



# **Journal of Law & Social Research**

Special Issue on Gender and the Legal Profession

A Research Journal Anchored by

Gillani Law College, Bahauddin Zakariya University, Multan, Pakistan

No.3, 2012

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Special Issue on Gender and the Legal Profession  
Edited by:

Hanne Petersen  
and  
Rubya Mehdi

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## **Gender and the Legal Profession – Changing Legal Cultures? Introductory Reflections**

Hanne Petersen<sup>1</sup>

This issue of the Journal of Law and Social Research deals with some of the changes which have taken place worldwide over the last few decades in the ‘world of law’. This development of a changing gender composition of first legal education and then the legal profession is first and foremost quantitative. Female students now comprise more than half of law students in the Western world, and their numbers have been growing quickly in the rest of the world as well, be it in Africa, in the Middle East or in Asia. Women have always been working, and many have also been doing (less well) paid work during most of the 20<sup>th</sup> century. Over the last generation the so-called bread-winner family model has been transformed, as women have more generally entered the world of paid work. Very many women have kept the major responsibilities for unpaid work, which has led to the introduction of a new concept and concern – that of the work-life balance.

The global movement of women into the professions outside of the communist and socialist world was boosted and supported by amongst others the feminist movements strengthened by the global “May revolution” of 1968. This movement – in some respects perhaps comparable to the Arab Spring – was influenced by and brought together black civil rights movements in the US with students and workers in Mexico, Paris and Europe (East and West) and anti-colonial struggles in Africa. The increasing focus on mass education on all levels alongside with general social and democratic movements gradually brought a lot more women into academia. To a very large degree they were newcomers to a professional culture, characterized by long term historical masculine domination. This was a professional culture, which was representative of a more general societal and legal culture dominated by conservative values supporting all societal institutions, be it the state, the family, religions or educational institutions.

Grethe Jacobsen, a Danish legal historian, claims in her article that for “*most of the last two thousand years of Western history, laws and courts were staffed by people, who had nor formal legal training but whose qualifications rested with their sex (male), civil status (married) and economic position (head of household, taxpaying citizen.*” The history of female legal professional in the Western world encompasses at most a century. However, this does not mean that women have not been involved in legal proceedings. What was important was the civil status of women – and men. In all western law “*the norm is male, usually qualified to the adult, propertied male. All legal rules, decisions and settlements were permeated by the issue of gender.*” The more male a woman was, the more rights she would enjoy, Jacobsen claims. Female monarchs were accepted, and women could hold certain property rights, especially inheritance rights were important.

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The role of law and especially the courts over the last two thousand years has been to keep up “the patriarchal equilibrium”. Economic changes and system changes did not impact on this during the industrial revolution, as the “*new active capitalist citizen remained purely male in spite of the need for capital and agents during the changing economic conditions.*” Muslim women in Eighteenth-Century Cairo actually had more property rights than contemporary women in France and England, but Islam did not overturn the patriarchal order as we know.

The German sociologist of law, Ulrike Schultz has written and published extensively on women in the legal professions. The book “*Women in the World’s Legal Professions*” from 2003 coedited with her German-British colleague, Gisela Shaw is a gold mine of descriptions of the situation of women in the legal professions in primarily European and English speaking societies (but also including articles from Brazil, South Korea and Japan). The book brings together 15 articles from four continents. “*What remains to be written is the story of women lawyers in underdeveloped and in developing countries, including those belonging to the world of Islam.*”<sup>2</sup>

This small journal will not fill out that lacunae, and also it is more oriented towards probing into the impact of women in the legal professions on the legal culture, but it does present articles from both Africa and the world of Islam.

In her introduction to the large anthology on *Women in the World’s Legal Profession*, Ulrike Schultz mentions a number of general issues that may be repeated here: Life and career planning for women generally, including women jurists, is shown to be greatly influenced by national preferences for specific life models for women. In most Western states, admission of the first female jurists to the advocacy occurred at the turn of the nineteenth to the twentieth century or during the first decades of the twentieth century. Granting women access to the legal professions was delayed even longer in countries where the move towards an industrialized economy and a modern state occurred at a later stage.

While the percentage of female practicing lawyers has been growing in Europe and in North and Latin America, in South Korea and Japan participation rates for women are very low due to the persistent exclusionary strategies in these countries.

In legal education female students are experiencing what Schultz calls a process of ‘*assimilation*’ which is achieved through mainly male tutors teaching a traditional law school curriculum characterised by “*an ideology of masculinism and homosociality at the expense of attentiveness to feelings and personal beliefs.*”<sup>3</sup> Women academics according to Schultz generally suffer from isolation, marginalisation and underrating of their achievements.<sup>4</sup>

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<sup>2</sup> Ulrike Schultz, Introduction: Women in the World’s Legal Professions: Overview and Synthesis. In Schultz and Shaw (eds): *Women in the World’s Legal Professions*, Hart, 2003, p.xxv

<sup>3</sup> Ibid, p.xxxix

<sup>4</sup> Ibid, p.xl



For Schultz, the impression of a success story related to the increased quantity of female law students and female legal professionals, conceals a situation of unwitting discrimination where “*women lawyers tend to remain on the margins of power and privilege.*” However both women and men are inclined to attribute discriminations more to individual failings than to gender-based issues.<sup>5</sup>

Traditional social class structures survive in the Anglo-American bar, which is dominated by older white males from elite law schools, who work in commercial law with corporate clients. Low incomes are typical of women lawyers working on their own in Germany. Bread-winner arguments are still important in a profession, where many professional women forego a family especially in highly gender conservative societies. Women are considered to have lower social capital and fewer networks, but gender issues are not considered in professional codes, and women fear stigmatization (also seen lately in the discussion about the EU gender quota in relation to boards in business).

**As a provisional conclusion Ulrike Schultz notes the following:**

“We have noted that due to the continuing gendered division of labour between the sexes in the family, female jurists work harder but stand fewer chances of professional success. There are intentional and unintentional mechanisms that produce professional hierarchies and persistent social forces that cause gender discrepancies. To name but a few: conscious and unconscious stereotyping (men as breadwinners while women work to meet the bill for the child-minder); the effects and notions of motherhood and even of femininity as damaging to professional commitment and efficiency; structural barriers in selection procedures and workplace arrangements; a male symbolic order based on homo-social bonding; male networks and style of working; a ‘hegemonic masculinity’ with a fixation on male cultural capital as opposed to women’s human capital. All this leaves women with either no choice at all or with choices taken under pressure, thus belying rational choice theory.

It has been shown that legislative as well as voluntary measures to reduce discrimination against women (and gender stratification) have met with no more than limited success. Two forms of segregation persist: firstly, vertical segregation in a hierarchical order, where women are pushed into the low ranks and male gate-keeping mechanisms force them either to conform or to create their own niches outside the traditional order...; or secondly, horizontal segregation allocating men and women to different fields.”<sup>6</sup>

Ulrike Schultz is not very optimistic either about the possibilities of women changing the legal culture, as they have been subjected to the submission under the male dominated legal and professional culture. “*Quantitative feminisation does not automatically equate with feminisation in the sense of demasculinisation, or a change of gendered practices in legal work and culture or in the profession itself.*”<sup>7</sup>

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<sup>5</sup> Ibid, xli

<sup>6</sup> Ibid, p.1-li

<sup>7</sup> Ibid, lviii

The Finnish gender researcher, Harriet Silius, who writes in the anthology has found decreasing income discrepancies between the sexes but growing income differentials among women themselves. She also underlines the importance of general social changes as (in the Nordic societies) the expansion of the welfare state, the deregulation of markets and the economic recession of the mid-1990s in Finland following the collapse of the Soviet Union and the later economic boom in the end of the 1990s.<sup>8</sup>

Have women's entrance into the legal profession only reconstituted inequalities?

To some extent this is perhaps the case. It has been underlined repeatedly over the last years that globally inequalities have been growing to degrees, which are beginning to feel threatening even to the affluent in affluent countries.<sup>9</sup> Some of the detrimental consequences of these growing inequalities have been discussed by two English doctors in their book *"The Spirit Level: Why Equality is Better for Everyone."*<sup>10</sup> The spirit level used by the two authors indicates relations in a societal context. During the last decades – especially after the fall of the Berlin Wall – the income gap between the rich and the poor within individual affluent countries has grown considerably. According to the two authors, who are basing their book on a very large number of international statistics from well-known and recognized institutions, this has detrimental effects for society in different ways.

Even among the countries which have according to current yardsticks (so far) been considered the most affluent countries of the world, the authors point out that the greater the income gap, the worse the outcomes for everybody in unequal rich countries in relation to community life and social relations, social mobility, physical and mental health including obesity and life expectancy, educational performance, teenage birth, violence, imprisonment and punishment.

The book argues that inequality leads to erosion of trust, increase of anxiety and illness, and encourages excessive consumption. Inequality neither promotes justice nor peace or benevolence.

The authors have created an Equality Trust with considerable information and resources about their work.<sup>11</sup> The slides, which are available online show that the very rich do not necessarily live longer or better lives than the less rich and affluent, who

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<sup>8</sup> Harriet Silius, *Women Jurists in Finland at the Turn of the Century: Breakthrough or Intermezzo?* In Ulrike Schultz and Gisela Shaw (eds): *Women in the World's Legal Professions*, Hart, 2003, p.398

<sup>9</sup> \*See *The Economist* Oct 13-19, 2012. The cover story (and inside special report on the world economy) is entitled "TRUE PROGRESSIVISM. The new politics of capitalism and inequality". The cover image shows a huge well manicured white male left hand in a jacket and white shirt with cuff links. The hand bows the leaves of an orange tree towards the small white right hand of a poor person on the other side of the wall, for this person to pick the 'low hanging fruits'. The cuff link of the wealthy, powerful white man has an image with the face and name of Theodore Roosevelt 1858-1919.

<sup>10</sup> Richard Wilkinson and Kate Pickett: *The Spirit Level: Penguin Hardback 2009, later paperback versions.* The book is translated into at least 10 languages and more translations are in preparation, <http://www.equalitytrust.org.uk/resource/the-spirit-level> The subtitles have varies according to country and publication time. The 2010 British edition was subtitled *Why Equality is Better for Everyone.*

<sup>11</sup> <http://www.equalitytrust.org.uk/>

live in poor but more equal countries. The dramatic comparison is that of the US and Cuba, where income is very different, but life expectancy is almost the same.<sup>12</sup> The authors, one of whom is a woman, do not address gender issues specifically, but it seems to me that gender aspects are clearly relevant in this context. Large income differences restrict social mobility and high numbers of teenage pregnancy influence girls' educational careers. High economic inequalities are also likely to lead to child poverty in single parent families.

Ulrike Schultz's article for this journal "*Do female judges judge better*" is translated from German and deals with German experiences. Once again it underlines the fact that women are everywhere newcomers to the legal profession. It also reminds us of the negative role of authoritarian regimes regarding women's rights and access to education, professions and the public sphere. In Nazi-Germany female lawyers disappeared almost entirely during the Third Reich. This undermined female authority in modern society for decades to come after World War II.

The conservative legal profession in a post-authoritarian state has required considerable assimilation and submission from its new female members. Women are finding themselves in an ambivalent situation, where their competency is being questioned and their self-confidence is undermined. In Germany as in many other countries, women are looking towards other fields and practices of law than the traditional legal profession to find access to ways of using their lawyering skills and to gain financial independence. Schultz claims that it is the communicative behaviour and style of work that distinguishes (some) female lawyers from male lawyers, but also that female lawyers have changed the law as judges, politicians, legislators and in cooperation with work done at grassroots level.

Julie E. Stewart's report on "*Lawyers? Women? Women Lawyers in Zimbabwe,*" is written for this journal. It is striking to note the more optimistic approach than in Ulrike Schultz and Gisela Shaw's anthology from 2003. Stewart's article is probably one of the first attempts at giving a both quantitative and qualitative description of the development of the situation of female lawyers in Africa. Julie Stewart is a white originally Australian lawyer, who has spent the last 40 years in Zimbabwe, most of them at the University of Zimbabwe, where she is a professor of law. She has a very long experience of dealing with issues concerning women and law, both regionally in Southern Africa, in cooperation with Nordic Women's Law environment as well as internationally.<sup>13</sup>

The number of female students and lawyers has been on the rise constantly since Zimbabwe became independent in 1980. In the 1982 graduating class only one out of 13 students was a woman, and 85% of students were white – whereas the white population in Zimbabwe made up about one per cent of the population at that time. In 2012 all graduates were black and more than half of them were women. Affirmative

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<sup>12</sup> <http://www.equalitytrust.org.uk/docs/spirit-level-slides-from-the-equality-trust.ppt> See for instance Income per head and life expectancy. Rich and poor countries.

<sup>13</sup> See the article by Julie Stewart in Rubya Mehdi & Farida Shaheed (1997) *Women's Law in Legal Education and Practice in Pakistan*. New Social Science Monographs, Copenhagen

action for females is not required and there is no formal legal basis on which women can be excluded or discriminated against in the legal profession. However, a “*very male paradigm imbued culture within the legal profession*” may perhaps lead to that “*women within profession seek to stay as close as possible to male work parameters.*” Women fear victimization – for instance if they would take legal action against employers. This male paradigm may also have led to the fact that one of the chosen professional areas for women lawyers is the NGO world, where women work in a number of law related NGOs.

Stewart claims that women lawyers have been especially energetic in generating critical analysis of the law and its treatment of women in a way that men would not. Administrative practices demanding that a married woman must change her surname is one example. Another is that women have not been considered ‘persons’ under South African Law until recently. Women lawyers have over the recent years attacked these practises through test case litigation, law reform lobbies and trenchant critical research reports, which have been used to effect formal law reform and clarification or declaration as to the exact legal position. They have stimulated what Stewart calls ‘creative law reform measures’ in areas such as the Legal Age of Majority, intestate inheritance law and lobbying for comprehensive marriage law reform. Although not expressed explicitly it seems clear from this article that the legitimacy felt by women in the post-colonial legal regime and legal culture is also related to their involvement in the liberation struggle. What still remains are to make law school curricula more sex and gender relevant. There is also a need for development of business and legal models that override the negative impact of the assumption that all things business and agricultural are male, and there is a need for law to be imbued with female understanding and perspectives and the development of a cross cutting feminist jurisprudence.

“*Women in the legal profession do make a difference*” claims Julie Stewart, but it is clear that it is not only increasing numbers of female legal professionals that matter. It seems rather to be interconnections between female professionals and a number of other civil society actors such as NGOs, (female) politicians, academics, and other groups as well as development of creative measures and methods. It is by contributing to these processes of change that women in the profession make a difference.

Similar experiences and developments seem to be found in Northern Africa in Morocco, where Danish lawyer and ph.d. student, Mira Ramhøj, lived during the first decade of the 21<sup>st</sup> century with her (then) Moroccan husband and family. That gave her the opportunity to follow the legal reform of the Moroccan Family Law in force from 2004 and observe the many and diverse actors and strategies involved as well as the tensions amongst different parts of society regarding the reform. The changes of the Middle East during the Arab Spring also affected Morocco, where Islam light policies have become more influential. Mira Ramhøj discusses this development for the process of future interpretation and implementation. Her article also underlines the importance and presence of non-professional women and religious women, who struggle for a change not only of formal law, but also of misogynist legal cultures and traditions – a

struggle which women have been involved in for centuries all over the world. The interconnectedness of different strategies and struggles seems to be the clue to deeper societal and normative change.

Ridwanul Hoque, a Bangladeshi legal academic, gives us what to her knowledge is the first-ever essay on gender and the legal profession in Bangladesh. There are certain similarities to the situation in Zimbabwe, for instance the prohibition against (gender) discrimination in the Constitution of Bangladesh. The first law relating to legal practitioners in British India goes back to colonial times and to the Legal Practitioners Act of 1879. In 1923 the Legal Practitioners (Women) Act was enacted, providing that no woman can be disqualified by reason only of sex. This act coincides with the history of women in Great Britain entering the legal profession in 1922.

Ulrike Schultz writes that the Anglo-Saxon legal culture seems to provide women with a hurdle especially as regards both the bar and the judiciary.<sup>14</sup> It took until the 1960s and 1970s before women were appointed to county courts or high courts in England, Wales, Australia and New Zealand. In this respect it is significant that in the Anglo-American legal culture the judiciary has the highest status and prestige, and could thus be expected to be guarded most jealously by a male legal profession and culture. There seem to be similarities to the post-colonial history of Bangladesh, where women have also had considerable difficulties accessing both the bar and the courts. As of today only 10% of advocates in Bangladesh are women, but not all of them are even active in what Hoque describes as a “*prohibitive social culture*” with restrictions vis-à-vis women legal practitioners. Hoque also mentions the importance of family relationships for access to the courts and other high status levels of the legal profession. Similar observations are made for Germany by Schultz (2003), although here in relation to private practice and not for the judiciary. “*As advocates tend towards liberal conservatism, I see definite effects of another factor: the highly qualified daughters of formerly patriarchal lawyers make their way into the profession and their fathers and consequently those around them go through a process of reeducation.*”<sup>15</sup> Here different legal cultures are at stake.

Judges do not have the same high status in continental legal culture as in Anglo-American legal culture. Schultz writes that women, who “*have been shown to be more conservative, from higher strata of society, more obedient, less competitive and more willing to adjust than men*” seem well suited for the continental European judiciary<sup>16</sup> – but not for the Anglo-American influenced legal cultures.

With legal academia having a lower prestige in the Anglo-American legal culture and profession including in the post-colonial societies influenced by that tradition, it is perhaps not surprising that the level of women in academia is higher, on average 30%. As in Zimbabwe Bangladeshi female lawyers opt for other professions than the traditional legal ones such as development practice, corporate jobs, social legal movements and associated NGOs. The ambivalent role of the Supreme Court towards

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<sup>14</sup> Schultz above, p.xxxiii

<sup>15</sup> Schultz (2003) *The Status of Women Lawyers in Germany*, in Schultz and Shaw (2003), p.289

<sup>16</sup> Schultz above p.279-280

claims for change of gender biased practices also shows similarities to Zimbabwe, another post-colonial state.

Hoque identifies the following factors or reasons as explanations for the lower rate women in the legal profession:

- the crowded environment of the courts and the absence of women-friendly facilities
- sexual harassment or stalking by colleagues, or clients or others
- the difficulty of balancing career and family life (or the expansion of family responsibility)
- decline of professionalism, reputation, and ethics
- absence of income and lack of remuneration paid by the 'seniors' in the early years of the profession
- lack of enough role-models in the legal profession
- failure to keep up with technology and changes in law
- the nature of the work involving much labour
- availability of alternative careers with relatively more remuneration (at the early stage of career) and time-flexibility

Hoque also mentions that many in responsible positions feel uncomfortable to discuss and debate inequality and inequity in the legal profession.

Mengia Hong Tschalaer presents an article on *Competing Model-Nikahnama: Muslim Women's Spaces within the Legal Landscape in Lucknow*. Based on empirical data gathered in the city of Lucknow, Northern India she explores the ways in which Muslim women's activists seek to carve out space for the creation of gender-just laws within a religious framework, and how within these women's legal spaces, orthodox demarcations between secular and religious practice and legal authority become blurred.

The legal mobilization of Muslim women in Lucknow contributes to an emerging landscape of interlegality. Already at the beginning of the 20<sup>th</sup> century, upper class Muslim women's activists in India sought to challenge orthodox interpretations of the Islamic marriage by reinterpreting the religious parameters of female subjectivity within conjugality. They reasoned that the textual sources of Islam are subject to interpretation and are changeable rather than absolute.

In 2005 the All India Muslim Personal Law Board published a model-marriage contract, a small document of four pages in Urdu. However, the activists were not satisfied with this contract. Muslim women's activists in Lucknow felt that their identities and rights as citizens were seriously jeopardised by patriarchal interpretations of matrimony by the clergy. They argue that a model-*nikahnama* drafted entirely by women was necessary in order to question the clergy's discriminatory interpretation of the textual sources of Islam and hence challenge their authority of interpreting religious texts. These Muslim women's activists command an eloquent knowledge of Islamic laws as well as state-governed Muslim Personal Law, Criminal Law, the Indian Penal Code and transnational human and women's rights. The activists are hence fluent in a

variety of legal languages, which they combine as well as fragment in order to challenge or even subvert hegemonic legal discourses on gender.

In March 2008, the All India Muslim Women's Personal Law Board (AIMWPLB) released its own model-*nikahnama*, a seven-page document available in Hindi and Urdu. Shaista Amber, the president of the AIMWPLB and author of the document argues that in India, where most women remain uneducated and ignorant about their rights, a number of 'un-Islamic' and gender-unjust practices have been established as law within conservative religious circles. Therefore, a *nikahnama* that stipulates the rights and duties of husband and wife according to the *Quran* and the *Hadith* is needed. In order to ensure that women can legally enforce the rights set forth in this *nikahnama*, Amber lobbies the state to recognize this document. Tschalaer argues that in a context within which women's legal mobilization is constrained, the conceptualization of gender-justice as brought forward in this *nikahnama* cannot be understood against Western, liberal parameters.

This *nikahnama*, which has received considerable media attention, constitutes a crucial counter-hegemonic voice in the debates on women's rights in South Asian Islam. It focuses especially on the financial rights of the wife with regard to *mehar*, marital property, gifts and maintenance. These are issues, which have also been dealt with in the context of Zimbabwe, although there is a less religious context and interpretation. In the Indian case of normative pluralism – legal and religious - it appears according to Mengia Hong Tschalaer to be precisely the complexity and competitive nature of the legal field by which room and possibilities open up for Muslim women's rights activists to work toward gender-justice beyond the normative dichotomies of state versus community and women's rights versus religion.

This is another interesting case of strategic approaches to normative cultures and diverse authorities, which are used specifically by women for women.

Jean-Philippe Dequen deals with the same empirical case in his article *Justice for Muslim Women in India: the sinuous path of the All India Muslim Women Personal Law Board (AIMWPLB)*. It presents the example of an attempt to challenge the 'patriarchal' legal discourse on Islamic Law by procuring an alternative dispute resolution forum specifically aimed at Muslim women's issues, as well as advocating for a more gender equal interpretation of the Quran through the prism of 'Islamic Feminism'. Dequen considers the ADR-forum in the Lucknow area somewhat successful but geographically limited. Islamic feminism originates from a global movement which was not prone to gender equality to begin with. Yet by relying almost exclusively on the Quran, it also paved the way for Feminist movements to interpret the Holy text on their own and to consider it quite gender neutral, if not very protective of women. The AIMWPLB follows this trend by advocating its sole reliance on the Quran as the only valid source of Islamic law. For Shaista Ambar (also mentioned in Tschalaers article), the Holy text suffices to solve most of the legal problems that Muslim women face. Dequen however is weary of the possible counterproductive effects of the AIMWPLB's alternative legal discourse and the attempt to strengthen it based on individual interpretation and positivation through the Indian constitutional

frame.

In modernizing societies the self-perception and legitimacy of the legal profession is often related to values of neutrality and equality, and this probably makes it more difficult to acknowledge biases, discriminations and malpractices in the profession.

What the articles in this issue seem to underline are a continued presence of women in normative traditions and cultures, which are often hybrid traditions mixing different norms and forms of authority. In all the normative traditions and cultures mentioned in these articles – be they religious or secular or most often overlapping and interconnected, women have had to assimilate, adjust and adapt to time and context – as have probably men, although more often under more privileged conditions.

The articles demonstrate that assimilation has also often gone – and still goes hand in hand with activism, critical analysis and creative strategies as well as dynamic interaction and cooperation between different walks of lives of different women from different parts of society.

There seems to be room for optimism and there is certainly inspiration to be sought in these diverse contributions which link analysis with reflections on gender and legal cultures undergoing changes.



## **Lawyers? Women? Women Lawyers in Zimbabwe?**

Julie E. Stewart<sup>1</sup>

### **By way of an Introduction - Setting the Scene**

At the University of Zimbabwe (UZ), Faculty of Law, the first year undergraduate law class has 133 students for the 2012-2013 programme. Of these 82 (62%) are female and 51 male. In each of the other years sex parity is roughly in place. It could be argued that it will not be long before we have to think about affirmative action quotas for male students, certainly in law. At the turn of this century the University of Zimbabwe introduced a special concession for female students to enhance women's enrollment it was predicated on the assumption that the girl child may have been hampered in her pursuit of education by social and cultural constraints, but to achieve parity in law the concessions never had to be made. In 2011 115 students graduated with law degrees 61 were women (53%) and 54 were men, in 2010 of 120 graduates 63 were male and 57 ((47.5%) women. Figures roughly around parity had been occurring since 2006 where 55 (49.5%) were women and 56 were men. 2011 was the first time that females predominated over males, and this looks set to continue<sup>2</sup>. In 1982, which was a graduating class that had commenced studies in final years of the Zimbabwe liberation struggle there were only 13 graduates of whom only one was a woman (9.1%). In the years between 1982 and 2006 there had been a slow but steady rise in the number of females graduates for example in 1984 15% of the graduates were women, in 1990 women were 24.5% of the graduating class. In 1998 the figure had risen to 35% of the graduates being women 17 out of a total class of 48; in 2005 39% of the graduates were female. There was another notable transition and that is that in 1982 the graduating class was 85 % white whereas in 2012 it is 100% black<sup>3</sup>. At UZ in the Faculty of Law the lecturing staff is comprised of 15 males and 10 females of these two are full professors one female and one male and there is one male associate professor. The most senior professor is female and is the only female professor of law in the history of the university.<sup>4</sup>

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<sup>2</sup> In recent years given the predominance of females it has become necessary to state at every available opportunity that the entry qualification for law for women has been and is identical to those of men, not less than 14 or 15 points at A level. Unfortunately men who miss out on a place are given to complaining and explaining their exclusion as discrimination in favour of less qualified women, which has certainly not been the case.

<sup>3</sup> The 1982 class had commenced their studies during the liberation war. The graduating class would have been larger if a significant number of black students had not withdrawn and joined the liberation struggle. Most of them returned after Independence to complete their studies. Precise details from the university or faculty are not available this is my personal recollection of what took place. I still vividly recollect in the early 1980s being in my office in the faculty, when answering a knock on the door, I admitted around six or so broadly grinning black high ranking army officers, there were 'brass' epaulets and medals 'everywhere. These were returning students who then re-joined the law degree programme. I was delighted they had survived and even more delighted they were returning to their studies. I do not recollect any women falling into this category, although there were women who enrolled after Independence and graduated who I came to know had been involved in the liberation struggle and had been in military camps outside the country.

<sup>4</sup> I am most grateful to the newly appointed Assistant Registrar of the Faculty of law at the University of Zimbabwe, Mr S. Matsika, for his assiduous tracking down and compiling of all these statistics.

Midlands State University, the only other university offering a law degree in Zimbabwe, had not prior to the request for disaggregated figures on graduates considered this as something to be recorded and had to comb their records to compile the disaggregated figures. Since the first graduating class in 2010 the number of women has steadily risen, in 2010 there were five females and 12 males, in 2011 there were 15 females and nine males, in 2012 there were five women and six men. The overall figures being 25 females and 22 males, currently across all four levels of the programme there are 89 females and 94 males. In terms of lecturing staff the figures are very different there are three females and 20 males, this covers both part-time and full time staff<sup>5</sup>.

Thus one can conclude that at the level of those studying law and for recent graduates near parity, or female dominance, between the sexes has been achieved, affirmative action for females is not required. The question then becomes prospective. How will this increasingly obvious transformation of the sex and, one assumes, gender<sup>6</sup> composition of the legal fraternity<sup>7</sup> influence the development of the legal and judicial climate in the future. Will the increasing numbers of women entering the profession make it more sex and gender sensitive, more aware of the inequalities for women that prevail in all forms of law in Zimbabwe and in the way that law is applied and interpreted? As will be shown later in this chapter women lawyers are already influencing the development and implementation of human rights and laws that benefit women or at least provide for formal equality between females and males.

This dramatic increase in the numbers of women graduating with law degrees has not as yet permeated to the upper levels of the profession, but there are as with the judiciary some senior women lawyers in private practice and heading up public service departments. There are black women as well as white women who are senior partners in large law firms as well as women heading smaller firms and the numbers are steadily growing. At the bar, that is specialist lawyers who must be briefed by an attorney who confine themselves to court appearances and opinion work, there are six women, which is comparatively low, out of around 24 in total<sup>8</sup>. One proffered explanation is that women are somewhat averse to the very male and aggressive format of adversarial litigation<sup>9</sup>, although in Zimbabwe there is nothing to prevent an attorney who has direct contact with the client from appearing in court, even the Supreme Court.

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<sup>5</sup> I thank my colleague at SEARCWL, Ms Rosalie Katsande for obtaining this information for me, she was at one time the Dean of the Faculty of Law at Midlands State University so had an insider track and the influence to get a quick compilation of the statistics.

<sup>6</sup> I make this cautious statement as it is important to distinguish between sex which is biological/physiological and gender which is the social construct imposed on sex and which is where the education, religious, legal, social and economic differentiation and discrimination between the sexes stems from, for further discussion of this see Stewart (2011).

<sup>7</sup> This is the term used to cover the whole gamut of lawyers and their various activities, it is a term I use without critically examining its gendered message, but writing it makes it starkly obvious that it denotes an unconscious use of male nomenclature.

<sup>8</sup> As this is a small collegiate group it was possible to get the numbers from one of the female members.

<sup>9</sup> Women are more likely to be attracted to areas of law where mediation, conciliation and discussion of issues predominate, this has emerged as an interesting dimension in the drive to set up a less adversarial process oriented family court.

One of the chosen professional areas for women lawyers is the NGO world, this covers a variety of national, regional and international organizations. Women lawyers are to be found providing legal aid and help to self-acting women litigants at organizations such as Zimbabwe Women Lawyers (ZWLA)<sup>10</sup>, Legal Resources Foundation, MUSASA Project<sup>11</sup>, Justice for Children Trust<sup>12</sup>. Zimbabwe Lawyers for Human Rights (ZLHR) has a number of women lawyers among its staff, although their work is not confined to women's human rights issues. In loose association with ZLHR is the Research and Advocacy Unit which is staffed by dedicated legal researchers who undertake mainly commissioned human rights research. The Women and Law in Southern Africa Research and Education Trust (WLSA) was set up as a regional research organization in the early 1990s and produced and continues to produce a prodigious amount of research into women's legal situation in six southern African countries<sup>13</sup>. Much of this research has contributed to law reform that is directed at the enhancement of women's legal and human rights situations, this is another critical topic to which I will return later in this article<sup>14</sup>.

### **So is there any Significance in the Sex and or Gender of a Lawyer or Lawyers?**

The main question that I seek to address in this chapter is what has been the influence and significance of women coming into the legal profession in increasingly large numbers in recent years? Have women altered the focus and thrust of legal studies in Zimbabwe? Have they begun to alter the way in which law is practiced? Have they begun to put a more empathetic face on the legal profession? Have women made a more comfortable space for themselves over the years in the legal profession? How are women lawyers perceived in the legal profession, on the bench, in academia and in the wider world?

Unfortunately in the context of Zimbabwe record keeping on women in legal practice and the impact women have had on law and legal practice are more anecdotal and impressionistic than based on clear empirical data. So the reader will be left most of the time with my personal recollections, and a few short studies undertaken by law students for their dissertations in both the undergraduate and masters programmes.

When I joined the first year class at law school, some forty five plus years ago, women were less than 5% of the class. I remember the somewhat startled expressions on people's face when I told them what my career choice was, it was disbelief. These reactions led to a situation where I would whisper what it was, as if there was some dreadful stigma attached to law as a choice of profession for a woman. My initial law

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<sup>10</sup> ZWLA is the Zimbabwean affiliate of the international group of women lawyers, FIDA.

<sup>11</sup> This is an organization which deals with the needs of women who are victims of domestic violence, the word Musasa is the name of a shady indigenous Zimbabwean tree and it symbolises shelter.

<sup>12</sup> Justice for Children Trust deals with children's legal needs but frequently it assists women, especially grandmothers and aunts caring for AIDS orphans with legal issues around guardianship and inheritance.

<sup>13</sup> Areas that have been the subject of research under both state laws and local customary laws are maintenance, inheritance, general legal issues around marriage and the family, access to justice both state and customary law, women HIV/AIDS and the law.

<sup>14</sup> For a list of WLSA's prodigious national research output in Zimbabwe go to [www.wlsazim.co.zw/index.php/wlsazim-publications.html](http://www.wlsazim.co.zw/index.php/wlsazim-publications.html) and to

studies took place in Australia and I vividly remember a criminal law lecturer who went out of his way to be as salacious and provocative on sexual issues as possible with the intention of making the women in the class (we were only 17 years old as embarrassed and uncomfortable as possible and to build up a camaraderie with the male students. As a small group of females we were determined not to react at all and sat unflinching and impassive regardless of the observations and comments made usually based on the facts in cases we were studying. Of course, he cranked up the level of offensiveness trying to get a rise out of us. As was to be expected, the males in the class would laugh uproariously and pointedly look to see our reaction. One female member of the class decided that she would only go to nice topics in criminal law, whatever those were, she did not attend lectures on rape or other sexual offences, suffice it to say her legal career was not long lived. As far as I recollect none of us considered complaining or making allegations of sexual harassment, we thought ourselves lucky to be tolerated in the faculty, and if complaints had been made about the deliberately salacious content of lectures it would have, no doubt, been pointed out to us that we were, therefore, not suited to a career in law.

Now when teaching at masters level on a programme that tackles among other issues women's experiences of law and legal process I deliberately set out to destabilize my students by openly and unashamedly getting them to use sexually explicit terms such as penis, vagina, breasts, clitoris etc., not to be salacious but to make such references non embarrassing and unequivocal in meaning. The class is usually 75% female and 25% male and is drawn from the Southern and Eastern African region and discussion of sexual matters in public between men and women is often regarded as taboo. Mentioning menstruation on the first day of the programme produces titters and awkward silences but within a couple of weeks issues of sexuality and sex based realities of life can be discussed in a mature and balanced manner by the whole class. This becomes important when addressing legal issues as it helps curb the use of confusing euphemisms in legal matters, discussions in class and in the research arena (Stewart, 2011). I like to think that my motives are very different from my former lecturer.

Unpacking the negative implications and connotations that arise from unconscious, almost innate sex and gender stereotyping is important if we are to move forward in producing the climate for achieving gender equality. Just adding women lawyers to the legal professional milieu is inadequate if these women are not aware of the implications of being both a woman and a lawyer – the issue is perspective. Men also need to understand the realities of women's lives and to appreciate what needs to be in place for women and girls to participate fully in all aspects of national life (Stewart, 2007).

One of the much prized qualities of lawyers is the ability to think analytically, dispassionately, logically, unemotionally and to deal with issues clinically and definitively. There is a tendency to see these qualities as predominantly male, women who join the legal profession, who enter university to study law around the age of 18 learn and acquire these very skills, and the highest praise used to be 'you think like a man'. One often starts to behave in a somewhat masculine manner, wanting to become

one of the boys, a sort of ‘anything you can do I can do better’ syndrome<sup>15</sup>. I have always been conscious that part of my reason for becoming a lawyer was that I resented that, as a girl, I could at best aspire to being the best girl pirate not the best pirate in my neighbourhood and I was looking for a way to assert my intellectual abilities in an un-circumscribed way. I resented the way in which girls’ personal freedom to roam and play at will was circumscribed. It was not my sex that bothered me so much, but its social and cultural implications. Over the years in teaching law I have found many female students who felt the same, comfortable being female by sex but angry about its implications for life choices and for careers.

Yet, as grownup tomboys some form of internal mental compromise becomes possible and, I would suggest, very useful in terms of tackling women’s legal issues when you suddenly realize that your sex and your gender do not match up. Once you are reconciled to this reality, you realize you are nicely placed intellectually in the middle of the gender spectrum to have empathy with other women while engaging with men in professional legal interchanges. This dichotomy and gender centralism are part of the mediating and engagement tools that women lawyers can exploit when deconstructing and effectively penetrating the previously exclusively male dominated arenas of the law. One becomes that phenomenon of the insider outsider protagonist, able to see the argument from both sides and argue women’s side of legal issues, promote legal reform and implementation issues with clinical legal approaches imbued with female empathy, female perspectives and an understanding of women’s lived realities. This I would assert is an important positioning and point of departure for women who are lawyers as they engage the law.

### **Women on the Rise**

Application figures for women to study law globally indicate how much attitudes towards women pursuing law as a career have changed over recent years. Now, in Zimbabwe, I am predominantly involved in administering and teaching on a postgraduate programme but there was a time when I did undergraduate registration in the 1970s-1990s and every first year registration involved a depressing and depressed stream of young women with high A level points begging to be given a place to do law. But because they had not put law on their list of programme preferences they were excluded. I would always ask these young women: ‘Why if you wanted to do law didn’t you put law at the top of the list?’ The answers varied but essentially they boiled down to teachers, careers advisers, parents, acquaintances of parents discouraging them on the basis that ‘law was not a career for girls’ or ‘girls aren’t suited to law’. With hindsight it was probable that the image of the lawyer that these people had was that of the criminal trial lawyer, either prosecutor or defense lawyer, someone defending a vicious criminal, not the kind of person that ‘nice respectable young women’ should associate with. Sounds very like my fellow student from first year law in Australia.

In terms of Zimbabwean law there is no formal legal basis on which women can be excluded or discriminated against in the legal profession. Any discrimination that takes place has no state or legal sanction and no private firm or company would openly cite the sex of an applicant as the basis for appointment or non-appointment to an

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<sup>15</sup> The reader might note a little personal analysis coming here.

advertised position as this violates the provisions of the Labour Relations Act and the Legal Practitioners Act. Even the much vilified current Zimbabwean Constitution does not sanction discrimination in relation to women in the professions.

This was not always the case, as in other parts of the world, women were excluded from joining the legal profession, their assumed status of legal minority and their being subjected most of their lives to either their father's guardianship or their subjection to a husband's legal control after marriage constrained their ability, so it was determined, to practice law. They might obtain a law degree from a university and then find that they could not proceed further in the profession. Not least in terms of women's legal disability to practice law was the persistent interpretative approach of courts to declare that a woman was 'not a person' in terms of legislation that prescribed the criteria for registration as a legal practitioner. Since colonial settlement in the now Zimbabwe, the general (state) law has derived from the law applied in South Africa, thus one would have initially looked to South African law to determine women's eligibility for registration as a legal practitioner.

