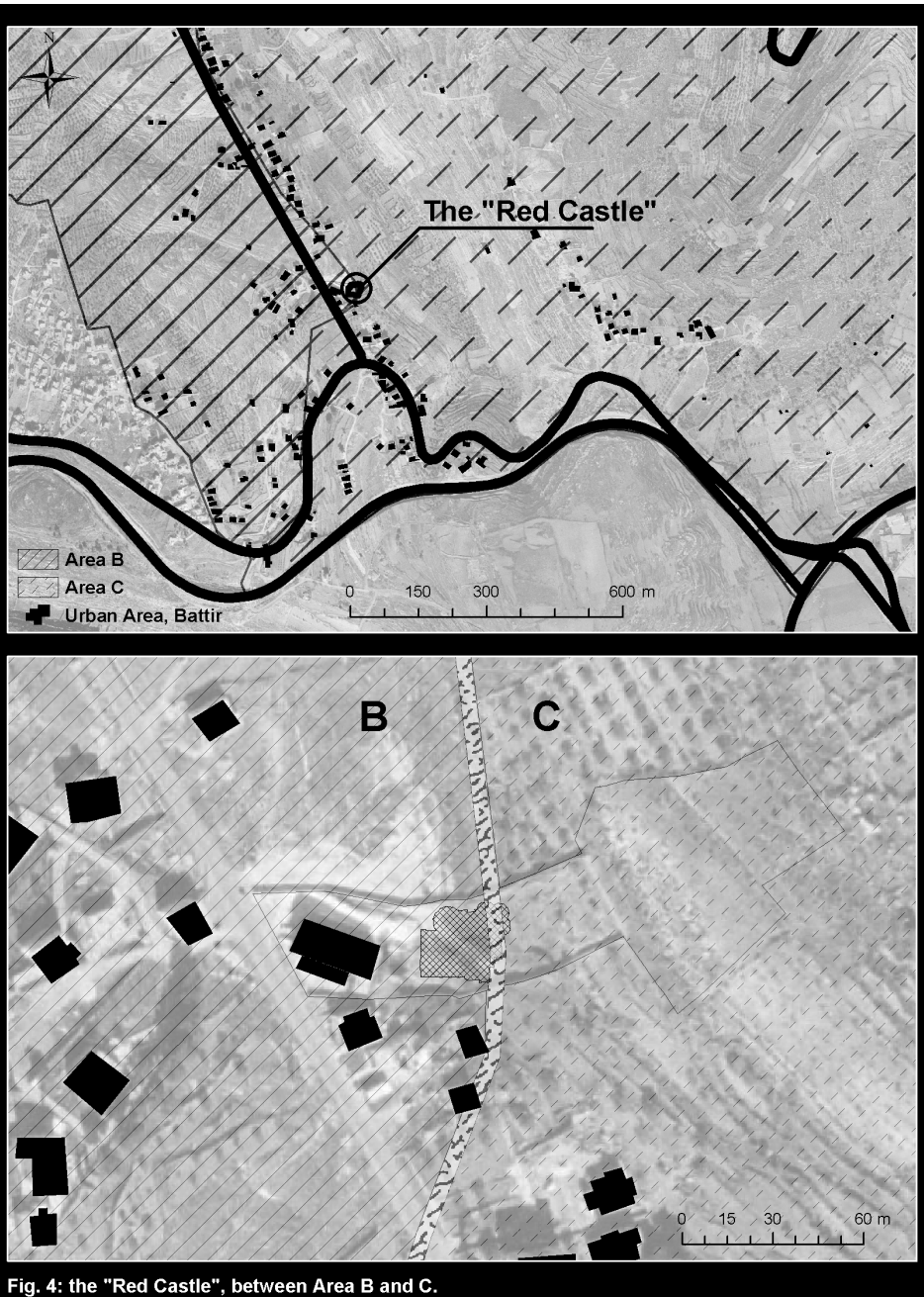


Fig. 4: the "Red Castle", between Area B and C.

legal battle, but rather the jurisdictional and spatial context in which the castle has been built, and the dynamics its construction has set off.

In December 2009, two years after the foundations of the building were laid, some very unusual members of a human rights association turned up, accompanied by a reporter from Israel's Channel 10 and a television crew. They interviewed the contractor (*wakīl*) of the villa[40] and began asking him details about the owner and legal statute of the building as regards the B-C territorial order: information that the contractor provided in good faith. In actual fact, these supposedly casual passers-by were representatives of a peculiar human rights association: the "Regavim Movement for the Protection of National Land", which defines itself, in the words of one of its exponents, as a "non-political movement whose aim is to protect national lands and properties, preventing *others* [my italics] from illegally taking possession of national property resources"[41]. As a Regavim spokesperson declared at the Israeli newspaper Ha'aretz during an interview with Israeli journalist Amira Hass, the organization:

> [Regavim] *is taking a very serious approach toward the illegal takeover by Arabs of lands in Area C in Judea and Samaria* [the biblical name for the Palestinian West Bank]*, including by means of agricultural cultivation designed only for this purpose. Regavim is following with concern the increasing involvement violating the laws of the State of Israel and brazenly undermining its sovereignty ... Regavim calls on the of foreign countries and entities in* establishing facts on the ground unilaterally [my emphasis]*, while Foreign Ministry to convey an unequivocal message to the international parties* [active in Palestine-Israel]*, and state that Israel is very upset by their behavior and demands that they immediately desist. The Regavim movement is pleased to hear that the Civil Administration has responded to its demands and has been enforcing the law in an egalitarian manner, among Arabs as well.*[42]

Previously only active on the Israeli side of the Green Line, the original aim of this 'national association' was to report 'illegal Arab building' by Palestinians who were still living in Israel after 1948. It is now becoming increasingly active, however, in the OPT, given that its 'hard core' is made up of right-wing settler-observers of whom there is a high concentration in the southern colonies of the West Bank, between Hebron, Bethlehem and Jericho[43]. In one of their petitions, the members of this association define themselves as a NGO that pays close attention to the relationship between space and law and which is invested with a vein of "indigenism" that aims to protect the public from any exploitation it might be subjected to by its own State, almost as if in a sort of democratic emergency:

> [Regavim is] *an association responsible for the protection of the citizens of Judea and Samaria, for the prevention of the use of the land by those who are unauthorized to do it, and for the* surveillance of the

[40] The contractor is handling construction work on the villa and the legal question that has arisen after the visit from the 'human rights association'.
[41] Jerusalem Post, 03-09-2010: http://www.jpost.com/Israel/Article.aspx?id=153805.
[42] Declaration by a Regavim spokesperson, cit. in Hass (2010a).
[43] On the monitoring and petitions by Regavim against the Bedouins living in Jericho, in area C, and on the organization's campaign against "migrating nomads who are placing at risk the resources in an area due to experience natural growth [of the settlers]", see Hass (2010b).

> activities of the [Israeli] authorities with the aim of making them respect the law [my emphasis].

Regavim's monitoring activities, which appear to range widely, are turning into a series of reports that the association is sending to top members of the Israeli government, to the colonial administration of the West Bank and the Israeli Supreme Court. Let us attempt to see what they are materially producing. After a petition presented by the organization to the Supreme Court in September 2009, for the first time in the history of the state of Israel the Court decided to carry out a number of orders to demolish Palestinian houses in the West Bank, further extending its jurisdiction within the OPT. In the past, these orders had been the prerogative of the Israeli Civil Administration, the Israeli colonial administration in the OPT. At the beginning of November 2009, the legal head of Regavim implemented the Right to Information Act, asking the District Court of Jerusalem for a list of international organizations operating in the West Bank and to see the applications presented to the Civil Administration by these organizations in order to construct humanitarian infrastructures and buildings. The group declared:

> *The citizens of the State of Israel have the right to know what the foreign organizations* [by that meaning foreign organizations working with the Palestinians] *are doing* in Israel [my emphasis]*, how the IDF and Civilian Administration treat them, and whether funds from foreign countries are used in illegal.*[44]

At the end of November 2009, the Defence Minister Ehud Barak sent 40 new 'building inspectors' to the West Bank to reinforce the "settlement freeze" announced by the mixed Likud-Labour government of Benjamin Netanyahu. At the same time, Regavim submitted a petition to the Ministry of Defence against construction of Battir's "red castle", requesting its demolition. The timing of the petition, presented at the same time as the start of the so-called "settlement freeze", is particularly important in helping us understand the nature of Regavim's legal claims to the areas in the West Bank, as well as the *strategy of equality* the association adopted in its *radical democratic colonialism.* Regavim is in fact fighting for most peculiar forms of "equality" and "non-discrimination" in Battir and other zones: the right for equal treatment from the colonial authorities of the Civil Administration as regards the "illegal constructions" of the settlers and of those of the Palestinian inhabitants of the OPT. By exploiting the Israeli government's decision to officially freeze the settlement construction, due to international and US pressure to reopen peace negotiations for the umpteenth time, Regavim is in actual fact working on a further –detailed– extension of Israel's colonial sovereignty in the OPT, especially in Area C, by trying to reproduce a system of restrictions, immobilize construction work and protect national lands in a manner similar to that which the Palestinians of Israel or Jerusalem are subjected to.

Due both to its 'unrestricted' range of action in the territory –with an approach very similar to Golda Meir's definition of a frontier–, and to its articulated network –a structure empowered by international ideological and financial support–, it is hard to accept Regavim's self-definition as simply a "national right association". Like Saskia Sassen (2006), we could define it as a "trans-national assemblage", a small-scale

[44] http://www.israelnationalnews.com/News/News.aspx/134454.

"ethnically pure" political organization with branches worldwide, which profits from the support of lobby groups which include major exponents of the Canadian Jewish community. The Jewish Tribune, Canada's main Jewish newspaper, defines Regavim and its role within another national and global assemblage, the Legal Forum for the Land of Israel:

> *The Regavim Movement for the Protection of National Land is one of those organizations* [that takes part in the Legal Forum]. *While unauthorized Jewish-built outposts* [the military term used to hide the start of a new settlement in the West Bank] *in Judea and Samaria are often demolished by the government, similar violations by Palestinians are generally ignored. In response, Regavim's members take pictures and document the construction and pursue these cases with the authorities – even to the courts*.[45]

Registered in Israel, Regavim is backed internationally by a global network of funding and power and has recently shifted its activities from the 'homeland' to the colonial frontiers of Israel. Its activities can be followed the world over on the Internet – as our own reconstruction shows– and nationally on Israeli television.

Let us however try to examine the legal debate that Regavim, this democratic figure which is supplementing the eco system of the colonial practices and spatial dynamics, has attempted to fuel with its petition to the Supreme Court against the castle of Battir. This will help understand the language with which the organization is trying to take a leading role in the legal arena of colonial sovereignty, and the nature of this role. The petition is addressed to the Court and it attacks four entities: the Minister of Defence Barak, the head of the "Civil Administration of Judea and Samaria", the military head of the Civil Administration and the "red castle's" representative. Claiming that the castle is entirely situated in Area C and that no permission of any kind has been afforded by the Civil Administration as required by the Oslo agreement, the petition asks for construction of the villa to be stopped and, and its electric and sewage to be demolished. Alongside the argument that the Oslo agreement is being violated, the petition uses an even more explicit language regarding the organization's spatial policies. Indeed the Israeli colonial administration is criticized for: its negligence over what Regavim calls "transformation of the features of the area" –claiming that the villa alters the geography of the biblical landscape of the zone–; the fact that the castle stands in a "dominant position" –that the hills of Jerusalem can be seen from the area and even better from the castle– and that, since it is "close to the Wall", there might be "repercussions on the security of the settlers" in transit; the luxuriousness of the villa, underlining more than once how inexplicable it is for a Palestinian from the Diaspora to be able to build a 5 million dollar villa.