The most celebrated case in South Africa on the right to admission to legal practice for women is the *Incorporated Law Society v Wookey* 1912 AD 623 (Cowan, 2006). The case was an appeal from the Cape Provincial Division which had held that Miss Wookey was in terms of the Cape<sup>16</sup> Charter of Justice not a person and thus not eligible to enter the legal profession. Miss Wookey had obtained articles of clerkship with a legal practitioner in Vryburg in the Cape Province but the secretary of the Cape Law Society refused to register her articles and the Registrar of the Supreme Court of the Cape thus could not register her articles either. The relevant extracts from the legislation were:

Every person ... shall having obtained either of the certificates in law and jurisprudence ..and having served as an apprentice or clerk throughout the term of three consecutive years ... be admitted ... .

The only pertinent issue at the trial was whether Miss Wookey was a 'person'. The finding of the highest court in South Africa at that time, the Appellate Division, was that: 'the word "persons" included only male persons, and that the respondent Miss Wookey was not entitled to be enrolled'. Achieving this result involved a long and protracted exploration of Roman Law, Roman Dutch Law, Scottish Law and English Law – all of which pointed, in the collective opinion of the bench, to the legal fact that women were not 'persons' in terms of the Act nor were they suited to or eligible to practice law. This despite the language used being gender and sex neutral, and despite the interpretive injunction that the male includes the female unless the contrary is indicated. What the bench was seeking was a clear statement from the legislature that women were actively contemplated, there was no such indication. Although relying on an interpretative nicety the court could not resist the gendered gibe that:

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<sup>16</sup> This refers to the Cape Province in South Africa which had a mixed Roman Dutch and English law legal system.

inasmuch [sic] as nearly the whole of womankind by reason of an inborn weakness is less suited for knowledge and judgment than men<sup>17</sup>, women are excluded from holding any office or dignity relating to the government of people and its affairs.

Further that:

But it [the law] did not place men and women in a position of equality. It went out of its way to protect women, but it protected them as being the weaker vessels, and subject to natural and legal disabilities.<sup>18</sup>

Similarly, women were not accepted into the legal profession, in the then Southern Rhodesia. In 1923 this exclusion was reversed by the South African legislature and women were entitled to be enrolled as legal practitioners, although the numbers remained very low. In Zimbabwe as in South Africa after the barriers were removed women did not enter the legal profession in significant numbers until around the late 1980s, law was a male domain and women joined its ranks only on sufferance and with no special concessions to their sex. Also women in substantial numbers did not enter university to study law, so the numbers of women eligible to practice law remained small in number.

There may still, in some quarters, be an aversion to employing women in their reproductive years, or to have a large number of women in private legal firms, because of the assumed financial and other adverse implications of maternity leave and women's child care obligations. Some years ago, here go the anecdotal accounts again, a very senior male partner in a large private law firm phoned me and asked me if I could make some suggestions of names of potential recruits from the about to graduate final year of the undergraduate law programme. As it happened, and still happens, the top graduating students were an equal mix of males and females, so I was preparing a quick mental list of roughly half-half males and females, but before I could speak he said: 'But no females as they will probably all become pregnant at the same time, and there where will we be?'. I put the phone down immediately and there was no further pursuit of the enquiry, at least with me, on his part.

Misguided as he might have been on the women and all being pregnant together issue<sup>19</sup> there is some justification for these concerns, as in Zimbabwe the employer

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<sup>17</sup> Of course if women were excluded from the education required to become a lawyer, or were subjected to limited forms of education directed only at imparting social graces, a little reading, painting, embroidery and domestic skills and little else they would inevitably appear to be inappropriately prepared for the cut and thrust of the legal world. Having been given the educational opportunities they have more than adequately proved their capacity to enter and excel within the legal profession. Also universal education has made it possible for able students from deprived backgrounds to reach university and obtain professional qualifications.

<sup>18</sup> One is then not surprised that despite the provisions of the Zimbabwe Interpretation Act, section 9 that states that the male shall include the female unless the contrary is indicated women lawyers in Zimbabwe lobbied for sex and gender explicit legislative drafting where both male and female descriptors and male and female pronouns are both used together in all legislation so that such ingenious and ingenuous interpretation can never be invoked again.

<sup>19</sup> This is a misguided approach as, once again and from personal experience and assessment, women are more likely to remain in employment over a long period and

meets the full costs of maternity leave and there is no state assistance to cover the costs of the leave itself or the costs of obtaining a locum. Only in the public service, in academia and in well-funded NGOs do women lawyers take the full period of maternity leave which is 90 days on full pay<sup>20</sup>. In a study in 2001 Irene Sithole revealed that many women lawyers in private firms were reluctant or received tacit indications that they should not take full maternity leave. Individual women lawyers indicated that they frequently undertook work on on-going files while on maternity leave and rarely went on maternity leave without some form of ongoing engagement with legal practice (Sithole, 2001). Sithole did find that one firm, interestingly one of the old established once 'crusty male dominated' legal firms, did take its maternity leave obligations very seriously and provided for full maternity leave to all female staff and for partners even extended maternity leave beyond the statutory requirements. This firm is known for its very low staff turnover and female friendly policy, it is able to do this because it has a sound economic base and has a well-established coterie of women, often from academia, who step in and serve as part-time locums during someone's maternity leave. In an interview with one of the senior partners Sithole was told that 'this is possible because we are a large firm, smaller firms struggle to cover the costs of such arrangements'.

Women lawyers in their reproductive years are well aware of their maternity rights, but knowing your rights and enforcing them are two very different things. Sithole noted during her interviews with women lawyers that many of them felt aggrieved that they did not take the full complement of leave. She asked them: 'Why if you know these are your rights, why don't you pursue them, why not litigate?'. One interviewee replied:

It is true that we know our rights but the reason why we do not take any legal action is because we fear victimization. Ours is a small world and if you are deemed notorious for taking your employer to court, you would not find another job. (Sithole, 2001)

Paradoxically, a woman lawyer may take up a maternity leave case for a lay client and succeed when she has herself eschewed her maternity rights. This speaks to a very male paradigm imbued culture within the legal profession that, perhaps, women within the profession seek to stay as close as possible to male work parameters.

### **Judges and Magistrates: Women on the Bench**

What is evident is that by 2012 there has been a significant penetration of women into all ranks of the judiciary. Although the most significant penetration has been into the lower ranks of the judiciary, there are at the time of writing 88 female magistrates out of a total of 207 magistrates that is 42.5%, a figure that is slowly edging towards parity<sup>21</sup>. Magistrates are not well remunerated in Zimbabwe, earning on

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although taking maternity leave probably give a longer and more consistent period of service than many male employees as they are less likely to seek altered and improved employment options providing current employment is stable and remunerative.

<sup>20</sup> Previously it used to be 75% of salary for 90 days.

<sup>21</sup> Figures supplied by the Judicial Service Commission of Zimbabwe.



average less than US\$1000 per month, the basic salary which is between US\$400 – US\$500 is enhanced by the provision of various undisclosed allowances. Female magistrates have disclosed confidentially, that those of them who are married take the view that their husbands are helping finance and underpin the justice delivery system<sup>22</sup>. However low as the salary may be the regularity of hours, fully paid maternity leave and guaranteed leave packages go some way in compensation for poor remuneration. Also a stint as a magistrate before embarking on other forms of legal practice is a good teething ground for newly graduated lawyers. Given the terms and conditions under which they serve, despite some favourable elements, means that most of them are looking to the private or NGO sectors for a possible exit from the lower ranks of the judiciary. Nonetheless, leaving the bench for greener pastures is quite wrench for some women who believe that they are able to make a positive difference when dealing with domestic violence matters, maintenance, family related issues and divorces as well as rape and sexual assault cases<sup>23</sup>.

Once one reaches the higher ranks of the judiciary remuneration improves and there are a wider range of perks so this is a more attractive option. There are according to the Judicial Service Commission of Zimbabwe 10 female judges in Zimbabwe, six are in the High Court and four in the Supreme Court, which is the highest and final court. In the Supreme Court women judges are close to parity and as will be discussed later this has been significant in the determination of some women specific cases, but they still lag behind men at the level of the High Court where they constitute 20% of the judges. There is no mandated sex balance in relation to judicial appointments at present although the draft of a possible new constitution provides that in all public offices gender balance needs to be pursued<sup>24</sup>.

It was not possible to obtain from the Law Society of Zimbabwe the number of women registered with them, or the number of women in the various forms of private or public legal practice. A phone call to the Law Society revealed that though they would have

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<sup>22</sup> The converse may also be true that wives support their husband's continuance in the judicial system, although men are more likely to have other business activities in addition to their judicial role.

<sup>23</sup> One former magistrate was literally in tears in my office at the prospect of leaving her long cherished career on the bench. She had come seeking advice on obtaining a better remunerated job during Zimbabwe's economic melt-down in the period 2007-2008. Both she and her husband were both judicial officers and such was their economic situation that they could no longer pay their two daughters' school fees and could not make ends meet. She had the better chance of obtaining other employment within the women's law related NGO field than he would have had at that time of severe financial cuts back in all sectors of the economy. Jobs were difficult to obtain in private practice, and he had always been a magistrate before being appointed as a high court judge. She has recently returned to the bench as a judge in one of the specialist courts.

<sup>24</sup> In the national objectives in the draft constitution the issue of gender balance is addressed, and this clearly encompasses the judiciary:

- (1) The State must promote full gender balance in Zimbabwean society, and in particular—
  - (b) the State must take reasonable measures, including legislative measures, to ensure that both genders are equally represented in all institutions and agencies of the State and government, in particular in Commissions and other bodies established by or under this Constitution; and
- (2) The State must take positive measures to rectify past gender discrimination.

However, the long term fate of the draft constitution is still hanging in the balance, nonetheless the Judicial Service Commission seems to be determined to steadily increase the numbers of women on the bench. This may be influenced by the head of the commission being female, but there had been even before her appointment a steady rise in the number of women.

been willing to provide such figures they did not categorize their members based on sex and gender or by any other criteria<sup>25</sup>. Membership is recorded manually and there is no compilation of various statistics from this basic record. I do not necessarily see this as unsatisfactory in administrative terms, it could even be perceived as having a positive interpretation, a lawyer is a lawyer, sex is irrelevant. Although I will later argue that sex and gender are significant but for what we might style jurisprudential reasons rather than administrative ones. It would have been interesting to know what the distribution of women in the various branches and management and seniority levels of the legal profession, both in the public service and in the various forms of private and corporate practice, but the information is not available.

### **Rights, Knowledge, Power and Frustration**

Female judicial officers and lawyers may find themselves in the bizarre situation of determining and pursuing legal actions in cases where, because they are women, they are potentially excluded from the beneficial operation of the law. It is arguable that such situations has driven women lawyers to be especially energetic in generating critical analysis of the law and its treatment of women in a way that a man would not. When women lawyers undertake research on law reform issues, when they argue for legal and constitutional change, when they argue and lobby for the full implementation of human rights instruments that ought to improve women's rights they do so with passion and zeal which is personal and altruistic.

For example in Zimbabwe under both general<sup>26</sup> (state) law and customary law men are the officially recognized as the primary guardians of minor children, a High Court judge, who is the arbiter of guardianship disputes between married or divorced parents may determine a matter of the exercise of guardianship rights and decision making between parents and go home to a situation where her husband's decision on the future education of a minor child would prevail unless she challenged it in the very court where she would normally preside. Only if she was a single mother who had never married or was married in an unregistered customary law marriage would she be the guardian of her child.

A woman in the commercial arena, on paper in the banking and financial realm, as well as in the right to acquire immovable property she can act alone<sup>27</sup>, independently and without reference to any male, but the gendered social constructs frequently bring queries and requests for the agreement of a male, usually a husband. This is easily thwarted by the well informed female lawyer, but points to the regrettable reality that the vast majority of women either do not know or if they know find it difficult to assert their rights. State officials may also be obstructive in honouring women's rights.

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<sup>25</sup> I did trawl through the Law Society's web listing of law firms, but unless one could remember someone's first name and their sex, it was not helpful. One needs also to appreciate that women take or have been forced to take, by the country's Registrar General of Births, Deaths and Marriages, their husband's surname on marriage, so this makes it difficult to pick up that someone is known to you, when they now go under their married name.

<sup>26</sup> Guardianship of Minors Act, s3.

<sup>27</sup> Prevention of Discrimination Act

The Registrar General's office, the office that registers births, deaths and marriages and issues passports, has in the past insisted that a woman on marrying must change her surname (family name) to that of her husband, including all her official state documentation including her metal identity card<sup>28</sup> and her passport. Obtaining a new passport is a protracted and expensive process. Zimbabwean women, including judicial officers, used to be forced to effect these changes when it came to the registration of the birth of a child or if they wished to travel with a child. In effect a precondition would be imposed that she must change her name to be able to obtain a passport for herself or her child. If the mother of a child needed to obtain a passport for a child she would be compelled by the Registrar General's office to obtain the consent of the father of the child, no such condition was imposed on the father of a child to obtain the mother's consent. There was nothing contained in any law that sanctioned these various impositions and limitations on women's status or capacity to deal with her legal status or that of her child.

Frustrated by these conjured up requirements woman lawyers have over recent years mounted a concerted attack on these administrative practices. Test case litigation, law reform lobbies, trenchant critical research reports have all been used to effect formal law reform and clarification or declarations as to the exact legal position. For example the Registrar General was taken to task over the issue of women obtaining passports for minor children by a prominent female politician, ZWLA facilitated the litigation and a group of women lawyers, including private practitioners, other NGO based women lawyers and women academic lawyers formed a think tank to formulate the strategies for litigating the matter. A team of female lawyers constituted the team that appeared for her in court. The matter, as it was cast as a constitutional issue in terms of the Declaration of Rights in the Constitution, meant that it went directly to the highest court, the Supreme Court. The judges assigned to hear the case were all female, although one had been seconded from the High Court as at that time there were only three female Supreme Court judges. This was undoubtedly a strategic move on the part of the Chief Justice and it put the case firmly in female hands, the Registrar General's legal team was male and pursued a patriarchal line of argument, one that would have sat happily with the judges of the South African Appellate Division in 1912 in *Miss Wookey's case*. The all-female court found that the issuance of a passport did not alter the legal status of a child thus any person with a legitimate interest in obtaining a passport for a minor child could do so, a guardian was not required to act, nor was a father's consent required<sup>29 30</sup>. ZWLA and other women's legal oriented NGOs have

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<sup>28</sup> It can take years to obtain a new one, meanwhile the holder must make do with a flimsy piece of paper that rapidly disintegrates. Of course if a woman thereafter divorces is she is saddled with her former husband's name, which she did not want to take in the first place. Even if she remains married her professional qualifications, if obtained in her maiden name, have always to be supported by a marriage certificate to prove the linkage between the disparate names. Conversely, other institutions would continue to use her maiden name, for example women who obtain a first law degree from the University of Zimbabwe usually do so in their maiden name, they married and were forced to change their name, then they attempt to register under their married name for a higher degree, but the registration system reverts them to their maiden name. You cannot win it seems!

<sup>29</sup> *Margaret Dongo v The Registrar General* SC 6/10

<sup>30</sup> This was an important determination in the context of Zimbabwe where many families have split up as economic migrants, leaving perhaps mothers alone or grandparents to care for children. Obtaining passports

had to vigorously follow up on the implementation of this judgment as the responsible officials are inclined to revert to the former instructions from their superior.

A pending threat of litigation by women lawyers obtained an acknowledgement on 25 August 2011 in the Herald newspaper that the Registrar General conceded that there was no law in Zimbabwe that requires a married woman to change her name to that of her husband. However, despite this women lawyers continue to monitor the practices in the offices of the Registrar General, not least because he refused to publish a note in all registry offices throughout the country that women did not need to change their names on marriage.

Law reform driven by women and especially women lawyers, with deep concerns about women's legal situation has stimulated some creative law reform measures. In the early 1980s immediately after the liberation war in which women fought alongside men, the Legal Age of Majority Act (LAMA, now s15 of the General Law Amendment Act) purported to confer majority status on all Zimbabweans, for all purposes including customary law, at the age of 18. This was ultimately to be thwarted by the Supreme Court in the infamous case of *Magaya v Magaya* 1999 (1) ZLR 100 (S) when the all male court found that customary law was especially protected by s23 (3) of the current Constitution which provides that the equality provisions laid out in s23 do not apply to matters of personal law or customary law, which of course is where women's lives are most likely to be constrained by sexed and gendered legal restrictions<sup>31</sup>.

However, prior to the *Magaya* case the law had been changed in favour of women in customary intestate succession cases that arose after 1 November 1997, the facts in *Magaya* had arisen prior to that date so the new legislation did not apply to it. The change in the intestate inheritance law was directly attributable to the WLSA research in the late 1980s and early 1990s into women's situation under both general and customary law. This provided a soundly researched platform for reforms in inheritance laws that significantly benefited women<sup>32</sup>. A subsequent nationwide campaign to provide information on the new laws and effect administrative reforms was carried out mainly by women's legally oriented NGOs and the Women's Law Centre at the University of Zimbabwe. Women's involvement as lawyers who had researched and come to appreciate the situation of the ordinary woman in the urban street and in the rural village, meant that the campaign was simple direct and used multiple methods including drama, poetry, film, role plays, cartoons and similar accessible communication approaches. Would male lawyers without the influence of female lawyers have taken such an approach? Probably no!<sup>33</sup>.

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for children in Zimbabwe to join or visit their parents was often frustrated by the purely administrative requirements imposed by Registrar General's office.

<sup>31</sup> For a fuller discussion of this see Stewart and Tsanga (2007), Damiso and Stewart (2013)

<sup>32</sup> For a further discussion of this research and its impact see Stewart and Tsanga (2007).

<sup>33</sup> During the formulation of the campaign strategies I was teaching inheritance law and asked the class to produce drawings, stories, plays, whatever they thought might help ordinary people to understand the law. Every female in the class produced a communication strategy that used at least one if not more than one of these approaches. All the males with the exception of one who was a media personality doing a law degree late in life, produced a sterile boring description of the content of the law and left it at that. At the time I did not appreciate the gendered implications of this, I now wish I had photocopied some of the assignments for

Similarly WLSA had researched maintenance laws from the perspective of women's experiences of the law and had come to understand how and why women made the choices around maintenance issues that they did. Women might know that they could claim maintenance from the fathers of their out of wedlock children but chose not to do so. From this WLSA research grew a number of initiatives to assist women to take up their legal rights. For example ZWLA in particular runs empowerment sessions in which fully qualified women lawyers explain their legal rights to women and assist them to prosecute maintenance, divorce, domestic violence and inheritance claims without the presence of a lawyer. ZWLA runs mobile legal aid clinics in rural areas and provides in house assistance in Harare and Bulawayo to female litigants mainly in divorce, custody, inheritance, maintenance and domestic violence cases as do other NGOs. WLSA undertakes research then engages key players in seeking law reform where necessary, running parallel with this they provide legal information and assistance to women to pursue their legal rights.

For the past 20 or so years women lawyers, in particular ZWLA, have been engaged in lobbying and advocacy for comprehensive marriage law reform. In the main this is aimed at raising the legal age of marriage to 18 or at the very least for girls to the age of 16. Removing references to the payment of bride price in legislation regulating marriage formalities, improving the share of matrimonial property that a wife obtains on divorce, altering the guardianship laws to provide for equality between spouses, developing less adversarial family law processes and procedures<sup>34</sup>, simplifying forms and legal applications so that women self-actors can pursue their legal rights with greater ease.

### **Human Rights, Women's Rights – Getting it on Paper**

Women lawyers in Zimbabwe have played a significant part in formulating and articulating women's minimum human rights and legal demands in the constitutional reform processes that took place in 1999/2000<sup>35</sup> and from 2009 an exercise which is currently ongoing. Women lawyers have acted as facilitators for women's groups and the broad based Women's Coalition in capturing their aspirations for reform and translating these into appropriate legal terminology<sup>36</sup>. ZWLA was the backbone of the recent CEDAW Shadow reporting exercise undertaken at the end of 2011 and women lawyers made up the bulk of the NGO delegation that went to present the Shadow Report to the CEDAW Committee in February 2012 (Damiso and Stewart, 2012). The Southern African Development Community Protocol on Gender and Development was

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future reference. I should also have interrogated the males as to why they were so conservative and unadventurous in doing the assignment. Did they feel foolish, were they embarrassed to be treating a serious legal topic in a seemingly frivolous manner? Left to themselves to plan an information dissemination campaign might the men of the law just trotted out pamphlets that just recited the law, law from a very complex area of the law but one which touches the lives of most people at some point.

<sup>34</sup> There is currently an exercise under way to establish a specialist family court and this was largely initiated by female judges of the high court, women academics and women's legal NGOs.

<sup>35</sup> The 1999/2000 contained significant human rights advances for women but the draft was rejected by the nation in a referendum for further discussion see Damiso and Stewart, 2012

<sup>36</sup>

greatly influenced in its formulation by the input of women lawyers from the member countries, not least from among those who had undertaken the regional Masters in Women's Law at the SEARCWL, UZ. Women lawyers do not feature as a critical mass in Parliament where only 16% of members are women. There is one very active deputy minister who is a female lawyer, she is located in the Ministry of Women's Affairs, Gender and Community Development but would rather have remained in the Ministry of Justice and Legal Affairs where greater law reform impact is possible, but in Zimbabwe's complex political climate you go where you are put and try to make the most of difficult situations. One observation from many non-lawyer female politicians is that the 'heavily legal atmosphere and language is alien to them' and various women's legal NGOS have tried to provide training and advice to such women on how to manage parliament and parliamentary process<sup>37</sup>. The Deputy Minister, Jessie Majome, has no such difficulties and can assert herself toe to toe with the other (male) lawyers in the house. Which is not to say there are no other women or ministers who cannot do so, but there seems to be an initial edge that women lawyers have. Quite noticeable is their assumption that they will be heard and listened to, that they can argue women's issues with men on an informed and skillfully crafted basis, and they are not easily intimidated by hecklers and snide remarks. You develop a thick skin as a female law student. What will happen now that women are in the ascendance in the law school, will they still need that thick skin?

### **Educating the Next Generation**

My experiences in teaching on the Masters in Women's Law programme show that most students graduate from a law degree with only a superficial awareness of the long term implications and impact for women's rights of the way in which law is taught in an ostensibly gender neutral analytical framework. They may be aware that men and women experience life and law differently but there is little or no internalization of how a gender neutral approach is one that conforms to male paradigms. Both male and female masters students have to be taken through a 1970s style consciousness raising process focusing on the extent to which law is hegemonically male and as such frequently obscures female lived realities. Only a limited number of graduates pursue the Masters in Women's Law. Women's Law is an optional course in the undergraduate law degree and annually around 12-15 students take that course both male and female, so the opportunities for inculcating penetrative sex and gender analytical skills are limited in the UZ undergraduate law degree. At Midlands State University Gender and Law is a compulsory course for all law students, but it is just one course and may be treated by some students as just another 'thing' to pass<sup>38</sup>. One of the lecturers on the course, Rosalie Katsande, observed that some male students are resentful of the levels of awareness about women's rights and entitlements that such a course raises. One retorted when asked by female classmates how he was going to deal with his girlfriend's pregnancy and maintenance for the child – 'this course is useless, if we didn't do it you wouldn't know about her rights'; a narrow view and certainly misguided as his fellow law students would learn about this in family law, but perhaps not with the accompanying feminist advocacy. Rosalie's analysis of his outburst was

<sup>37</sup> For example: ZWLA, WLSA, Women's Parliamentary Support Unit (WIPSU), Musasa project.

<sup>38</sup> This insight into the attitudes of some male students was provided by the lecturer during an interview on the possible benefits of making such courses compulsory – Katsande October 2012.

that the course puts an emphasis on sex, gender, sexuality and responsibility, a perspective that he would rather avoid in his legal studies.

Even if there is now a preponderance of female law students one of the struggles remains to make law school curricula more sex and gender relevant. There are some obvious areas in the law where sex and gender are self-evidently critical concerns in how the law is taught, critiqued and analyzed for its appropriateness to the needs of the target market, the public at large of which roughly 52% are women. The Faculty of Law at the University of Zimbabwe has, as stated earlier, one optional undergraduate course that focuses exclusively on women, Women's Law, there are other courses that, depending on the lecturer concerned, should obviously lead to a focus on how women fare in legal disputes, mainly within family and family relationships – Family Law and Succession. In Criminal Law and in Criminal Procedure sex related crimes, defences and rules of evidence are part of the content to be taught, but the problem is that these are frequently taught as matters of pure content or as fixed rules that are not subjected to critical sex and gender analysis. Defences such as provocation and self defence are constructed using male paradigms and the so called 'reasonable man' behavior patterns when under stress and threat. Women are expected to meet these male criteria if they are to succeed with a defence. But, patently the reasonable woman is not the reasonable man, she must of physical and strategic necessity plot her approach differently. But very few such courses start with a sex and gender diverse entry point and probe how women and men respond to different pressures both economic and social, why they do so and how they exploit varied opportunities to commit crime, to defend themselves, to protect their children (Tibatemwa-Ekirikubinza, 2011; Stewart, 2003, Staunton and Musengezi, 2003)

### **Getting Sex and Gender Analysis into all Areas of Law – Possible, not Possible?**

Recently I was discussing an inspired but complicated analytical framework diagram with a female colleague at SEARCWL, she is doing a doctorate under my supervision. Her topic has gone through a series of transitions, she began with what might be styled a strong assumption that if women small scale horticultural farmers could just see the value in using the various forms of legal incorporation available under Zimbabwe's various private enterprise oriented legal frameworks: such as private companies, sole traders, cooperatives and the like, their lives would be transformed. She had taught courses on company law and entrepreneurship at undergraduate level and had used the gender neutral approach of the law as captured in legislation and as determined through case law in constructing her courses. She was, even after doing the Masters in Women's Law including the optional course on Women, Commerce and Law in Africa, still caught within the disciplinary paradigm of formalized law holding onto a ready-made solution, if only she could get women to buy into it. She realized that women faced different challenges to men in relation to entrepreneurship, and that women's participation was more constrained and limited than that of men, but perhaps a liberal feminist approach could be the solution, if she could just insert women then women would benefit from the available range of legal entities and options.

What has emerged through her empirical research since those early days is a realization that women cannot just be included via the medium of standard gender neutral legal frameworks. Women are subsumed within families and family production structures, regardless of their quantified contributions to the family business they remain mere contributors because marriage and customary laws dominate their connections to the business; land vests in men, women's interests are limited and the public or commercial face of the business is male. Yet women, frequently wives, are a prime source of labour, the source of skills, they actively participate in management but not publicly so they struggle for recognition. In a sense what has taken place for her, is a journey from the gender neutral legal paradigms through to the sexed and gendered realities of how laws affect or do not affect an individual either positively or negatively. She is now exploring a different methodological positioning in relation to these women's needs that of interrogating how and why laws that are assumed to be applicable and available to all are so skewed in terms of their actual availability and beneficial impact for women. She is going further by asking what are the business and legal models that need to be created for women to benefit in a way that engages with family controls and overrides the negative impact of the assumption that all things business and agricultural are male.

The question that I ask, perhaps rhetorically, is would such a critique of the law been undertaken if women were not involved as interrogators of the law, that is if they were merely observers and users of law and not drivers of legal researchers, analysis of law and legal argumentation?

A list of courses where there are sex and gender differentials both overtly and insidiously privilege men over women that would benefit from a sex and gender analytical framework is not hard to generate: Law of Contract, Constitutional Law, Interpretation of Statutes, Criminal Law, Law of Delict (Torts), Law of Evidence, Property Law – each of which has sex and gender specific elements where men and women are likely to have experienced events differently and outcomes will have sexed and gendered dimensions. This mini exercise is already showing that every law course that one calls to mind would require such a framework to provide for substantive and real equality in the application of the law as between men and women. I am not going to continue with a tedious listing, the need for law to be imbued with female understanding and perspectives and the development of a cross cutting feminist jurisprudence is clear.

One might ask: If women lawyers were not increasingly questioning the equity and equality issues in the application of law to themselves and to women at large how much longer might it have taken to begin the process of legal, constitutional and human rights reforms that positively address women's situations and sexed and gendered needs? If women lawyers were not personalizing the law, imbuing it with their own experience would we have made the progress over the last thirty or so years that has significantly changed the gendered profile of law and the content of law? As female legal activists we are still not satisfied and have no reason to be satisfied as yet, but the



agendas are being constantly developed, reshaped and redirected so as to achieve real and substantive equality and to have women sensitive laws.

## Conclusion

When I first agreed to write this article I thought it would be easy to get the disaggregated data on women in all branches of the legal profession. It turned out to be a significant challenge. It is a task that needs to be undertaken, as without a thorough profile of women in the profession it is difficult to determine how they might or do impact on the profession as a whole. Has it become more caring, is it more alive to women's issues and needs, do women in general benefit as a result? Intuitively, and based on the information and opinions I was able to glean in researching and writing this article, women in the legal profession do make a difference. It is also my impression that those currently entering the legal profession in whatever form their employment might take have an easier time than my generation, although perhaps the older generation always think that. If it is too easy might they lose sight of the sight of the importance of being a woman and tackling law as a woman from a sex and gender aware perspective?

Perhaps this is the moment to undertake a baseline survey for future reference.

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Prevention of Discrimination Act, Chapter 8:16

## **Do Female Judges Judge Better?**

Ulrike Schultz

### **Do Women Change the Legal Profession?**

In the last two decades the question came up whether an increase of women would change the nature of traditionally male-dominated professions.

From a male point of view this question was legitimate, as the access to certain professions was denied for women until the beginning of the 20th century. They were considered unsuitable due to gender characteristics and it was presumed that a higher percentage of women would jeopardize status, prestige and income levels of those professions.

In the 1980s the debate about gender disparities was picked up again by the new (in Europe: second) Women's Movement; this time with a different aim: The discussion was focused on the question whether women would be the "better" (ironical) persons whose participation in the power positions of society would positively influence the world order.

Whether at all and in how far the participation of women changes specific job profiles and whether the public image of femininity and women influences the perception of a profession will be exemplarily dealt with here using the example of female jurists in Germany.

### **1. The Advancement of Women into the Legal Profession**

First of all a look back: In 1900 for the first time ever women had the chance to enroll in law faculties in Germany, by 1912 they took part in the first state examination following legal education at university for the first time and only in 1919 were they admitted to practical legal training.<sup>1</sup> This was followed by an intense debate about whether women could and should practise law. The arguments were:

- that women would not be able to judge objectively due to their emotionality and their biologically based mood swings. Therefore it would be unthinkable to let them speak justice at court. But also
- that women would be too precious for the tough legal world and that they would need to be protected from it.

Also in respect of complaints about an overcrowded legal profession which have already been uttered at that time, the hidden fear was that the economic situation of lawyers would further deteriorate with the influx of women.

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<sup>1</sup> About the structure of legal education in Germany, comp.: Schultz 2011

After the *Weimar Constitution* was passed in 1919 which gave women the right to vote and proclaimed the legal principle of gender equality,<sup>2</sup> it was still necessary to pass an explicit act which regulated the admission of women to the legal professions in 1922. The women's way into legal professions was thereby opened but not facilitated. The number of women increased slowly, female lawyers disappeared again nearly entirely during the *Third Reich*. In 1936 Hitler had passed a decree that women had to be removed from legal occupations.

After the second world war a very conservative family ideology kept women from professional work (Schultz 2003 b). In 1960 less than 4% women practised law. Only after campaigns for tapping the full educational potential in society in the 1960s and 1970s did the numbers of female (law) students increase, more rapidly since the mid-1980s. Nowadays even more women than men study law. Law has developed into a favourite choice for women; a development which has not happened in other male-dominated subjects as for example natural sciences where the percentage of women in spite of all campaigns of "Women in Male Professions" is rising still slowly. With a bit of delay the share of women in the legal professions has risen as well and again very rapidly in the past two decades. The percentages below do not reflect the actual share of the job market though, as considerably more women than men work part-time.

### Share of women in legal professions

	judges %	public prosecutors %	advocates %
1961	2.6		>2.0
1971	6.0	5.0	4.5
1981	13.0	11.0	8.0
1989	17.6 = 2,109 of 17,627	17.6 = 661 of 3,759	14.7 = 7,960 of 54,108
1995	26.3	28.9	19.3
2001	27.7	30.9	25.3
2009	35.79 = 7,195 of 20,101	38.71 = 1,983 of 5,122	31.08 = 46,736 of 150,377
2011	38.45 = 7,848 of 20,411	41.03 = 2,152 of 5,246	32.04 = 49,872 of 155,679

Official statistics: Federal Ministry of Justice, Federal Chamber of Advocates

The increase of around 3.000 judges and attorneys shortly after 1989 is a consequence of the German reunification. Otherwise the number and proportion of judges and prosecutors has remained remarkably stable since the foundation of the German empire in 1871.

<sup>2</sup> Dogmatically it was considered to be a "programme sentence", i.e. a rule the state should implement over time. Only the Bonn Basic Law, the German Constitution (Grundgesetz) which was passed in 1949 when the German state was rebuilt after the second world war, finally gave women an individual right to equality which could be claimed at court.

After all women have reached the „critical mass“ for effective participation in the legal occupations. Around a third had been regarded as standard by the women´s movement.

## 2. Theoretical Groundwork of a Research Hypothesis

In the 1980´s I initiated a big and international comparative project „Women in the World´s Legal Profession“. (Schultz 2003 a-c) The question whether the growing share of women would change the legal practice was central.

Therefore we phrased our research hypothesis: „Will women change the legal profession? Will the profession change women?“ (Menkel-Meadow 1985, 1987, 1989)<sup>3</sup>

A part of the women´s movement at the time was strongly influenced by Carol Gilligan´s book: *The other voice* (1984).<sup>4</sup> Gilligan tried to rebut Kohlberg´s condemnation that women don´t reach the same level of moral development than men. In her book she reaches the conclusion that Kohlberg drafted a model which mainly encompassed the male way of moral thinking, but which falls short of specifically female reasoning. She claims that men rather follow a logic of justice, which implies that they refer to principles of „blind justice“; that they are bound to a way of thinking which is strongly influenced by norms and rules, and that they rely on abstract rules and universal principles in order to solve conflicts in an impersonal and unbiased manner. Women rather use logic of care; their moral way of thinking and acting is typically more geared towards taking responsibility and care and the relatedness with others. It becomes clear that Gilligan considered “the other voice” as more humane, livable and likeable.

The female orientation towards relatedness is also the leading topic of the book: *You just don´t understand. Women and Men in conversation* published in 1991 by the linguist Deborah Tannen, which became another milestone of feminist literature. Based on empirical research she established that the male style of speech corresponds to a report format which aims at preserving their own independence and that conversations mainly serve as agents for negotiating and establishing the own position in the social hierarchy. The female style of communication by contrast is characterised by establishing a relation with the dialogue partner and aims to build bonds, create communality, create intimacy and avoid isolation. These findings suggest the pair of opposites: cold (inhumane) and warm (humane) style of communication.

Gilligan´s work is specifically relevant for the evaluation of which impact the increase of women in legal occupations has, as lawyers are regarded as guardians of morality and the value system in society. In respect of Tannen´s work, the fact matters that

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<sup>3</sup> cf. also Jack and Jack 1989 and Harrington 1994

<sup>4</sup> Gilligan is a developmental psychologist, former student of Kohlberg´s. Kohlberg developed a differentiated graded scale to classify the moral reasoning according to level and stage of development. His findings were based on empirical research on male children and adolescents, like those of Piaget and Freud as well. In comparison girls often did not reach the same level of development and were therefore considered „retarded“.

language is lawyers' main tool and working equipment. So when women are "different" in these respects this cannot be without consequence for legal practice.

The German feminist mainstream criticised these books plus those of other so-called *difference-theorists* (Field-Belenky 1984 amongst others) as essentialist as they assigned women gender specific characteristics.<sup>5</sup> In the 90's German feminism committed itself to structuralism and deconstruction of gender. Its aim was to overcome the social gender with traditional gender roles and character constructed by patriarchy, (Ben-Habbib 1993) although many feminists cherished a „we, the women“-rhetoric which in itself presupposes difference.

### **After the Turn of the Millennium Theories Stressing Diversity Prevailed.**

As a matter of fact, if differences between men and women are pointed out, one immediately drifts towards the „patriarchal dilemma“ and tends to reinforce those men, who always knew that „women are different“ (in the sense of weaker). As a consequence my research on the impact of feminisation on the legal profession was not welcomed in German mainstream feminism.

### **At Least I had a Prominent Confederate:**

In a speech at the German *Judges Day* 1995 which was focusing on the topic of "the changing judiciary" the president of the Federal Constitutional Court, Jutta Limbach, talked about the „trends“ within the judiciary, including the increasing numbers of female judges and prosecutors. She put forward the following questions: *Do women change the judiciary? Will women influence jurisdiction with empathy and leniency? Will penalties become softer? Or indeed do law schools and the judiciary initially attract women that are similarly authoritarian as men?*

For that same *Judges Day* Renate Jaeger, judge at the Federal Constitutional Court, later the German judge at the European Court of Human Rights, had been asked to discuss the topic "Women change the judiciary – do women change the judiciary?" She criticised the way the question was put as she feared that this would bring up the same expectations and attitudes that refused women access to legal occupations at the beginning of the century, and also that outdated gender characteristics could be revived. She held that lawyers (whether female or male) choose a certain profession due to individual characteristics and character traits (logic, abstract thinking skills, eloquence) and that men and women would equally be exposed to and socialised by the influence of the male-dominated judiciary. She concluded that therefore male and female lawyers would not be that different from each other after all.

## **3. Do Women Change Legal Practice?**

### **1. Legal practice changes women**

Renate Jaeger makes an important and correct point: female lawyers are being "moulded" – in the course of their 7-10 years of legal education, the famous "*formation*

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<sup>5</sup> Nunner-Winkler 1995 criticised Gilligan severely, also methodologically.

*professionelle*". They are going through character forming processes (Schultz 2003 c, 301), which are still organised and led by men who in turn are influenced by traditional ideals and paradigms (Schultz 2012). Up until today there are not more than 9 % of women law professors holding a "full" chair.<sup>6</sup>

Besides the necessary acquisition of knowledge and practical skills these adjustment processes lead to a homogenisation of attitudes and opinions; this equally applies to men and women.