To this game between legal discourse and matters outside the colonial law as it has been drawn in Oslo (i.e. the cost of the villa), and to this attempt by Regavim to berate the administration for not performing an increasingly detailed monitoring of the agricultural and building practices of the Palestinians living in Area C –a game which aims more at extending the borders of colonial sovereignty and surveillance than any real,

[45] "The Jewish Tribune", 24 September 2009, available online: http://www.brucebawer.com/jewishtribune.pdf.

and extremely unlikely, equal treatment of the illegal Palestinian constructions and those of any settlers–, both Ehud Barak and the Civil Administration have replied by attempting to re-establish the legal order which came out of the Oslo agreement. Both the Minister of Defence and the administration have confirmed their authority, challenged by Regavim, and the legitimacy of their work, claiming that the government is aware of all the "illegal constructions and farming activities without permits" in the pre-Oslo area: constructions "without permits" and farming activities, such as the building of wells, concerning which the administration had opened files before the Oslo agreements but that, answering Regavim, they claim not to be able to implement in the demolition orders since these would represent a kind of *retroactive malfunctioning* or disorder of the current post-Oslo *pacification* order. The clash here is between a rightist settlers movement that adopted an anti-state and rights discourse, and a government that in the particular ecosystem of this legal case is assuming a presumed moderate position, re-establishing the authoritativeness of that very accord which enabled the continuation and the refinement of the apparatus of occupation.

However, the "red castle" legal case is still in a procedural phase at the Supreme Court. Indeed, as far as one can see from maps, a large part of the castle stands in Area B, while a small portion of the building and the plots of land bought by the owner prior to construction are in Area C (**see Fig. 5**). Multifarious maps show the line compartmentalizing the space to be volatile, and most of those available do not show with any clarity the threshold between these two different jurisdictional territories, with their separate legal systems. Rather than from the "dominant position" described by the lawyers of Regavim, the choice of the owner – backed by the National Palestinian Authority, which asserted its administrative and planning authority by approving the villa's construction – seems to have been dictated by a ploy that took advantage of the jurisdictional and territorial line mapped out by Oslo, or rather by playing with the inherent elasticity of that line in the attempt to appropriate a liminal space, that *threshold* which embodies the territorial order of sovereignty, but also a space which engenders practices that can undermine and subvert that very order. To paraphrase Golda Meir, the frontier is where the Palestinians live.

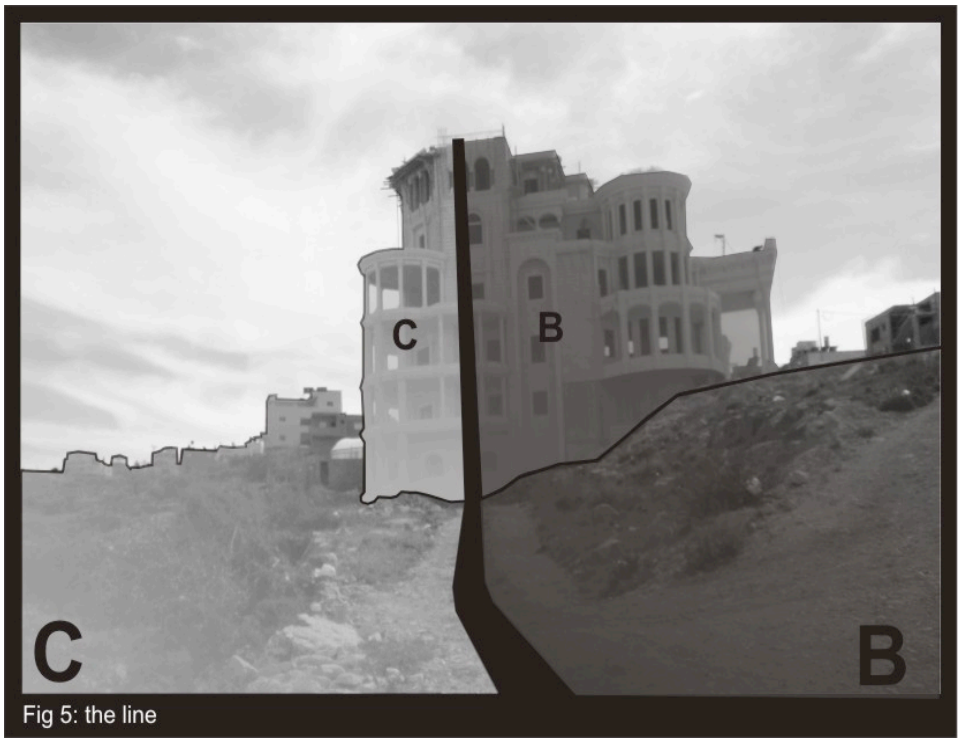


Fig 5: the line

Conclusions

Since 1967 Israel's illegal extension of its sovereignty has progressively intersected with International Humanitarian Law. Human rights organisation defending the rights of the Palestinian have always occupied the ambiguous threshold between the sphere of the protection of a population under occupation and that of the enablement of the occupation through the assumption of those very duties which, according to the International Humanitarian Law, are up to the occupying power. After the recent wars on the Palestinians (the Second Intifada and the wars on Gaza), the recent increase of Israeli repression towards its citizens of Palestinian origin, and after the recent attack on the humanitarian ship *Mavi Marmara*, it seems that international human rights organisations have become Israel's "strategic threat", together with Iran, Hamas and Hezbollah (Weizman, Keenan 2010). The attack to the Gaza Flotilla is the first deliberate attack on a humanitarian convoy. Are these dynamics and the proliferation of rights associations, even among violent settlers, two sides of the same coin? Are peculiar human rights associations such as Regavim trying to monopolize the right discourse, normalize the occupation and produce their specific conception of rights for a specific category of citizens, the same way the State of Israel is attacking humanitarian NGOs in order to obliterate the violence of its siege on Gaza? If, on one hand, post-colonial states can become democratic forms of colonialism (Chatterjee 2007), on the other hand, can Israeli colonialism assume the shape of a *colonial democracy* through the extension of its sphere of judiciability?