Women in legal occupations also adapt their outward appearance, like women in other male dominated professions as well. Women at work usually speak with deeper voices than their mothers and demonstrate their incorporation by their clothes: for at least three decades skirts were hardly found, being replaced by discreet pantsuits. Meanwhile dresses and skirt have come back but in unobtrusive forms and colours in the legal world. Professional women overall show different behavioural patterns than their preceding generations, a different "habitus", although the adaptation to the male model is no longer as marked as it used to be. Men *and* women have changed.

Nonetheless not all differences are blurred, in whatever way they could be quantified. Specifically obvious are still differences in the style of speech and body language.<sup>7</sup>

Which impacts of the feminisation of the legal professions can be identified then?

### 3.2 The subjective perspective

To find out whether there are differences in attitude I analysed biographical reports of female lawyers (Fabricius-Brand 1986; Deutscher Juristinnenbund 1984), conducted questionnaires, took part in female lawyers' gatherings as a participating observer and made notes of impressions and observations during teaching and „informal“ conversations. (Schultz 1990, 1994, 2003)

Female lawyers in the 1980s definitely considered themselves different to the men in their field; they claimed to work in a more flexible and patient and less formal manner (Schultz 1990, 346). This also applied to female lawyers who I talked to and discussed with in the 1990s. They named further female attributes: Sensitivity, compassion, understanding, willingness to compromise, social skills, charm, perfection, reliability (Schultz 2002, 2003 c). An American research about how (female) divorce lawyers self-assess their behaviour resulted in a similar list of attributes (Mather 2003).

During a founding meeting of a network for female attorneys in North Rhine-Westphalia in 1999 one of the attorneys stated: *My way of working is totally different to that of my male colleagues. For me the most important thing is quality, only then I think of the money. After I opened my practice I had a financially tough time for quite a*

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<sup>6</sup> The overall statistical number for 2012 is 16% including junior professors and professors with a less well equipped chair.

<sup>7</sup> This is my experience as a communications' trainer for young lawyers and the judiciary.

*while. By now people know that I am particularly motivated and as a result I now have a number of loyal clients and my accounts are straight.*

One female defence lawyer from Cologne who is specialised in the defence of youths accentuated in 1995, during a talk about her profession, how different she felt compared to her male colleagues in her way of working. She pointed out that for her the most important thing would be to create an agreeable atmosphere at court and to be fair towards all parties involved. She would feel responsible for the course and the outcome of a trial and she would try to help her clients on an interpersonal level, take care of them, even mother them and follow the moral aim of bringing them back on track.

In a questionnaire implemented during a training for attorneys in 1997 the female attorneys claimed that they had the impression that their male colleagues would treat their clients differently, e.g. not taking female clients seriously or treating them in a dominant, patriarchal or paternal way.

Female judges and prosecutors also claimed that their style of working was different to that of their male colleagues. Evidence for this was obtained from a small research project with female judges in the federal state of Hessen in 1988. The women specified as feminine elements that should be incorporated into the administration of justice: Improving the emotional climate, strengthening communication and cooperation between the involved parties in the trial, reduction of authority towards the parties, reduction of competitiveness between colleagues.

Surprisingly congruent with this were statements from a group of mainly male judges and prosecutors during training in the Academy for the Judiciary in Treves in June 1993 whom I asked which characteristics (of their colleagues) they considered specifically feminine. The main answers were: emotionality, a high level of sensitivity, empathy, preparedness to solve problems on an emotional level, a lower risk of restricting oneself to juristic dogmata.

The female judges and prosecutors from Hessen stated furthermore that on the one hand they were expected to behave in a gender specific way, like e.g. showing understanding, empathy, charm, a higher level of collegiality, a certain level of feminine reservation, on the other hand they were confronted with negative prejudices as e.g. incompetence, an inability to cope with workload, adapted behaviour, subordination, a lack of authority and a lack of career ambition.

Inversely the male participants at this training in Treves answered the question which evaluations and prejudices towards female lawyers they had encountered. They added diligence and ambition to the list of expected behaviour though not for themselves and their colleagues but for the lawyers, the non-legal personnel and further parties to the proceedings. One participant, who apparently had some frustrating experience, wrote: frequent rigidification, especially when pursuing a career, adaptation of a negative male attitude.



During gender trainings in the Academies for the Judiciary in Eastern Germany and Treves in 2003 and 2004 I realised that these perceptions may have become less marked but are still existent (Schultz 2013 b). In any case it had become more difficult to talk about them. Since 2005 I have organised a one week seminar on Judicial Decision Making annually, and in my units on communication and decision making any mention of gender is met with hostility from a good part of the participants, although most of the women in the group signal that they perceive differences in style and behaviour (Schultz 2013 b). In the narrative interviews for our research into women judges' careers in the judiciary in the Federal state of Northrhine-Westfalia not much was mentioned in the sense of these differences. Meanwhile it was always stressed by men and women that women are as good as men. No mention any more of women being incompetent or too slow at their work. The female president of one of the appeal courts stated that women bring more colour into the administration of justice. Unchanged was that women complained about career deficits due to male dominant behaviour (Schultz 2013 a), arrogance and a too high self-esteem.

### 3.3 Research results

The subjective perceptions are being supported by socio-linguistic analyses of communication in court hearings in Israel (Bogoch 2003). Female attorneys were more likely to deal with the emotional needs of their clients during the court proceedings than their male counterparts.<sup>8</sup> Female state attorneys had a more agreeable style of interrogation. During divorce proceedings and in divorce mediation cases it was rather obvious that female attorneys discovered and denominated disadvantages for the women involved quicker than male attorneys, (Bogoch 2007) which shows that they better understood their clients' needs.

The question was also whether female attorneys behave more ethically than their male counterparts, i.e. if they less often get in conflict with the rules and regulations of vocational and professional law. Data from the Netherlands confirmed indeed that female lawyers were less often subject to disciplinary proceedings. This could match the general results of the criminal statistics. The overall share of women in criminal sentences is up to today less than 20%.<sup>9</sup> A clear interpretation of these results is however still not possible.

A hypothesis verbalised by American sociologists of law that female attorneys might try to avoid legal proceedings more often than their male colleagues due to less contentious attitudes was not fully confirmed. The study by Mather (2003) came to the conclusion that attorneys, both male and female, prefer amicable solutions. In Germany it became evident though, that considerably more female lawyers than male lawyers show an interest in training in mediation. To what extent this in turn effectively translates into their professional strategies and behaviour cannot be answered clearly.

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<sup>8</sup> Clients also confirmed that they experienced more respect and sympathy when being consulted by a female lawyer.

<sup>9</sup> Feminist criminologists advance the view, that this is not necessarily because women are the „better“ part of mankind but rather because the specific forms of female misbehaviour are not being captured as legal wrong by criminal law.

### 3.4 Do female judges pass judgments different from those of male judges?

Some aspects of the question whether women are better judges was investigated in Germany by Regine Drewniak at the beginning of the 1990s in an empirical research study about gender-related attitudes in the judiciary and respectively different ways of passing judgments between female and male judges. The research hypothesis employed was fully influenced by Gilligan and the 1980's *Zeitgeist*. It assumed that female judges would show more sympathy and sensitivity for the individual situation of the accused rather than strictly being focused on enforcing legal principles.

Her research led to the result that female judges had a distinctly more negative attitude towards practice as a criminal judge than their male colleagues, but that there was not generally a higher preparedness to take the accused's individual personality and situation into account.<sup>10</sup> Regine Drewniak left the question open whether the specific judge personalities are created by an individual's choice of profession or by juristic socialisation.

Quite the opposite was found out by the leading German feminist Alice Schwarzer in 1977 by analysing criminal court verdicts in manslaughter cases: she established that indeed there were gender-specific perceptions to be found and that some kind of "male-justice" (Raab 1993) could be detected. These gender-specific perceptions influence the description of the accused's personality profile. She kept on criticising this fact several times in verdict reviews in the feminist magazine "EMMA". Quote: *In Germany the risk for a woman to be killed by her husband is 10 times higher than for the husband to be killed by his wife. In court the risk for the women is higher as well: The murderess usually obtains a prison sentence of ten to fifteen years, if not a life sentence; the murderer not rarely obtains a sentence of acquittal or just a few years on probation.*

She had to leave open at the time whether women in the judiciary would make a difference and if consequently there would be "female-justice" as there were so few women judges and prosecutors at the time. There are statements in regard to this from Dagmar Oberlies (1995) who analysed, motivated by Alice Schwarzer, 177 penalties in manslaughter cases against women and men. Dagmar Oberlies observed that there would be *an influence on the legal evaluation of a case and the sentence when female professionals were part of the proceedings. The involvement of a female defence lawyer correlated with the conviction for murder (instead of the less serious crime of manslaughter.)* It can therefore have a negative effect for the accused. *The participation of female prosecutors and women in juries had a moderating influence on the sentence whilst the participation of female professional judges remained without influence* (Oberlies 1995, p. 188 ff). These results are not necessarily a proof of differing attitudes of women in the proceedings, but as well of men preventing them from achieving their professionally desired result (higher sentence for the female prosecutor, lower sentence for the female defence lawyer).

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<sup>10</sup> Furthermore she found out that criminal judges (both female and male) in general had a different offender-society-orientation and different intentions in sentencing than other judges.

Slightly deviating are the results that were reported from Poland (Fuszara 2003) and from Brazil (Junqueira 2003) in our comparative volume on Women in the World's Legal Professions. In those countries differences in decisions were observed in two areas: Female judges were more likely to show empathy with male accused persons, e.g. in the evaluation of personality factors which are taken into account in the calculation of the sentence. Only in cases of physical violence the female judges tended to have a more rigid approach than their male colleagues, possibly because they identified with the victims. But there was also proof for the opposite, namely that women judges tended to be milder in cases of violence to belie any prejudice that their judgment might be influenced by female empathy.

In alimony cases female judges – working women themselves – tended to be less generous to housewives than male judges. Apparently in these cases gender-specific attitudes which are informed by own personal experiences and life situations play a role for the female judges. This fits the general observation that especially women tend to regard consexuals more critically than members of the opposite sex,<sup>11</sup> and accordingly members of the opposite sex are treated more leniently (Raab 1993).

German judges reported during gender trainings at the Academy for the Judiciary in 2003 and 2004 that they observed something similar in themselves and in colleagues but were convinced that gender stereotypic perceptions and reactions could only become apparent in the way they led the trial but would not influence the outcome of the trial.<sup>12</sup>

A rich source for reflections on differences in attitude and decision making is the comparative volume on Gender and Judging (2013): In family law there may also be a gender effect in decisions on custody; also in these cases female judges tend to better identify with women's interests. The same holds true for sex discrimination and sexual harassment cases in labour law. There is an extensive research in the US on these cases which also have shown the troubling effect that women judges in a minority position on panels tend to decide with their male colleagues (Boyd, Epstein, Martin 2010)<sup>13</sup> In administrative law, women judges have extended the right of asylum to cases of threatening female genital mutilation. The most prominent example is given by the first female judge at the House of Lords, now Constitutional Court in the UK, Brenda Hale. In the Constitutional Court of South Africa the women judges have effected an extended interpretation of rules in cases of (sexual) violence; it was their influence that rape now also encompasses non-consensual anal penetration, that prostitution does not only incriminate the prostitute but also the customer, that also non-married widows can benefit from pensions of their partners (Cowan 2013). In Germany the female judges at the Social Appeal Court differed in their vote whether Viagra should be paid by the health insurance from their male colleagues, and the German General Attorney Juliane Kokott at the European Court of Justice has advocated the uniform tariffs in insurances for men and women – just to give a few examples.

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<sup>11</sup> Which is also described in management literature (Schultz 2013 a)

<sup>12</sup> Differences in behaviour were mentioned in many reports of my project (Schultz 2003 c)

<sup>13</sup> Comp. also Field-Belenky et al.

The interactions of judges, state attorneys and witnesses in courts in Israel from a sociolinguistic point of view were described in-depth and differentiated by Bryna Bogoch (2003). In the lawsuits she examined she discovered that each sort of male statement towards female parties to the proceedings was geared towards establishing male power and hierarchical status.<sup>14</sup> Interestingly the statements women made (witnesses and female judges) towards other women (prosecutors and lawyers) were likewise less respectful than those towards men.<sup>15</sup> Altogether the statements made by women found less consideration.

These communication structures had tangible results comparable to the ones from Oberlies in her research: sentences turned out higher, when an accused had a female defendant but lower with a female prosecutor. In regard to representation and power assertion in the course of the court proceedings this means that women were weaker (Bogoch, 2003, p. 265; Schultz 2003 a, p. XLI) Female judges tended to pass lower sentences and treated female and male attorneys leniently, though they did not show specific sympathy for female victims. This could be seen as the effort of not wanting to seem biased and not acting differently compared to colleagues, as this could make them seem unprofessional.

Bogoch inferred that this reflects the still ambivalent situation of women in society in which their competency is still being questioned and their self-confidence undermined.

#### **4. Changes**

The research presented is not statistically representative. The collected statements and results cannot be quantified as most of the research samples are too limited. Furthermore the reference period has to be taken into account. This still does not considerably lower their significance. The influence of women in the system of justice should not be underestimated even though it is not downright measurable. An argument in favour is the striking accordance with comparable data from countries and states with a completely different societal structure and cultures.

The conclusion that suggests itself is that not the female lawyers' work results are different but their attitudes, their communicative behaviour and style of work. First and foremost they feel obligated to do their job properly and to employ whatever they learned at law school and also to fit in with the rules and norms. Men do not need to fear to be treated less equitable by female judges, rather the opposite is true as the previous examples showed.

The culture in the judiciary and in the legal profession has changed, as in other professions as well. A "de-formalisation" of juridical work can be observed and a higher level of service-orientation. The classical male-breadwinner-model is diluting

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<sup>14</sup> Which can be connected to Tannen's work.

<sup>15</sup> This could argue for an imitation of behavioural patterns.

and the organisational structures in advocacy are changing rapidly. To what extent this can be attributed to an increase of women jurists cannot be estimated reliably. It would therefore be speculative to assess the effect of increasing numbers of women jurists on status, prestige and reputation of the legal occupations. Too many factors are playing a role. Europeanisation and globalisation are intense agents of change - especially in the advocacy – in addition to feminisation (Schultz 2003, 2004).

The women in the legal professions are not speaking with one voice either. A “female jurists’ movement“ as such does not exist, as there is no clearly defined and locatable female culture in legal practice. There are female jurists which are part of the feminist movement and others that are totally indifferent towards questions of women’s rights. Female lawyers can hardly be seen as a homogenous group but rather fragmented. There are completely different patterns of professional identity: ranging from the edgy female attorney that is represented in the glossy legal magazines of the internationally networked global law firms to the motherly female judge that is interested in the individual good of those who are entrusted to her; both also with reversed attributes plus many different “types” in between.

It could be complained that there is no “female jurists’ movement”. The women of the Second Women’s Movement were in agreement that they wanted to search for a different and a better way out of the traditionally male-dominated world with violence and wars. Women should become visible as women in society, male power monopolies should be broken up and female alternative drafts to the male designed world should be implemented. This goal has partly been reached but partly it also seems to have been forgotten over time; maybe it is also outdated. In the foreground for female and male jurists is the aim to reach financial independence through their professional work and to participate in the prestige and power that the legal professions offer. A reform of the professions and the practices carried out which is geared towards a better morality is hardly under discussion these days. With a heightened orientation towards commercial interests, particularly from lawyers (Schultz 2003 d, 2005) it could be said that rather the opposite of the feminist vision set in. At least there is a vivid discussion in the judiciary – from men and women equally –about the importance of quality control and citizen orientation.

There is one point that female jurists influence clearly and sustainably: They change the law. Female judges at the Federal Constitutional Court often on motion of female lawyers check the constitutionality of legislation and adapt it to modern ideas of equality (Jaeger 1996, S. 123 ff), female politicians with legal qualifications integrate women’s interests and needs into the legislative process towards a redistribution of goods and to facilitate women’s participation in societal functions and in the power structure of the state. Prerequisite for this was and is work at grass-roots level: that the increasing number of female lawyers has picked up and dealt with the multiple legal questions concerning women in everyday life.

What is the conclusion?

Do women judge better or differently? In spite of the evidence given, no clear answer is possible.

Renate Jaeger concluded in her article for the *Judges Day 1995: We will realise that the judiciary has changed when we will stop reassuring ourselves about the share of women and stop speculating about it. The judiciary will have changed when both female and male lawyers together with female and male judges will fend for a humane judiciary* (1996, S. 125).

Let us wish and work for a humane legal practice.

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## Gender and the Legal Profession in Bangladesh: Achievements and Challenges

Ridwanul Hoque<sup>□\*</sup>

### Abstract:

*The history of women entering the legal profession in Bangladesh is quite recent. This is not surprising. Even in Western societies, with liberal cultural ideologies as regards gender-equality, women had to fight a lot to create a space for themselves in the legal profession. In the US case of Bradwell v. State of Illinois (1872), for example, the Supreme Court refused to allow a married woman into legal practice, arguing that 'the paramount destiny' of women is to fulfill the noble office of 'wife and mother'. Women in Bangladesh aspiring to enter the legal profession never faced such overt 'official' hurdles from the fellows of the same profession. Rather, a number of social, religious, professional, environmental and ideological factors have often stood, in various degrees, in their way. The Constitution of Bangladesh categorically prohibits discrimination based, among others, on sex. By contrast, it imposes a duty on the state to promote women's participation in every sphere of public life. Nevertheless, it is argued in this paper, Bangladeshi women in various walks of the legal profession continue to face implicit gender discrimination. There are factors that both dissuade women from choosing law as a profession and retard the career of those who are already in the profession. This paper brings into light and examines the factors that are arguably responsible for the hidden discrimination against women in the legal profession. For the purpose of this paper, the term 'legal profession' is used to mean legal practice in courts and elsewhere and the profession in the judiciary.*

### Introduction

Why is it important in the 12th year of the 21st century to study 'gender' within the frame of 'legal profession', a profession that practices and professes 'the law' which is supposedly a vital weapon to eliminate discrimination against women? The answers are obvious: laws, legal institutions, and collective and individual cultures do combine in almost every society to maintain and perpetuate discrimination against women. Despite many achievements of the feminist movements and feminists legal scholarships, sexism or gender-bias still produces injustice and deprivation in many legal professions in the world.

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The history of women entering legal profession in Bangladesh is unsurprisingly quite recent. Even in Western societies, with liberal cultural ideologies as regards gender-equality, women had to fight a lot for their entry to the legal profession. In the famous *Bradwell* case (1872), for example, the US the Supreme Court refused to allow a married woman into legal practice. Speaking for the Court, Justice Bradley reasoned that, "[t]he paramount destiny and mission of women are to fulfill the noble and benign office of wife and mother. This is the law of the Creator."<sup>1</sup> Women in Bangladesh aspiring to enter the legal profession never faced such overt 'official' hurdles from the fellows of the same profession. Rather, a number of social, religious, professional, environmental and ideological factors have often stood, in various degrees, in their way. The Constitution of Bangladesh categorically prohibits discrimination based on, among others, sex. By contrast, it imposes a duty on the state to promote women's participation in every sphere of public life. Nevertheless, as argued in this paper, Bangladeshi women in various walks of the legal profession continue to face implicit gender discrimination. There are factors that both dissuade women from choosing law as a profession and retard the career of those who are already in the profession.

This essay is based on a small-scale empirical study. I conducted a formal survey amongst around 30 judges and lawyers, both male and female. By drawing on interview-results, statistics and facts regarding achievements and challenges of Bangladeshi women in the legal profession, I focus on several factors that are arguably responsible for a discriminatory situation in this field. For the purpose of this paper, the term 'legal profession' is used to mean, principally, the legal practitioners who practise before the courts. The phrase 'legal profession', however, has been used here also to mean lawyers practising the law elsewhere than in courts, the profession in the judiciary and, for a limited purpose, the legal academia.

## **Legal Profession in Bangladesh**

In Bangladesh, lawyers admitted to the legal profession are formally called advocates. Advocates are called to the bar or given licence to practise law by the Bangladesh Bar Council, which regulates the legal profession as a whole including the administration, disciplining<sup>2</sup> and control of advocates in accordance with the provisions of the Bangladesh Legal Practitioners and Bar Council Order 1972. For practice, every advocate enrolled with the Bar Council has then to take membership of any local/district-level bar association or the Supreme Court Bar Association.<sup>3</sup>

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<sup>1</sup> *Bradwell v. State of Illinois* (1872) 83 U.S. 130 at 141-142. In a similar English case, *Bebb v The Law Society* [1914] 1 Ch. 286, the Court of Appeal upheld the Law Society's decision refusing to allow Ms. Bebb to sit the professional test leading to the qualification of solicitor. Justice Joyce ruled that women could not become solicitors for their "general disability" and because they were not 'persons' within the meaning of the Solicitors Act 1843. For a historical analysis of the *Bebb's* case, see Auchmuty (2011). For a critique of judicial gender-based prejudices in this and other similar cases, see Sachs (1976); Sachs and Wilson (1978); and Pearson and Sachs (1980).

<sup>2</sup> Apart from other disciplinary measures, the Bar Council has in place a quasi-judicial mechanism for disciplining the recalcitrant and defaulting advocates through the Bar Council Tribunals. On this, see articles 33-36 of the Legal Practitioners and Bar Council Order 1972, and rules 40-51 of the Legal Practitioners and Bar Council Rules 1972.

<sup>3</sup> There are two types of Bar Associations- the Supreme Court Bar Association and other local Bar Associations. There are 81 local bar associations in Bangladesh. An advocate cannot take membership of two local bars at the same time.

Any 'person' being a citizen of Bangladesh, male or female, who is of the age of at least 21 years and has a qualifying law degree from any university recognized by the Bar Council, may be admitted to the legal profession. In terms of the practising status, there are three types of advocates. The first group is entitled to practise only before the subordinate courts. The second group is entitled to practise before the High Court Division of the Supreme Court<sup>4</sup> as well as subordinate courts. Advocates of these two categories, after they pass oral and written tests, are enrolled under the provisions of the Bar Council Order of 1972. The advocates who are permitted by the Chief Justice to practise before the Appellate Division of the Supreme Court are admitted under the Supreme Court (Appellate Division) Rules 1988.<sup>5</sup>

In Bangladesh, the legal profession has a long history of standing, culture, regulation and honour.<sup>6</sup> The Dhaka District Bar Association was formed in 1889, for example. In this region comprising the territories including what is now the present day Bangladesh, before the legal profession became to be formally regulated, people of great wisdom, integrity and social acceptance used to be asked to help the courts or to plead before them. But, since women were not thought to be worthy of possessing the kind of wisdom a society needs to progress further, wise women were not asked to be the pleaders at the outset. Law was a male-centric activity. The Indian High Courts Act, 1861 (commonly known as the Charter Act), passed by the British Parliament, enabled the Crown to establish High Courts in India by Letters Patent and these Letters Patent authorised and empowered the High Courts including the Calcutta High Court (and for that matter the then Dacca High Court) to make rules for advocates and solicitors. Under this system, Ms. Cornelia Sorabji is reportedly the first Indian woman to be called to plead, on an *ad hoc* basis, before a British court in India in 1896 (Mossman 2006: 2-3).<sup>7</sup> The Allahabad High Court enrolled Ms. Sorabji in 1921, thus paving the way for the entry of women into the legal profession in this region.

Perhaps the first law relating to legal practitioners in British India is *the Legal Practitioners Act, 1879*.<sup>8</sup> This law did not spell out any provision regarding the capacity of women to enter the legal profession. Nor was there any woman who was reportedly admitted to any bar until 1921. In such context, *the Legal Practitioners (Women) Act 1923* (Act No. 23 of 1923) was enacted which provided that, no woman can be disqualified by reason only of sex. It is interesting to notice that this the Act of 1923 prohibiting gender-based discrimination in the legal profession coincides the

<sup>4</sup> In order to be able to practise before the High Court Division, an advocate has to have a standing of at least 2 years (in some cases 1 year) in any local bar.

<sup>5</sup> In addition, there are some advocates called 'advocates on record' who are attached only to the Appellate Division to 'instruct' the pleading advocates while filing any petition with the Appellate Division.

<sup>6</sup> Unfortunately, however, there is no available research on this in Bangladesh. For a helpful source, see Schmitthener (2005).

<sup>7</sup> It was no surprise that Ms. Sorabji was called to plead before a court because she was the first woman to study law at Oxford (at Somerville from 1889 to 1892) achieving a third-class honours in the Bachelor of Civil Law (BCL) examinations (Mossman, 2006: 203).

<sup>8</sup> Act No. 18 of 1879. This was followed by the Bombay Pleaders Act, 1920 (Act No. 17 of 1920). In India, the Indian Bar Councils Act, 1926 (Act No. 38 of 1926) first provided for the central and state-level Bar Councils for the regulation of advocates.

history of women entering the legal profession in 1922 in Britain,<sup>9</sup> the country that has most influenced the legal professions in the India-Pakistan-Bangladesh subcontinent.

Thus, by the early 1920s, when there was no 'constitutional equality clause' for the British colonies, it became clear that women wishing to take up the legal practice had a right not to be discriminated. *The Legal Practitioners (Women) Act 1923* has been repealed, for Bangladesh, by the Legal Practitioners and Bar Council Act, 1965 of the then Pakistan, which along with Pakistan's Constitution prohibited gender-based discrimination in the legal profession.<sup>10</sup> After its independence in 1971, Bangladesh enacted the *Bangladesh Legal Practitioners and Bar Council Order 1972* to regulate the legal profession, which provides that, no woman shall be disqualified for the legal profession by reason only of her sex.<sup>11</sup>

### **The Issue of Gender in the Legal Profession in Bangladesh<sup>12</sup>**

In Bangladesh, there is hardly any debate on gender-discrimination within the legal profession, let alone any thoughtful writing or any serious research, although law journals and books contain some good work on the gender issue generally.<sup>13</sup> Compared to that, the role of gender in the legal profession, especially in leadership roles, occupies a significant position in legal scholarship in the west.<sup>14</sup>

In the long forty years of the post-Independence legal profession in Bangladesh, women have earned many achievements. However, these achievements had to be earned with much labour, vigour, patience and perseverance. As the following discussion will bring to light, there is hidden discrimination against women who are in the legal profession.

Women in Bangladesh are not seen in enough numbers in leadership roles within the legal profession. Even, law is still not a usual subject for many girls coming to study at universities. In the post-independence history of Bangladesh, no woman has ever been appointed as the Attorney-General or even the Additional Attorney-General, although women lawyers have achieved the posts of assistant and deputy attorneys general. While there are female-judges both in the lower and higher judiciary, no woman has so far been appointed as Chief Justice or the Registrar of the Supreme

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<sup>9</sup> The Sex Disqualification (Removal) Act 1919 paved the way for the women to enter the legal profession in the UK, and Carrie Morrison was the first woman to be admitted as a solicitor (Auchmuty, 2011: 223-24).

<sup>10</sup> After its independence in 1947 India too repealed the Act of 1923 by the Advocates Act 1961.

<sup>11</sup> See article 28. This Order repealed the Legal Practitioners and Bar Council Act 1965.

<sup>12</sup> The factual accounts given and analyses made in this and the following parts are based on the survey I conducted amongst lawyers and judges as well as personal interviews of some select advocates.

<sup>13</sup> To my knowledge, the present paper is the first-ever essay on gender and legal profession in Bangladesh. This is, however, an inadequately serious work. Further socio-legal research should be taken to chart the position and impact of 'sexism' or 'genderness' within the Bangladeshi legal profession. But see a somewhat relevant work on the life and work of the first woman judge in Bangladesh by Karim (2009). Further, there is also a dearth of literature on status/treatment of women under the law in Bangladesh. But see Sobhan (1978; 2004); Khair (1999); and Monsoor (2001).

<sup>14</sup> The literature on women's inequality in the legal profession is extensive, but see Buckley (2008); ABA (2006); Schultz and Shaw (2003); and Brockman (2001). There are even many specialist journals on the 'gender and the law' issue in the USA and elsewhere in the West. My quick search has found around 20 such journals in the USA alone. See, for example, *the Duke J. of Gender Law and Policy*; *Texas J. of Women & the Law*, *Harvard Women's L. J.*, and *Yale J. of Law and Feminism*.

Court. Nor has any woman ever been appointed as the Secretary in the Ministry of Law and Justice.

Since Bangladesh's independence, senior lawyers have been appointed Law Minister. However, no woman advocate has, to this date, been appointed Law Minister or the State Minister for Law. It is notable, however, that in the present Cabinet there are three female ministers who happen to be advocates of the Supreme Court.<sup>15</sup> Also, the Bangladesh Law Commission has not yet had any woman commissioner.

At the level of activism by the Bar Council or the Supreme Court Bar Association against gender-based discrimination, neither of them has really been serious on the issue of gender diversity in the legal profession or protection of women-lawyers generally. The Bangladesh Bar Council has a human rights committee, but it does not have any special equal rights committee. The Council has not yet reportedly done anything visibly to promote gender diversity within the legal profession or to suppress the discriminatory environment against women lawyers. For example, amongst the 15 members of the present Bar Council, only one woman, Ms. Tania Amir, has been elected as a member. Ms. Amir is the first woman to become a member of the Bar Council in the forty years of its history. Nor has been any woman-advocate appointed thus far as a member of any Tribunal of the Bar Council that adjudicates allegations of professional misconduct against lawyers. Another example of inaction on gender-grounds by the Bar Council is that, even after a Supreme Court decision to formulate an anti-sexual-harassment committee/policy in every working place where women work, the Bangladesh Bar Council has not yet reportedly formed any such committee.<sup>16</sup> The SCBA has not constituted such a mechanism, either.

Interestingly, there is no apolitical women lawyers' organisation in Bangladesh.<sup>17</sup> The Bangladesh National Women Lawyers' Association (BNWLA), formed in 1979, is not such an organisation to promote and protect the interest of women lawyers. Rather, it is a civil society organisation (NGO) with a motto to protect and promote legal rights of women and children and 'gender equality' in society. On the other hand, the Bangladesh Women Judges' Association (in which the current membership is 244), the first-ever organisation of its kind, was not formed as an independent local entity but rather as a chapter of the Internal Association of Women Judges (IAWJ) that was formed in 1991 with judges of all levels as members from across the world with a commitment to 'equal justice'. However, the Bangladesh Women Judges' Association symbolises the unity of a section of judges for the protection of rights of women judges

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<sup>15</sup> They are Advocate Sahara Khatun, Dr. Dipu Mony (a medical doctor with an LLM from the University of London), and Dr. Shireen Sharmeen Chowdhury. During the second martial law regime in the 1980s, one woman-lawyer, Ms. Rabia Bhuiyan, was appointed the Minister for the Women Affairs (1984-1986).

<sup>16</sup> In *BNWLA v Bangladesh* (2009) 14 BLC (HCD) 694, the Court held that, "since the Constitution [...] ensures gender equality [...], it shall be the duty of the employers and *other responsible persons in work places*, and the authorities of all educational institutions to maintain an effective mechanism to prevent or deter the commission of offences of sexual abuse and harassment [...]."

<sup>17</sup> There are some women lawyers' forums, which are affiliated with major political parties. An example of it is the *Jatiyatabadi Mohila Ainjibi Front* which is an association of pro-BNP (Bangladesh Nationalist Party) women lawyers. Needless to say, these associations serve the interests of political parties.

and hence against any kind of gender-discrimination in the profession, say, for example, in the posting of judges to different positions.<sup>18</sup>

As noted above, there is no legal bar for women to enter the legal profession or to take up any leadership role therein. As briefly shown above and as we shall see further below, some women, albeit belatedly, have achieved leadership roles as lawyers. Nonetheless, this success in law does not necessarily mean that there is no discrimination, harassment and injustice against women within the legal profession.

### **Statistics: Locating 'Gender' in the Legal Profession**

In addition to the information as regards the roles and positions of women in the Bangladeshi legal profession, this part takes up the statistics again with a view to giving a glimpse of the role of women in the legal profession. While doing so, I will also bring in analyses of the concerned overt and subtle/background factors wherever relevant.

### **Women Practising Law in Courts**

During the early 1950s (in 1953, in exact terms) there was reportedly only one female lawyer in the then 'Dacca High Court' who used to not practise.<sup>19</sup> The first historic female name in the legal profession is Ms. Salma Sobhan (1937-2003). Ms. Sobhan was the first Bangladeshi (the then first East-Pakistani) woman barrister to be called to the English bar in 1959 at the age of 21 (Khondker 2004).<sup>20</sup> She studied law in Cambridge during 1955 to 1957. She then joined the legal profession but did not continue practice for too long. Ms. Sobhan then joined legal academia and happened to be the first female law professor in the Independent Bangladesh, teaching at the University of Dhaka. In 1982, she resigned from the law faculty to form what is today a leading human rights organization *Ain o Salish Kendra*. For several years, Ms. Sobhan edited a law report, the Bangladesh Supreme Court Reports (BSCR) (1981 to 1988), published by the Bangladesh Institute of Law and International Affairs and thus was the first woman-editor of any law report.<sup>21</sup>

Reportedly, the first practising woman-lawyer to be in legal practice thoroughly has been Ms. Rabia Bhuiyan, also a historic name for the Bangladeshi legal circles, who joined the District Bar in 1967 and the High Court Bar in 1969. Ms. Bhuiyan became an English barrister in 1973, when she returned home to resume legal practice. During the time of Barrister Rabia Bhuiyan, there were three other women-advocates

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<sup>18</sup> Most of the respondents of my survey told that, this Association was not formed out of a sense of 'insecurity' amongst women judges, although such a sense does prevail actually. Women judges themselves think that this Association is formed for their social and legal advancement. As an example, they cite the Association's role in extending the maternity leave from 3 to 6 months.

<sup>19</sup> Information given by Dr. Rafiqur Rahman, a senior counsel of the Supreme Court, in a personal interview with me in Dhaka on 26 August 2012.

<sup>20</sup> Salma Rasheeda Akhtar Banu, known as Salma Sobhan, was born in London in 1937 and was educated in England. Her father was the first foreign secretary of Pakistan and her mother was one of the first two women members in Pakistan's Constituent Assembly, who also later became an Ambassador. Huseyn Shaheed Suhrawardy, former Prime Minister of Pakistan, was her maternal uncle while Justice Hidayatullah, former Vice President and Chief Justice of India, was her paternal uncle.

<sup>21</sup> The second woman-editor of any law report was Dr. Shireen Sharmin Chowdhury, who edited for several years the *Bangladesh Legal Decisions* (BLD).



who practised law intermittently, of whom Advocate Kamrun Nahar Laily was also a notary public (reportedly the first woman-notary).<sup>22</sup> At the Supreme Court-level, Ms. Sigma Huda is another famous female name in the legal profession, who happens to be one of the pioneers for the follower women-advocates who joined the legal profession later. Ms. Huda enrolled as an advocate in 1970 just a year before Bangladesh's independence, and is quite active in practice up to this date.

In 1972, immediately after Bangladesh's independence, 2 female advocates as against 172 male lawyers enrolled with the Bar Council. Of these two female advocates, Ms. Momena Khatun<sup>23</sup> became forgotten in the legal profession – no one knows anything about her, which appears to be a case similar to the life-history of Ms. Bebb in the UK who in effect opened the legal profession to women there. The other woman, Ms. Nazmun Ara Sultana is today's history-making judge on the Supreme Court. In 1972, she was the first woman to be enrolled as an advocate in the Mymensingh District Bar. Those were undoubtedly hard days for a Muslim woman to show the courage or, as some might even say, 'the audacity' to practise law in crowded courts along with male colleagues. This is well-captured by a commentator, Karim (2009: 68):

Justice Nazmun Ara joined the Mymensingh bar in 1972 as its first female advocate. The social reaction was far less than welcoming, however. Even to this day, a subtle yet perceptible stigma exists in the workforces in Bangladesh, where a female has to frequently travel an extra mile to set herself in equal footing with her male counterparts. Understandably, the situation was rather dire some thirty-odd years ago. Petty provincial prejudice prevented a number of people from accepting a young female as a practicing lawyer. Some even had the audacity to come to her house and rebuke her mother! Fortunately though, her family stood firm behind her *choice* to pursue a career in law (*emphasis supplied*).

It is relevant to mention here that, 'choice', as noted in the above quote, is an important driving force behind Justice Sultana's rise to the pinnacle of the profession. In traditional Bangladeshi societies, choices of women used to, and still continue to be, dominated by male-members of family and society. This male-dominance over the women's career-choices, as we shall see below, is one of the culpable reasons behind the inadequacy of number of women practising law in today's Bangladesh.

Like any other country, the number of women taking up the legal profession in Bangladesh increasingly began to rise since the 1980s.<sup>24</sup> Unfortunately, however, the number is still very low, compared to the situation in other countries, including the neighbouring country India. In the Bhola District Bar Association, for example, there is

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<sup>22</sup> The other two advocates were Ms. Ayesha Siddiqua and Ms. Meherun Nessa. I sincerely thank Barrister Rabia Bhuiyan for this piece of information.

<sup>23</sup> According to the Bar Council, Ms. Khatun was the only woman to be enrolled with the Bar Council in 1972. However, Justice Nazmun Ara Sultana was also reportedly enrolled in 1972, which she personally confirms. See also Karim (2009).

<sup>24</sup> Ms. Fawzia Karim Feroze joined the bar in 1982, being the first amongst the women with an LLB Honours degree from the University of Dhaka. In fact, the number of women lawyers in Bangladesh began to increase since the 1990s.

currently only one non-practising female member. In the same way, in the Cox's Bazar District Bar, which was established in the British-period, there are only 10 women lawyers. As of today, only about 10% of the advocates (approximately 30,000) in Bangladesh are women. This does not, however, mean that those women-advocates enrolled are all active in legal practice. In the first part of 2012 (2 April 2012), 3001 advocates enrolled with the Bar Council, among whom approximately 300 are women.<sup>25</sup> By any standard, this increase in the number of women lawyers from <0.5% in 1972 is anything but a 'revolution in number.' It is undeniable, however, that even this level of rise in the number of women taking the law as a profession is quite significant in view of the prohibitive social culture and restrictions vis-à-vis women legal practitioners.

Let us now consider the position of women in leadership roles within the legal profession. The account given here is, however, a partial picture. In the present Supreme Court Bar Association Executive Committee (2012), there are five women members,<sup>26</sup> while back in 1972 there was no female member in the Committee. The number of executive members in the SCBA Committee is 7, and 8 women (out of 14 candidates) ran for the elections. The rate of nomination for the Bar Committee membership seems to be 28.6%, while the rate of passage in election for women is 62.5%. Despite this high electoral success, the reality is that no woman lawyer seemed 'qualified' to have a nomination for the leadership posts of the Committee such as the post of President or the Secretary. As such, since the inception of the SCBA in 1947 no woman has ever been elected (or nominated for election) as its President or Secretary. As noted above the first woman-member in the history of the Bar Council has been elected only in July 2012. The question remains whether this subtle discrimination can be attributed to male-biasness of those bar leaders and politicians who decide and influence the list of candidates or to a generally held gender-based stereotyping that the roles of politically important President/Secretary of the SCBA or of senior officer-holders of the Bar Council are too 'tough' roles for women to play.

### **Women in the Judiciary**

The Bangladeshi Judiciary is often known as the lower judiciary and the higher judiciary, the latter comprising only the Supreme Court of Bangladesh. The judges at the level of junior or trial judiciary are also called the career judges as they are appointed after having been selected through a competitive screening test. Ms. Nazmun Ara Sultana, now Justice Sultana on the Supreme Court, was the first female career judge to join the Bangladesh Judicial Service in 1975 and also the first woman to become the District Judge, the senior most position of the District judiciary, in 1991. She is also reportedly the first woman judge in the entire history of Bangladeshi judiciary since 1947.

Presently, there are approximately 345 women judges against approximately 1150 male judges, which is about 35% of the total number of judges. In the first batch

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<sup>25</sup> These are estimated or approximate accounts. The Bangladesh Bar Council could not provide any exact data.

<sup>26</sup> They are: Advocates Shahanara Pervin, Jahanara Pervin, Jubaida Pervin, Syeda Sabina Ahmed, and Jannat Sultana Mukta.

of career judges selected by the Judicial Service Commission (JSC) in 2008 after the separation of lower criminal judiciary from the executive organ of the State in November 2007,<sup>27</sup> there were 100 female entrants out of the totality of 394, which is about 25.4% of the total judges. In the 5th intake of judges selected through the competitive test conducted by the JSC in 2011-2, this percentage rose to more than 27% (35 women out of 129 judges). Against this, the percentage of female judges was less than 0.30% in 1972.

Justice Nazmun Ara Sultana was the first woman to be appointed as a Judge of the High Court Division of the Supreme Court in May 2000. Justice Sultana was also the first lady justice ever to be appointed in the Appellate Division of the Supreme Court in 2011. She is the first judge of the Supreme Court from amongst the career judges, while Ms. Salma Masud Chowdhury was the first woman to be appointed to the High Court Division of the Supreme Court from amongst the practising advocates in 2002.

In the Supreme Court, there are currently 6 female judges of whom one is in the Appellate Division and the others are in the High Court Division.<sup>28</sup> Of these six Supreme Court judges, 3 were drawn from the bar, of whom two happen to be daughters of former judges of the Supreme Court, and the other has been the daughter of an influential politician-advocate cum former Member of Parliament. By providing this bibliographical fact, I do not mean in any way that they are deficient in qualification to become judges of the Supreme Court. By contrast, they are perfectly qualified for the post of Supreme Court judges: two of them have first class law degrees<sup>29</sup> and all of the three judges have both graduate and post-graduate degrees in law from Dhaka University. It is, however, undeniable that the biographical links do often influence the policy-makers who decide who will sit on the nation's top court. Also, it is not known whether, while elevating female career judges to the Supreme Court the policy-makers were in any way influenced by some pressure/lobbying from any sector or whether the Government was motivated with an absolute good faith that diversity in the judiciary should be increased and maintained.<sup>30</sup>

### **Women in the Legal Academia and Female Law Graduates in Bangladesh**

In Bangladesh, on average 30% of the legal academia are women. Amongst the law faculties of the two major universities of the country - Dhaka and Chittagong Law Schools, for example, respectively 33.36% and 24% are women. At present, of the 33 members of the Dhaka University Law Faculty only 12 are women, while the number of female members in the Chittagong University Law Faculty is four out of 17

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<sup>27</sup> Before 2007, lower court judges were used to be selected by the Public Service Commission and they were treated as members of Bangladesh Civil Service for the purpose of appointment.

<sup>28</sup> One woman-judge who was appointed as an additional judge to the High Court Division for 2 years was not later appointed as a permanent judge after her provisional tenure.

<sup>29</sup> One of these two judges has an LLM from Columbia University and a PhD in law from South California University.

<sup>30</sup> It would not be completely out of place to mention that, amongst the law clerks of the advocates, there is reportedly very poor representation of women. Also interestingly, throughout the country there are reportedly no woman-peshkar (administrative officer) in the lower judiciary. In the High Court Division of the Supreme Court, too, there is no female principal bench officer.

members. Notably, however, with the increase of new law schools at both private and public universities, women are joining the legal academia in greater number than before.

As mentioned above, the first woman to teach law at the University level was Ms. Salma Sobhan, while the first female dean of law was Dr. Taslima Monsoor at the University of Dhaka who was elected a dean in early 2002.

In order to have an idea of the number of women joining the legal profession, we now turn to a few selective accounts of career-choices of female law-graduates from three leading and old law schools.

To take a representative example from the Dhaka University Law School, in the graduation year of 1984, the number of female law-graduates was 20. Of them, three are in legal practice, one joined the judiciary and two joined legal academia. For Rajshahi University Law School, 9 female law-students graduated in the year 1988. Of them, two are in legal practice, one in the judiciary, and two joined human rights organisations. From the University of Chittagong, 9 female law-graduates passed out in 1996, of whom two have been teaching law at universities (at home and abroad) but none has been practising law and none has joined the judiciary. This sample does not provide the whole picture of the scenario. However, in order to have a glimpse, these figures can be seen in terms of percentage. It seems that, only 13% per cent of the female graduates do join the legal practice, while 5% join the judiciary and another 10% join the legal academia. This means that, around 70% of female law graduates opt for other professions such as development practice, corporate jobs, business, and so on.

### **Women Lawyers in Development Practice and Social Actions**

A number of female lawyers are active in development practice and social legal movements, working with non-government organisations, government organisations, and development organisations such as the USAID, DFID, UNHCR, ILO, UNICEF, UN Women and so on. One can debate whether the term legal profession includes the law-job in such organisations. The fact, however, remains that, in most cases female lawyers are recruited by these organisations for a kind of legal job beyond the court.

Further, a number of women-lawyers are working in human rights and legal aid organisations, prominently in Ain o Salish Kendra (ASK), BNWLA, Bangladesh Environmental Lawyers Association (BELA), BRAC, and so on. As regards the nature of job of the female advocates with non-government human rights organisations, one discernible trend is that some are engaged in private legal practice and at the same time serve such organisations as legal advisers. There are some others, such as those lawyers in BELA, who are in full-time positions in such NGOs but represent their organisations as advocates in court litigations.<sup>31</sup> Another trend is that there are female lawyers appointed as legal officers or legal advisers but who do not practise law in courts.

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<sup>31</sup> For example, Syeda Rizwana Hasan, the Executive Director of BELA often argues the cases filed by BELA.

## The Hidden Discrimination or the 'Implicit Gender Bias'<sup>32</sup> in the Legal Profession

As noted above, there seems to be no prima facie gender bias in the Bangladeshi legal profession, which is clearly prohibited in the law. Article 28 of the Legal Practitioners and Bar Council Order 1972 provides that, "[n]o woman shall be disqualified for admission to be an advocate for reason of her sex." This, however, only guarantees an equal right for women to enter the legal profession and does not in itself protect women from discrimination within the legal profession.

Beyond the legal profession, Bangladeshi women generally are officially guaranteed formal equality. The Constitution of Bangladesh, in article 28, expressly prohibits any kind of discrimination including gender-based discrimination, and guarantees women "equal rights with men in all spheres of the State and of public life".<sup>33</sup> Unlike the statute of 1972 governing Bar admission, this constitutional equality clause, combined with the equal legal protection clause,<sup>34</sup> encompasses any kind of discrimination, implicit or explicit, against women in any occupation including those in the legal profession.

Alongside the formal guarantee of general equality, the courts of law have largely drawn a broader view of the concept of equality in dealing with legal challenges on the ground of discrimination.<sup>35</sup> Of course, there are instances of applying the law from a gendered framework of understanding and construction (Khair 1999: 157).<sup>36</sup> In *Sayeeda Rahman Malkani v The Government of Bangladesh* (1977),<sup>37</sup> for example, the Supreme Court refused to hold unconstitutional a legal provision that disallowed any woman married to a foreigner to pass her nationality to her children.<sup>38</sup> "The judge agreed that the Constitution would appear to have empowered the judiciary to have found in favour of [Ms. Malkani] but he preferred that the Legislature should take this step" (Sobhan, 2004: 49). However, "[d]espite the fact that paternalistic assumptions have long influenced lawmaking and public decision-making including judicial decisions", the Court has generally applied the constitutional equality clause quite assertively (Hoque, 2011: 124). On several occasions, the Supreme Court has struck down gender-based discriminatory actions. In the case of *Bangladesh Biman v Rabia Bashri Irene* (2003),<sup>39</sup> the Court declared unconstitutional a public body's fixation of

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<sup>32</sup> This phrase is taken from Levinson and Young (2010).

<sup>33</sup> Article 28 (2).

<sup>34</sup> Ser article 27 (*Equality before law*): "All citizens are equal before law and are entitled to equal protection of law".

<sup>35</sup> It is interesting to note that, there seems to be no court challenge that involves gender-discrimination in the legal profession.

<sup>36</sup> Khair (1999: 157), as regards the adjudicative results in cases involving violence against women, had this to say: "[...] the legal process is also paternalistic in its approach and tends to personalise women's problems in keeping with popular social demands that exhort women to suffer in silence. As such judicial decisions have traditionally tended to weigh against the woman by giving the man the benefit of doubt".

<sup>37</sup> Writ Petition No. 3192 of 1977 (unreported judgement of the High Court Division).

<sup>38</sup> The Citizenship Act 1952 (which gave this right to a Bangladeshi male citizen married to a foreigner). This inequality has recently been removed by amending the Act.

<sup>39</sup> (2003) 55 DLR (AD) 132 (DLR = Dhaka Law Reports).

differentiated retirement- ages for male and female flight attendants. In another famous case, *Shamima Sultana Seema v Bangladesh* (2005),<sup>40</sup> the Court declared unlawful a scheme of the allocation of differentiated functions and unequal 'remuneration' for women commissioners of Khulna City Corporation, a local government body, who were elected from the 'reserved seats'. In this case, interestingly, the Court took up a pedagogic role, "seeking to educate the government about its protective duty towards women in an egalitarian welfare state like Bangladesh. It emphasised that a dynamic rather than technical approach to the constitutional concept of gender equality was to be cultivated, and wished a change in societal attitude towards women (Hoque, 2011: 124)".<sup>41</sup>

As the above account reveals, neither the Constitution nor the anti-discrimination court jurisprudence could prevent implicit or tactical discrimination against women in the legal profession in Bangladesh. It is seen, for example, that in leadership roles, women-advocates are less visible. Internal male-dominated politics of different professional forums as well as ideology-inspired government decisions have prevented them from rising to leadership roles.

Without repeating the facts described above, one should recall that no woman-advocate has until today been nominated for or elected into the top-level positions of the Bar Council (and within its committees and tribunals), the Supreme Court Bar Association, and other legal forums. As we have seen, three women with legal professional qualifications have been appointed ministers in the present Government, but the minister and the state minister for law are male-advocates. By the same token, although there are senior women judges in the District judiciary, no woman-judge has ever been appointed the District Judge for Dhaka or the Chief Metropolitan Magistrate in any metropolitan city. The policymakers consider these posts to be the 'sensitive posts', perhaps not worthy of being staffed by women.

Needless to say, these are instances of tacit gender-discrimination practised institutionally at the high-level policymaking arena. One reason for this state of affairs may be that women-advocates for these political or politically important positions are not adequately trusted or considered capable enough. Male-biasness may also be witnessed amongst the minds of individual legal leaders or legal policy-makers. One tentative example of this kind of bias is perhaps reflected in the fact that, the Chief Justices of Bangladesh have tended not to nominate any woman-judge to the enrolment committee of the Bar Council for the purpose of selecting new entrants to the legal profession or the 'High Court advocates'. Similarly, patriarchal attitude of the male judges of the Supreme Court can perhaps be read from the fact that they rarely invite any female lawyer to appear in any case as *amicus curiae*, a call that is considered highly prestigious for lawyers.<sup>42</sup>

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<sup>40</sup> (2005) 57 DLR (HCD) 201.

<sup>41</sup> For details, see the judgment in (2005) 57 DLR (HCD) 201, at 212-13.

<sup>42</sup> As far as my personal knowledge goes, only three women-advocates have been till date invited to be the amici curiae: Ms. Rabia Bhuiyan, Ms. Sara Hossain, and Ms. Syeda Rizwana Hasan.

My survey reveals that female advocates face discrimination from both clients and colleagues. Some 'senior'<sup>43</sup> male colleagues reportedly engage their junior female lawyers only in drafting legal documents ('chamber practice') rather than sending them to courts to argue any case. Some other 'seniors', who are few in number though, do use directly discriminatory words towards their junior female colleagues. On the other hand, Bangladeshi clients prefer male-lawyers to women lawyers generally, and when they approach women advocates they do so because, they think they can pay them less than they will have to pay any male-advocates.<sup>44</sup> Let us take a glimpse of the picture of court-appearances of women lawyers before the Supreme Court by way of a sample-inquiry. Amongst the 88 cases/judgments of the Supreme Court reported in the *Bangladesh Legal Decisions* in 2011, women advocates appeared in 47 cases that were argued by only 26 women-advocates. Of the 47 cases, only two cases before the Appellate Division, the top most court, were argued by two female advocates.<sup>45</sup>

In the following part, we reflect upon certain reasons that may be held responsible for the implicit gender-biasness in the legal profession in Bangladesh.

### **Reasons for the Hidden Gender Bias: The 'Culture' Factor and Beyond**

The above shows that, despite the constitutional guarantee of equality, tacit discrimination in varied forms against women in the Bangladeshi legal profession persists. In this Part of the article, I shed some light on the probable reasons that generate, maintain and perpetuate this 'gendered' scenario.

One telling argument of the feminist legal scholars as to why discrimination persists even in societies that recognize *de jure* equality is that, "law in its actual functioning discriminates against women because legal agents interpret laws in patriarchal ways" (Menon, 2004: 4). As regards our case of the role of gender in the legal profession, there has been little or no occasion of interpreting the law with a bias-against the women advocates. However, generally, the 'ideology' that many laws behold is patriarchal (Khair, 1999) and, despite the instances of recent gender-sensitive court decisions, any keen observer may locate gender-biasness in some judicial pronouncements. It can be argued that such a scenario within the legal system may influence the mental make-up of the persons charged with decision-making as regards women advocates/judges.

This leads us to take a view that the core reasons why there are still such a quite small number of women-lawyers in Bangladesh or why women-advocates depart from

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<sup>43</sup> This means the advocates in whose chambers junior/ trainee lawyers work, and not necessarily the 'senior advocates' designated as such by the Chief Justice.

<sup>44</sup> A recent Indian survey, conducted in a wider and a more systematic way, interestingly unravels similar kinds of discrimination against women lawyers in India. See Makhija and Raha (2012).

<sup>45</sup> As my survey shows, some female-lawyers have received more briefs than others because of, among other things, their political and family connections.

the profession more often than their male colleagues (Kay 2004: 110)<sup>46</sup> may be grounded in the social culture tainted by patriarchal beliefs and gendered stereotyping. As we shall see below, this state of affairs may also be explained by some other factors such as, for example, the inadequacy of 'shining' women lawyers or judges or even the size of the family of which a woman is a member.

The question of why there are fewer females in the legal profession can partially but significantly be answered by looking at the image of women's position in any other profession. The patriarchal society still typifies jobs by classifying some of their kinds as worthy of being done by persons of softer hands, passionate minds and loving hearts, that is, women. This being the case, the families of the women aspiring to join a profession or rise up the ladder of the career often influence and in some cases manipulate the free choices of the women. The intervention with the choice of women begins at the early days of their education. In Bangladesh, during the early 1950s, for example, even the female Muslim students entering the University of Dhaka were to give an undertaking to wear head scarf. During this period, no girl students were allowed to talk to their male friends without the prior-permission of the Proctor (Khatun, 2012: 121). At this time, only a limited number of courses were thought to be the right subjects for the girls to study. Moreover, the law course was not even opened in any university during this time. Law could be studied only in law colleges in which classes were taught during the evening hours. These disadvantages, combined with the inhibition that the legal profession is not a befitting vocation for women, led to the creation of a small number of women advocates in the country.

The damaging patriarchy (*see* Chowdhury, 2009) has emerged as a reason also for the departure of women advocates from the legal profession. We have already shown that this is a reason why women advocates in Bangladesh are not seen in leadership roles in enough numbers. During the survey I conducted, the male lawyers tended not to be willing to respond to the survey altogether or to the questions relating to discrimination against women advocates. While this does not, in any way, mean that male colleagues are not supportive and pedagogic to female advocates, this fact of disinclination perhaps suggests that male advocates generally refuse to accept that women advocates are discriminated.<sup>47</sup>

Apart from the above broad-based and systemic factors, the following are identified as factors or reasons that explain the lower rate of women entry into the legal profession or the women-advocates' less visibility in the leadership roles or relatively less briefs, and the relinquishment of the profession:

- the crowded environment of the courts and the absence of women-friendly facilities

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<sup>46</sup> This may also be the case in other societies. For example, a Canadian report (Kay, 2004: 110) states: "Women are more likely than men to leave the practice of law. Women are less likely to enter law practice after bar admission, and more likely than their male colleagues to leave law practice in subsequent jobs."

<sup>47</sup> On the other hand, almost all the female respondents have reported that they think that their male colleagues do not want to see women in leadership since it is their conviction that women lack the leadership-capacity.



- sexual harassment or stalking by colleagues, or clients or others
- the difficulty of balancing career and family life (or the expansion of family responsibility)
- decline of professionalism, reputation, and ethics
- absence of income and lack of remuneration paid by the 'seniors' in the early years of the profession
- lack of enough role-models in the legal profession
- failure to keep up with technology and changes in law
- the nature of the work involving much labour
- availability of alternative careers with relatively more remuneration (at the early stage of career) and time-flexibility

Now, reflections may briefly be made on some of the above factors that retard the growth of women's legal practice in Bangladesh. The physical environment of most courts in Bangladesh is extremely unwholesome and indeed not friendly for women. In particular, Dhaka and Chittagong court premises, the two largest courts, do hardly have any space even for breathing. The court buildings lack healthy lavatories and refreshing facilities for lawyers. In no court premises, there is any support that accommodates women's family responsibilities, such as any day-nursery facilities.

The non-physical environment of the court premises also constitutes another disincentive for women legal practitioners. The attitude, body-language and behaviour of male lawyers, judges, court-officials, law clerks and even clients are such that a women lawyer cannot win a case or does not have the necessary skills to handle a case properly.<sup>48</sup> There is also the allegation of sexual harassment of women lawyers. One reason why women-advocates entering the legal profession leave is sexual harassment. All the respondents of my survey told that, sexual harassment exists within the legal profession. Very often women junior lawyers face sexual harassment from their 'seniors' either of their own chambers or from outside of the chambers. All the respondents but one confirmed that they knew some one leaving court practice for the reason of sexual harassment.<sup>49</sup>

The difficulty of balancing career and family responsibilities is a "pressing issue" for many women-advocates across the world (Kay, 2009: 9).<sup>50</sup> In the culture-bound Bangladeshi society, it is very difficult for a woman-advocate with family responsibility or children to continue with the hard work of legal practice. In such a case, the family often insists on her either to quit or to go for an 'easy job'. Success in

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<sup>48</sup> It is relevant to mention that, such kind of prejudice was present amongst many in the early days of women entering the legal profession across the world, which unfortunately still persists in some societies including Bangladesh. Justice O'Connor (2001: 189) quotes one Even Clarence Darrow, one of the most famous champions of unpopular causes at his time, as saying: "You [women] can't be shining lights at the bar because you are too kind. You can never be corporation lawyers because you are cold-blooded. You have not high grade of intellect. I doubt you can ever make a living."

<sup>49</sup> I know personally two women-lawyers who have left the profession specifically for unsocial behaviour and demeaning comments of the fellows, of whom one joined a multinational corporate firm as a lawyer and the other joined a legal rights-NGO. Interestingly, most of the women lawyers who appoint female clerks are thought to be doing so in order to avoid unacceptable behaviour of male clerks.

<sup>50</sup> For a general view of this problem, see English (2003).

the legal profession depends on how much time one can give not only during court hours but also thereafter at homes or at chambers in the evening. In this job, there is thus virtually no scope for a woman with a child to take even maternity-leave. These are factors that dissuade certain women, after their bar admission, to either commence legal practice or to leave it soon after they have entered it. Some of my interviewees have confirmed that they left the legal practice for the interest of their children or family, while some have returned to the profession after a long family break.<sup>51</sup> The difficult task of balancing private life and court-career is prevalent in any society tainted, at whatever degree, by patriarchy. The disadvantages for careers associated with motherhood, whether they are men-made or natural, are ubiquitous. It is for these private reasons that Ms. Bebb who famously helped to open the door of legal practice for women in England disappeared from the practice. Regarding this, Auchmuty (2011: 230) helpfully writes:

Her story shows that women's history is often going to be different from men's, because women have not found it so easy to escape the private dimension of their lives, or to rely on it to support the public dimension. This account of Miss Bebb's life raises a number of gender issues that are still relevant today – arguments about masculine and feminine roles and qualities, the 'choices' available to men and women, the political tactics adopted by feminist legal reformers (...) and, most tellingly, the defensive strategies employed by those [male lawyers] whose privileges are under threat.

Financial uncertainty is another potential reason that is more likely to incentivise women-advocates to look for other jobs. In Bangladesh, senior advocates pay almost nothing to junior trainee lawyers. The clients too do not like to engage any junior lawyer. The Bar and other forums do not provide any financial incentives to the new entrants. Nor are there adequate chances for young lawyers to work under the legal aid schemes, which would have earned them some emoluments.<sup>52</sup> Unless one has sufficient means or wealth from family or other sources, it is very difficult for one to survive in the legal profession or to bear with its early-day 'glorious uncertainties'. Besides, in the legal profession it usually takes much time for one to establish, which, is also a discouraging force. As such, there are few established and highly successful role models in the legal profession, which would have attracted young women to this profession. Needless to say, in order to make a career-choice, it matters a lot for the new-comers whether there are enough women-judges and enough senior women-advocates in practice.<sup>53</sup>

The degradation of professionalism and the over-politicisation of the legal profession in Bangladesh (see, e.g., *LawDev* 2009) also constitute a disincentive for aspiring women who might think of joining the legal practice. Despite many attractions

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<sup>51</sup> I know a woman-advocate, now teaching at a school, who was selected as a judge back in the mid-1980s but could not join the judiciary because her first child was below six months at that time.

<sup>52</sup> The Legal Aid Act 2000 only creates scope for lawyers with certain length of standing to work as legal aid panel-lawyers.

<sup>53</sup> Justice O'Connor (2003: 187), the first woman US Supreme Court judge, wrote: "Even today...I can still say that it matters a great deal to me to have a second woman on the Supreme Court".

of the legal profession that motivate young girl students and female law graduates to think of a career in law, the Bangladeshi legal profession has, in recent years, sustained a dent in its reputation.<sup>54</sup> There also is a widely held perception amongst the public that the lawyers earn money by excessively charging their clients and that lawyers are usually anti-poor. The decline of professionalism and the fact of over-flow of the profession with mediocre practitioners discourage young brilliant law graduates, including women, to come to the legal profession.<sup>55</sup>

## Conclusion

My aim in this paper has been to demonstrate that all is not well with women's participation within the legal profession. If one forgoes the notable instances of a few women rising to high positions or offices within the legal practice or in other areas of the legal profession, it can be safely concluded that legal profession in Bangladesh is a gendered profession. Although some may have different views, the above shows that the success of those few women in the legal practice is founded together on their talent, hard work and bibliographical background factors. This very fact means that there is a hidden male bias in the legal profession. As the facts and statistics provided above show and confirm, the implicit gender discrimination within the legal profession is in effect more pervasive than it is thought to be, and this helps sustain the continued subordination of women in the legal profession. The discrimination has its roots not only in society and in one's family, but also in the minds of brothers and sisters of the legal fraternity.

The present paper also stands for optimism for those women who are in the struggle against discrimination and injustice within the legal profession. The successful women legal professionals had the resilience, and gained skills to overcome the inhibitions and hurdles. The facts demonstrated above also serve to remind those of us involved in the current struggle that women usually have to fight for their rights, "and that reason and justice are often irrelevant in the face of institutional power" (Auchmuty, 2003: 230).

Many feel that there is some discrimination against women in the legal profession. But it seems that those in responsible positions feel uncomfortable to discuss and debate this inequality and inequity. The present paper, therefore, can be seen as an important call to the effect that the continuing 'subversion' of women in the legal profession must be taken seriously and needs to be addressed to forge the path towards gender equality. As this needs to be accomplished, further research should be

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<sup>54</sup> This claim is equally applicable to other legal professions such as the ones of India and the USA. O'Connor (2003: 223) writes about the American legal profession: "It is hardly a secret that many lawyers today are dissatisfied with their professional lives. The pressures associated with the increasing commercialization of law practice have made lawyers, as a group, profoundly unhappy a lot". As for India, the Indian Law Commission in its 14th (1958) and 184th (2002) reports respectively observed that, the legal profession in India is no more a 'distinguished public service' and is no more as attractive as it was before, and that there is some dilution in the quality of the legal profession.

<sup>55</sup> One can find this assumption (or the reality) as true while one pays attention to the fact that Bangladeshi women are generally more honest than men, and that they are more likely to be affected by professional erosion than men.

undertaken to explore the varying shades of discrimination and inequities women in the Bangladeshi legal profession are facing.

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## **Competing Model–*Nikahnamas*: Muslim Women’s Spaces within the Legal Landscape in Lucknow<sup>1</sup>**

Mengia Hong Tschalaer

### **Abstract**

*This paper delineates the growing women’s spaces within the legally pluralistic landscape of postcolonial India. Based on empirical data gathered in the city of Lucknow, Northern India, it explores the ways in which (i) Muslim women’s activists seek to carve out space for the creation of gender-just laws within a religious framework, and (ii) how within these women’s legal spaces, orthodox demarcations between secular and religious practice and legal authority become blurred. At the centre of my analysis are two women-friendly versions of the *nikahnama* (marriage contract), which stipulate conjugal rights and duties as well as conditions of divorce and financial support. This paper will contextualise and analyse these counter-hegemonic voices that address matrimonial rights - brought forth by two ideologically different Muslim women’s organisations in Lucknow. In so doing, this paper challenges simplified modernist accounts that depict secular conceptions of state law as incompatible with non-state religious law and norms. Conversely, this paper will demonstrate that current attempts by Muslim women’s rights activists to formulate gender-justice within the domestic sphere in fact, contribute to an emerging legal landscape of interlegality (Santos 1987/2002) - a field characterised by legal entanglements rather than parallel systems of law and morals.*

### **I. Introduction**

Within the last decade, India has witnessed a considerable proliferation of Muslim women’s activists and Muslim women-led organisations and networks that struggle for gender-justice and women’s rights within the framework of Islam. In the context of postcolonial India, little academic attention has been paid to these current efforts. Such a focus, however, would be an important contribution to scholarly debates on women’s rights and gender equality in India. Then within these debates, formal religion, and especially Islam, are invoked as barriers to modernisation and as institutional and ideological obstructions to gender-just legal reform.

This article challenges such simplified modernist accounts of gender equality and Islam that stress the dichotomy of non-state law versus state law, by highlighting recently renewed endeavours of Muslim women’s rights activists to re-articulate gender-justice within the framework of Islam. Based upon empirical material collected over the course of eight months of fieldwork in Lucknow,<sup>2</sup> northern India, this paper analyses attempts of two ideologically diverse Muslim women’s organisations, namely the All India Muslim Women’s Personal Law Board

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<sup>2</sup> The city of Lucknow, with its sizeable Muslim population, features a variety of Muslim societal organisations ranging from orthodox men-dominated institutions such as the All India Muslim Personal Law Board or the conservative All India Shia Personal Law Board to recently established Muslim women’s rights organisations. The latter category includes the progressive All India Muslim Women’s Personal Law Board and the secular Indian Muslim Women’s Movement (*Bharatiya Muslim Mahila Andolan*). Given this diversity of religious institutions concerned with questions around law, the city of Lucknow hence features a rich and complex legal pluralistic landscape that is ideal for the study of competing versions of Muslim family laws in terms of interlegality.

(AIMWPLB hereafter) and the *Bharatiya Muslim Mahila Andolan* (BMMA hereafter), to publicly contest the parameters of women's subjectivity within marriage under Islamic law through the release of their own Islamic marriage contracts (*nikahnama*).<sup>3</sup> In India, an official and recognised form of the *nikahnama* does not exist therefore there is no consensus on its stipulations. Muslim women's organisations have made use of this legislative void. In 2008 they have challenged orthodox and conservative discourses on matrimony brought forth by the religious clergy, which, they argue, deny Muslim women numerous rights inherently granted to them by Islam, with the proposal of a women-friendly model-*nikahnama*. These middle-class activists justify their demands for gender-justice by referring to both the Indian Constitution and the *Quran* in order to claim their rights as Muslim women as well as citizens of India. In doing so, they create a necessarily plural legal space that allows for the conceptualisation of the *Quran*, as well as state administered religious law and the Indian Constitution not as conflicting but as synergetic and as conducive to gender-justice (e.g. equality, dignity, equal legal protection by the state and anti-discrimination on the grounds of sex).

This struggle of Muslim women's activists for gender-justice in the domestic sphere reflects an increasing heterogenisation of Islamic ideology and practice underway within the Muslim community of postcolonial India. Gender equality in this context is uneven and complex, indicative of a multilayered process of negotiation within the broader, legally pluralistic landscape. The spaces being carved out by Muslim women's activists in Lucknow who employ their own model-marriage contracts arise from the momentum of the multilayered, trans-local struggles between a variety of societal actors on the question of 'what' is the correct interpretation of Islamic laws and on 'who' is authorised and legitimised to set the parameters of the conjugal relationship in Islam. This paper will provide insight into a small part of these institutional struggles concerning concepts of 'correct' and 'Islamic' interpretations of women's matrimonial rights. It intends to analyse the means by which Muslim women's activists challenge the concept of gender inequality as grounded in non-state legal practice and ideology. It will be illustrated that these particular female legal spaces are characterised by a cross-fertilisation of state-led and societal discourses on gender-justice within the domestic sphere. In this respect, the legal mobilisation of Muslim women in Lucknow contributes to a more openly emerging landscape of interlegality. This is a landscape where legal as well as social boundaries are porous and in flux, and where legal authority is constantly contested.<sup>4</sup>

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<sup>3</sup> The author has collected all versions of the model-*nikahnama* discussed in this paper. A *nikahnama* is a religious contract that can be oral or written. The written form of the contract becomes valid with the signature of the groom, of the bride, the bride's guardian and of the witnesses to the wedding. So, marriage (*nikah*) in Islam is viewed as the contractual agreement between the groom, the bride and the bride's guardian. For a Muslim wedding to take place, the bride and her guardian must both agree on the marriage. From a jurist perspective, the Islamic marriage contract has a rich socio-legal life. The Islamic marriage contract can be amended and altered as according to Islamic school, religious practice, individual needs and expectations, time and space. For instance, the law of countries such as Bangladesh, Pakistan, Sudan, Algeria, Iran or Tunisia recognises the right of the spouses to negotiate the terms of the marriage as long as they are not contrary to the textual sources of Islam, or, to the very meaning of marriage. There, couples have the option to negotiate and include a wide range of conditions to the marriage in their marriage contract (e.g. maintenance, employment options, place of residence, educational options, freedom to travel or visit relatives, division of household responsibilities etc.) In the city of Lucknow, as elsewhere in India, the most widely used form of the marriage contract is simple and contains no more than the name and the signature of the couple and the guardian of the bride, the witnesses to the ceremony and the *qazi* who has solemnised the marriage. In some cases, it lists the amount of money (*mehar*) awarded to the bride at the time of the marriage. This form of the written marriage contract can be purchased in the markets of old Lucknow for Rs. 10-50.

<sup>4</sup> The concept of interlegality, as conceptualised by Boaventura de Sousa Santos (1987/2002) defies legal centralistic approaches that assume the state's monopoly of the production of law. Interlegality also speaks against classic legal pluralism, which although it acknowledges various socio-legal systems, conceptualises state and non-state law as parallel systems of ethics and moral (1987: 280-281). Unlike these static approaches, interlegality stresses the porosity and fluidity of legal (and social) boundaries that results in the entanglement of legal codes and morals among the different legal systems. It promotes a view of law as fragmented and of normative orders as overlapping and competing rather than distinct (1987: 298).



In what follows, this paper first situates the two female versions of the model-*nikahnama* within the broader institutional context, and highlights some earlier efforts by Muslim women and men to change the legal and ideological practices of gender within conjugality by means of the formulation of a *nikahnama*. Second, it analyses in depth the two women versions of the marriage contract. It explores the ways in which Muslim women's legal and hermeneutical intervention challenges and fragments normative and patriarchal discourses on Islamic practice and ideology in order to create a female space of autonomy.

## II. Contextualisation of the female versions of the gender-just model-*nikahnama*

Muslim women's public struggles and contestations around the formulation of an appropriate and Islamic version of the Islamic marriage contract (*nikahnama*) are not recent phenomena but can be traced back to colonial times. Already at the beginning of the 20<sup>th</sup> century, upper class Muslim women's activists in India sought to challenge orthodox interpretations of the Islamic marriage by reinterpreting the religious parameters of female subjectivity within conjugality. In so doing, they felt that the written *nikahnama* offered a viable avenue through which problems of unilateral divorce, maintenance, polygamy and property could be tackled (Kirmani 2011b). Later, in the 1930's, Muslim women's activists in India argued for the expansion of women's options for divorce, and for the curtailment of the husband's unilateral right to divorce. For instance, the non-sectarian All India Women's Conference, spearheaded by its Muslim President Mrs. Sharifa Hamid Ali, prepared a draft of a Muslim marriage contract containing stipulations that allowed women to divorce under certain conditions (Minault 1998: 150). Such early legal mobilisation by women's activists in colonial India failed, however, to garner support for actual 'legal consciousness'.<sup>5</sup>

In the 1990s, the growing Hindu-Muslim communalism propelled a political approach by the state to locate family laws within the private sphere of religious and ethnic communities and hence rendering it unreachable for legal reform by the state.<sup>6</sup> In other words, it appeared that the state complied with the claims of the Muslim representatives who lobbied the government for a protected legal space of Muslim Personal Law that is excluded from state interference (Hasan 2000: 132). In this context, the figure of the Muslim woman as a pious and undecayed symbol of authentic Islam became generalised instead as a symbol of the Muslim community and of the Muslim family (Sarkar 2004:238–239). Struck by the continuing desolate legal and social status of Muslim women in postcolonial India, Muslim women's rights activists began to amplify their voices for legal reform and gender-just interpretation of the Islamic laws in the area of the family in the 1990s and demanded further protective measures for Muslim women. For example, urban Muslim women's organisations and networks, such as the Muslim Women's Rights Network, the Muslim Women's Forum, the *Awaaz-e-Niswan*, and STEPS Women's Development to name a

<sup>5</sup> Merry (1990: 5) understands legal consciousness as "the way people conceive of the "natural" and normal way of doing things, their habitual patterns of talk and action and, their common-sense understanding of the world".

<sup>6</sup> The political debates that have surrounded the famous Shah Bano case have among others contributed to the political polarisation of Hindus and Muslims. The Shah Bano case is about a Muslim woman has been granted maintenance from her ex-husband as according to the secular Section 125 of the Criminal Procedure Code. The judgment has outraged the Muslim clergy, or more precisely the AIMPLB, who felt that the court has interfered in Muslim Personal Laws by making a decision, which is not according to Islam. The ensuing political debates and controversies around the judgement, which resulted in the enactment of the Muslim Women (Protection of Rights on Divorce) Act in 1986, centred on the question of whether or not the court has the authority and jurisdiction to determine rights in the area of family in regard to the Muslim community. Thereby, the question of women's rights and women's citizenship has been completely sidelined. The Muslim leadership has deployed the Shah Bano case to couch the issue of Muslim Personal Law in a rhetoric that stresses the need to protect Islamic tradition and culture from state interference. This is in a politically charged context, where the Hindu nationalist increasingly emphasised the need for a Uniform Civil Code, which the clergy felt, was just a strategy to bring the Muslims into the Hindu fold and deny their separate cultural and religious identity (Hasan 1998: 74). The fact that the state has acquired partial control over the adjudication of Muslim with the pronouncement of the Muslim Women (Protection of Rights on Divorce) Act in 1986 has become an established interpretation after the Danial Latifi case of 2001. There, the Supreme Court ruled that Muslim women are entitled to maintenance until she remarries. This stands in contrast to the original wording of the 1986 Act, where maintenance was restricted to the period of *iddat* as according to the *Shariat*.

few, have demanded extensive changes in Muslim Personal Laws on the one hand, and appropriate gendered practices on the other. One of their strategies was to demonstrate that they could engage in processes of *ijtihad* (legal reasoning) regarding textual sources of Islam such as the *Quran*, *Hadith* and the *Sunnah*. The act of *ijtihad*, which is legal reasoning with the aim to reform religious thought and practices, is central to women's claim to authorisation of law-making. Under this respect, Muslim women's activists publicly reasoned that *nikha* is not an act of worship (*'ibadat*) where the scope of interpretation and rationalisation is limited. Rather, they argue, marriage falls into the realm of the private (*mu'amalat*) within which the relationship between humans is regulated and not between them and God. The realm of the private, Muslim women's activists assert, remains open, almost with no restriction, to rational consideration. The textual sources of Islam are hence subject to interpretation and are changeable rather than absolute (Kirmani 2011b: 58, Vatuk 2008: 490, Subramanian 2008: 656, Mir-Hosseini 2003: 11). In extrapolation, they demonstrated their right to engage in law-making itself, through the formulation of their own *nikahnama*.