Bibliography

Bimkom, Planners for Planning Rights, (2008), *The Prohibited Zone: Israeli Planning Policy in the Palestinian Villages in Area C*, Report, May.

Chatterjee P. (2007), "Democratic Colonialism", *Mainstream Weekly*, http://www.mainstreamweekly.net/article120.html

Efrat Z. (2003), "The Plan", in Segal R., Weizman E. (eds.), pp. 59-78.

FMEP, Foundation for Middle East Peace, (2009), *Report on Israeli Settlement in the Occupied Territories*, Vol. 15, n. 6, September-October.

Foucault M. (1977), "La redéfinition du 'judiciable'", *Justice*, n°115, juin, pp. 36-39.

Foucault M. (2003), *Society Must Be Defended: Lectures at the Collège de France, 1975–76*, Penguin Books, London.

Gorenberg G. (2007), *Occupied Territories: the Untold Story of Israel's Settlements*, Tauris, New York.

Gordon N. (2008), *Israel's Occupation*, University of California Press, Berkeley and Los Angeles, California.

Hass A. (2009), "What does Israel have against a Palestinian stadium?", *Ha'aretz*, 26 November 2009, available online: http://www.haaretz.com/hasen/spages/1129433.html.

Hass A. (2010a), "Palestinian farmers are being treated like criminals", *Ha'aretz*, 28 January, available online: http://www.haaretz.com/hasen/spages/1144286.html.

Hass A. (2010b), *"Bedouins fight state for land near Dead Sea",* Ha'aretz*, 18 March, available online: http://www.haaretz.com/hasen/spages/1155866.html.*

Keenan T., Weizman E. (2010), *"Israel: the third strategic threat",* Open Democracy*, available online:* ***http://www.opendemocracy.net/thomas-keenan-eyal-weizman/israel-third-strategic-threat***.

Kelly T. (2006), *Law, Violence and Sovereignty Among West Bank Palestinians*, Cambridge Studies in Law and Society, Cambridge University Press, Cambridge.

Kimmerling B. (1982), "Change and Continuity in Zionist Territorial Orientations and Politics", *Comparative Politics*, Vol.14, n.2.

Misselwitz P., Rieniets T. (eds. 2006), *City of Collision. Jerusalem and the Principles of Conflict Urbanism*, Birkhauser, Basel.

Sassen S. (2006), *Territory, Authority Rights: From Medieval to Global Assemblages*, Princeton University Press.

Segal R., Weizman E. (eds. 2003), *A Civilian Occupation. The Politics of Israeli Architecture*, Babel-Verso, Israel-London.

Weizman E. (2006), "Principles of frontier geography", in Misselwitz P., Rieniets T. (eds), pp. 83-91.

Judicial Approach to Child Relocation

Mr. Justice Tassaduq Hussain Jillani
Judge Supreme Court of Pakistan

The issue of relocation of children is mainly one of the by-products of the break down of the institution of marriage. Little do the "Romeos and Juliets" know that their mutual discord may land the star creation of their union of love in Court and the issues of custody or relocation of the poor child would be left to be decided by the judges, social scientists and psychologists. 'The prominence of the issue stems from a variety of factors including the increasing numbers of working parents subject to employment – related transfer, the greater mobility of our society with far – flung families, and the rising numbers of custody disputes occurring within burgeoning variety of family structures'.[46] In attempting to strike a right balance between multiple and conflicting judiciaries all over the globe have found these cases to be tough, worrisome and challenging. No wonder, it has been a focal point among international family law judges, practitioners and academicians.

Broadly there have been three approaches/trends in relocation jurisdictions. These are:

(i) raising presumption in favour of custodial parent;
(ii) favour ongoing contact between the child and non-custodial parent; and
(iii) focusing on 'best interests' factors and other relevant considerations.

The first trend raises a presumption in favour of the custodial parent who seeks to relocate. This is by and large the practice in courts of United Kingdom. The most often cited case is Payne v. Payne (2001) 1 FLR 1052. 'Under Payne the primary carer seeking to relocate with their child or children must first establish that the move is realistic and not motivated by selfish reasons, that is, a desire to exclude the father from the child or children's life. Likewise, so must the motives of the contesting parents be examined'.[47]

Assuming the proposed relocation is motivated by good faith, the parent must then establish the proposed relocation is reasonable. When considering the reasonableness of the proposed relocation the court will examine the logistics of the move, for example, carer opportunities, education, availability of housing and distance from current residence. The court will also consider the child's relationship with the primary care and the present and future contact arrangements with the non-primary care giver and the impact of the future arrangements on their relationship. The child's wishes will be taken into account where appropriate depending on age and maturity.[48]

Once the court is satisfied that the relocation is reasonable, the court will allow the parent to relocate with the child unless it is clearly demonstrated that the relocation would be detrimental to the child's welfare.[49]

---

[46] Gary A. Debele (1998) A children's right approach to relocation: A meaningful best interest's standard, Children's Rights Vol.15.
[47] Payne v. Payne (2001) 1 FLR 1052 at 99.
[48] Ibid at 109.

[49] See Annex 2 for a diagram summarising the approach embodied in the Payne decision.