In the early 1990s, a Mumbai group that includes lawyers, academics and NGO representatives made the attempt to draft and disseminate a women friendly model-*nikahnama*. The new model contract, which tackled problems such as polygamy, maintenance and divorce, was presented to the All India Muslim Personal Law Board (AIMPLB hereafter) in 1994 but without success (Vatuk 2008: 505–506, Hussain 2006: 4, Subramanian 2008: 658, Kirmani 2011b: 58). The AIMPLB did not embrace the document due to internal discrepancies regarding the interpretation of *triple talaq* (Hussain 2006: 4). Despite the AIMPLB's rejection of this women-friendly contract, however, the clerics began to acknowledge the nascent legal mobilisation of Muslim women and their growing engagement in the area of law-making. So as not to forfeit its legal authority and monopoly of religious interpretation, the AIMPLB started to pay more attention to reforms in the area of Muslim family law. For instance, the AIMPLB began to demand that all Muslim women be given inheritance rights involving agricultural land, as well as a share in agricultural income. The Board also published a booklet specifying the forms of Islamic family life (Subramanian 2008: 658). So, as part of the AIMPLB's effort to minimise the legal mobilisation and intervention by the fast-growing urban Muslim women's organisations and networks, the Board published a model-marriage contract in 2005. Whereas the initial draft of this contract followed some of the suggestions made by Muslim activists and gave women a number of rights, such as the right to unilateral divorce (*khul*)<sup>7</sup>, the right to live separately if the husband marries someone else, the right to retain all gifts that the couple received during marriage, and a voice in regard to polygamy, the final document does not include these stipulations, due to internal discrepancies in the Board (Subramanian 2008: 658).

The model-*nikahnama* that was finally released by the AIMPLB in 2005 is a small document of four pages in Urdu. Like all the other *nikahnama*, this document consists of multiple sections. One section is the actual *nikahnama* that mandates the signature of the bride, the groom, and the father or guardian of the bride. The second part of the marriage contract is called the *iqrarnama* or agreement, whereby stipulations regarding the process of dispute settlement,

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<sup>7</sup> *Khul* is an extra-judicial initiated divorce by the woman, in which she asks her husband to release her from the marriage in return for some 'payment. In most cases, a woman has to forfeit the *mehar* (also spelled as *mahr* or *mehr*), or whatever of its payment is outstanding, and her right to maintenance during the time of *iddat*. Additionally, the husband may urge her to waive her rights to retain custody of the children if they are over four years of age. The negotiations over whether or not the wife is granted the right to *khul* usually take place in presence of a *qazi* as per example in the *Shariat*-court. Usually, the *qazi* would try to reconcile the couple and only if it appears clear that there is no chance of reconciliation he advises the husband to accede to his wife's request. The statistics from the *Shariat*-court in Lucknow show, that Muslim women do not opt easily for *khul*. Of the 512 cases that have come to the *Shariat*-court within the last five years, only 16 cases have been filed by women under *khul*. Most cases (353) have been filed under *faskh* (nullification of marriage by the *qazi* and without the consent of the husband). In this case, a man admits that he mistreats his wife but he does not want to divorce her, so the *qazi* can end the marriage. Whether or not the woman gets her *mehar* and the maintenance during *iddat* depends upon the husband. (Interview with the secretary at the *dar-ul-qaza* in Lucknow, January 13, 2010).

financial transactions at the time of the wedding, property, inheritance, divorce etc., can be made. The third section, called the *hidayatnama*, lists the guidelines for the marriage under *Shariat*-law. The document prepared by the AIMPLB adopts a view on law that is strongly image-based, and that depicts the matrimonial relationship in terms of metaphors.<sup>8</sup> Drawing on the textual sources of Islam, this *nikhanama* describes marriage as a ‘gift from God’ or a ‘service to God’. It holds that the conjugal relationship rests ‘on mutual love, mercy and respect’ and that the spouses are ‘each other’s garments’. This contract stresses the difference in nature between women and men and their respective and specific duties and responsibilities, and attaches importance to the wife’s moral behaviour and sexual conduct.<sup>9</sup> For example, the *hidayatnama*, which sketches the guidelines of a Muslim marriage, declares that it is the wife’s duty to duly ‘obey’ and ‘honour’ her husband. It requires that the wife seeks her husband’s permission to step out of the matrimonial home, though it ‘allows’ the wife to visit her parents and relatives and holding that the husband should safeguard her ‘honour’ and ‘respectability’ when the ‘need’ arises. He, on the other hand has to assure financial security for his wife and it is his responsibility to provide food, clothes and shelter.

The AIMPLB’s version of the *nikahnama* only introduces minor reforms. For example, it mandates: a strict procedure of dispute settlement to prevent rushed divorces, the requirement of a written record of all marriages and their copies to be given to the bride, the groom and the office at the *Shariat*-court, and the mandatory presence of parents and guardians at the marriage in order to prevent forced and clandestine marriages. Nevertheless, this *nikahnama* does put forward some reformist features. It requires the husband to give the *mehar* to the bride in tangible assets such as jewellery, gold or silver at the time of the wedding so as to avoid inflation.<sup>10</sup> It does not provide any safeguards against men leaving their wives without sufficient maintenance, and has ignored issues such as marriage of minors, polygamy and the woman’s right to divorce either by *khul* or by the delegated right to divorce (*talaq-e-tafweez*). It only mentions that the *triple talaq* is ‘avoidable’. Moreover, the *iqarnama* says that in case of conjugal infringements, the couple is subject to the exclusive arbitration of the *dar-ul-qaza*. In other words, this section seeks to foreclose the couple’s option to address the state courts if a dispute arises. This contract is hence a reflection of the clergy’s current efforts to keep state law out of Muslim law regulation and an indication of their preference for informal self-regulation of family law matters. In this respect, this contract re-establishes the authority of the AIMPLB for the administration of the family hence strengthening the legal and moral boundaries between Muslims and the state.

Other men-dominated religious establishments have also supported gender reforms by means of the *nikahnama*. In November 2006, the All India Shia Personal Law Board (AISPLB hereafter) released its own version of the model-*nikahnama*, as formulated according to the Shia-school of jurisprudence. The result is a ten-page document available in Urdu and in English. Apart from a statement by the AIMPLB in the media that declares this version as ‘irrelevant’, the release of this *nikahnama* has otherwise been received quietly. The most important advancement made by this *nikahnama* was to delegate the right to divorce to the wife under certain

<sup>8</sup> Such a rich and metaphoric legal language has been termed by Santos as the ‘biblical style of law’ (Santos 1987: 295). Santos (1987: 295) explains the concept of the biblical style of law as an approach to law, which “presupposes an image-based legality characterised by preoccupation with inscribing the discontinuities of legal interaction into the multilayered contexts in which they occur, and with describing them in figurative and informal terms, and through iconic, emotive and expressive signs”.

<sup>9</sup> In this spirit, the feminist Carol Pateman (1988) speaks of the marriage contract as a sexual contract, which establishes men’s access to women’s bodies. She argues that the marriage contract is not an agreement between two individuals, as theorised in liberal theory, but the marriage contract implicitly and explicitly stresses the differences of the sexes.

<sup>10</sup> However, the stipulation about the *mehar* has to be read carefully. Then it does not say anything about the amount that has to be paid as dower. The judge of the *Shariat*-court in Lucknow, for example, has told me in an interview that he had paid his wife a *mehar* of one hundred and seven rupees. This amount was fixed according to the amount that was given to Mohammed’s daughter, Fatima at the time of the Islamic revelation. This amount, however, does not protect a woman from financial despair after divorce.

circumstances. (*talaq-e-tafweez*). These are: if the husband fails to provide maintenance for longer than four months during the subsistence of the marriage, if his whereabouts are unknown over a time-period of four years, if he mentally and physically tortures his wife, or if he forces her into sexual relations with other men. Moreover, this Shia version further curtails the husband's right to unilateral triple *talaq* in one sitting, a practice that the Shia consider un-Islamic and unconstitutional due to its discriminatory effect on women. It also advocates that divorced women should receive alimony beyond the period of *iddat*, until they are able to support themselves. *Maulana* Athar, the president of the AISPLB and the author of this *nikahnama* explains in an interview that although the latter stipulation corresponds with the contested Section 125 of the Criminal Procedure Code wherein the woman is entitled to maintenance even beyond the period of *iddat*, it has also been brought into accordance with the Islamic concept of humanity by appealing to the husband's humanitarian responsibility toward his former wife.<sup>11</sup> This way, Athar says, he could avoid the critics of the clergy who reject state-regulated Muslim Personal Law as the official legal position.<sup>12</sup> Here, the Shia-*nikahnama* cautiously softens the boundary between secular state and informal law by dragging state law into societal laws. However, the gender-friendly advancements brought forward in this *nikahnama* are not binding. The *nikahnama* declares that it is not mandatory for the parties to accept the conditions laid down for the groom and bride in this model-*nikahnama*. This stipulation is not only a reflection of the absence of an authority to actually enforce the stipulations made in the contract, but, moreover, indicates the political implications of this marriage contract. From a perspective of politics, the question of whether or not the stipulations made in the contract are actually enforceable might be less pertinent than the fact that the contract constitutes an inherent part of the political debates around marriage and the family in Islam.

Disappointed by these male versions of the model-*nikahnama*, and in particular by the one drafted by the AIMPLB, these Muslim women's organisations challenged the clergy's interpretation of the religious texts as well as their authority of law-making with the release of their own model-*nikahnama*. In their view, these documents fail to address such issues as: the exclusive right of the husband to ex-judicially divorce his wife by simply uttering the word '*talaq*' three times in one sitting, the prohibition of polygamy, and verification of the couple's age at the time of marriage for prevention of child-marriage (Vatuk 2008: 505-507, Hussain 2006: 4).<sup>13</sup> Moreover, Muslim women's activists in Lucknow felt that their identities and rights as citizens were seriously jeopardised by such patriarchal interpretations of matrimony. In this regard, they claim that their activism is crucial for awareness building among Muslim women and men, which, they hope, would eventually result in socio-legal change.

### III. Muslim Women's Interpretations of the Muslim Marriage Contract

Against the backdrop of such patriarchal constructions of conjugality, the question of how Muslim women's activists square entrenched patterns of gender hierarchy with principles of gender-justice comes to the fore, and will be discussed in the following.

Muslim women's-rights activists in Lucknow contend that a model-*nikahnama* drafted entirely by women was necessary in order to question the clergy's discriminatory interpretation

<sup>11</sup> Though not mentioned by *maulana* Athar, this stipulation of the *nikahnama* also corresponds with the Muslim Women (Protection of Rights and Divorce) Act of 1986. Recently in 2001, the Supreme Court has read Section 3(1)(a) stipulating the ex-husband's responsibility to pay his former wife a 'fair' and 'reasonable' provision of maintenance in terms of Article 14 and 15 of the Indian Constitution. There the Supreme Court held that a fair and reasonable provision extends the period of *iddat* and applies until she remarries. See Danial Latifi vs. Union of India: <http://www.legalserviceindia.com/article/1141-Danial-Latifi-v.-Union-of-India.html> (accessed August 23, 2012)

<sup>12</sup> Interview with *maulana* Athar in Lucknow, February 24, 2011.

<sup>13</sup> For the reactions of Muslim women's groups and women's networks on the release and content of the AIMPLB's *nikahnama* see: <http://www.frontlineonnet.com/fl2211/stories/20050603003303600.htm> (accessed April 30, 2012)

of the textual sources of Islam and hence challenge their authority of interpreting religious texts. In their own interpretation of the conjugal relationship, they posit their quest for gender-justice neither within an orthodox Islamic nor a Western liberal discourse of marriage and gender. Rather, they exhibit an approach that strives to maintain the balance of their identity as ‘good Muslims’ on the one hand and Indian citizens on the other. These Muslim women’s activists command an eloquent knowledge of Islamic laws as well as state-governed Muslim Personal Law, Criminal Law, the Indian Penal Code and transnational human and women’s rights. The latter often appear, although to a different extent, in Muslim women’s progressive discourses on gender-justice. Muslim women’s rights activists in Lucknow, as elsewhere, are eager to be consonant with transnational human and women’s rights as well as secular state law. Integrating discourses on human rights and equality in a liberal sense is thus a common feature in the practice of Muslim activists. This happens in most cases not in terms of a juxtaposition but in terms of the synergies and the potential of power that are inherent in the combination and vernacularisation<sup>14</sup> of these different legalities. These activists are hence fluent in a variety of legal languages, which they combine as well as fragment in order to challenge or even subvert hegemonic legal discourses on gender. Doing so, they create a legal space that allows for a conceptualisation of the *Quran*, the state administered religious laws, and the Indian Constitution as synergistic rather than conflicting, and conducive to the accomplishment of gender-justice (e.g. equality, dignity, equal legal protection by the state and anti-discrimination on the grounds of sex). In their opinion, these legal frameworks are not mutually exclusive but viably complementary. Rather than opting for one or for the other, both Muslim Women’s organisations, the AIMWPLB and the BMMA, view the *Quran* and the Indian Constitution as two different expressions of the same object - human dignity. The only notable difference between these two representations of human dignity is, in their view, language and not content. Such an approach renders the distinction between state and non-state, or religious and secular laws, as often stressed in liberal discourse fuzzy and unclear, and subject to different legal perspectives.

### 3.1. The All India Muslim Women’s Personal Law Board’s Version of the Islamic Marriage Contract

In March 2008, the AIMWPLB released its own model-*nikahnama*, a seven-page document available in Hindi and Urdu.<sup>15</sup> Shaista Amber, the president of the AIMWPLB and author of the document argues that in India, where most women remain uneducated and ignorant about their rights, a number of ‘un-Islamic’ and gender-unjust practices have been established as law within conservative religious circles. Therefore, a *nikahnama* that stipulates the rights and duties of husband and wife according to the *Quran* and the *Hadith* is needed. In order to ensure that women can legally enforce the rights set forth in this *nikahnama*, Amber lobbies the state to recognise this document.

The release of a model-marriage contract entirely drafted by lay-women and not clergy has created much controversy among the Muslim community in Lucknow. Whereas the

<sup>14</sup> In the context of global women’s human rights, Sally Engle Merry (2006) explains vernacularisation as a process that entails the extraction of the human rights language and its adaptation in the local context. Crucial to such a process are ‘knowledge-brokers’, who operate in the ‘middle’ or, in between the local and the global, such as rights activists, lawyers, policy makers, who ‘[...] refashion global rights agendas for local contexts and reframe local grievances in terms of global human rights principles and activities’ (2006: 39).

<sup>15</sup> The AIMWPLB was founded by middle-class Muslim activists in March 2005 as a response to the Muslim clergy’s patriarchal and essentialist interpretation of Islamic ideology and law regarding marriage and divorce. The AIMWPLB is constituted of a 50-member committee and a loose network of several thousand members spread over different states in north India. The number of members, however cannot be verified as the AIMWPLB does not have them on file. The sphere of its activities ranges from spiritual gatherings and religious education over legal advocacy to the mediation of family disputes. As a part of their strategy, the AIMWPLB lobbies the state to secure Muslim women’s rights as citizens under the Constitution, as Muslims under Islamic laws within MPL, and to enhance women’s political representation. See their website: <http://www.muslimwomenpersonallaw.com/index.html> (accessed August 24, 2012)

*nikahnama* was welcomed by women's rights organisations all over the country, the clergy has deemed the document a 'joke' and a 'public stunt'. They have publicly defamed Amber as a *kafir* or non-believer who lacks the religious knowledge and authority to formulate a *nikahnama* in accordance with *Shariat*-laws. Moreover, conservative religious scholars condemned the AIMWPLB's claim to state authorisation of their proposal as an attempt to curtail and further fragment their legal authority.<sup>16</sup> Considering this harsh public critique, the dissemination of this women-friendly document turned out to be difficult. Amber's attempts to have her *Shariat-nikahnama* sold in local stores in the old part of Lucknow failed. As she stated, the vendors were afraid that the Muslim clergy would exercise repression. So for now, the Hindi-version of the *nikahnama* can be downloaded from the Board's website, and is distributed randomly amongst members of the AIMWPLB.

This reactionary stance of the *ulema* toward alternative formulations of the model-*nikahnama* poses a great challenge for Muslim women's activists, who have entered and operate within a socio-legal space hitherto reserved exclusively for men.<sup>17</sup> The AIMWPLB has been wary not to step outside the line of 'the acceptable' with their own formulation of the model-contract. Their strategy was not to directly confront the dominant discourse on gender and Islam, but rather to gain recognition and acceptance within existing constraints. Amber believes that working for gender-justice from within an Islamic framework is indispensable. Stepping out of the framework of Islam would, according to her, render their efforts for legal mobilisation irrelevant to the majority of the Muslim community and lay them open to the alleged charges of being 'irreligious' and of 'undermining Islam'.

This *nikahnama* therefore cannot be understood simply as an open claim for secular women's rights, but as Amber has put it, the contract instead 'cunningly hides' the fundamental Constitutional rights it confers (e.g. age of consent, her right to legal protection and to live in dignity). What Amber refers to as 'hiding' is actually a process of vernacularisation wherein constitutional values are combined and merged with religious knowledge, idioms and practices. This allows Amber to minimise the critics of the conservative religious representatives, who draw a sharp line between secular and religious laws. So, in a context within which women's legal mobilisation is constrained, the conceptualisation of gender-justice as brought forward in this *nikahnama* cannot be understood against Western, liberal parameters. Rather, the analytical eye has to adopt what Santos (1987: 288) has called, a 'large-scale' or microscopic view of the law in order to appreciate the subtle advancements concealed within seemingly normative formulations of Muslim women's rights. The fabric of Muslim women's rights, woven in this *nikahnama*, displays fine patterns of interlegality where secular and religious conceptions of women's rights are combined and vernacularised. Such processes of interlegality render visible the actual working of the state and non-state dimensions of law on a trans-local level.

In its introduction, the *nikahnama* advises the couple on how to lead their conjugal lives, and encourages Muslims to duly follow the rules as set forth in the *Shariat*, listing crucial *Quranic* textual sources in regard to the woman's right to *mehar*, property, maintenance during *iddat*, polygamy and divorce. At first glance, Amber's vision of the conjugal relationship as set forth in this *nikahnama* does not seem to substantially differ from conservative conceptions that

<sup>16</sup> For an in depth discussion of the responses that have surrounded the release of the AIMWPLB's version of the *Nikahnama* see: Venkitesh Ramakrishnan, *Frontline*, April 11, 2008. <http://pay.hindu.com/ebook%20-%ebf120080411part2.pdf> (accessed April 19, 2011)

<sup>17</sup> Among Muslim communities in India, the public space is highly men-dominated. Muslim women are not only underrepresented in political and legal positions, they are also kept back from praying in public *mosques*. Given these circumstances, Muslim women's activists have been persistent in pushing the boundaries of the highly gendered public space that circumscribes the radius of women's activities. For instance, the Shaista Amber, the president of the AIMWPLB, has built a women's only *mosque* near Lucknow and a female *qazi* solemnised the marriage of the Naish Hasan, a co-founder of the BMMA. These advances into otherwise traditionally strongly male-dominated arena have attracted considerable media attention both nationally and internationally.

emphasise conjugal duties over rights. Similar to the conservative versions of the marriage contract, this *nikahnama* adopts an approach, which stresses two separate sets of rights for men and women in marriage. Women are prompted to create a domestic environment of love and harmony while men are responsible for their wife's financial welfare. However, contrary to the male-formulated versions, in this *nikahnama* women's subjectivity is not conceptualised in terms of her duty to obey her husband. Rather, this document appeals to the bridal couple to respect and honour each other. The discourse on respect and honour, as employed in this *nikahnama*, allows the woman to demand certain obligations from her husband as well. For example, that he refrains from forcing her into domestic labour, that he provides for her financial maintenance, that he upholds his own fidelity and that he psychologically supports his wife. In this respect, Amber is in line with the epistemology used by many Muslim women's activists in Africa, Malaysia, Iran, Egypt and the US, who see no contradiction in fighting for gender-justice outside the realm of the state within a discourse that stresses biological and social differences between the genders (Mir-Hosseini 2003, Tripp 2003, Foley 2004, Badran 1991, Hatem 1998, Moghadam 2002, Wadud 2009, Hassan 1995).

This discourse on mutual respect and honour mentioned above penetrates the socio-legal imagery of the conjugal relationship throughout the whole document. For instance, the section that lays down the conditions under which a woman has the right to initiate a divorce reflects such a discourse. Since husbands often divorce their wives over trivial matters and even while physically absent from them, the AIMWPLB has included a clause in the section on *talaq* that prohibits *triple talaq* through e-mail, SMS (short message service), phone and videoconferencing. In case the husband divorces his wife in such a disrespectful manner, the *nikahnama* stipulates the wife's right to take *khul*. *Khul* means the extra-judicial separation initiated by the wife where she asks her husband to release her from the marriage in return for some form of payment. Furthermore, the *nikahnama* asserts that divorce is only valid after it has gone through a mandatory process of arbitration over the time-period of three months, as per *Shariat*.<sup>18</sup> This includes the practice of *talaq-e-bain*, a term delineating that if the husband has pronounced *talaq* twice-only before deciding to remain in the marriage, the couple can be remarried in the presence of a *maulana*. This requirement aims to prevent the desertion of women, and to give the couple a chance to reconcile. The third *talaq*, however, is final. Once the divorce is pronounced, the husband is obliged to give his ex-wife 'a warm farewell' and the *talaqnama* (decree of divorce) must be read aloud by a *maulana* or scholar in the presence of two witnesses.<sup>19</sup> In the absence of divorce, any woman can opt for separation if the whereabouts of her husband are unknown for the duration of four years, if he tortures her, if he commits adultery or if he refused to disclose human immunodeficiency virus (HIV) status at the time of the marriage.

Furthermore, the section that stipulates the financial rights of the wife is couched within a language that stresses the notion of respect. This section mandates the husband to treat his former wife kindly and respectfully after divorce. In this manner, the husband cannot deny shelter to his ex-wife in the matrimonial home during the period of *iddat*, nor has he the right to claim her property. Conversely, it is the husband's duty to pay her *mehar* to the best of his abilities. Although the *nikahnama* encourages the husband to financially support his wife beyond the *iddat* period in order to protect her from destitution, it is not a declared mandate. This also reflects the common practice of the High Courts in India that tend to interpret the terms 'fair' and 'reasonable' provision of the Muslim Women (Protection of Rights on Divorce) Act of 1986 very

<sup>18</sup> The law in India does, contrary to other South Asian countries like Bangladesh or Pakistan, not regulate the process of men-initiated unilateral divorce.

<sup>19</sup> As in contrary to the Shia-practice, Sunni jurisprudence does not declare the presence of witnesses as mandatory for a divorce to become valid. This way of interpreting *Shariat*-laws facilitate the husband to divorce his wife anytime and anywhere. In many cases, women do not even know about the divorce divorced and might come to know about it through a third person.

broadly. Due to such an interpretation Muslim women are entitled a one-time payment from their husbands during and beyond the time of *iddat* that could be worth *lakhs* (hundreds of thousands) of rupees. These amounts clearly exceed the meager amount of money women tend to get under Section 125 of the Cr.Pr.C. However, in cases where the ex-husband cannot financially afford to support his ex-wife after a divorce ‘fair’ and ‘reasonable’ means that the wife is only eligible for a minimal amount of lump sum payment – if at all.<sup>20</sup> Hence, the terms ‘fair’ and ‘reasonable’ mentioned in this *nikahnama* have to be understood against the backdrop of these current court practices.

This *nikahnama* advises against polygamy and reminds the husband only to take a second wife if he is able to afford her. Further, this *nikahnama* includes two important stipulations which, as Amber explained in an interview, both reflect the endeavour of the AIMWPLB to harmonise with secular state laws and to bring marriage and the family under the legal auspices of the state. The first one prohibits the marriage of juveniles. This *nikahnama* is the first to mention the age of consent otherwise not codified in Islam. Traditionally, women are considered ready for marriage once they have reached so called ‘physically maturity’. This leaves ample space for misuse and clashes with the formal state law that suggests a minimum female age at marriage of 18 years. The second stipulation declares the registration of marriage as mandatory. International policy makers and modernist thinkers have considered registration as most important in order to end discrimination against women and prevent forced child marriages. Registration of marriages grants legal approval to the marriage and further authorises the bride or the groom to claim the property and investments of the spouse in the case of his or her death or disappearance. Both stipulations regarding the age of consent and registration are in accordance with the secular Special Marriage Act of 1954.<sup>21</sup> In order to facilitate registration, the *nikahnama* suggests: Photos of the bride and the groom, their registered address, date of birth, occupation and nationality. Three forms of the *nikahnama* should be completed, one for the couple, one for the state marriage bureau<sup>22</sup> and one for the *qazi* who has solemnised the marriage.<sup>23</sup>

<sup>20</sup> In legal practice Muslim women are often granted substantially more money under the Muslim Women (Protection of Rights on Divorce) Act of 1986 than under Section 125 of the Cr. Pr. C. A female advocate at the Criminal Court in Lucknow explained to me that it is generally more difficult to demand monthly payment, as granted under Section 125 Cr.Pr.C., than the one-time lump-sum payment Muslim women are entitled to under the Muslim Women (Protection of Rights on Divorce) Act of 1986. (Interview with the Risha Syedi, advocate at the Criminal Court in Luknow, January 20, 2010)

<sup>21</sup> The Special Marriage Act from 1954 is a secular piece of legislation that is not a part of the personal laws. It is applicable on all Indian citizens irrespective of their religion, but is hardly used by anyone. The Special Marriage Act, 1954 provides for inter-religious marriages, the formal registration of marriages and, nullity of marriage and divorce. The marriage performed under this Act is a civil contract and there is no need of rites or a ceremony. This Act considers a couple as eligible for marriage who have reached the age of consent (groom 21 and bride 18), who are monogamous, who are mentally competent to be able to give valid consent to the marriage and, who are not within the degree of prohibited relationship. However, the Special Marriage Act, 1954 conflicts with the Prohibition of Child Marriages Act from 2006 and Muslim Law as it considers marriages that have been solemnised between two parties, who have not reached the age of consent as void. Under the Prohibition of Child Marriages Act of 2006, however, all child marriages are although voidable and punishable, still not void. The *Shariat* recognises all marriages contracted with the consent of two parties who have reached puberty as valid. The stipulations set forth in this version of the *nikahnama* are further congruent with CEDAW, a transnational piece of legislation. As an attempt to end discrimination against women, CEDAW stipulates the right of women and men to choose their spouse, to share the same responsibility within matrimony and to decide on the number of children as well as the spacing between them (Article 16). This convention states that child marriages should not have legal effect and that all marriages must be put into a register. India signed the convention on July 30, 1980. However, the Indian state made a declaration saying that given its vast population the registration of marriages was not a viable practice. Considering registration of marriages as the best strategy to prove that the marriage as valid this *nikahnama* overturns the state’s reservation toward registration and aligns its wording with secular national and transnational legislation.

<sup>22</sup> Marriage bureau is the term Shaista Amber uses for the state registrar office.

<sup>23</sup> Here it is important to note, that these stipulations are idealised expectations and not actually letters of the law. In India, the law declares the customary ceremony, here the *nikah*, and not the actual act of registration is the dominant piece of evidence for the marriage. Although the spouses could register their marriage with the district registrar, most marriages in India remain unregistered.



This *nikahnama*, which has received considerable media attention, constitutes a crucial counter-hegemonic voice in the debates on women's rights in South Asian Islam. It clearly challenges the clergy's stance of strict separation between the state and the Muslim community, and respectively, of secular state law and religious family laws, by creatively vernacularising state law with religious idioms and language. This Muslim marriage contract facilitates a space of women's autonomy in the shadow of the state within which normative discourses on the ideology and practice of the conjugal relationship are challenged and the legal authority of the Muslim leadership is fractured. Asking the state to support this version of the Muslim marriage contract, it seems that the AIMWPLB seeks to produce a hybrid form of legal authority through which women, backed by the state, could become 'authorised' to interpret Islamic texts in order to define new rights for women within Muslim family law.

### 3.3. A Secular Reading of the Islamic Marriage by the Bharatiya Muslim Mahila Andolan

In an effort to further stretch this space of legal autonomy *vis-à-vis* the Muslim leadership, the BMMA released a so-called 'secular' version of the Islamic marriage contract in November 2008, which is subject to the exclusive jurisdiction of the court – and hence render Muslim marriage subject to state control.<sup>24</sup> This *nikahnama* was drafted as a part of a larger project of the BMMA that seeks to codify Muslim Personal Law, which is then entirely administered by the state.<sup>25</sup>

This version of the contract is grounded in a discourse that envisions women's rights in terms of equality of the sexes in all areas. Such an interpretation vehemently rejects concepts of biologically-based character differences between men and women, and holds that they are equal. Equal here means that men and women share the same rights and duties and are valued equally in all areas of life. Contrary to all other versions, the *Quranic* stances which establish the wife as the embodiment of love and honour and the husband as her 'provider' and 'protector' are nowhere mentioned in this *nikahnama*. Instead, Naish Hasan, the co-founder of the BMMA and co-drafter of the contract, explains that their interpretation of the *Quran* takes into account the situation of men and women in contemporary India. From such a perspective, Islam itself is not rejected but is reinterpreted in a manner that fits the contemporary daily realities of Muslim women. Nevertheless, due to their engagement with the Islamic texts and to their own faith, the BMMA does not see themselves as falling out of the Islamic framework with the formulation of a secular marriage contract.

This *nikahnama* focuses especially on the financial rights of the wife with regard to *mehar*, marital property, gifts and maintenance. As Hasan explains, these financial rights are formulated in accordance with state regulated Muslim Personal Laws such as the Dissolution of Muslim Marriages Act of 1939 and the Muslim Women (Protection of Rights on Divorce) Act of 1986, as well as with secular provisions such as Section 125 of the Criminal Procedure Code. The *nikahnama* itemises and registers the amount of *mehar* in cash or kind, such as gold, silver, fixed deposits, land or cheques, and stipulates them as the sole property of the wife. As announced on their website, the *mehar* amount stipulated for marriages performed under this

<sup>24</sup> The BMMA is intended as an alternative progressive voice for change and democracy that comes from within the Muslim community. The BMMA works for the amelioration of the political, educational, social, political and legal backwardness of Muslims and fights for justice. In order to achieve these goals they work towards developing leadership qualities among Muslim women, especially belonging to the lower strata, lobby the state for reforms of Muslim Personal Law and political inclusion. Moreover the BMMA works hand in hand with grassroots organisations, and networks with (trans)national development agencies such as for example UNICEF, USAID and UNIFEM. The BMMA is organised as a network and is comprised of local groups organised on the state level. According to their promotional material, the BMMA counts 20'000 members dispersed in 15 states. The BMMA mobilises and organises Muslim women on the grassroots where it fosters leadership qualities among women who in turn advocate for change.

<sup>25</sup> This project of the codification of Muslim Personal Law is supported by a variety of secular Muslim women's groups all over India and organised under the auspices of the eminent scholar Ali Asghar Engineer. Interview with Naish Hasan in Luknow, January 22, 2010.

*nikahnama* ranged from Rs. 5000 (US\$ 97) up to Rs. 100'000 (US\$ 2000).<sup>26</sup> This stands in sharp contrast with the majority of Muslim marriages, whereby women either 'forgive' (*maph karna*) their *mehar* and receive nothing, or receive only a minimal amount, since *mehar* is considered more a symbolic than a real matrimonial right.<sup>27</sup> In a separate annexure, the *nikahnama* lists the financial and material transactions that have taken place at the time of the wedding. This includes gifts received by the bride from her parents and relatives or by the bride's groom's parents and relatives, as well as the articles received by the groom from the bride, his relatives and friends. Both the bride and the groom sign the annexure. The BMMA states on their website that, based on their *nikahnama*, 40 marriages have been performed in Mumbai and 200 group marriages in Juhapura district, Gujarat.<sup>28</sup> These numbers are considerably small and reflect the (so far) scarce use of the contract.

The *nikahnama* further insists on women's right to equal share in all property acquired during the time of the marriage. In case of a divorce, the husband is obliged to financially maintain his former wife with a reasonable and fair provision (*mattaa*) that equals the amount of a ten-year maintenance. *Mattaa*, as referred to in the *Quran*, delineates that maintenance for divorced women should be provided on a reasonable scale. This stipulation reflects the wording of the Muslim Women (Protection of Rights on Divorce) Act 1986, according to which Muslim women are entitled to a 'fair' and 'reasonable' provision by their ex-husbands. Given that the amount of *mattaa* remains unspecified in the *Quran*, the Indian Muslim women's movement interpret the line so as to give adequate maintenance for the divorced woman even after the period of *iddat*. The activists involved in the drafting process of this *nikahnama* have hence decided the ten-year limit – an interpretation, which stands in clear opposition to orthodox interpretations of the term. This provision, Hasan states, aligns the (ex-)husband's duty to pay maintenance with the Muslim Women (Protection of Rights on Divorce) Act 1986 as well as with the secular Section 125 Cr. Pr. C., from which Muslim women are theoretically exempt. Further, the woman is now granted the right to reside in the matrimonial home during the subsistence of the marriage as well as after a divorce. This is in accordance with one of the most important features of the more recent Protection of Women from Domestic Violence Act 2005. This Act, which is a general law and thus also applies to Muslim couples in India, provides for women's right to reside in the matrimonial or shared household, whether or not she has any titles in the household. This right is secured by a residence order, which is passed by the court.

Within the paradigm of gender equality, this *nikahnama* dismisses all kind of unilateral and ex-judicial divorces, including the husband's rights to *triple talaq* and the wife's right to *khul* and *talaq-e-tafweez*. In so doing, the *nikahnama* establishes divorce as a right that is shared equally and only becomes valid with the agreement of both parties (*mubarat*). Polygamy, according to this *nikahnama*, is prohibited. The age of consent is 18 for the bride and 21 for the groom.

In order to ensure the implementation of the financial rights and to prevent unilateral and instant divorces, this *nikahnama* provides for all the necessary documentation needed for governmental registration as per the Special Marriage Act of 1954. It mandates photographs of

<sup>26</sup> <http://bhartiyaMuslimmahilaandolan.blogspot.com/> (accessed December 8, 2011)

<sup>27</sup> In practice, *mehar* is rarely given to the woman at the time of the marriage. Most of my female informants, belonging to a variety of educational and economical groups, have stated that they have not received any amount of *mehar*, even after having been in the marriage for decades. Whereas women from a privileged background have felt that the *mehar* was an outdated and old-fashioned practice that reduces woman to mere objects of trade, women from less privileged backgrounds often found it as disturbing to ask for their dower. Moreover, it is common sense among Muslims in Lucknow that *mehar* is not a financial right that becomes effective at the time of the marriage but at the time of divorce. For example, at the Family Court in Lucknow I have interviewed fifteen Muslim women who have all approached the state legal system to make effective their financial rights as according to the *Shariat* and Muslim Personal Law. All of them were either separated or divorced from their husband and none of them had received their *mehar*.

<sup>28</sup> See their website: <http://bhartiyaMuslimmahilaandolan.blogspot.com/> (accessed May 29, 2012)

the bride and groom, a wedding invitation card (if available), a copy of the passport or any other identity card, a copy of the ration card, proof of employment, and in case of an earlier divorce or a widowhood, a divorce decree or death certificate. Apart from the address, date of birth and marital status, the bridegroom is obliged to give information about his current occupation, his income and the particulars of his property (self-acquired and inherited). Three forms have to be completed, one for the bride, one for the bridegroom and one for the marriage solemniser. Moreover, this *nikahnama* affords the couple with the opportunity to add further stipulations, as long as they do not violate the provisions of the *nikahnama*.

This *nikahnama* marks not only a change in the discourse of the conjugal relationship, but an important shift in terms of the language - a shift away from a religious cadence toward a judicial one. For instance, indications to religious sources in the contractual language, as well as metaphor, have been omitted, while the phrasing has been brought into accordance with the judiciary style common to state law. It is only the after word of the document that contains a set of *Quranic* stances on maintenance, polygamy, *mehar* and the ideal of a matrimonial relationship. The BMMA hence places its own formulations of gender equality and justice within this highly competitive legal and political landscape by appropriating the legal jargon of the state legal system. In doing so, the BMMA seeks to remove the regulation of Muslim marriages from the penumbra of the state by asking the state to integrate their proposal into its legal apparatus so as to create a democratic legal space within which Muslim women's rights are articulated on the premises of the secular values of the Constitution and human rights.

Both *nikahnamas*, formulated by Muslim women's organisations in Lucknow, exemplify the fact that religious and secular state led discourses of gender-justice stand not in opposition, but merge within the localised discourses on women's rights and Islam - creating new forms of law within newly designed legal spaces. Rather than being caught between the discursive strategies of a liberal versus religious discourse on women's rights, both organisations claim that the Indian Constitution, the state administered Muslim Personal Law, secular laws and the *Quran* are all sources of synergy and not conflict. It is thus the *inclusion* rather than *exclusion* of modern secular legality, within local interpretations of Islamic laws, by which Muslim women's organisations stake their claim for participation in the law-making process. This allows for the creation of a non-antinomic legal space of new interpretation and production of Islamic laws within the context of Indian citizenship and the specific ground realities of Muslim women in India.

#### IV. Conclusions

This article has illustrated the ways that Muslim women's activists in India currently seek to define and expand the legal space within which gender-just reinterpretations of the textual sources of Islam become possible. In so doing, they creatively adapt, merge and vernacularise secular and non-secular state law with religious idioms, ideologies and experiences. This gives rise to a complex legal landscape, where different legalities not merely co-exist but entangle and overlap in the sense of interlegality (Santos 1987/2002). Drawing on these two women-friendly model-*nikahnamas*, it appears to be precisely the complexity and competitive nature of the legal field by which room and possibilities open up for Muslim women's rights activists to work toward gender-justice beyond the normative dichotomies of state versus community and women's rights versus religion. While it is important to note that the two *nikahnamas* have not (yet) penetrated legal reality due to the opposition of the religious leadership and/or objections raised by the contracting families (their scope of implementation is restricted to the areas where the AIMWPLB and the BMMA are currently active),<sup>29</sup> they yet proffer insight into an emerging mixed legal space of hermeneutical flexibility. Within this space Muslim women's activists are

<sup>29</sup>

See also: Kirmani 2011b, Lemons 2012, Suneetha 2011

afforded room for the formulation of other positions on religion and gender taking into account both their identity as Muslims, mothers and wives as well as their rights as Indian citizens. Moreover, it is a legal space that furthers participation and inclusion beyond the politics of identity and monolithic ideology, and hence offers room for the articulation of alternative experiences and conceptions of religion and justice. In this regard, Muslim women's rights activists' strategies for gender-justice and equality create a non-antinomic discursive space in the sense of interlegality. Interlegality consequently facilitates women's activism, enhances their public visibility and allows for a reconfiguration of religious power and legal authority.