Although there is neither a presumption for or against relocation in England and Wales, in practice it is rare for the court not to allow relocation by the requesting parent. [50] A rationale for the importance, if not deference, the court affords to the requesting parent's desire to relocate is the belief that a primary carer's emotional and psychological well being is directly linked to their child's emotional and psychological well being.. Thus Thorpe LJ stressed the crucial task of the judge in relocation cases in assessing the potential effect the refusal of an application to relocate will have on the primary carer his or herself and in turn the quality of life for the child.[51]

In United States, the family law is not a federal subject but a state subject. There are 50 States and the State law and the precedent case law reflect all the three approaches to child relocation to which reference has been made above. 'Quite simply, the difference can be boiled down to states that generally do not favour relocation, states that generally do favour relocation, and those that 'favour' neither and instead adhere to a case-by-case analysis on each occasion. Different considerations include the right of the primary carer and relocator to move freely, the right of the non-primary and non-relocating carer to maintain meaningful contact, and a state duty to protect the best interest of the child. [52]

In some cases the constitutional right to travel has also been invoked by a custodial parent seeking relocation. But the other aspect is that the left behind parent, who loses access to child, may be denied the fundamental right to parenting. In such a conflict of two constitutional rights, the courts have decided the issue of relocation by keeping the best interests of child in mind. A typical case of this kind is the one decided by the Maryland Court of Appeal where it was held that, "neither parent has a superior claim to the exercise of this right to provide, 'care, custody and control' of the children…..effectively, then, each fit parent's constitutional right, leaving, generally, the best interests of the child as the sole standard to apply these type of custody decisions".[53]

In cases of international relocation of a parent with a child, the U.S. courts like other countries (70 in number) follow the Hague Convention. The Convention enshrines the principle to be applied internationally to ensure swift return of abducted children. Under this Convention, it is for the courts in the child 's "habitual residence", before the removal took place, to decide the question of relocation. The courts in jurisdiction to which the child has been removed are mandated to return the child to those courts for the appropriate custody determination.[54]

In Australia the law and the courts do not raise presumption in favour of the custodial parent. The most celebrated and frequently cited case on child relocation is that of U v.U (2002) 191 ALR 289. The High Court dismissed mother's appeal and concluded that 'a court is not bound by the proposals of the parties and the child's best interests were to be treated as paramount consideration in relocation cases. However, the High

---

[50] R. Spon-Smith, (2004)'Relocation Revisited' Family Law 191 at 193
[51] Lowe at 99
[52] Thomas Foley (1980) 'International child relocation: Varying Approaches among member States to the 1980 Hague Convention on Child Abduction' Page 14.
[53] Relocation of Children: Law and Practice in the United States by Judge Peter J. Messitte, U.S. District Court for the District of Maryland, the International Family Justice Judicial Conference for Common Law and Commonwealth Jurisdictions Windsor, England, August, 2009.
[54] As at F.N.8.

Court further concluded that the best interest of the child should not be treated, or elevated, as the sole factor for consideration. The High Court noted the need to consider the requesting parent's economic, cultural and psychological well being if permission to relocate were granted or refused. The rational being that the welfare of the parent has a direct impact on the welfare of the child'. [55]

The Family law Amendment (Shared Parental Responsibility) Act 2006 introduced yet another guideline which underpins the importance of shared responsibility. It is now, 'widely considered that in cases where both parents have a close relationship with the child, and there are no countervailing issues of violence and abuse, it is more difficult to justify a relocation than it was before the Family Law Amendment (Shared Parental Responsibility) Act 2006 came into effect.[56]

In South Africa, the Courts have attempted to strike a balance between the right of the custodial parent and the best interests of the child as mandated by a South African constitutional provision i.e. section 28(2). The leading case from the said jurisdiction is that of *Jackson* in which Justice Scott JA who authored the majority opinion held:

"It is trite that in matters of this kind the interests of the children are the first and paramount consideration. It is no doubt true that, generally speaking, where, following a divorce, the custodian parent wishes to emigrate, a Court will not lightly refuse leave for the children to be taken out of the country if the decision of the custodian parent is shown to be bona fide and reasonable. But this is not because of the so-called rights of the custodian parent; it is because, in most cases, even if the access by the non-custodian parent would be materially affected, it would not be in the best interests of the children that the custodian parent be thwarted in his or her endeavour to emigrate in pursuance of a decision reasonable and genuinely taken. Indeed, one case well imagines that in many situations such a refusal would inevitably result in bitterness and frustration which would adversely affect the children. But what must be stressed is that each case must be decided on its own particular facts. No two cases are precisely the same and, while past decisions based on other facts may provide useful guidelines, they do no more than that. By the same token, care should be taken not to elevate to rules of law, the dicta of judges made in the context of the peculiar facts and circumstances with which they were concerned. (emphasis is added)." [57]

In Canada the questions of relocation are decided under the Divorce Act and the leading judgement in this regard is that of Gordon v. Goertz (1996) 2 S.C.R. 27. In the said case, the mother sought relocation of the child as she wanted to move to Australia and she pleaded the presumptive deference approach. The Court by a majority of seven to two rejected the application and held that the sole governing principle was the best

---

[55] A. Worwood, 'International Relocation – The Debate'. (2005) Family Law 621 at 623.

[56] See, eg, Eltham and Eltham (2007) 213 FLR 272; (2007) FamCA 657 at (346) per Cronin J: 'If …equal time or substantial and significant time is in the best interests of the child and practicable, a relocation which departs significantly from those sharing arrangements, becomes harder to permit.' See also M and K (2007) FMCAfam 26; BC200701779 at (35) per Altobelli FM; BJZ and KEM (2007) FMCAfam 86; BC200703059 at (47) and (48) per Lindsay FM; Treloar and Treloar (No.2) (2007) FamCA 1127 at (69) per Strickland J.

[57] Jackson v. Jackson 2002 (2) SA 303 (SCA) para 2 at 318E-1.

interests of the child which should be determined by considering all relevant factors without the application of any presumptions.

In New Zealand the precedent case law is mostly against relocation and the issue is decided under the Guardianship Act wherein the paramount consideration is welfare of the child. In a leading case which still holds the field is Stadniczenko v. Standniczenko (1995) NZFLR 493 (CA). The Court held that, "the only principle which governs is that of the best interests of the child. That test cannot be implemented by the devising of a code of substantive rules or of procedural or evidential rules embodying presumptions and onuses."