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## **Justice for Muslim Women in India: the sinuous path of the All India Muslim Women Personal Law Board<sup>1</sup>**

Jean-Philippe Dequen<sup>2</sup>

### **Abstract**

*Muslim Women movements in India have been very active in the past decade, attracting attention both in the Sub-Continent and beyond. This article vows to present a particular trend of this activism centred on the legal sphere, moreover within the frame of the Muslim personal law system and its non-State adjudicative bodies. Through the All India Muslim Women Personal Law Board (AIMWPLB), it will present the example of an attempt to challenge the 'patriarchal' legal discourse on Islamic Law by procuring an alternative dispute resolution forum specifically aimed at Muslim women's issues, as well as advocating for a more gender equal interpretation of the Quran through the prism of 'Islamic Feminism'. However, it will show that despite its President's tremendous efforts, the AIMWPLB's scope remains limited. Although establishing a somewhat successful mediation centre in the Lucknow area, it has for the moment failed to extend its reach in the rest of the Indian Territory. Likewise, its particular discourse on Islamic Law has had but little influence on its overall application in India, and paradoxically could even be counter-productive towards its progression towards a gender equalitarian interpretation.*

### **Introduction**

If you ever travel to Lucknow and adventure in its outskirts, you might find a little white mosque lost in the middle of an empty field. As insignificant as it might seem, this is no ordinary mosque. On one of its walls hangs a huge banner: 'All India Muslim Women Personal Law Board' (AIMWPLB). In a patriarchal society and moreover within what is often portrayed as a male dominated religion such as Islam, one could be surprised as to find an organisation that would promote the place of women within its legal frame. Yet, such organizations seem to be now thriving in India, attracting a lot of attention from academics and the media, both locally and around the globe<sup>3</sup>.

Women activist groups are not a recent phenomenon in India; they have been fighting for their rights and enhancing legal consciousness for decades. However, their work was for a long time entrenched within the secular paradigm of the State, perceived as the only one able to redress, through both economic empowerment and

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<sup>1</sup> This article was first presented as a conference paper at the '2012 International Conference on Law and Society: A conversation across a sea of Islands' in Honolulu, Hawaii, within the 'Non-State Law and Governance in South Asia and in the Diasporas' panel.

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<sup>3</sup> Indeed, the AIMWPLB office walls are covered in framed newspapers clips mentioning its actions. Internationally, the BBC has underlined its existence (for example: *Protest against India rape fatwa* 2005; Mukerjee 2005), and it was recently mentioned in an article of the New York Times (Roy 2012).

legal reform, the social inequities that were still at play on the ground, and officially translated in the form of a personal law system<sup>4</sup>. The rapid reform of Hindu personal law<sup>5</sup>, as well as the possible recourse to criminal law (especially sect. 125 of the *Code of Criminal Procedure* in regards to a wife's right to maintenance), were interpreted as many steps in the right direction that would sooner or later influence Muslim personal law towards more gender equality, and perhaps lead to the constitutional objective of a Uniform Civil Code (art. 44) for all Indians.

Yet, Muslim law apparently did not budge. Even worse, the State seems to have abandoned any sort of reform after the *Shah Bano* case, legislatively precluding the Judiciary to depart from Islamic classical interpretation regarding post-divorce maintenance<sup>6</sup>. Moreover, it acknowledged and defended the existence of non-State courts, under the authority of *Qazis*, as legitimate *fora* where disputes pertaining to family matters among Muslims could be settled<sup>7</sup>. It all seems as though the idea of Uniform Civil Code is now out of reach (Dhanda and Parashar 2008), and despite some strong advocates (Pal 2001), the movement appears now to reform Muslim personal law from within, making it more 'just': either through enactments that would submit its application to Human Rights principles, or through an internal process of 'Substantialisation' that would privilege acculturation of Islamic principles through custom, hence transforming it alongside India's overall progression in matters of gender equality<sup>8</sup>.

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<sup>4</sup> A personal law system is a legal system where citizens are regulated by the law of their perceived community (religious or otherwise) in matters pertaining to their civil status (marriage, filiation, succession). After its independence, India has maintained this system inherited from the Raj (*The Muslim Personal Law (Shariat) Application Act 1937*). Article 26 of the Indian Constitution disposes that "every religious denomination (...) shall have the right: (b) to manage its own affairs in matters of religion", although subjected to "public order, morality and health" (*The Constitution of India 1950*).

<sup>5</sup> Hindu law has indeed been profoundly reformed towards more gender equality in numerous fields relating to family law, such as inheritance (*Hindu Succession Act 1956* and *Hindu Succession (Amendment) Act 2005*) allowing daughters to be coparceners of a familial joint property. Marriage, adoption/guardianship traditional laws have also been amended, not to mention the constitutional ban of 'untouchability' (art. 17).

<sup>6</sup> The case revolved around a rich husband refusing to grant his divorced wife maintenance beyond the 'idda (3 lunar months) period. The Supreme Court construed the Quran in order to extend the maintenance he owed her on top of 'idda money (*Mohd. Ahmed Khan v. Shah Bano Begum and Ors. 1985*). This ruling spurred protests around India and the Legislator enacted a new law (*The Muslim Women (Protection of Rights on Divorce) Act 1986*) apparently to overturn the decision towards a more traditional approach. This was perceived as a backlash from progressive/gender equality policy regarding the Muslim community in India. However, it has proven to be just the opposite (Menski 2008; Vatuk 2009) and in fact crystallised the *Shah Bano* solution (*Danial Latifi v. Union of India 2001*). However few commentators have perceived this change and the State is still considered incapable and/or unwilling to reform Muslim personal law in India beyond property issues (as it has partially done concerning *Wakf* properties – *Wakf Act 1995*).

<sup>7</sup> The State made its position known in an affidavit responding to a Public Interest Litigation (PIL) claim that vows to declare *Darul-Qazas* (*Qazi* Courts) unconstitutional (*Vishwa Lochan Madan v. Union of India* writ Petition (Civil) 386/2005) still pending in front of the Supreme Court (Redding 2010). Moreover, it has somewhat institutionalised them through the *Wakf Act 1995*, where each State's *Wakf* Board names *Qazis* and allots them a geographical 'jurisdiction' – if they are theoretically chosen over their merits alone, their lineage remains however a preponderant factor. Notwithstanding, the Indian State makes clear that it is not bound by these institutions' decisions, but whilst admitting and even accepting their use alongside of the official justice system, mainly due to practical reasons (relating to the cost of the latter and the overbearing number of cases it already has to handle), the State acknowledges that most *Qazi* decisions will remain unchallenged.

<sup>8</sup> The process of 'Substantialisation' consists in acknowledging that custom - as a source of Islamic law - has always played a predominant role in both its interpretation and application to a certain cultural/political



The idea of 'justice' is therefore increasingly put forward, parallel to or directly against the rule of law attached to the State. This idea is not specific to India, as it can easily relate to the Western movement of Alternative Dispute Resolution (ADR), which then was exported to certain parts of the globe. ADR's underlying ideology is the promotion of a harmonious society where conflict can and should be avoided through consensual means, rather than the inherent clash an adversarial judicial system is likely to create. The point is to favour negotiation over adjudication, where 'justice' is no longer linked to the application of a somewhat 'dogmatic'<sup>9</sup> rule of law but found through a negotiated settlement (Nader and Grande 2002).

This article vows to assess what part the AIMWPLB plays in this legal paradigm. Created in 2005 and based in Lucknow, the AIMWPLB is interesting for it both inserts itself within the wide galaxy of Muslim feminist movements in India, but also within the frame of non-State Muslim adjudication entities, such as the All India Muslim Personal Law Board (AIMPLB)<sup>10</sup>. It therefore vows to have a 'social' role in helping Muslim women in need, but also a 'legal' one in challenging the mainstream discourse on Muslim law through 'Islamic Feminism' and a re-interpretation of the Quran towards gender equality, all within the frame of the existing personal legal system<sup>11</sup>. Hence, the AIMWPLB vows to be a relevant actor within the apparently opposing scenes of ADR and the Rule of law, following in that sense the model put forward by the AIMPLB, and departing from mainstream feminist movements which for the most part help navigate around the legal system, and influence it from outside, rather than changing it from inside. To take a closer look at the AIMWPLB is also getting an insight into the broader question of how and under what conditions can non-State legal bodies can acquire the power to enforce their rulings in modern Nation-States, such as India.

In its short life-span of 7 years, the AIMWPLB has managed the feat to create a successful alternative dispute resolution *forum* in the Lucknow area, and is reckoned as such alongside other *Darul-Qazas* (despite the tensions between them). However, it has yet to gain the capacity to elaborate an Islamic legal discourse that is 'dogmatic' (Legendre 1996-1997). Indeed, the AIMWPLB is perfectly aware that it has not gained enough legitimacy to transform its legal opinion on Islamic law into rulings that would be directly applicable - whether socially or through the official judiciary's recognition. Therefore, it seeks the help of the State (through its constitutional frame) to legitimize its positions... to little avail as of yet. On this issue, I will however argue that one can

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context (Dupret 1999). In the modern era, this has been translated into its inclusion into the positivist frame of a Nation State, allowing the latter to define and reform it (Dupret and Buskens 2012).

<sup>9</sup> I will explicitly define my use of the word 'dogmatic' *infra*.

<sup>10</sup> Non-State Muslim adjudicative bodies - commonly referred as '*Darul-Qazas*' - are mainly organized through the *Wakf Act* 1995, as well as the affiliation of 'non-official' *Qazis* to a Muslim legal association, the most powerful being the AIMPLB, which was instrumental in the *Shah Bano* protests.

<sup>11</sup> I am here making the distinction between 'Feminist movement' and 'Islamic Feminism' that Nadja-Christina Schneider (2009) operates in her seminal article on the matter, concluding in the AIMWPLB's potential in allying both aspects of this particular Indian Feminism. For a more detailed account on 'Feminist movements' in India, Sylvia Vatuk's (2008) work remains a corner-stone (as for a more global approach to 'Islamic Feminism', see Mir-Hosseini 2006).

be weary of the AIMWPLB stance, which could be counter-productive for women rights in the long run, despite its initial intentions.

This analysis is the result of fieldwork achieved in Lucknow in October 2011, where I have been to the AIMWPLB and interviewed its president Shaista Ambar, as well as in the *Darul-Qaza* of 'Farangi Mahal' (linked to the AIMPLB), where I interviewed one of its *Qazis*<sup>12</sup>. Notwithstanding, I would emphasize that this article does pretend to grasp the multiple realities at play in India, whether they relate to ADR, Islamic feminism and more generally to Islamic law. It does however wish to shed some light towards one particular example that vows to participate and act upon these numerous fields, and to assess how it has managed to do so up until today.

## 1. "Signs of churning"? The AIMWPLB as challenging the AIMPLB's non-State adjudicative supremacy.

For a very long time, the AIMPLB seemed to hold a firm grasp on the definition, but also the non-State adjudication of Islamic law in India<sup>13</sup>. However, since the 1990s this monopoly seemed to be challenged on multiple fronts, certain portions of the Muslim community feeling they had not been sufficiently represented. 'Signs of churning' (Jones 2010) could be observed as other contesting 'law boards' were created<sup>14</sup>. The AIMWPLB follows this ongoing movement, with apparently the same goals as to become an alternative to the AIMPLB.

### 1.1. A one woman board?

Created in 2005, the AIMWPLB's objective was to potentially be accessible for all Indian Muslim Women throughout the territory, allying informative action towards their legal consciousness<sup>15</sup>, but also being able to assure legal adjudication pertaining to family matters (in others words, to have its own *Darul-Qaza* in the form of a *mahila adalat*), thus attaching itself to a Mosque in order to gain theological legitimacy as to its interpretation of Islamic law.

#### 1.1.1. Lucknow... where else?

The AIMWPLB was created in Lucknow, and doesn't seem to have extended its reach outside Uttar Pradesh (UP), let alone the city. Notwithstanding, its president is a well known figure in the area. I was indeed surprised, while desperately looking for the organization's location, to notice how so many people in the streets knew Shaista

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<sup>12</sup> Both interviews were conducted in Hindi and Urdu. I would like to thank Akhil Katyal, who acted as an interpreter and scooted me around Lucknow from one place to the other. I would also like to express my gratitude to Shaista Ambar and the *Darul-Qaza* of 'Farangi Mahal' for their welcome and the time they shared with me.

<sup>13</sup> I do not wish to imply that it held the monopoly on Islamic legal discourse; one could cite the *Jamaat-e-Islami Hind* (JIH) or the *Imarat Shariah* as a counter-examples. But unlike other organizations, the AIMPLB vowed to be a representative body and not only a school of thought (even though the latter may have other social activities). It also managed to create throughout the territory a multiplicity of *Darul-Qazas*, being able to ascertain predominance in the application of Islamic law, thus influencing its definition and content.

<sup>14</sup> Such as the All India Shia Muslim Personal Law Board (AISMPPLB), also based in Lucknow.

<sup>15</sup> Following in that sense other Feminist movements, such as the Women's Research and Action Group (WRAG) educating women on their legal rights in State Courts, and the Bhartiya Muslim Mahila Andolan (BMMA) which is more focused on women's rights within the Islamic legal frame.

Ambar, a member of the local communist party who previously held responsibilities in the UP government.

The organization however does not have any other office outside Lucknow and relies heavily on internet to extend its presence over the country. Indeed, its website is very nicely arranged and also offers a blog<sup>16</sup>, but the number of ‘hits’ remains relatively low compared to India’s overall Muslim population<sup>17</sup> and the blog has not been updated since April 2011. Moreover, this ‘advertising’ policy can only reach the small segment of the population which can both read and have internet access. Another issue is one of language, since both websites are in English. Surprisingly, Shaista Ambar does not speak English and depends on her daughter for translations. Regardless, the AIMWPLB does receive some legal queries, as I have been able to read, notably a mail from a woman in Tamil Nadu asking if ‘triple *talak*’ was authorized under Islamic law<sup>18</sup>. The number of such queries appears nevertheless to be quite limited.

### 1.1.2. *Material difficulties*

The AIMWPLB also runs on a very small budget, which limits its scope. Located in the suburbs of Lucknow, it consists of a small mosque to which is adjoined an office where Shaista Ambar receives ‘litigants’, with a room at the back reserved for women who wish some privacy. Within the Mosque’s grounds, there is also a shelter/dispensary for families who have no-where else to go. Despite the latter, which has been built following a particular donation, the rest of the buildings were financed by Shaista Ambar herself, who sold her family jewellery to that purpose.

Being present on a Friday, I was able to observe that the Mosque did attract a large number of followers. It however remains minuscule compared to other Islamic Institutions in Lucknow such as ‘Farangi Mahal’<sup>19</sup>. Even though these two institutions are barely comparable, given their respective history, suffice is to say that the AIMWPLB is still of a very small stature within the ‘network’ of *Darul-Qazas*. Despite claims that it consists of a 30 member board, it only appears to rest on Shaista Ambar’s

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<sup>16</sup> Website of the AIMWPLB: <http://muslimwomenpersonallaw.com/>  
Shaista Ambar’s blog: <http://shaistaambar.blogspot.com/>

<sup>17</sup> 127 667 ‘hits’ were recorded as of May 11<sup>th</sup> 2012. In comparison, India’s Muslim population is over 138 million people (source: IndiaStat, based on the 2001 census).

<sup>18</sup> ‘triple *talak*’ is a form of divorce, initiated by the husband and irrevocable once he pronounces ‘*talak*’ three times. Similar to a repudiation, it is of course a contentious issue for feminist movements as it gives to the husband a formidable power within the marriage bond (moreover since traditional Islamic law does not allow maintenance beyond ‘*idda*’ – and the wife can only claim her *mahr* (dower), unless it has already been paid beforehand).

<sup>19</sup> ‘Farangi Mahal’ is one of India’s most prominent Islamic centres dating from the 17th century. It has its own *madrassa*, *Darul-Qaza* as well as *Darul-Ifta* (where *fatwas* – legal opinion – can be enacted). Its compound in Lucknow is huge and clearly attracts a lot of money. (For more on the history of this institution see Robinson 2001).

shoulders alone and one can legitimately ask if it would last long without her continued devotion to this endeavour.

Hence, given the sharp contrast between the AIMWPLB's depiction in the media and its material reality, one has to ponder its real influence within the realm of Islamic law in India. Its media coverage has nevertheless been able to advertise its existence outside Lucknow, but it lacks the relays to extend its presence in other parts of the country. This being said, it is common for a young organization to primarily focus on its geographical origins, as well as to rely on a strong leader in order to secure its position before expanding. The AIMWPLB's record on that front is quite impressive, as it managed in a limited time-frame to both secure social recognition as well as spiritual legitimacy through the establishment of a Mosque. Yet, it is also not uncommon for movements to fade away once their leadership becomes vacant and no strong organizational structure is there to take over.

It is indeed striking to notice how the AIMWPLB is closely identified to its President<sup>20</sup>, such as it becomes difficult to assess whether 'litigants' come to the AIMWPLB for what it represents (as an organization, an ideology) or actually due to its President's own reputation. As aforementioned, the AIMWPLB seems to rest on Shaista Ambar alone, and would need as that stage of its existence to structure itself around other personalities in order for it to both to expand outside Lucknow, as well as to simply survive beyond its current President.

## **1.2. An alternative dispute resolution *forum* that falls short of adjudication**

All non-State Muslim legal *fora* have a tendency to first use mediation and conciliation before stepping up to adjudication. The AIMWPLB follows the same procedure, but for the most part is only able to achieve the first stage of this process. If indeed Shaista Ambar elaborates a distinctive Islamic legal discourse, which can be linked to the broader movement of Islamic feminism, she is only partially able to translate it into a socially enforceable ruling. Conscious of this shortcoming, the AIMWPLB skilfully concentrates its efforts on the contractual field (marriage) and the State's constitutional frame in order to implement its legal discourse ; a strategy both drawn for the organization's minority position within the realm of non-State Muslim adjudicative bodies, as well as from a critique of the judiciary's and *Qazi's* patriarchal bias. This can be exemplified through the 'case' of L. and H. which was resumed to me by Shaista Ambar, while the litigants were actually present.

### **1.2.1. The facts of the 'case'**

L and W were young and flirted with each other for some time until they "foolishly" decided to have pre-marital sex. Out of this intercourse, a son was unexpectedly born (H). During her pregnancy, L's family had desperately tried to get her married to W, fearing the shame a 'bastard' would bring to their good name. But L was from a poor background, and W's family (which had higher standards for their

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<sup>20</sup> Indeed, while searching for the organization's 'headquarters' by asking as to the whereabouts of the AIMWPLB, people were a bit confused and finally understood that I was searching in fact for Shaista Ambar.

son) refused the marriage. W further claimed that H was not his, and that he was leaving anyway for the Persian Gulf, where he would be working as a tailor.

L went to Shaista Ambar who started mediation. Since no arguments relating to Muslim law could convince W to marry L, she threatened to file rape charges against him. W got scared and reluctantly agreed to the marriage, but only upon his return from the Middle East (in order for him to provide for his new family), which was suppose to last only a few months.

As it turned out, he came back several years later. L's family started to organize the marriage but were inadvertently informed that W's family had made plans of their own and chosen another bride for him. S. Ambar was called upon again. W offered L 2 lakhs Rs.<sup>21</sup> in compensation, if she abandoned the marriage and accepted H was not his. Despite the large amount this sum represented for her, L nevertheless refused on the grounds that H would never have his father's name and would therefore always be considered as a 'bastard'.

S. Ambar managed (though this remains unclear) to make a paternity test while W was at the police station, arrested for a misdemeanour (apparently at her instigation). The test proved W was H's father. Faced with the facts and their possible repercussions (such as child support), W finally agreed to marry L in the AIMWPLB's Mosque.

### **1.2.2. Recognition through mediation**

The legal problem revolved around the child's recognition by his father, which in Islamic law is translated by *ikrar bi-l nasab*. Shaista Ambar's resolution of the case was however not one of adjudication where she would have declared the child to be W's following a legal procedure involving witnesses and other material evidence, but one of mediation where she convinced (notwithstanding a certain amount of threats – rape charges and social stigma by publicly presenting the results of paternity tests) W to legitimize H through marriage. The mediation allowed the basic legal matter of recognition to be linked to the wider social issue revolving around the status of an unmarried mother. The AIMWPLB's aim in this instance was to procure a legally binding solution that, it felt, could not be found either through the State's judicial system, or the *Darul-Qazas*.

The first assumption is to consider that Indian society as a whole is patriarchal, and even though State law favours women in some instances, judges will still have some difficulty applying it<sup>22</sup>. As it comes to this particular case, Indian statutes offer some latitude, their goal being to limit as much as possible the 'bastardisation' of a child. As such, Section 112 of the *Indian Evidence Act 1872* prolongs up to 280 days after the dissolution of marriage the presumption of paternity, Section 45 allows expert evidence (construed as allowing DNA testing), and Section 125 1. b) of the *Code of Criminal Procedure* orders the maintenance of a minor child whether he be legitimate or not. Hence, Courts have indeed ordered DNA tests to prove the paternity of a

<sup>21</sup> About 400 \$.

<sup>22</sup> In regards to maintenance of divorced Muslim women, Sylvia Vatuk (2001) has shown that this statement is quite true during an investigation of Family Court practices in Chennai.

child<sup>23</sup>. However, the solution in this case would only have been one of maintenance and not legitimacy. It is also possible to consider that the judge would not have deemed L. to “have a strong and *prima facie* case” required to seek the order of such a test by certain High Courts<sup>24</sup>.

The second premise is based on the same perception: a biased patriarchal application of Islamic law by *Qazis*. Indeed, even though Shaista Ambar believes Islam to be profoundly gender equal, she on the other hand considers *Qazis* to have made throughout the ages a misapplication of its precepts, relying on intricacies conveyed by books rather than the clear precepts of ‘The Book’ to ascertain their male dominance. According to her, women are not welcomed and hardly believed at first glance when they dare to initiate proceedings. Moreover, society has made them weary of confiding in a man, and ‘truth’ is better assessed when they can talk amongst women.

In this specific case and according to Shaista Ambar, the *Qazis* would have rapidly judged the child to be the result of *zina* (unlawful sexual intercourse), thus confirming his status as a ‘bastard’. The question however could have been one of *Ikrar* (recognition) of the child. Indeed, Islamic law does not allow easily the ‘bastardisation’ of an offspring, applying a prolonged presumption of paternity (*‘idda* period) and elaborating an easy process of recognition. The latter only requires three conditions: that the child may not be of someone else, that there a sufficient age difference between him and his alleged father and that finally the child (unless he is too young) accepts the recognition<sup>25</sup>. *Ikrar* may be judicial or extra-judicial (as a unilateral act). During judicial proceedings, the *Qazi* can acknowledge that the claim is sufficiently sound and not require other forms of evidence. If the defendant disagrees however, he may be forced to swear an oath denying the claim (*inkar*).

It is interesting to notice how in this case, Shaista Ambar did not follow this procedure (not even mentioning the possibility of *Ikrar*), even though this would have allowed the child to be considered from the marriage bed (*al walad li-'l-firash*). She preferred pushing towards the contractual solution of marriage, which in her mind had the advantage of satisfying both the woman and the child, and on a practical note was also a way of advertising her own version of *nikah nama* (marriage contract)<sup>26</sup>.

In this instance, the AIMWPLB embodies both the precepts as well as the critiques of ADR as a viable alternative to the rule of law represented by adjudication. As advertised by its proponents, mediation in this instance did allow a harmonious social solution that surpassed what adjudication would have been able to offer, which at best would have been the recognition of the child and financial support, but leaving the mother stranded. However, by criticizing the *Qazis*’ own use of ADR, Shaista Ambar also confirms that it can easily be perverted as a false conciliation where the weak party

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<sup>23</sup> *Anil Kumar vs. Turaka Kondala and another* 1998.

<sup>24</sup> *S. Thangavelly vs. S. Kannammal* 2004.

<sup>25</sup> The *Maliki* School adds a fourth condition as to assess whether the relationship is materially plausible.

<sup>26</sup> This solution however has the problem of not automatically legitimizing the child, and as time will tell, W could very well claim in front of a State Court that although married to his mother, he never officially recognized him as his son.

does not have the upper hand in truly negotiating a consensual solution, just as Laura Nader and Elisabetta Grande (2002) have shown in other instances.

The AIMWPLB is aware of such shortcomings, and is therefore advocating for another type of Islamic legal discourse that both State and non-State Courts would recognize as legitimate and enforceable. This goal has yet to be achieved.

## 2. The AIMWPLB's legal opinion: advocating for an Islamic feminist legal discourse

I define the expression 'legal discourse' as a discourse that has a direct implication on someone's behaviour. This discourse is fundamentally 'dogmatic'. The concept of 'dogmatic discourse' was put forward by Pierre Legendre (1996-1997, 1999) drawing from the classical linguistic distinction between signifier and signified<sup>27</sup>. The modern era has progressively drawn the individual to abandon his sovereignty to interpret the signifier, and rely on other entities (clergy, State etc...) to impose a signified meaning to it – for example not questioning the rules on how society should behave. Different tactics and doctrines were elaborated to snatch from the individual his power to interpret, whether it is on the greater reliance on textual sources (and hence an elite trained in interpreting them), the positivist theory of the State...etc. all build from a certain *mise en scène* of their authority and legitimacy<sup>28</sup>.

Hence, a legal discourse (whether it be a statute or a decision from the judiciary) is binding to the individual for it emanates from an entity that is deemed legitimate enough as not to argue its interpretation on how social ties should be organized. Law in this sense is no more than an illusion (Ross 1957) based on an *a priori* individual's surrender to a certain 'space of reference' from which this interpretation emanates. It systemises the link between two actions, translating them into 'cause' and 'consequence'.

A legal opinion, or discourse about law is on the other hand the effort of the individual to regain his own interpretation, trying to convince others through rational arguments to follow his position.

### 2.1. The AIMWPLB's critique of the patriarchal Islamic legal discourse

India as Nation-State is built on a positivist dogmatic legal discourse that has established its Constitution as the basis of any law. But by maintaining a system of personal laws, it also acknowledges that the State is not the unique 'space of reference' where this legal discourse can emanate.

The AIMWPLB critiques the legitimacy of these other 'spaces of references', such as the *Darul-Qazas*, as having through an elitist reliance on books and man focused legal education taken away from the individual (and more specifically women) its godly right to interpretation of Islam. It follows in that sense the path of 'Islamic

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<sup>27</sup> I would point out that Pierre Legendre uses this expression in a totally different context (centred on Western civilization), and that I am adapting and extending his concept to the issue at hand, for it allows to theoretically frame the latter in a comprehensive manner.

<sup>28</sup> A legal hearing is indeed a show, where actors have a role to play and judges are staged in a way to ascertain their power, Antoine Garapon (1997) defining the process as a 'ritual'.

feminism’, and aware of its minority position is actively seeking the help of the State to implement it.

### **2.1.1. Islamic feminism and individual Quranic hermeneutics**

Islamic feminism originates ironically from a global movement which was not prone to gender equality to begin with. Indeed, Islamist rhetoric which has sprung in the 20<sup>th</sup> century advocates a literalist approach to Islam’s founding scriptures against the ‘Substantialisation’ of Islamic law that was at play either through customary practices (as the devotion to *Sufi* Saints in South Asia) or its positivation by States. Yet by relying almost exclusively on the Quran, it also paved the way for Feminist movements to interpret the Holy text on their own and to consider it quite gender neutral, if not very protective of women<sup>29</sup>. Sunnis not recognizing any clergy, it is very difficult for other Islamist movements - who have thrown away most of Islamic law’s other sources – to counter such interpretations and would most likely have to take them into account (Mir-Hosseini 2006).

The AIMWPLB follows this trend by advocating its sole reliance on the Quran as the only valid source of Islamic law. For Shaista Ambar, the Holy text suffices to solve most of the legal problems that Muslim women face. In the case of L and W, she indeed based her argument on the Quranic prescription that no soul can suffer for others’ mistakes (Q 6: 164); hence H could not have his status diminished despite his parents’ pre-marital encounter.

As such, the AIMWPLB seems to rely on an individualist approach of Islam, against any traditional and systemised authority. It follows in that sense the Human Rights path of entrenching the freedom of religion, but through individual claims and thus the latter’s own interpretation of his religion. Islam is therefore de-Substantialised to become an “individual state of life” (Christians 2012, 228).

The inherent problem of this venture is that it can rapidly reveal itself to be a double-edged sword. The Quran, despite Shaista Ambar’s claims, contains but very few legal verses as such<sup>30</sup>, more often than most in contradiction with one another. The AIMWPLB’s refusal to use classical Islamic legal tools such as the theory of ‘abrogation’<sup>31</sup>, certainly allows Islamic feminism to pick and choose Quranic verses that suit their goals, but at the same time cannot dispute to others the right to have an anti-feminist approach using the same reasoning. Furthermore, it is still to be proven how the AIMWPLB would get around verses which clearly favour the male, such as the ones relating to inheritance (Q 4: 11-12 and 176).

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<sup>29</sup> One of their leading arguments being that ‘triple *talak*’ is no-where to be found in the Quran.

<sup>30</sup> Authors do not agree on their exact number, ranging from 350 to 2000 that could be interpreted as such (out of 6236 verses). Moreover, out of these legal verses, only a fraction concern interpersonal relations (*mu’amalat*), the others regulating the relations between God and mankind (*ibadat*).

<sup>31</sup> Based on Q 2: 106, it consists in identifying the verse which has been revealed last, which as a consequence abrogates the previous ones. The classical example is the ban on alcohol – which appears to be allowed (Q 16: 67), then banned while praying (Q 4: 43) to finally be totally forbidden (Q 5: 90).



The AIMWPLB had already been able to somewhat enforce such discourse through its marriage contract (*nikah nama*)<sup>32</sup>, which includes several Quranic verses emphasizing the husband's duties towards his wife<sup>33</sup>. Notwithstanding, marriage in Islam being primarily a private affair, which does not require the presence of any religious or legal official, the drafting of a marriage contract can be done bi-literally and include all sorts of clauses, as long as it states the amount of the 'dower' and the spouses' consent. As such, it is the translation of a private legal opinion, rather than one of legal discourse that would define marriage as an institution<sup>34</sup> imposing general and binding obligations.

### 2.1.2. *The AIMWPLB's claim to legal discourse through the positivation of Islamic law*

The AIMWPLB is quite aware of its difficulties to transform its discourse from a dissenting opinion to a binding legal one. Still advocating maintaining a personal legal system, it therefore seeks the help of the State to implement its women-focused application. Hence, Shaista Ambar has written to the Indian President in order to both codify Islamic Quranic precepts and directly include them in India's constitutional frame<sup>35</sup>.

Indeed, she continually proclaims her attachment to the Indian nation<sup>36</sup>, and seeks as such the positivation of Islamic law as the translation of its pluralist nature. In other words, she accepts the idea of the Constitution being the 'rule of recognition' (Hart 1993) under which Islamic precepts can become law, which would in turn bind the *Qazis'* interpretation of the latter.

It is however somewhat of a paradox on the one hand to claim that the Quran - as an ultimate and trans-national godly 'constitution' - does not impede on any 'secular' constitutional provisions, and on the other to still advocate for a personal legal system. For if the Indian Constitution is already Islamically compatible, so are the 'secular' laws that derive from it. Why not then only rely on them as adjudication is concerned?

The second problem lies on its trans-national nature. By constitutionally fixing broad Islamic precepts (by definition applicable to all Muslims indifferent of time and space) the process of their Substantialisation is halted (or more precisely dependent on the Legislator, representing the Hindu majority). However, it is under this very process that several progressive social achievements relating to the Muslim community are nowadays advocated, such as the inclusion of Muslim 'Dalits' into India's reservation policy (Misra 2007), or more recently the surprise *fatwa* issued by the *Deoband*

<sup>32</sup> Accessible online: <http://muslimwomenpersonallaw.com/pdf/nikahanama.pdf>

<sup>33</sup> It also requires photographs for identification and is made up of three copies: one for the spouses, one remaining with the AIMWPLB for archiving, and the last for means of registration (which is not yet required under Indian Law). It therefore included multiple safeguards that most *nikah nama* currently lack.

<sup>34</sup> Notwithstanding, a recent legal decision defined Muslim marriage as an institution (*Mst. Gulshan v. Sh. Raisuddin* 2011), paving the way for such opinion to become a legal discourse (although it remains a single judgment emanating from a District Court, far from the value of a precedent).

<sup>35</sup> A copy of the letter she sent can be found on her blog (Ambar 2011).

<sup>36</sup> The same is also true of the *Qazi* I met in 'Farangi Mahal', who perceives also Muslim personal law as a constitutional right, and acknowledges the limits of its application within *Darul-Qazas* (especially when property issues are concerned).

seminary to ban polygamy on the grounds it was contrary to Indian custom (Srivastava 2012)<sup>37</sup>.

### **Concluding remarks**

Following Nadja-Christina Schneider's (2009) distinction between feminist movement and Islamic feminism, one could conclude that if indeed the AIMWPLB has achieved its goals as creating an alternative dispute resolution *forum* - allying both secular and Islamic legal principles to achieve a mediated solution - its scope remains quite small and barely extends beyond its Lucknow headquarters, despite the global attention it received. However, its endeavour to elaborate an Islamic feminist legal discourse that in time could challenge the one put forward by other legal 'spaces of reference' such as the AIMPLB has for the time being been unsuccessful, and remains but a dissenting legal opinion with but little effect on the application of Muslim personal law in India.

Notwithstanding the AIMWPLB diagnoses on both the 'Islamic legal discourse' and the *Qazis'* led mediation do bare some ground. Despite its paradoxical appeal to the State and the rule of law in order to apply Islamic legal principles, the AIMWPLB does intend to show that the State's approval of *Qazi* led mediation can be less harmonious than it seems. As Laura Nader and Elisabetta Grande (2002) have demonstrated concerning Africa, mediation can be less than equal and one party (according to Shaista Ambar's claims, it would be the 'Muslim Man') can easily have the upper hand to enforce a solution only glazed by negotiation<sup>38</sup>.

One can however be weary of the possible counterproductive effects the AIMWPLB's alternative legal discourse and the attempt to strengthen it based on individual interpretation and its positivation through the Indian constitutional frame. Albeit the inherent theoretical contradiction in regards to the very existence of a personal legal system, such an approach might lead to unforeseen consequences and diminish the otherwise real progress Muslim law has made in the recent years, whether originating from the State or the Muslim community itself as to both its adaptation to the Indian context and its social and economic evolution.

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<sup>37</sup> One could also add that the AIMPLB in its *Compendium of Islamic Laws* (2001) had already mitigated the practise of 'triple *talak*' as to invalidate it if pronounced out of anger or not in sound state of mind. State Courts have used this source in their decisions to strongly regulate the practice of *talak* in general. (*Dagdu S/O Chotu Pathan, Latur vs Rahimbi Dagdu Pathan, Ashabi...* 2002).

<sup>38</sup> Particularly so when the 'mediator' is not a neutral and 'foreign' actor to the problem at hand, but a participant in the community within which it erupted.

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*The Constitution of India.* 1950. Articles 17, 26, 44

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## **Women and Men in Legal Proceedings: A European Historical Perspectives**

Grethe Jacobsen

### **Introduction**

Focusing on 'Gender in the legal profession' implies to me a focus on the legal professional with a gendered view, that is, looking at the lawmaker, the lawyer and the judge as a professional with a gender, which will influence the perceptions and actions of that professional. My perspective as a historian is that all known societies were gendered but - equally important - gender was not a constant. What was male and what was female has been determined by what any given society perceived as the proper roles and behavior of women and men.

In the following, I will give a brief, gendered overview of European legal history during the past two millennia, with a special focus on the Middle Ages (500-1500) and Early Modern Period (1500-1800) with the aim of providing a historical background for developments in Western law and the legal profession in the 20<sup>th</sup> century. My research as a feminist historian has dealt with social, economic and legal history from a gendered perspective, analyzing the sources to determine what was considered male and female at a given point and place in time and how these perceptions changed. My main focus has been on women, analyzing the norms, roles and rights governing women's lives especially during the late medieval and early modern period (roughly 1300-1600) as this part of legal history has been the least known and certainly has been the least explored.<sup>1</sup> We should not, however, forget that men also have gender, and in the following I shall deal with both sexes in European legal history.

### **The Legal Professional**

The history of the male legal professional is rather short. For most of the last two thousand years of Western history, laws and courts were staffed by people, who had no formal legal training but whose qualifications rested with their sex (male), civil status (married) and economic position (head of household, taxpaying citizen). The earliest institution to employ jurists, trained at the universities, was the Catholic Church, and the canon lawyer emerged during the 11<sup>th</sup> and 12<sup>th</sup> centuries. The study of secular law entered the university curriculum during the early modern period (16<sup>th</sup> - 18<sup>th</sup> centuries) and a group of male legal professionals appeared<sup>2</sup>.

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<sup>1</sup> The second wave women's movement, which began in the 1960's, has also produced a sizeable literature on women's history and gender history. I shall here limit myself to recent works by three historians, who has influenced my own research: Gerda Lerner, *Why History Matters: Life and Thought* (New York, Oxford University Press, 1997), Judith Bennett, *History Matters* (Philadelphia, PA: University of Pennsylvania Press, 2006) and Merry E. Wiesner-Hanks, *Gender in History - Global Perspectives*, 2nd ed. (Oxford, Blackwell, 2011)

<sup>2</sup> My general remarks are based on readings over the years in legal history. Some basic works are James A. Brundage, *Law, sex and Christian society in medieval Europe* (Chicago, Chicago University Press, 1987); James A. Brundage, *The medieval origins of the legal profession: canonists, civilians, and courts* (Chicago, University of Chicago Press, 2008); Ute Gerhard (ed.), *Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart*. (Munich, C.H. Beck, 1997)

The history of female legal professional in the Western World is even shorter, encompassing at most a century. Prior to the admission of women to legal studies at the university or other certified institutions for lawyers and to the bar afterwards in the late nineteenth and early twentieth century, only members of the male sex staffed the judges' benches, the advocates' chair, the lawyers' offices and the law professors' dais. We may find literary exceptions to this rule, such as Deborah, who is mentioned as a leader of the people of Israel in the Book of Judges of The Old Testament. In the English translation, Deborah is referred to as one of the judges; however, the word 'judge' in this context means 'ruler', and Deborah is described as being a "prophetess".<sup>3</sup> Another famous literary judge is, of course, Portia in Shakespeare's play, *The Merchant of Venice*. Portia could be a literary version of the many learned women, who emerged during the Renaissance,<sup>4</sup> but she is not an educated lawyer, even though her verdict, given when she, in male disguise, appears as a judge in a Venetian court, is considered valid. While none of these women in reality could be called a legal professional, their appearance, never-the-less, point to another story, namely that of gender in law and the legal profession, and that story is long, in fact as long as law itself.

### **Lawmaking and Gender**

The legal professional, whether trained or not, had to make decisions according to rules agreed on by the community or issued by the authorities in power. The rules that were to govern a community were most often formulated exclusively by men, primarily certain privileged groups of men. Examples are laws for villages and towns, issued usually by those men who were head of households and owned property of a certain size. Their laws were aimed at solving conflicts, punish perpetrators of rules for behavior and expressing norms of a society that was organized with a gender hierarchy and divided into classes or estates, each with their special privileges and rights. The so-called democratic assemblies prior to the 20<sup>th</sup> century rarely, if ever, included women. Even when the idea of universal democracy in the Western world was proclaimed in the French Revolution in 1789, this did not include women. The last word in the battle cry of the Revolution: liberty, equality and brotherhood, was to be taken literally. The radical new idea was that all men, regardless of class and birth, should partake of liberty, equality and brotherhood.

Far less radical, but to a certain extent new, was the fact that all women, regardless of class and birth, should not. Many women publicly protested this and organized to get women a place in the revolution and the new society that was to emerge from it, and one, Olympe de Gouges, drafted a Declaration of the Rights of Women in 1791 as a gendered correction to the first declaration of 1789, but her declaration was dismissed, and she was guillotined in 1793.<sup>5</sup> The century following the French Revolution saw a development towards a society in which gender became the

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<sup>3</sup> Judges 4,4

<sup>4</sup> Sarah Gwyneth Ross, *The Birth of Feminism: Women as Intellect in Renaissance Italy and England* (Cambridge, MA, Harvard University Press, 2009)

<sup>5</sup> Darlene Gay Levy and Harriet B. Applewhite, "A Political Revolution for Women? The Case of Paris," in: Bridenthal, Renate, Susan Mosher Stuard, Merry E. Wiesner (eds.) *Becoming Visible: Women in European History*, 3rd ed. (Boston, Houghton Mifflin, 1998)



determining factor overruling class, and many women lost even more of the legal competences they had hitherto enjoyed due to their class. The century also saw the emergence of a broad women's movement that, among other results, opened the university to women, paving the way for the female legal professional of the twentieth century.

While rules, formulated by a smaller community, thus had a male origin, rules issued by authorities in power over larger communities could be formulated both by men and by women, as women could and did hold power as queens regnant and female regents in Europe during the Middle Ages (500-1500) and Early Modern Periods (1500-1800).<sup>6</sup> In the Holy Roman Empire, abbesses for the major convents could also create legislation for the lands and town, they controlled.<sup>7</sup>

Do we find special women-oriented legislation issued by women? Generally, we do not. One of the few exceptions is an ordinance issued in 1396 by the Danish Queen Margrete (1353-1412), in which she proclaimed that everybody should respect and enforce peace towards the Church, houses, farms, legal assemblies, workers in the fields – and women, expressed in the word “kvindefred”.<sup>8</sup> In other words, these institutions, persons and buildings should not be attacked. The idea of protecting certain institutions, people and buildings was an older idea, most forcefully expressed during the twelfth century as ‘the Peace of God’, but to my knowledge the ordinance of Margrete is the only which specify women as a group to be sheltered from attack.

Women and men appear together in all types of laws throughout western history, women first and foremost characterized by civil status, that is, as daughters, wives, mothers and widows, but also as female traders and workers, men first and foremost characterized by their economic or social status, as knights, soldiers, traders, craftsmen, with a rank or an occupation, but also as sons, husbands, fathers and widowers. A general feature for all western law is that the norm is male, usually qualified to the

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<sup>6</sup> For the latest research and literature on queenship see Liz Oakley-Brown and Louise J. Wilkinson, “Introduction,” in: Oakley-Brown, Liz & Louise J. Wilkinson (eds.) *The ritual and rhetoric of queenship: medieval to early modern*, (Dublin, Four Courts Press, 2009); for female rulers in the Holy Roman Empire see Heide Wunder, “Regierende Fürstinnen des 16. Jahrhunderts im Heiligen Römischen Reich Deutscher Nation: Teilhabe an Herrschaft, Konfessionsbildung und Wissenschaften,” in: *Herzogin Elisabeth von Braunschweig-Lüneburg (1510-1558): Herrschaft – Konfession – Kultur. Beiträge des wissenschaftlichen Symposiums der Klosterkammer Hannover vom 24.-26. Februar 2010 im Historischen Museum Hannover*, Quellen und Darstellungen zur Geschichte Niedersachsens 132 (Hannover, Hahnsche Buchhandlung, 2011) p. 35-55; for Spanish history see Earenfight, Theresa (ed.), *Queenship and Political Power in Medieval and Early Modern Spain*, (Aldershot, Ashgate, 2005), esp. Theresa Earenfight, “Partners in Politics,” p. xiii-xxviii (2005a)

<sup>7</sup> Merry Wiesner-Hanks, “Ideology meets the Empire: reformed convents and the Reformation”, in: Merry Wiesner-Hanks, *Gender, Church, and State in Early Modern Germany. Essays by Merry E. Wiesner*, (London and New York, Longman, 1998), p. 47-62, Merry Wiesner-Hanks, “Gender and Power in Early Modern Europe: The Empire Strikes Back”, in: Bohnert, Christiane and Lynne Tatlock, *The Graph of Sex and the German Text. Gendered Culture in Early Modern Germany 1500-1700*, Chloe, vol. 19 (Amsterdam, Rodopi, 1994), p. 201-223

<sup>8</sup> Kroman, Erik (ed.) *Den danske rigslovgivning indtil 1400*, (Copenhagen, Munksgaard, 1971), p. 335, 340. This is the only text containing the word “kvindefred” in medieval Danish legislation.

adult, propertied male.<sup>9</sup> All legal rules, decisions and settlements were permeated by the issue of gender. Gender coupled with age and civil status determined who could be active in court, either as plaintiff, defendant or as witness, who could inherit and control property and how much one could inherit and control, and who could engage in trade and craft production and on what conditions. In my own work on Danish town laws and guild statutes during the later Middle Ages, I was looking for paragraphs explicitly prohibiting women from being active citizens, craftsmen or traders. I found none. Outright discrimination was not the issue; instead the laws expressed a gendered view of how a society, in this case Danish urban society, functioned. By defining who could be a citizen, a craftsman and a trader, gender roles were reinforced and increasingly during the 16<sup>th</sup> century these definitions came to fit only male heads of household.<sup>10</sup> This did not prevent women from being active outside their homes, but their work was not regulated and therefore not visible and not upsetting the existing gender order.

There were essentially two opposing gender models in Medieval and Early Modern Europe: the two-gender model that posited men and women as two opposing sexes, and the one-gender model, according to which there was only one sex and that sex was male, and the female was seen as a more or less imperfect man. It has been argued that during the Early Middle Ages (400-1000) the former dominated, while the latter was introduced into male theological and scientific discourse during the High Middle Ages (100-1300).<sup>11</sup> From a legal point of view the former meant, that women would have different rights than men – or no rights at all – while the latter meant that women were not completely excluded from legal rights and privileges and that the more 'male', a woman had to act, the more rights she would enjoy without the basic perception of society's gender roles being questioned. This would partially explain the general independent position that widows enjoyed throughout the Middle Ages and the Early Modern Period in the Western World.<sup>12</sup> It should be stressed, that these models were primarily found in academic discussions, and while they serve as a useful tool of analysis for the historian, their influence on and relation to the actual lives and conditions of men and women, including the laws and the legal systems, is difficult to uncover.

The males, who acted as legal professionals, whether or not they were formally trained, acted in a context that was highly gendered and this influenced decisions as

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<sup>9</sup> One recent study with a gender analysis of medieval laws is Christine Ekholst, *För varje brottsling ett straf: Foreställningar om kön i de svenska medeltidslagarna* (Stockholm, Stockholm University, 2009), with an English summary, p. 280-293 and with references to literature.

<sup>10</sup> Grethe Jacobsen, *Kvinder, køn og købstadslovgivning 1400-1600: Lovfaste mænd og ærlige kvinder*, Danish Humanists Texts and Studies, 11 (Copenhagen, Det Kongelige Bibliotek, Museum Tusulanum, 1995)

<sup>11</sup> Susan Mosher Stuard, "The Dominion of Gender or How Women Fared in the High Middle Ages," in: Bridenthal, Renate, Susan Mosher Stuard, Merry E. Wiesner (eds.) *Becoming Visible: Women in European History*, 3rd ed. (Boston: Houghton Mifflin, 1998), p. 129-180

<sup>12</sup> Jack Goody, "Inheritance, Property and Women: Some Comparative Considerations," in: Goody, Jack, Joan Thirsk, E.P. Thompson (eds.) *Family and Inheritance: Rural Society in Western Europe, 1200-1800* (Cambridge, Cambridge University Press, 1976), 10-36; Sandra Cavallo and Lyndan Warner, *Widowhood in Medieval and Early Modern Europe*, (Harlow, Longman, 1999)

well as legal procedures. The male legal professionals were not necessarily acting as "partisan" for their own sex, but through their status as heads of a household and as marriage partners, they were deeply enmeshed in contemporary gender relations and had an interest in protecting the rights of the women in their household, especially their wives. To show the relationship between gender hierarchy, gender norms and the legal systems, I will focus on three issues in Western legal history, that has a bearing upon the legal profession as well as the general population: The actions of women and men in court, the connection between property, patriarchy and demographic reality, and the legal system, including the legal professional, as a crucial instrument in keeping up the 'patriarchal equilibrium'.

### **Women and Men in Court:**

In Medieval Europe (500-1500) a plurality of law existed: customary law, royal statutes, town laws, Canon law and Roman law and with each set of laws followed particular legal procedures. While the occupants of the lawyers' and judges' benches before the twentieth century have been male, both men and women filled the courtroom as plaintiffs, as defendants, as witness and as audiences, and the cases that was heard by the legal professionals would involved both men and women as far back as legal records for Western legal history is extant. In general, adult males who were not mentally or physically handicapped could act in court. For women the situation is more complex and changing over the centuries and with many local variations from permitting women to act on their own to demanding that they exclusively be represented by husbands, male relatives or advocates.

Local laws and legal procedures was something that women as well as men should – and did – know about as we can tell from the writings of one medieval women Christine de Pisan (1365-1430?). Christine was a highly educated woman who was widowed at the age of 25 with three small children and an elderly mother to provide for. She was able to do so by writing on a wide variety of topics for the French king and queen, who paid her for her work. Among her many works is a handbook for women, *Le Livre des Trois Vertus*, or *Le Trésor de la Cité des Dames*, completed in 1405.<sup>13</sup> In the book she gives advice on how to survive as a woman in a society that does not treat women as well as it should, especially not widows. She enumerates the dangers facing widows one of which is being sued for debt, property or services, and then gives advice on how to tackle the dangers. As for being sued, a widow should avoid this if at all possible because "she does not know all the ins and outs and is naïve in such matters,"<sup>14</sup> because people will cheat her if they see an opportunity, and because a widow cannot spend all day in court (due to her domestic duties) as a man can. If she cannot avoid being sued, she should try to obtain a settlement out of court, taking great care to examine all claims against her, and if she has to sue herself, "she should pursue her claims courteously and see whether she can get them by some other means." If she has to go to court, she needs good counsel by lawyers and clerks who are very knowledgeable in law and legal proceedings, she has to be careful and diligent in pursuing her case and she has to have enough money to go through with the case.

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<sup>13</sup> I have used the English translation here: Christine de Pisan, *The Treasure of the City of Ladies or The Book of the Three Virtues*, tr. Sarah Lawson (Harmondsworth : Penguin Books, 1985)

<sup>14</sup> de Pisan, *The Treasure*, p.157

Finally, it is necessary to “adopt a man’s heart (in other words, constant, strong and wise)” and not “collapse like a simple woman into tears and sobs without putting up a fight”.<sup>15</sup> While proclaiming that women in general is ignorant of the law, Christine de Pizan also reveals a practical knowledge of the legal system and suggests ways to use it to one’s advantage.<sup>16</sup> However, as it is also implied in Christine’s text, gender roles with its implicit and explicit rules for male and female behavior, defined the actions and strategies that each gender employed in court. This was found also in the early modern period.<sup>17</sup>

Court records show that women were regularly present in the courts, at least in local courts. Two examples from medieval and early modern Denmark will demonstrate this. In 1500, a document issued by a local court concerning court procedures proclaimed that victims of violence, including theft, should raise the case at the court 'whether man or women, young man or maiden'.<sup>18</sup> The document also gives the wording of the oath to be used by male and female witnesses, who should be trustworthy people and the expression for these witnesses are gendered but equal by using the designation "sandemand" (lit. truthful man) and "sandekvinde" (lit. truthful women) about the witnesses who were qualified to swear an oath (to the truth of the accusation). In a document from 1587, women and men are both mentioned as qualified witnesses in court procedures, but with two different designations: men are called 'law firm' ("lovfaste"), women are called 'honest' ("ærlige").<sup>19</sup> A firm chronological development cannot be deduced from these two examples, but they reveal that a gender hierarchy and gender roles undercut attempts to create fixed rules as well as names for those who could appear in local courts. When it came to appellate courts or ecclesiastical court situated further away, the tendency was for women to be represented by advocates and/or designated guardians, but this was true for some men as well, and in the Papal courts in Rome, both men and women had lawyers as laymen and laywomen rarely knew of the rules and procedures of Canon Law.

The Early Modern period (1500-1800) saw a trend in continental Europe toward modernizing the law and the procedures, making Roman law the ideal, along with a professionalization of judges and advocates.<sup>20</sup> This in general led to restrictions for women in court, either excluding them from proceedings or – more often – demanding that they be represented by a lawyer. In England, a plurality of law (ecclesiastical law, based on Roman and Canon law, customary (local) law, common law, equity law,

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<sup>15</sup> de Pisan, *The Treasure*, p.158

<sup>16</sup> One study that has attempted to ascertain women's knowledge concluded that women appear have known enough about law and courts to have been able to utilize the legal system to obtain their goals: Emma Hawkes, "[S]he will...protect and defend her rights boldly by law and reason..."Women's Knowledge of Common Law and Equity Courts in Late-Medieval England", in: Noël James Menuge (ed.) *Medieval Women and the Law*, (Woodbridge, The Boydell Press, 2000), p.145-61

<sup>17</sup> Tim Stretton, *Women Waging Law in Elizabethan England* (Cambridge, Cambridge University Press, 1998), p. 226.

<sup>18</sup> Jacobsen (1995), p. 222.

<sup>19</sup> *Ibid.* p. 232-33

<sup>20</sup> Merry E. Wiesner-Hanks, *Women and Gender in Early Modern Europe*, 3rd ed. (Cambridge, Cambridge University Press, 2008), p. 42-49.

chancery law) remained.<sup>21</sup> In the Mediterranean area a plurality of laws similarly reigned both during the Middle Ages and the Early Modern Period. The existence of Muslim, Jewish and Christian laws and courts meant that women and men could 'shop around' for the best place to settle conflicts which in turn influenced behavior of legal professional.<sup>22</sup>

Recent studies of litigation, primarily during the Early Modern Period, has shown how women used the courts to challenge or to exploit the legal restraints, they encountered, in order to protect their property, their livelihood and their families, especially their children.<sup>23</sup> They could also exploit the restrictions by using laws to avoid responsibility for debt, for paying taxes etc. which threw the authorities into a quandary having to choose between unpleasant economic consequences in order to uphold patriarchal ideology or pick the economic most sensible solution but risk upsetting the gender balance. One such case is found in the Danish town of Ribe in 1555. A poor widow was sued for debt that she and her husband had incurred. The court asked if she had a law guardian who could offer surety for the payment. She answered that no one could be found who would guarantee payment of the debt. The decision handed down by the court is really not a decision but an appeal to her to pay. Obviously, the court did not want to give her the full rights to handle her own case, but neither did they want to impose payment of the debt upon a man, and so they settled for the hope that somehow she would be able to pay or find someone who did.<sup>24</sup> Such deliberations made up the daily caseload of the legal professionals and forced them to act in a gendered frame even though they were not conscious of it.

Conversely, some of the learned juridical disputations in academe may not have had any bearing in real life. One example of this is the Roman law concept, 'Senatus Consultum Velleianum', according to which women were exempted from responsibility for claims upon their property because of female weakness which made women susceptible to bad advice and flattery. This was much debated especially by Early Modern jurists in the wake of the rising influence of Roman law, as the concept had been unknown in medieval law. Because of the academic discussion the concept has also loomed large in legal history and was presumed to have had an important role in legal practice. However, contemporary court cases from a Saxon court (in Germany) show that it had absolutely no influence on the court proceedings and decisions.<sup>25</sup> It did have some importance when it came to female rulers and regents (women who acted as guardians for a minor king or prince, usually their son) in areas where Roman law

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<sup>21</sup> Susan Staves, *Married Women's Separate Property in England, 1660-1833* (Cambridge, MA, Harvard University Press, 1990), p. 18-25

<sup>22</sup> For examples of this see the articles in Jutta Gisela Sperling and Shona Kelly Wray (eds.) *Across the Religious Divide: Women, Property, and Law in the Wider Mediterranean (ca. 1300-1800)*, (New York, Routledge, 2010)

<sup>23</sup> See e.g. Stretton (1998)

<sup>24</sup> The case is discussed in Jacobsen (1995) p. 189

<sup>25</sup> Hendrikje Carius, "Strategien vor Gericht? Die 'velleianischen Freyheiten' im sächsischen Recht (1648-1806)", in: Grethe Jacobsen, Helle Vogt, Inger Dübeck, Heide Wunder (eds.) *Less Favored – More Favored: Proceedings from a Conference on Gender in European Legal History, 12th – 19th Centuries, September 2004 / Benachteiligt – begünstigt: Tagungsbericht einer Konferenz über Geschlecht in der Europäischen Rechtsgeschichte, 12. – 19. Jahrhundert, September 2004* (Copenhagen, Det Kongelige Bibliotek, 2005) [http://www.kb.dk/export/sites/kb\\_dk/da/publikationer/online/fund\\_og\\_forskning/download/A07\\_Carius.pdf](http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A07_Carius.pdf)

dominated, in that such a ruler had to issue a written waiver of the 'Senatus Consultum Veilleianum' in order to issue valid legislation.<sup>26</sup>

The legal professional also had to deal with property cases outside the courts, in those cases that involved no litigation but disposal of property through wills and contracts, involving women as well as men, and which had to be formulated according to the laws to be valid. As each case was unique this would involve an estimate of the rights of the parties involved.<sup>27</sup>

### **Property and Patriarchy and the Demographic Reality**

Both men and women could own property but the right dispose of property depended upon gender, civil status and the type of property law of local society. During the Middle Ages the plurality of laws meant a great variation in the rights of owning and controlling property both for men and women.<sup>28</sup> Very generally stated, for men their status was dependent on their being the head of a household or at least independent, while for women their status was dependent on being single, married or widowed. The latter would also confer the status as head of household upon a woman.<sup>29</sup>

During the Early Modern period, a study has shown how the one-gender model was found in Early Modern Sweden and how it may explain the varying rights women enjoyed (or not) to control their property, also revealing the important role that civil status played in determining the rights concerning property given a woman. The model fitted well with the social and economic conditions of Early Modern Sweden, as it was flexible enough to handle property issues within a marriage by accommodating the reigning marriage model in which the husband was the head of the household and represented it in court as a rule but a wife could be given a larger or smaller share of his rights when needed.<sup>30</sup> As it is aptly expressed: 'women owned property and passed it to the next generation, while men owned property, passed it to the next generation AND disposed of it as head of households'.<sup>31</sup> During the nineteenth century the two-gender model emerged more clearly, and the issue was now, how to give equal rights to two different sexes and at the same time uphold the marriage as a social and economic unit?<sup>32</sup>

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<sup>26</sup> Pauline Poppel, *Die Regentin: vormundschaftliche Herrschaft in Hessen 1500-1700* (Frankfurt/New York, Campus Verlag, 2004), p. 88

<sup>27</sup> For further discussion of the issue of the various rights of women and men within a Roman law frame see Thomas Kuehn, *Law, Family, & Women: Towards a Legal Anthropology of Renaissance Italy* (Chicago, The University of Chicago Press, 1991)

<sup>28</sup> The international research network 'Gender Difference in the History of European Legal Cultures' has since 2000 held regular conferences using a comparative approach to gender and legal cultures across Europe from Antiquity to the 20th century. See <http://www.gendered-legal-cultures.de/index.html>

<sup>29</sup> For a discussion of this issue with references see Cordelia Beattie, "A Room of One's Own? The Legal Evidence for the Residential Arrangements of Women Without Husbands in Late-Fourteenth- and Early-Fifteenth-Century York," in: Noël James Menuge (ed.) *Medieval Women and the Law*, (Woodbridge, The Boydell Press, 2000) p. 41-56.

<sup>30</sup> Maria Sjöberg, *Kvinnors jord, manlig rätt. Äktenskap, egendom och makt i äldre tid* (Hedemora, Gidlund, 2001) spec. P. 82-86

<sup>31</sup> Sjöberg (2001) p.86

<sup>32</sup> Sjöberg(2001) p.169-194.

Property relations between the husband and wife in the Western world has ranged from total communion of property, governed singly by the husband or jointly by the couple, to a total separation of property with each spouse governing her or his own property, along with a myriad of variations in between. Sometimes these two extremes could be found within a relatively small geographical area, as for example in present-day Southwestern Austria. A study of marital property in this area during the Early Modern period show how each model had its benefits and restriction for the wife as well as for the husband, and not the least for widows and how each model developed with own gendered dynamic and logic,<sup>33</sup> which, of course, a legal professional would have to deal with.

It must also be considered that property would never be a static entity but would be changing during the course of a marriage, partly as a result of the couple's work partly as a result of negotiations during the marriage with a view to the common benefit of the household,<sup>34</sup> which in turn meant that the legal professional also had to be attuned to the social and economic as well as the gendered context in those cases where these negotiations ended in court.

Rules for inheritance play a dominant role in all Western laws. Owning property gave power and the more land, one owned, the more power. Transferring property though inheritance meant assuring that one's accumulated property and power went to one's offspring. The ideal process in a patriarchal society would be for a couple to marry, produce a son who would grow up to inherit the couple's property and a daughter who would get a share as a dowry that enabled her to make an advantageous marriage, whereupon both spouse would die at the same time. Such an orderly transfer of property was, of course, extremely rare. For one, not every marriage produced children and fewer marriages produced sons. Before reliable methods of birth control and modern fertility technology only about 60% of marriages produced at least one son, 20 % produced daughters but no son and 20% of all married couples remained childless.<sup>35</sup> For another, spouses rarely died at the same time, leaving a widow or a widower who could remarry and establish a household with children of previous marriages as well as common children and with each child in the household having different claims on the property.

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<sup>33</sup> Gertrude Langer-Ostrawsky & Margareth Lanzinger, "More Favored – Less Favored: Women and Men in Different Marital Property Right Systems: A Comparative study of Marital Property Rights in the Habsburg Empire during the 18th Century/Begünstigt – benachteiligt? Frauen und Männer im Ehegüterrecht. Ein Vergleich auf der Grundlage von Heiratskontrakten aus zwei Herrschaften der Habsburgermonarchie im 18. Jahrhundert," in: Grethe Jacobsen, Helle Vogt, Inger Dübeck, Heide Wunder (eds.) *Less Favored – More Favored: Proceedings from a Conference on Gender in European Legal History, 12th – 19th Centuries, September 2004 / Benachteiligt – begünstigt: Tagungsbericht einer Konferenz über Geschlecht in der Europäischen Rechtsgeschichte, 12. – 19. Jahrhundert, September 2004* (Copenhagen, Det Kongelige Bibliotek, 2005)

[http://www.kb.dk/export/sites/kb\\_dk/da/publikationer/online/fund\\_og\\_forskning/download/A04A\\_Langer-Lanzinger-ENG.pdf](http://www.kb.dk/export/sites/kb_dk/da/publikationer/online/fund_og_forskning/download/A04A_Langer-Lanzinger-ENG.pdf)

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<sup>34</sup> Maria Ågren and Amy Louise Erickson (eds.) *The Marital Economy in Scandinavia and Britain 1400-1900* (Aldershot, Ashgate, 2005)

<sup>35</sup> Amy Louise Erickson, *Women and Property in Early Modern England* (London, Routledge, 1993), p.5

Inheritance rights in the Western world reflected the many ways to deal with demographic reality. One system, and the one which became common during the Middle Ages, allowed all children to inherit after their parents. In areas following Roman law all children received an equal share. In other areas, as for example the Nordic countries, sons received a share that was twice as large as their sisters. Another system was to favor one child (usually oldest son) or only male children. For those propertied men and women who died without children, the rules were just as varied. Complicating the transfer of property from one generation to the next was also the rights of kin in cases involving land that was designated as family land and belonging not just to one person but to a group of kinsmen and kinswomen. Women's rights in relation to the kin group reflected both a patriarchal society but also what was considered optimal for the kin group and the community at large. All of this gave rise to much litigation, rarely with any clear-cut answers for the legal professional.

### **Keeping up the 'Patriarchal Equilibrium' through the Court**

The American historian, Judith Bennett, or rather one of her students, first formulated the idea of the 'patriarchal equilibrium', and she has used this to support her hypothesis that no major transformation really happened in Western women's history for the past 2.000 years, while the many changes, for better or for worse, that historians have noted, especially during the last decades of renewed interest in the history of women, have served one purpose, namely to keep up the equilibrium.<sup>36</sup> The legal system (laws, courts and legal professionals) have contributed to preserving the equilibrium. Two legal historians have revealed how underlying patriarchal structures have been maintained and preserved through apparent great changes in law and legal discourse on Early Modern Europe through neither of them actually used the phrase 'patriarchal equilibrium'. Susanna Burghartz looked at marriage and sexuality during the 16<sup>th</sup> and 17<sup>th</sup> centuries, as reflected in the cases at the marital court of Basel, and Susan Staves took on married women's property in England from 1660 to 1833.

According to Susanna Burghartz the Protestant reformation meant that marriage no longer was a sacrament and therefore could be dissolved - at least in Protestant areas. On the other hand, marriage was so central to social organization and gender hierarchy that too much upheaval would undermine social order. In addition, the frames for purity discourse changed. During the Middle Ages this discourse had dealt with celibate as well as noncelibate men and women, most of them living outside a marriage: monks, nuns, priests, secular virgins, widows and widowers, while celibacy in marriage was a smaller part of this discourse. With the abolishment of religious orders and the endorsement of marriages for priests in reformed areas, purity discourse now had to take place within marriage. The court cases in Basel demonstrate that, over time, the marital court changed from being an institution for conflict solutions to an institution of oppression, determining what was right and what was wrong in sexual relations between the sexes thereby restoring and upholding the deeper lying structures governing gender relations.<sup>37</sup>

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<sup>36</sup> Bennett (2006), esp. chap. 4: "Patriarchal Equilibrium"

<sup>37</sup> Susanna Burghartz, *Zeiten der Reinheit – Orte der Unzucht: Ehe und Sexualität in Basel während der Frühen Neuzeit* (Paderborn, Schöningh, 1999)



Susan Staves analyzed the modernization of the property law in England from the late 17<sup>th</sup> to the early 19<sup>th</sup> century which aimed at making property transfers more flexible than under Common Law in order to accommodate changing economic conditions and the demands of a new capitalistic society made up of enterprising individuals with property and capital. As married women could own property and capital, they could in theory become active in this emerging society, but that would undermine existing social order with its gender hierarchy and its legal system that had erased the legal *persona* of the wife, subsuming it in the person of the husband. This was not considered desirable by a patriarchal society, and the changes in rules concerning married women's property were all formulated so the old gender (im)balance was retained and the new active, capitalist citizen remained purely male in spite of the need for capital and agents during the changing economic conditions. An additional point is made by Susan Staves: the rules, which during the recent centuries have been labeled "private law" were formulated in public by jurists and legislators, applied by publicly appointed judges and enforced by public courts and institutions.<sup>38</sup>

A similar cross-cultural pattern is revealed in a recent comparison between England, France and Ottoman Empire (Cairo) during the eighteenth century. Mary Ann Fay shows that Muslim women in fact had more property rights than contemporary women in France and England, and that marriage played no role for Muslim women's property rights, unlike the situation in Europe where women's civil status determined their property rights. Still, they were also living in a patriarchal society, so "Islam, while expanding the legal and property rights of women, did not overturn the patriarchal order set in place by its emergence in seventh-century Arabia".<sup>39</sup>

Upholding the patriarchal equilibrium during the many day-to-day cases in court means that lawyers, judges, jurists and legislators had to incorporate in their decisions the norms of a society with an embedded gender hierarchy: male on top, female on bottom, even though the laws may appear neutral.

## Conclusion:

While the Western legal professional prior to ca. 1900 was always a male, he continuously and daily had to deal with gender in courts and lawmaking assemblies. Because the laws took male as the norm, they regulated male activities primarily, in which case the legal professional "merely" had to look up in the law books to solve conflicts. As women were equally active in social and economic life which regularly brought them into courts, checking the law books were not enough in those cases as regulations made for the male subjects didn't always fit the female subjects. Such a simple thing as coming of age was always determined for men but rarely for women, and if determined, contingent upon her civil status as well as age.<sup>40</sup> Thus, the decisions

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<sup>38</sup> Staves (1990) p.197

<sup>39</sup> Mary Ann Fay; "Counting on Kin: Women and Property in Eighteenth-Century Cairo," in: Jutta Gisela Sperling and Shona Kelly Wray (eds.) *Across the Religious Divide: Women, Property, and Law in the Wider Mediterranean (ca. 1300-1800)*, (New York, Routledge, 2010), p. 207-23, citation p. 213

<sup>40</sup> The issue of women's coming of age was especially important in connection with guardianship, see Puppel (2004) p. 82-84

made by the judge, or the argument proposed by the advocates, the plaintiffs and defendants themselves were created in a mental environment with gender roles and norms.

Considering that the question posed by this special issue is “Has this changed with the advent of the female professional?” I will, as a historian with specialty in the medieval and Early Modern period, leave the answering to others with the remark, that the one major difference – from a historical perspective – is that now gender has become visible also in the lawyers’ chairs and judges’ benches and this should lead to a conscious discourse on gender and law.

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## **Field Notes**

### **Female Judges in Southern Punjab, Pakistan**

Coordinator: Rubya Mehdi<sup>1</sup>

Interviewer: Sajid Sultan, Sajida Ahmed Chaudhary and  
Rubina Perveen Magassi<sup>2</sup>

The concept of justice in Pakistan is very much plural; it is a mixture of the ideal justice of Islam, ideas derived from the Anglo-Muhammadan traditions, customary laws and modern laws made after 1947. People usually do not prefer to go to the courts as it is expensive, time consuming and involves long procedures, and in the end the justice delivered may not be in accordance with the expectations of the recipient. Therefore, commonly poor people use the traditional alternative methods of resolving their disputes, i.e. conflict resolutions outside the courts. Moreover, the various legally plural systems work jointly in interaction and understanding with each other. This means that there is a wide network of informal and formal interaction of the courts. The system becomes complex as it combines with negotiation, manipulation, power plays and many other cultural, political and social pressures. The subordinate courts of the country, where most of the female judges are working, have closer relations to the informal justice system of the country as these courts are situated near to rural areas from where most of the population comes.

Though most of the legal activity exists outside the legal system of the country in the non-official sphere (it is inadequate to talk about the legal system centralised around court decisions) still the law professionals, i.e. advocates and judges tend and try to look at the law in a strict legal positivistic perspective. This helps them in maintaining a powerful position. But consciously or otherwise their interaction with the informal, non-state legal sphere is unavoidable, as their clients mostly come from backgrounds wherein the understanding of justice is legally pluralistic.

The movement for the independence of the judiciary in 2007 had large-scale popular support because of general dissatisfaction with the state courts, suicide bombers, shortage of electricity and disillusionment from the politicians of the country.

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Sajida Ahmed Chaudhary is Civil Judge, 1st Class-cum-Judicial Magistrate Section 30 recently submitted her thesis to accomplish PhD in Law at the Islamic University Islamabad.

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However, in the post-movement period many reforms were made in the working of the subordinate courts, employment of the female judges on large scale is one of them.

This paper (field notes) present empirical data collected in 2012 consisting of interviews from female judges mainly from the South Punjab obtained from the permission and consent of the relevant Districts and Sessions Judge. Here it will be worth mentioning the work of Livia Holden and Marius Holden based on the project Lady Judges of Pakistan started in 2009 and whose first outcome is the documentary film “Lady-Judges of Pakistan” due for release in December 2012.<sup>3</sup> Livia Holden has presented her works at several venues in Pakistan and has communicated with me many of her findings. The present article even though it might contain views and use methods that are not endorsed by Livia and Marius Holden is inspired from their work.

We will study the existence of recently increased number of female judges in the lower courts of Pakistan and how they respond and adjust to not only a complex structure of legal pluralism but also seek to strike a balance with “gender equality”, which becomes a natural demand for them in a male dominated culture i.e. dealing in a “manly” way, which mainly consist of negotiations and upholding of predominantly feudal values.

Firstly, when working on an equal status and position with their male colleagues, they are expected to deliver justice like men. They say, “we should not think we are women, but on the seat of judge we are like a man”. This also means that there is pressure to understand equality in the sense that if at all they have entered this profession; they should be “like their male colleagues”. If they do not and cannot fulfill this demand their very credibility as competent judges may be challenged.

Secondly, their struggle to meet the demands of a challenging job goes side by side with pressures for the daily running of the household and persisting old pattern of the family where they still are mainly responsible to run the domestic affairs. The traditional concepts of the family and motherhood are tied to the perception that women as basically responsible for the household and as primary caretaker for the sick in the family.

Thirdly, the effects of globalisation can be strongly seen in Pakistani society, some might say more than anywhere else in the world. In response there is a rising wave of conservative radicalism, wherein the space for human rights values and gender equality is getting narrower every day.

Let us examine the structure of the courts in Pakistan to see in context of female judges where they are placed in the hierarchy of this organisation.

### **The Structure of the Courts and Legal Profession:**

The Supreme Court and Female Judges: Supreme Court is the apex court of the land, exercising original, appellate and advisory jurisdiction (Article 184, 185 & 186).

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<sup>3</sup> The extract (2011) of the film is accessible at <http://www.insightsproduction.net/ljp>



No lady judge has ever been elevated to the Supreme Court of Pakistan. A retired female judge of the High Court says:

Look at the history of courts in Pakistan and how many female judges have been from the beginning. Five female judges were appointed in the High Courts in 1994. Two of them had legitimate expectancy to become Chief Justices of the High Courts of Punjab and Khyber Pakhtoonkhwa respectively. However, both of them were superseded and were allowed to retire without being elevated to the Supreme Court of Pakistan. (Justice Nasira Javed Iqbal, retired).

The Shariat Appellate Bench of the High Court hears appeals from judgments/orders of the Federal Shariat Court (Art 203F).

### **The High Court and Female Judges:**

There is a High Court in each province and a High Court for the Islamabad Capital Territory. According to Article 25 of the Constitution, some sort of gender equality needs to be maintained. If not 30%, then at least 10% judges in all courts should be women. Competent and eligible women are not hard to find if one looks for them. (Judiciary and Gender Bias, Ms. Justice (R) Nasira Javed Iqbal).

Only three female judges were appointed to the Lahore High Court. Two retired judges are Justice Mrs. Fakhar-un-Nisa Khokhar and Justice Nasira Javed Iqbal. One serving judge recently appointed is Mrs. Justice Ayesha A. Malik.

In the Sind High Court two female judges were appointed. Both have since retired, Justice Mrs Kaiser Iqbal and Justice Mrs Yasmeen Abbasi.

Justice Khalida Rashid Khan has been appointed to the High Court of Peshawar (KPT) while no female judge has been appointed in the Baluchistan High Court since the inception of Pakistan.

### **Federal Shariat Court and Female Judges**

The Federal *Shariat* Court consists of 8 Muslim judges including the Chief Justice (Art 203-C). The Court, on its own motion or through petition by a citizen or a government (Federal or Provincial), may examine and determine whether or not a certain provision of law is repugnant to the injunctions of Islam (Art 203-D). Appeal against its decision lies to the *Shariat* Appellate Bench of the Supreme Court, consisting of 3 Muslim judges of the Supreme Court and not more than 2 *ulema*, appointed by the President (Art 203-F). If a certain provision of law is declared to be repugnant to the injunctions of Islam, the government is required to take necessary steps to amend the law so as to bring it in conformity with the injunctions of Islam. The Court also exercises appellate and revisionary jurisdiction over the criminal courts, deciding *Hudood* cases. (Art 203-D). The decisions of the Court are binding on the High Courts as well as the subordinate judiciary.

The question regarding the appointment of a woman as *qazi*/judge or ruler/*hakim* was challenged for the first time in the Federal *Shariat* Court in 1983 on the following

grounds: “1) They discharge their functions of *qazi* without observing *pardah*, which is a clear violation of the injunctions of Islam; 2) During the period of the Holy Prophet and his companions the duties of the *qazi* were never entrusted to females, since it appears to be a violation of the injunctions of Islam; 3) According to Muslim law, the evidence of a woman is half of that of a man and her share in inheritance is equal to half of that of her brother. The judgment of two ladies only can be equivalent to that of a male, 4) Ladies do not fulfill the qualification of *qazi* according to the established principles of Muhammadan jurisprudence.”

The petition was dismissed. The arguments against the petition were interesting. For example, in answer to the third objection against the appointment of women as judges or magistrates that the number of *qazis* to decide a particular case should correspond to the number of witnesses was challenged with the argument, that if such a concept is given effect, it will follow that no male sitting alone can decide a civil or criminal case as according to *fiqh*, in cases other than that of adultery in which four eye-witnesses are required to prove the offence, at least two male witnesses must prove disputes of property or criminal cases of *hudood* and *qisas*.