In the preceding paragraph, I have given an overview of the law in practice in the Common Law countries. In the civil law countries, the approach is slightly distinct. For instance, in France, the Court trend favours a joint parental authority model. The view is that the decisions concerning the child must be jointly made by both the parents regardless of whether the parents are married, unmarried or divorced. [58]

Similarly in Germany, a similar approach is followed and when a parent wishes to relocate with their child, that parent must obtain the other parent's consent or permission from the Court. [59]

In Pakistan the cases of relocation or custody of child are decided in accord with the Guardians and Wards Act, 1890 wherein paramount consideration is the welfare of the child. Although under the Islamic law, mother has a preferential right to retain the custody which include relocation for a minor girl till the age of 12 and for the minor boy till the age of 07 with visitation rights of the non-custodial parent, yet this is not an inflexible rule and mostly the courts have kept in view the welfare of the child as a guiding principle. In several cases, the courts have decided in favour of the custodial parent who invariably is a mother although the baby boy had crossed the threshold age of 12 years.[60] If the Court has passed a custody order in favour of a parent, relocation within the country is not an issue. In a case where the mother of the child had died when the baby boy was hardly 15 days old, the real sister of the deceased mother, on request of minor's father brought up the baby on an undertaking in writing that he would not demand his custody later. However, when the child grew up and came of age, the father sought his custody and moved the Court. The trial Court, the Appellate Court and the High Court decided the matter in favour of the father, inter alia, on the ground that under the Islamic law when a boy attains the age of 07 years, the father has a right of custody. However, the Supreme Court reversed the three concurrent findings of the courts below, mainly on the ground, that the welfare of the child in the facts of that particular case should weigh with the Court while deciding the question of custody or relocation. The Court held as under:

---

[58] Worwood at 627 as quoted in International Child Relocation: Varying approaches among Member States to the 1980 Hague Convention on Child Abduction by Thomas Foley.
[59] Ibid.
[60] Mst. Razia Bibi v. Riaz Ahmad (2004 SCMR 821) and Muhammad Tahir v. Mst. Raeesa Fatimah (2003 SCMR 1344).

"It would, thus be seen that welfare of the minor is the paramount consideration in determining the custody of a minor. The custody of a minor can be delivered by the court only in the interest and welfare of the minor and not the interest of the parents. It is true that a Muhammadan father is the lawful guardian of his minor child and is ordinarily entitled to his custody provided it is for the welfare of the minor. The right of the father to claim custody of a minor is not an absolute right, in that, the father may disentitle himself to custody on account of his conduct, depending upon the facts and circumstances of each case. In this case, the respondent-father, who sought custody of the minor, neglected the child since his birth. The minor had admittedly been under the care of the appellant since the death of his mother. Thus, visualized the mere fact that the minor has attained the age of seven years, would not ipso facto, entitle the respondent-father to the custody of the minor as of right." [61]

So far as the cases which involve transnational child abduction or relocation are concerned, Pakistan is a non-Hague country but such cases are decided keeping in view the best interests of the child. In 1993 Pakistan judiciary signed a protocol with U.K. judiciary on child abduction. The said Protocol, *inter alia*, stipulates that if the question of relocation or custody of the child is being regulated by a court in the country of child's habitual residence, the court in the jurisdiction to which the child has been abducted or taken shall return the child to the country of origin so that the matter is decided there.

A brief overview of the case law from Pakistan jurisdiction would be in order.

In Sara Palmer's case (1992) [62]the petitioner mother moved a divorce petition in England and also sought custody of three youngest children, the elder two were already residing with her, the High Court of Justice Family Division directed that till their majority or until further orders, those children would remain as ward of the Court and shall not be removed from England and Wales without the leave of the said court. The respondent father in utter disobedience to the Court orders left UK along with the afore-referred minor children, she followed him and filed a Habeas Corpus petition in the Lahore High court, Lahore, the court gave the interim custody to the mother but put a clog that order of interim custody would be valid as long as she remained in Pakistan.

In Hiroku Muhammad's case (1994)[63] petitioner mother, who was a Japanese national, married the respondent father in the country of her origin after being converted to Islam, gave birth to a baby boy, came to Pakistan, developed differences, respondent – father retained the custody of the minor son who by then was six years old, the respondent –father filed an application before the learned guardian judge for an interim custody of the child, petitioner-mother moved a Habeas Corpus petition before the High Court and the issues mooted were whether the High Court could interfere in Habeas Corpus proceedings, during the pendency of an application before the Guardian Judge? Could the petitioner-mother be granted the interim custody notwithstanding the serious allegation leveled against her impugning her character and the apprehension that she might flee to country of her origin i.e. Japan, the High Court decided the matter in petitioner's favour and held as under:

---

[61] Mst Nighat Firdous v. Khadim Hussain (1998 SCMR 1593).
[62] Sara Palmer v. Muhammad Aslam (1992 MLD 520).
[63] Hiroku Muhammad v. Muhammad Latif (1994 MLD 1682)

> "…..As regards nationality, it is to be seen that the minor was born in Japan and is, therefore, a Japanese National though he also carried nationality of his father. The respondent had himself gone to Japan and married the petitioner, Japanese lady with open eyes. He cannot, therefore, be heard to criticize her for being Japanese".

In Aya Sasaki's case (1999) [64] the court granted custody to the custodial parent (mother) on the grounds that a Court in Singapore had already passed an order entrusting the custody of the minor to the petitioner and the said order had to be honored unless the same was unjust or improper and second that the petitioner mother had a preferential right to have the custody of the minor.

Again in ms. Lousie Anne Failey's case (2007) [65] which was decided after the UK-Pak Protocol was signed, the Court decided the matter in favour of the custodial parent (mother) mainly because the custodial parent had a custody order from a Court in Scotland and the child had been abducted by her father from England to Pakistan. The father took up the plea of Islamic injunctions and his desire to rear his daughter under the Islamic laws but the Lahore High Court held that let even this question be decided by the Scottish Court.

Miss Christine Brass's case (1981)[66] is the only reported exception in which the custody of abducted minors was refused to the mother despite a custody order from the court of the country of minor's habitual place of residence on grounds of religion. Petitioner (mother) who had a domicile of Canada, got married to respondent (father) in Ontario (Canada), four children were born out of the wedlock , the petitioner along with those children shifted to Washington, spouses fell apart culminating in dissolution of marriage by a court order and the custody of daughter and the youngest son was granted to her whereas the custody of the other two children (a son and a daughter) was awarded to the respondent (father) but the latter left Canada for Pakistan along with four children, petitioner (mother) followed him and filed a Habeas Corpus petition in the Peshawar High Court. The mother continued to be Christian notwithstanding the marriage. The questions which came up for consideration before the Peshawar High Court, inter alia, were: could the petitioner (mother), who was a Canadian Christian, be granted the custody of minor children notwithstanding the Muslim Personal Law? Could a foreign judgment be enforced in writ jurisdiction? And where would the welfare of the minor lie in the afore-referred circumstances? The Court dismissed the petition and held as under:
"….As indicated above under the personal law of the respondent i.e. Muhammadan Law, he alone is the natural and legal guardian of his minor children and even during the period of Hizanat, the constructive custody of the children remains with the father….Therefore, it will be against the intention of law if the minor children residing in Pakistan under a Muslim father are entrusted to the petitioner who is a Christian and who is living outside Pakistan, to be taken to Canada."

---

[64] Aya Sasaki v. Zarina Akhtar (1999 CLC 1202).
[65] Ms. Lousie Anne Failey v. Sajjad Ahmed Rana (PLD 2007 Lahore 293).
[66] Miss Christine Brass v. Dr. Javed Iqbal (PLD 1981 Peshawar 110).

This perhaps is the only case from Pakistan jurisdiction in which the custodial parent was denied the custody on religious considerations. I am not aware of any reported case in which this judgment from Peshawar High Court was ever followed.

One of the crucial issues which has engaged the jurists, academics, practitioners and judges is to evolve a principle of general application which can be globally enforced. Such a uniformity in this shrunken world would help to decide such matters. Thomas Folley warns that, "the absence of a common international approach to relocation may dilute any achievements gained in relation to trans-frontier access/contact.[67]

Gary A. Debele canvases a child centered approach and believes that, "regardless of the weight to be given to the child's desires, the child must be involved and represented independently in the process. Making these determinations will of course require a sensitive and well-educated judicial officer, experienced attorneys conversant in child development as well as substantive family law, and well trained guardians ad litem, social workers, and child psychologists."[68]

Justice Dennis Duggan from U.S. regards, "*welfare test*" to be too vague to be of any guide. He favors a "system which encourages, empowers and commands parents to reach joint decisions, making suggestions which include the use of mediation and legislative bright line rules which add predictability to the issue of relocation,"[69] While concurring with the view that the welfare test is vague, some academics have suggested amendments in the relevant law to make the "welfare checklist" more comprehensive and modeled on the Australian system. In New Zealand law as well there are provisions which provide for these considerations to be taken into account. These academics advocate a "process change, which involves a more active role for practitioners in helping the parent parties in a potential relocation case to make informed choices." [70]

Dr. Marilyn Freeman in her instructive research paper on relocation highlights the need, "(a) for research to be urgently undertaken specially into the outcomes of relocation and the effects of relocation on children …..(b) an amendment to the welfare checklist in the Children Act 1989 (U.K)……(c) a process change which enables informed decisions to be taken by parents involved in relocation issues which may include a combination of mediation, education programmes and practitioner information sessions…..(d) the appointment of a guardian in relocation cases." According to her, this is essential "in case involving very young children, where the relocation has the potential to threaten the heart of the relationship-building in which a young child engages with its parents and wider family". [71]

---

[67] International Child Relocation: Varying Approaches among member States to the 1980 Hague Convention on Child Abduction.

[68] A Children's Rights Approach to Relocation: A Meaningful Best Interests Standard by Gary A. Debele, Children's Rights Vol. 15, 1998.

[69] A judicial rule that helps resolve ambiguous issues by setting a base standard that clarifies the ambiguity and establishes a simple response http://legal-dictionary.thefreedictionary.com/Bright-line+rule as quoted by Dr. Marilyn Freeman in Relocation: The Reunite Research Unit.

[70] Prkinson, "The realities of relocation: Messages from judicial decisions" (2008) 22 Australian Journal of Family Law, pp 35-55 at 55. As quoted by Dr. Marilyn Freeman in Relocation: The Reunite Research Unit.

[71] At their fn 97 they cite Parkinson and Cashmore who suggest from preliminary findings of a research project about relocation disputes that the high level of conflict between the parents in their sample may relate to the

The foregoing analysis would demonstrate that there are many factors which weigh with the courts while deciding issues of relocation. Some factors can be statutory, some reflected in the precedent case law and others may be general canvassed by psychologists or evaluators. Laying down a uniform list of factors which a Family Judge should consider may remain illusive because each case has its own distinct features; the social context from which the case originates the capacities of both the custodial parent and the one left behind and the level of child's intimacy with each. The issue of welfare of the child shall have to be resolved in the light of these considerations. No inflexible rule therefore can be laid down and each case has to be examined on its own merits. But to decide which factor or consideration or approach may weigh with the Court in a particular case, would require certain ability, and a conduct on the part of a judge. He should proceed with an open mind because "a judge who is called upon to decide such cases should not have any bias in one direction or the other most of times." [72] He should not only be well versed in the relevant law but should also have some understanding of child psychology, should be able to visualize the effect of the order that he proposes to pass on the child as also on the custodial parent, should be creative in offering more than one alternative solutions keeping the best interest of the child in mind and be persuasive to make the parties agree for a settlement through ADR or mediation. Such an approach, I believe, is the one which the judges both from Common Law and Civil Jurisdiction may follow.

---

effect of litigation driving people into corners compounded by the crippling cost of litigation and the cost of funding contact at a distance.

NB Patrick Parkinson has suggested that guidance is also required on how judges should apply the terms of the welfare checklist regarding the requirement to maintain contact with both parents. He states that: In determining whether a parent's proposed change of location is in the best interests of the child in cases where: (i) their parents have or will have equal shared parental responsibility (ii) the child has been consistently spending time on a frequent basis with both parents, and (iii) the child will benefit from maintaining a meaningful relationship with both parents, an outcome that allows the child to continue to form and maintain strong attachments to both parents, and to spend time on a frequent basis with both parents, even if it is not as frequent as before, shall be preferred to one that does not." Freedom of Movement in an Era of Shared Parenting: The Difference in Judicial Approaches to Relocation http://papers.cfm?abstract _id=1181442.

[72] Avoiding Bias in Relocation Cases by Philip M. Stahl

Book Review

"Creolization: History, Ethnography, Theory", Charles Stewart (ed.), Walnut Creek , CA: Left Coast , 2007, 268 pp., ISBN 978-1-59874-278-7

There are some words in the social science discourse which, through different trajectories, have left their original contexts of use and their peculiar stories to become paradigmatic of more general phenomena or to be put at the centre of more comprehensive theories. Creolization is surely one of these. Its genealogy is complex and its semantic field varies greatly according to different historical, geographical, and cultural contexts. Its transit from a disciplinary field, i.e. that of linguistics, to social and cultural theory of the contemporary world – since the end of the nineteen-seventies and mostly due to the well-known work of the anthropologist Ulf Hannerz – has paralleled the trajectories of other terms, as hybridization, as metaphors good to think with about the complex cultural global dynamics. The concept of creolization, as an analytical tool, conveys indeed a particular theoretical fascination, able as it seems both to grasp those subtle processes of production of a third space in the field of cultural encounter, and to explain for the creation of new cultural constellations. But beside its apparently heuristic power, which are its origins and its ideological underpinnings, its historical routes – linked to particular geographical regions – and its actual political uses?

The book edited by Charles Stewart, which is the outcome of a workshop organised at UCL in 2002, is a truly useful journey through these issues. The twelve chapters offer a variety of perspectives on the concept of creolization, approaching it through different disciplinary and theoretical points of view. Even if reading the chapters in succession gives sometimes the impression of a lack of dialogue among the different contributions, the attention is kept high by the interest of the various analysis and by the recurrence of some references and deepest connections, providing the reader with a general framework within which to better understand the contemporary debate on the theme and the theoretical pitfalls it entails.

For instances if, with Stephan Palmié words, the aim of the volume is "to probe the analytical (rather than merely descriptive) usefulness of concepts built from terms such as criollo ore 'creole'" (Chapter 4, p.67), the distinction made by Aisha Khan (Chapter 12), and borrowed by Clifford Geertz, between descriptive "models of" and interpretative "models for", recurs implicitly or explicitly in many contributions and becomes salient as a sort of background above which to read the various positions of the authors in this theoretical attempt.

Thus, while Joshua Hotaka Roth (Chapter 10) seems to apply in a rather unproblematic way creolization as a conceptual tool to read the social and cultural dynamics concerning the return to their original country of Japanese Brazilians, Jorge Cañizares-Esguerra (Chapter 2) and Joyce E. Chaplin (Chapter 3) investigate in the two much different contexts of Spanish America and British North America the processes of formation of the collective identities under which colonial elites built independence struggles. The first analyses how Spanish creoles, caught between loyalty to Spanish Crown and the construction of an autonomous positioning within New World polities,

drew on race categories and what the author defines a patriotic epistemology in order to differentiate themselves from foreigners and from Amerindians and mestizo commoners, at the same time mobilising religious inclusive discourses in order to develop the new local allegiances which finally brought to the construction of independent and creolized Spanish American Kingdoms. Chaplin takes her moves from the apparent paradox of the rejection of a creole identity on the side of those people who Benedict Anderson defined as the first "creole nationalists", that is British colonists in North America, and their embracing instead an American identity. The author interestingly investigates this denial by analysing it within the conceptions of person which constituted the discourse on 'creoleness', finally claiming the analytical usefulness of the framework of creolization to grasp these historical processes.

Miguel Vale de Almeida (Chapter 6), in a similar perspective, analyses creolization discourses within the context of 20th Century Portugal. He shows how elite anthropological, colonial and emancipatory discourses were intertwined in producing knowledge around concepts as miscegenation or Luso-Tropicalism – the latter developed by Brazilian Gilberto Freyre and then appropriated by Portuguese colonial ideologies – in order to explain how in Cape Verde "creoleness has come to be the definer of national cultural specificity, not part of a positively valued project of hybridisation" (p. 129).

Philip Baker and Peter Mühlhäsler (Chapter 5) presents a useful survey of the history of the study of creole languages. Centred on the figure of the German linguist Hugo Schuchardt, their contribution helps clarifying the etymology of the word 'creole' and its trajectories through linguistic and anthropological theory, pointing at the often misleading use of creolization, by the latter, for indicating what linguists would call 'borrowing'.

Stephan Palmié (Chapters 4 and 9), Thomas Hylland Eriksen (Chapter 8), and Aisha Khan (Chapter 12) engage directly with the problems related to using creolization as an analytical concept outside its historical and geographical contexts of origin and salience. While the first criticises the extrapolation of the term from its specific time and place boundaries, and its often unproblematic use in anthropological theory, warning about the complexity and contradictions of the concept, the others two authors suggest that more restricted uses might be both necessary and analytically useful.

Eriksen points out the need of distinguishing between different forms of cultural mixing in order to disentangle the concept of creolization from the skein of other akin terms. In order to do so, he investigate both the emic uses of creolization found in Mauritius, and the linguistic original field from which the analogy of creolization has been adapted by anthropology, proposing a definition of the concept which, rather than aiming at being exhaustive, should direct the attention toward processes of particular analytic interest.

Khan, on the other hand, elaborates on the double distinction between creolization as a process or as a concept, and creolization as a "model of" or as a "model for". Warning against the risks in conflating the two terms of each opposition, whose kind of relation should instead be that of an ongoing dialogue, Khan insists on the limits of using the concept outside of its own "narrative box", underlining the importance of addressing the problem of power whereas it is adopted in more general theory.