Moreover, in answer to the second objection for excluding women from appointment as *qazi* because the Holy Prophet or the companions did not appoint any women as such was rejected on the pretext that “we have to see whether there is any express or even implied restriction on the appointment of a female *qazi*. If no such restriction can be inferred, the appointment will be legal in *shariat*.” Some other interesting points discussed in the case and can be relevant for the present paper were limitations regarding female judges being appointed for deciding cases concerning family matters and if the rule of *pardah* could be relaxed in cases of *qazi* women. These points were positively discussed in favour of women.

We do not have much space to discuss this lengthy issue here. The above short description should be enough to demonstrate the positive stand that was taken in favor of female judges in this case.<sup>4</sup> This judgment was assailed in the Supreme Court through an appeal in 1983. It was however dismissed as time barred.<sup>5</sup> After a lapse of about 28 years, the matter was brought up again in the Federal *Shariat* Court in 2010 that a woman judge is not competent to decide matters between litigants in respect of a family case. The petition was dismissed on the pretext that judgment of the matter had already attained finality in the apex court of the country hence there was no reason for further interference.<sup>6</sup>

### **Subordinate Courts and Female Judges**

Most of the lady judges are appointed in the lower courts of Pakistan. In the subordinate judiciary, no woman has yet been appointed as senior civil judge. However, there are today quite a number of female civil judges in all provinces.

<sup>4</sup> PLD 1983 Federal *Shariat* Court 73, Ansar Burney versus Federation of Pakistan and others pp73-93.

<sup>5</sup> *Shariat* Appeal No. K-1 of 1983

<sup>6</sup> Federal *Shariat* Court (Appellate/Revisional Jurisdiction *Shariat* Petition No1/L of 2010

The position of higher court judge is considered to be more prestigious than district court judge. Higher court judges increasingly review the judgments of district court judges. This confirms their low status. The district court judges usually have to simply apply the rules and do not play much role in interpretations of the laws, which is mostly done by the High Court and the Supreme Court. The High Court judges have more power and prestige due to fact they can interpret laws in a dynamic way and set precedents. Also, their judgments are published while the judgments of the districts courts are not published, and their judgment can be appealed to the higher courts.

The subordinate judiciary may be broadly divided into two classes: (1) civil courts, established under the West Pakistan Civil Court Ordinance 1962 and (2) criminal courts, created under the Criminal Procedure Code of 1898. In addition to the above, there are other courts and tribunals of civil and criminal nature, created under special laws and enactments. Their jurisdiction, powers and functions are specified in the statutes creating them. The decisions and judgments of such special courts are assailable before the superior judiciary (High Court and/or Supreme Court) through petition for revision or appeal. The provincial governments appoint the civil and criminal courts judges and the terms and conditions of their service are regulated under the Provincial Civil Servants Acts/Rules. The High Court, however, exercises administrative control over such courts. The civil courts consist of a district judge, an additional district judge, a senior civil judge and civil judges class I, II & III. Similarly, the criminal courts comprise of a session judge, an additional session judge and a judicial magistrate class I, II & III. The law fixes their pecuniary and territorial jurisdictions.<sup>7</sup>

Appeal against the decision of civil courts lies to the district judge and to the High Court, if the value of the suit exceeds a specified amount. Similarly, in keeping with the quantum of penalty, appeals against criminal courts lie to a sessions judge or the High Court.

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<sup>7</sup> CIVIL JUDGE 1ST CLASS

1. To try all civil suits, there is no pecuniary limit on its jurisdiction.
2. In certain jurisdictions also designated as Rent Controller.
3. In certain jurisdictions also designated as judge, family court.
4. At Karachi, pecuniary jurisdiction limited to rupees 3 million (Karachi Courts Order 1956);
5. In certain jurisdictions designated as Magistrate empowered under S.30 of Cr.P.C.

CIVIL JUDGE 2ND CLASS

1. To try civil suit up to the value of fifty thousand rupees; and
2. In certain jurisdictions designated as Rent Controller/Judge, Family Court.

CIVIL JUDGE 3RD CLASS

To try civil suit up to the value of twenty thousand rupees.

MAGISTRATE 1ST CLASS

To try offences punishable up to 3 years imprisonment and fifty thousand rupees fine.

MAGISTRATE 2ND CLASS

To try offences punishable up to 1 year and five thousand rupees fine.

MAGISTRATE 3RD CLASS

To try offences punishable up to 1 month and one thousand rupees fine

The jurisdiction of subordinate courts (civil and criminal) have been established and defined by law (Art 175). After appointment, the civil judges are usually attached for a few weeks to the court of a senior civil judge/district & sessions judge to get practical training. They also receive specialised training at the Federal Judicial Academy, Islamabad and in the respective provincial academies. Such training comprises of education in various substantive laws, court management, case processing, judicial procedure, and code of conduct, etc.

As mentioned earlier, the High Courts exercise supervision and control over the functioning of the subordinate judiciary. Such supervision and control is both administrative as well as judicial.

The subordinate judiciary in almost all the provinces operates under some constraints. There is a shortage of judicial officers, their supporting staff and equipment. The strength of subordinate judiciary has not kept in pace with the rise in litigation, due to which huge arrears of cases are piling up and there are enormous delays in deciding cases. As against the recommendations of several commissions and committees that the number of cases pending with a civil judge should not be more than 500, and the number of units pending with a district & sessions judge should not be more than 450 at a time, in actual practice the number of cases and units is far in excess of this prescribed limit. Thus, to alleviate the suffering of litigants owing to delays, the National Judicial Policy Making Committee (headed by the Chief Justice of Pakistan with justices of Federal *Shariat* and High Courts as members) launched on 1st June 2009 the National Judicial Policy. The policy set targets for disposal of cases by the superior/subordinate courts.

### **Empirical Data about Female Judges**

10 judges of the lower courts were interviewed from the South of Punjab. Maintaining a standard of professional confidentiality and keeping in mind the sensitive nature of their job, the names of the judges are presented as ABS, SH and TB etc. and their courts are not named to keep them anonymous. Interviews were conducted in Urdu, English, Punjabi and Saraiki, whichever language was found convenient to communicate with female judges. Few interview questions were drafted in the early stages which were restructured during the interviewing process for a qualitative research.

Extracts from the interviews are presented under the following headings.

### **Family Personal Life and Profession**

The code of conduct for members of the subordinate judiciary<sup>8</sup> starts by saying, "The judicial power is a sacred trust and divine duty. A judicial officer should exercise it honestly, efficiently and to the best of his capacity keeping always in mind that he is accountable not merely to his superior officers but to God Almighty Himself. He should all the time be conscious of his onerous duty and his integrity."<sup>9</sup>

<sup>8</sup> It should be understood that throughout in the Code of Conduct wherever the formulation "He" is used it refers to both male as well as a female member

<sup>9</sup> 2(1) Revised Code of Conduct for Members of Subordinate Judiciary: Sayed Zahid Hussain, Chief Justice 31-10-2008

Moreover, the code of conduct demands a very high standard of character from both male and female judicial officers, it says,

“A judicial officer should be God fearing, law abiding, abstemious, truthful of tongue, wise in opinion, cautious and forbearing, patient and calm, blameless, untouched by greed, completely detached and balanced, faithful to his words and meticulous in his functions.”<sup>10</sup>

Generally parents in Pakistan do not want their daughters to join the legal profession therefore our first investigation was about what motivated female judges to join the legal profession.

It has been noticed that most of the young women employed as judicial officers (judges) are unmarried and come from middle class families.

A young female judge NR (CJ (civil judge) Class-11) who did her basic education from a provincial city Rahim Yar Khan and has law degree from the University of Punjab, Lahore a cosmopolitan city, said:

My family did not think that law is an appropriate profession for girls. Nobody in the family encouraged me to join. But I had to struggle for it. Now when I am judge I think they are quite pleased with it.

Another young female judge MA (CJ Class-111) described:

My mother wanted that I should be a medical doctor but I couldn't get the required merit therefore I was left with nothing to do. Then one of my relatives advised me that I should take admission in law. I didn't have any choice so I joined law as a profession. Now I feel that I am lucky enough because I never thought I will become a judge. In fact I did not want to be a working lady at all. It's too difficult to be a working lady.

A young female judge ABS (CJ Class-11) explained in detail:

In fact, my brother not only inspired but even compelled me to join the profession. However, I am very critical towards the profession. Firstly, it's a very hectic job I do not have any time for healthy activities. No time for reading or visiting anybody. I have very short time to rest and then I have to prepare and study files for the next day. I think our working hours should be until 1pm. Secondly; colleagues have a lack of training. Only few are well-mannered.

Another TB (CJ Class-11) goes on to say:

My basic inspirations come from my elder sister who is also a civil judge. The way she raised herself up, I was much inspired by her. Now I get almost Rs. 83,000 as salary it's a handsome amount for the family.

### **Choice of Husband:**

A husband from the same profession seems to be a preferable choice for almost all the female judges interviewed. Interestingly, nobody mentioned the possibility of competition between the married partners.

NR (CJ Class- 11) a judicial officer said:

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<sup>10</sup> 2(18) Revised Code of Conduct for Members of Subordinate Judiciary: Sayed Zahid Hussain, Chief Justice 31-10-2008

If a husband is from the same profession we can understand each other better. We can easily adjust and understand the busy routine.

SH, who is CJ Class 1 and married to a civil judge, has one daughter and two sons. She got the experience of working as a judge for 10 years and said:

I got a harmonious family as my husband is also a civil judge. Because we both are in the same profession we understand each other better. At the home front I always cook the food myself and I am good in cooking and can do all types of cooking. My husband helps me in child care. He can also make good coffee and milk shake. I come from North of Punjab while my husband belongs to South Punjab. There is a big cultural difference between the two sides of the same province. "Couples are made in the heavens" (*Jorey aasmanon paer baentey hain*).

### **Profession and Family Life**

Female judges seem to be aware of the fact that combining busy professional and traditional family life is not an easy task. ABS, who is unmarried (CJ Class-11), explained:

Every female has problems they are performing double duty to take care of the family and profession. Female colleagues are responsible for pick and drop of their children they are always worried. My mother is much worried about my marriage. If I have to be married I have to choose a right person and it's not an easy job. My brother who inspired me to join the profession in fact says that "don't go for marriage.

TB CJ (Class-11) said:

A lady judge has both to look after a family and work. Culturally husband takes rest and you look after children. Though I feel this has to be changed. Sometime I also fight with my husband and sometime try to make him realize especially when he is in a good mode. He likes my job very much he is also trying to get a job in the judiciary.

SAC (CJ Class-1) explained:

Precisely speaking, family life is not a bed of roses for the married lady judges especially because with this tedious job. They have to look after the household matters from miscellaneous chores to teach their kids in the evening along with cooking, attending in-laws or often un-invited guests, so their lives become more mechanical than any other professional person; because they have to work under pressures and threats. I feel that we should be provided with a permanent servant at home like the one army personnel have, who in the evening time can assist us in household matters.

**Day care facility** for children is of great concern for the married female judges as well as non-married ones, as they know the seriousness of the situation of their married colleagues: NR (CJ Class-11) who herself is not married but understands the problem said:

It is important that judges should not have worries about their family because their attention is diverted. There should be daycare centers for the small kids of the lady judges. So that during the short breaks in working hours they can go and watch their children.

ZMM (CJ Class-111) explained the seriousness of the situation in these words:

The problem is that when there is no such school or center, then what to do? So they are blackmailed by these *maasis* and so called *mais* (traditional maid servants). Some of our colleagues bring the kids to the chambers and make them seated there with the maids. A child gets tired of sitting at one place all the time. Then he/she moves out in the court and sees the prisoners and litigants and listens to their language.

RA (CJ Class-111), whose husband works in a city away from where she is appointed, had so much problem with managing the household and babysitting that she had to call her mother to stay with her and look after the child when she was at work, she explained:

My husband is an advocate working in a different city. We have a son of one year, and my mother has come to live with us and she looks after my son when I am in the court.

### **Need for Training and Refresher Courses**

Most of the newly appointed female judges complained of the lack of training and the difficult time they had to face:

MA (CJ Class -111/FJ) explains it like this:

I have been working for two years since my appointment was made in 2010. My training lasted forty days and was conducted in the Punjab Judicial Academy, Lahore. I think my training was not enough and it was too short, and not very useful. It was just the theory and nothing practical. I think in academy students and sessions judges were relaxed and it was like we were in a university campus. Law moots were held by them but they were not enough. I faced problems due to no experience. Now I am getting over how to pass order and decide the case.

NR (CJ Class-11) said:

I have been a judge since three years. We had only three months training. This was sufficient in the light of the fact that in Pakistan there is dire need of judges. But I think that now and then refresher-courses should be held to overcome the gap of training.

RA (CJ Class-111) however was satisfied with a short pre-post training:

I am working as a judicial officer since two years. I think 3 months pre-postal training was ok for us. We were trained in the administration of justice.

However, most female judges very much felt the need for refresher courses as RR (CJ Class 111) suggests:

I think courses and training are extremely important for the judges as because of the over load of work we do not get time to do the necessary reading and courses can be very helpful in this regard.

### **Working Place:**

Female judges were asked about their chambers and whether they were satisfied with the arrangements. TB (CJ Class -11) narrated:

Our working rooms are such that they were basically made for the men I would like a chamber made for the convenience of a lady judge. Women chamber should be more

protected our chambers are built in such a way that there is easy access from all sides of the room. Sitting place and wash rooms should also be according to the needs of female judges.

### **Appointments in Remote Areas**

Few female judges complained about the problem when female judges are posted in the far-flung areas of Pakistan:

NR (CJ Class-111) described:

Now during the appointment of lady judges especially when they are not married due consideration should be taken not to appoint them to the far-flung places but at the nearest station to their home town.

SAC (CJ Class-1) dwelt in detail on the same issue:

Our job is very hectic and challenging. Though in routine we used to cope with the family and profession if stationed at a nearby place of our permanent abode, but if we are posted at a far flung station, from where we cannot come and enjoy the family life umbrella on a daily basis, life becomes hell due to suffering from multiple problems like insecurity of one's own life and of the children especially. When the mother is working in the court, and their father is also sitting hundred kilometers far away from them, their security and well-being becomes a real issue and their schooling suffers badly. Then health problems sometimes become very serious. In case there is a serious emergency in the middle of the night then at that time when your kid is suffering from acute vomiting, high temperature or during the period if you are in family set up in this situation what to do and where to go if at any time you suffer from some serious health hazard? It becomes a life and security threat but who can come forward to help with such problems of the lady judges? For example, a few lady judges due to long travelling had abortions or even are still suffering from severe backache and spinal cord damage issues.

### **Female Judges' Comparison with Female Advocates**

The situation of female lawyers and the attitude of female judges towards them were discussed. The following are expressions of their feelings towards female advocates.

A Judge NR (CJ Class-111) described:

Before becoming a judge, one is supposed to have two years of practice as a lawyer in the court. During these two years, I realised how difficult it was to be a lady advocate, who usually work as juniors associates and senior advocates do not teach them much. I think it's easier to be a judge than to be an advocate. Position of a judge is more secure than lady lawyers moreover they are in position of power and do not face other problems which lady advocates have to face due to their direct interaction. Finance is the biggest problem for lady advocates I try to appoint them in the local commission to strengthen them.

TB (CJ Class -11) endorsed by saying:

It's easy to be a judge and difficult to be a lawyer. Lawyers should be open to us and should be able to reach out to us. Advocates work hard and research the matters and put them before us. They make it easy for us to make decisions. We add a little to the research they have done. As judges we are respected more than female advocates, and we also enjoy more power and economic security. We can exercise our power to move whole systems of justice to work in a particular way.



RA (CJ Class-111) added:

I got a good attitude towards the lady lawyers. Prior to becoming Judge I myself was an advocate and I know the problems of lady lawyers I also invite them for a cup of tea.

RR (CJ Class-111) declared:

I feel lenient towards lady advocates, and I demonstrate this through my attitude because they have to work very hard. I encourage them and show solidarity towards females struggling in a male dominated profession.

Following are the words of an experienced female judge SAC (CJ Class-1). She understands the issue in an absolutely different perspective:

For me, to be a practising lawyer is a more comfortable and easy job for the ladies, as due to being a freelancer you can cope easily with your family life and there is no constant fear of a domicile's sword being always hung upon your head for postings and transfers to far-flung places away from your family upon an anonymous or false complaint of any Tom, Dick or Harry.

### **Dress Code**

There is no dress code prescribed for the district and sessions court judges. Therefore they follow the dress code prescribed for the Supreme Court and High Court judges.<sup>11</sup>

The following three statements reflect a moderate viewpoint of dress code among the female judges, and may be representative of the views of female judges: (NR (CJ Class-111) said:

I like wearing simple dress in the court. It should not go to the extent that people would come and watch us like a model. We are here as judges not as models. Generally, I think all female judges give a simple appearance in the courts.

TB (CJ Class -11) said:

We have to look after children I do not have time for makeup. Court is a serious place and make-up and jewelry do not give good impact.

RR (CJ Class-111) stated:

I usually wear the dress in the court in which I feel myself comfortable. I do not do any make-up and wear any jewelry in the court and try to look simple.

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<sup>11</sup> 2(26) "He must be dressed in prescribed uniform and seated in a dignified manner, but not so as to look a proud man. He should avoid arrogance." (Revised Code of Conduct for Members of Subordinate Judiciary: Sayed Zahid Hussain, Chief Justice 31-10-2008)

Then there are two extremes, on the one side are female judges with half *hijab* (where face is not covered), full *hijab* (face is fully covered and only eyes can be seen) or ones who always wear white clothes even at home. SH (CJ Class-1) said:

I always wear white dress in the court as well as at home. I wear no color and no make-up and no jewelry at all.

MA (CJ Class -111/FJ) who wears half *hijab* said:

I do not like wearing make-up and jewelry in the court and not in home either. In the court I always wear white dress but when I am at home I also wear colored clothes.

RA (CJ Class-111) who wears full *hijab* said:

I feel that *hijab* is no problem in administration of justice in fact it is appreciated in the courts. I have heard this from lady judges in other courts who wear full *hijab* like me and they have experiences as me. In Lahore some of the female judges were without *dupatta* they were criticised by the sessions judge that they should wear a *dupatta*.

On the other side of the extreme are those female judges who wear jeans and do not want to cover their heads either. They justify their view by interpreting the dress code provided by the rules of dress-code for judges.

ABS (CJ Class -11) who was wearing jeans with a smart shirt and without head cover, said:

I wear trousers or jeans and feel more comfortable in it, though I am much criticised in the court. In fact in the official dress code of judges suit is mentioned while *dupatta* is not prescribed, which also means that head cover is not necessary.

### **Discrimination against Female Judges in the Assignment of Courts:**

In some places female judges complained about the discrimination of assigning just the family courts to them. However, most of young female judges interviewed in the present survey have not experienced such discrimination. The reasons are firstly; more senior judges do not feel discriminated as due to their experience they are assigned to all type of courts. Secondly, in some courts where female judges are more in number and due to the work load of cases, such discrimination is not desirable. This is confirmed by RA (CJ Class-111):

There is no discrimination in assigning lady judges to the criminal courts because of the work load.

TB (CJ Class -11) said:

I do not find any discrimination for the assignment of the courts. In my 10 years of experience, I have worked in all types of courts ranging from the family to criminal, revenue and any possible type of cases.

MA (CJ Class -111/FJ) said:

My first appointment was made as a family judge. One and a half years I worked with that. I prefer to work on both civil and criminal cases.

SH (CJ Class-1), a more senior judge, describing her experience in both civil and criminal courts said:

When I am sitting on the seat of judge I do not feel like a woman; I feel like a judge.

However in one of the courts in South Punjab, a female judge had the opposite experience. NR (CJ Class-111) said:

Lady judges are usually not assigned the criminal court but once they are assigned there I think they have better output than the male judges. I love to work in the criminal law court. In the criminal law court, you deal with the liberty of people. You get a wide power of discretion. There are more challenges. You have to decide there and then, and you have to be strong, courageous, confident and blunt. You should not show any hesitancy. I think there should be courses for lady lawyers to increase their understanding of the criminal matters. One reason that lady judges are reluctantly assigned the criminal law courts is that in our society the general norm is that a woman should not interact with the men. In the criminal law court female judges are not only interacting with men but with hardened criminal men (criminal matters include dacoit, physical injury, fights, and theft, etc.).

Another reason why criminal work is not given to us is that male advocates do not find us easily accessible. When women work in branches of law other than family law they come into competition with the male judges.

My experience in the criminal courts is that most of the time it's only a false litigation. In 90% of the cases, compromise outside the court and the task of the court is just to write a statement.

### **Male-Dominated Profession**

The following are expressions of female judges to show their feelings towards a male-dominated profession. MA CJ (Class-111) said:

No, it's no more a male-dominated profession. Males are sitting before us; males are standing before us. They are looking towards us for our decision. We do hundred cases per day. There is a shortage of judges. Male lawyers react. They make complaints. Sessions judges called us and gave hard directions. Lawyers even honour us, and they regard with respect.

Unmarried women have no children and no responsibilities in the house. Women relatively have to work harder to survive in the legal profession. Secondly, the women have no history in the law profession, and they can be considered new to the legal profession as compared to the other professions. They also need to have prior awareness of the environment before joining the profession so as to keep their feet firmly grounded and succeed in the legal profession. The work load in the courts for female judges as compared to men is pretty tough. The environment in the courts is much more uncongenial and unhealthy as women judges are confronted with the male advocates, police men and the litigants who often create unwarranted situations.

TB (CJ Class -11) asserted:

I don't think this is male-dominated profession; we are equal to men judges here. Now a female sessions judge is also going to join us here. Senior judge is like a mother to us.

RA (CJ Class-111) maintained:

We are many lady-judges in the court here and it became a problem for the male advocates and judges to make adjustment with us. A tea party was arranged to create understanding amongst the partners. I think lady judges can resolve the problems in a better way.

### **Attitude of Male Colleagues:**

It should be noted that the attitude of the judges towards advocates is controlled by the Code of conduct.<sup>12</sup>

The following are in the words of female judges with regard to the situations they encounter:

TB (CJ Class -11) stated:

Humanity between us is increased. Colleagues discuss everything with us. As men and women we are not shy of each other. The attitude of the general public is appreciable but sometimes you are harassed by the male lawyer or by yours own senior colleagues at your work place.

MA (CJ Class -111/FJ) asserted:

Male advocates give lot of resistance to the lady judges. It's in fact hard for them, not for us. They are standing and looking up to us they try to create problems that judge has done this and that. They have also gone to the Lahore High Court with complaints that madam is too harsh and strict. I wanted to have short adjournment. I wanted to dispose cases as soon as possible, advocates reacted to it and made complaints against me to the Session Judge. That "she is strict and she is sitting until 6 pm. She has no children she is unmarried and she has no liability. The entire staff is also suffering". I am thankful to the sessions judge who supported me and threw the complaint paper in the dustbin.

ABS (CJ Class -11) complained:

Lawyers use abusive and filthy language if the order passed is not according to their wish. I feel that I am insulted every day. I would have to explain my position before my superiors was too difficult to manage. Lawyers would always say why you have done this and that they would like to have work of their own choice. I have also seen that a junior would always follow their seniors, a lawyer should not make precedence of seeking something unfair.

TB (CJ Class -11) said:

My experience is that a males would like for themselves to be listened to. We should listen to them. They are not always right. I don't see it as a pressure. Some of the advocates are polite and decent while others are rude and indecent; they in fact are portraying themselves through their behavior. Females judges are in fact stricter; they are strict in passing orders.

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<sup>12</sup> "His behaviour and conduct should be gentlemanly particularly towards the litigants and lawyers. He should be courteous and polite but firm and dignified to maintain decorum of the Court. His conduct in and out of Court should be exemplary which should enhance the prestige, respectability and honour of the court in the society" 2(3) Revised Code of Conduct for Members of Subordinate Judiciary: Sayed Zahid Hussain, Chief Justice 31-10-2008

When we were less in number, we also became more serious. I appreciate the advocates they should not go unattended.

RR (CJ Class-111) asserted:

Senior male advocates are usually very aggressive. It is difficult for them to see a woman making a decision on the case they are pleading; they can't tolerate that their case is reverted.

### **Is the Social Circle Very Limited?**

The social circle of the judges is limited by rules provided in their code of conduct. On the other hand, keeping in view the legally plural society, a wider social network is indispensable.

ZMM (CJ Class-111) explained the restrictions:

Yes, our social circle is limited and when you step into the judiciary your social circle is constrained by your department, and you are not allowed to attend any private or social gathering. You cannot join clubs, and if you join a club then you have to mention the name and all the details of the club; and you have to send the declaration of your assets. We tend to have a very limited circle. Females' problem is that they cannot even go to parlors easily and freely. We have to maintain our status. We have to be very conscious of where we are going.

RA (CJ Class-111) said:

We do not have many links in society. Our social life is very limited. Our residences should also be separated. People try to approach us outside the court, and we are not approachable. We do not get a separate residence in all cities of our appointment. If we are not living in a segregated, guarded area, we are vulnerable to people who would approach us privately. Moreover we are more trusted than men as women are hardworking, they are honest and generally do not opt for unfair means. We have 4 female civil judges, 1 additional sessions judge, and none of them till date have been alleged with any corruption whatsoever. They are known to be straightforward, as they go by the book only.

### **Non-accessibility/Non-approachability**

The limited social circle of female judges leads towards the issue of non-approachability, (approachability opens the possibility of partiality, bribes and other type of corruption) which is very sensitive issue in Pakistan. Therefore it is repeatedly mentioned in the code of conduct for example "*He should always live within his honest means and believe in Rizq-e-Halal (honest earning, editor's translation).*"<sup>13</sup> Also a requirement of a judge is "*To be above reproach, and for this purpose to keep his conduct in all things, 'official and private, free from impropriety is expected of a judge.*"<sup>14</sup> This can also be perceived from the directives issued to control the financial gains of judges during their services.<sup>15</sup>

<sup>13</sup> Revised Code of Conduct for Members of Subordinate Judiciary: Sayed Zahid Hussain, Chief Justice 31-10-2008

<sup>14</sup> Code of conduct for judges of the Supreme Court and the High Court Article -111

<sup>15</sup> On behalf of Chief Justice Umar Ata Bandial, the LHC registrar issued notifications directing all district and sessions judges to ensure that they and the staff under their charge submit declarations of their assets by July 31.

NR CJ (Class-111) said:

.... in the sense that they are not accessible in other words lady judges do not mix up and their social network is not that wider that one could easily access them for any favour, etc.

SH (CJ Class-1) explained:

Usually lady judges are not corrupt, and we are not easily approachable. When we do not allow the male advocates to approach us, they get very irritated in turn. There are advantages attached with the lady judges that people don't approach us for bribes.

TB (CJ Class -11) expressed:

Why should we be accessible to advocates? They give service to their client. The main stakeholder is the client. In a particular state of mind, we think over it when the other party is not there. When we have heard the arguments from both sides at the decision making time we should be non-accessible. Yes, of course some people try to interfere with our decision making. Criminals ask for favour. Once my husband was physically hurt. He did not tell anyone about the episode, but he later told me that some criminals hurt him because of the verdict I made in the court. My father is very supportive. Once he was asked by some clients that they would like to explain the case to me in private, but my father refused by saying, "My daughter has become disobedient; since she has become a judge, she does not listen to me.

ZMM (CJ Class-111):

Yes it is correct. Because when sessions judge has passed the directions that for smooth running of the system, male judges can attend to male lawyers, but this access has been denied to the female judges. We are strictly prohibited, and just have to maintain our limits, and nobody will come and sit in our chambers. No male advocates should come to our chambers, but we have extended this to the female lawyers also. So this is a way closed to approach the female judges. Secondly, as females, we don't move in the society very freely, and on the other hand, male judges have contacts with so many other people then they try to approach them. Whether they get approached or not, it is another debate but they are easily accessible, whereas when it comes to females, if I receive a missed call and the person does not tell his name, I just switch off my phone. So the female judges cannot easily be accessed.

## Soft Justice

MA (CJ Class -111/FJ) said:

I am not soft. I am a judge as well as a "parents of litigant" I decide the cases on merit. We are here to do paper justice. We don't want that people should suffer.

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The registrar said that the D&SJ were told through the notification that in light of amended rules 12(2) of the Punjab Government Servants (Conduct) Rules 1966, they were required to forward a Declaration of Income and Assets for the financial year ending June30 , 2012 (FY 2011-2012), on the prescribed Performa (after filling-in each column according to its scope and spirit), and of all the Judicial Officers (AD&SJ, Senior Civil Judges & Civil Judges) as well as Superintendents, Session Courts, working under their control, showing any increase or decrease in property accrued during the said financial year along with bank statement(s) and other related documentary evidence. By Rana Tanveer

Published: June 26, 2012The Express Tribune with the International Herald Tribune.

TB (CJ Class -11) formulated:

We are considerate and not just soft and lenient. We should not be emotional when making decisions. For example we all know that how necessary dowry is in our society. All parents give dowry to their daughters. Now usually no evidence is kept for the dowry of a daughter. Therefore, in the cases usually evidence is missing, but because I know that in society it is important therefore I tend to be considerate in such cases. I also discuss tradition and customs with clients in the court. In a criminal case, on the one hand, there could be habitual criminal with a big theft while on the other hand there could be a small theft, for example an instance of cycle lifting. By looking at the personality of the person, we can see that he is not a habitual criminal and if he goes to prison for three years, he would be more spoiled. I am considerate in this situation as well.

RR (CJ Class-111) like others she reacted against the words ‘soft justice’:

I would rather use the word “humane” instead of soft. I am very considerate and give time to reconcile in family cases. I go for an agreed compromise in both criminal as well as civil cases.

ZMM (CJ Class-111) emphasised:

Women have a soft corner in their hearts and they are not hard in their judgments and is more inclined to give relief. But there is an opposite impression in our society that female judges do not give relief whereas the male judges are considered to be more willing to give relief. What to do when the appeal, suit or their application is not maintainable under the laws but to dismiss and pass harsh orders? Women are more human. We don’t have a soft corner even towards the female litigants. People use middle ways to get their work done. People are coming there on a daily basis, and we know that bribes are given to the staff and the clerks (*munshi*) of the advocates. We are soft in the sense that we are just, but we have no soft corners to do injustice. Bribes are a burden on the clients. It is said that even the walls of the courts demand money (*kachehri ki diwarein bhi paisay mangti hein*). From the cycle stand to the reader sitting and the advocate and his clerk, everyone demands money.

MA (CJ Class-111) was of the opinion:

I am not soft. I am a judge. I used to say that I am like a parent to litigants. I have to decide between parties as between two of my children who are both dear to me. It’s a kind of great responsibility when you have to adjudicate between two children. There is or may be softness, but I try to decide the case on merits. I will not decide the cases by looking at people even though they are looking innocent on their faces. You can say we are doing ‘paper justice’. I have to decide on what’s there in the files. Softness is in the sense of delivering justice and not making people suffer. And if the litigants are present in the court, I prefer that they should record their evidence; then I proceed and get their counsels in the court. Afterwards I go through the files again and again and my soft corner is in the sense of providing speedy justice.

### **Female Judges: Impact on the System of Justice:**

Whether female judges have a positive influence on the system of justice is may be too early to assess and draw any conclusion. However, we have discerned some visible influences which females have made on the legal profession. Some of the influences that can be named are the following:

#### **Female judges have more understanding of female clients:**

NR (CJ Class-111) said:

First and foremost they can understand women's problems better than a male judge can do. They can share and help in family problems more than a man. Sometimes women show signs of violence on their bodies to us, which they would not do before a male judge, and recently the dissolution of marriages cases are on the increase. The reason for the increased trend of dissolution is the sense of sacrifice is diminishing and materialistic approach towards life is on the rise.

Another TB (CJ Class -11) said:

Moreover women litigants have become more confident and confide their problems in us. Once there was case of a woman who murdered her husband. She told me many things which a woman would not tell a male judge. The judge enjoys the social status of parents to their clients.

It seems that female judges have more understanding of family matters, and they make more efforts for mediation. This is also prescribed in Code of Conduct 2(34) for the members of the subordinate judiciary, "*He (she) should make endeavour as far as possible to act as "musleh" and help the parties to resolve the dispute through amicable means acceptable to them, without leaving any impression of siding with anyone.*"

NR (CJ Class-111) said:

In the family cases, I try to do mediation between the parties. Especially in the cases where there are children. I try to make parties think about the children and make compromises. Sometimes when you are trying to reconcile, you feel that clients come with a rigid mind, but women who come from good, educated families, they are more flexible. Usually when women come to the court, they are very desperate, and they are not flexible and come with fully prepared for separation and divorce. Usually it's very difficult to prepare them for compromise. Men are more flexible and want compromise. When a man feels that he would lose his respect (*naak kut jai gi*) and would be disgraced and dishonoured in the society, therefore he wants compromise and would be ready for negotiating terms and conditions. Their ego is broken. From the very beginning, within a glance we can see if a woman is ready to compromise. Most of the cases in family matters are run-away-bride cases of abduction and rape.

Another SH (CJ Class-1) said

As a lady judge I have more understanding of family matters. Whatever few family matters I get, I deal with them with understanding. I am strict with divorce cases. But once a divorce case has come up in the courts, it is difficult to make compromises between the parties. Due to one or the other reason they are not ready to accept any conditions. The laws of our country have also made divorce very easy.

Most of the family law cases are of exchange marriages. If one family in the exchange marriage is divorced there is pressure on the other family of exchange to be divorced too. They may be living happily and may not want divorce but there is family pressure and sometime also pressure of the *panchayat* (traditional institution to resolve disputes).

Some of the cases from the rural areas consist of pure revenge. We can only make limited efforts for reconciliation between the parties. If we take too much interest, we may be accused of taking too much side of a particular party.

It also seems that female judges are keener to learn the local customs and traditions of the place where they are appointed. The purpose seems to be to help integrate this in their judgment.

SH (CJ Class-1) said:



I am more conscious of the local customary practices, and I keep them in mind while making judgments. For example, in the South Punjab very high dower is fixed for woman for example a house, land, and hand pump are common items in dower, and there are early marriages.

My husband who is also a civil judge come from this area and speaks the Saraiki language. I do not speak the language but understand it.

ABS (CJ Class -11) said:

We are hard-working and make speedy disposals of justice. We are not approachable. I try to mediate among the couples. It's the children who suffer if the family is divorced. In the cases of honour, I think murder is murder. Judges are part of society. They make judgments according to how they are and with what type of ideas they are brought up. Judges should not have biases. They should have training for these matters.

TB (CJ Class -11)

For dispensing justice, it is important that one should know people and their customs. For example, now when we are working in South Punjab, there are exchange marriages. In Lahore there is no such tradition. Cases are very simple and direct. Now in exchange marriages there are two connected families. In both families the girls are treated equally; if one family is richer, the less rich family would try to keep the girl to a more or less similar standard as the rich one. One couple may be more compatible than the other couple. We have to keep all these things in mind when making decisions.

Another example, in the South Punjab we should be aware of is the existence of *panchayats*. This does not happen in Lahore. Here due weight should be given to the existence of *panchayats*. People also sit in the mosque and resolve disputes through mediation. Our law also allows us to acknowledge these mediations. When the decisions are made outside the courts, we just have to pass decrees from the court. Traditions in fact carry the force of law.

One more example is from the law of inheritance. According to this all property goes to the eldest son. This custom still exists. We also have our own limits. We can use our discretion only to a certain extent and must give consideration to the local customs and traditions. For the cases of inheritance, we also have to give consideration to different sects in Islam. The Shia sect should have their rules of inheritance. Usually there is reluctance to give landed property to women, so all of it is taken by the brothers showing that sisters have given up their share to them. If we have doubts, we make sure that the free consent of the sisters was given without any pressure from the brothers. If we are suspicious that it has not been given freely and there is no tradition/custom of compensating women in the area, then we can give a strict decision in favor of sisters.

One of the judges had an interesting comment showing their influence on the coming generation. She said:

TB (CJ Class -11)

Before people did not think that law is a profession for their daughters, but now they have started thinking of selecting this profession for their daughters. I think decision making power is a blessing. It is not awarded to women in our society even in small family matters; whereas it is a big thing that this decision making power is awarded to the lady judges.

I would like to end with Rule 37 of Code of Conduct, which says:  
One should never forget that he/she is accountable to God Almighty in the end.<sup>16</sup>

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<sup>16</sup> Revised Code of Conduct for Members of Subordinate Judiciary: Sayed Zahid Hussain, Chief Justice 31-10-2008

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## **Field Notes** **Lady Advocates of Pakistan**

Coordinator: Rubya Mehdi<sup>1</sup>

Interviewer: Rashdeen Nawaz, Sajid Sultan, Mariam Ahmed, & Fatima Malik<sup>2</sup>

The field notes consist of interviews with lady advocates (the expression used for female advocates in Pakistan) in the district and sessions courts, from different parts of mostly Punjab in Pakistan. The detailed interviews of the female advocates were conducted by a team. A questionnaire was devised for conducting a qualitative nature of research; it was constantly improved during the interviewing process in the light of new facts appearing.

The interviews conducted during the last three years show various issues in the professional lives of female advocates in Pakistan. The extracts of the interviews are provided under the issues selected which were found to be most common and related to their everyday professional life, for example encouragement and support to enter the profession on the home front, marriage, married life and legal profession, discrimination against female advocates in the courts, problems with social attitudes, harassment, integration with the customs and culture of the courts (corruption, softness and care, alternative methods of resolving disputes), and participation in the organisational life of the courts. Some of these issues seem to be overlapping but it is considered important to distinguish them in the light of the experiences of female advocates.

It should also be noted that female lawyers have varied experiences depending on economic class, educational status, age group, urban or rural background, etc. Interviews under some issues revealed a glaring contrast in the experiences they have in their chosen professions.

The number of advocates in various courts of Pakistan in the year 2011 was as follows:

Supreme Court Advocates: Total number 4118

High Courts Advocates: Balochistan 1531; Khyberpakhthunkwa 3,171; Punjab 30,000; Sindh 6,840.

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<sup>1</sup> We are thankful to Professor Dr. Werner Menski for his feedback on this paper.

<sup>2</sup> Rashdeen Nawaz, Cand. jur University of Copenhagen, Advocate Supreme Court of Pakistan; Sajid Sultan, Mian Sajid Sultan holds LL.M degree. He is a research associate with Rubya Mehdi in a HEC research project "Management of Conflicts; Customary Laws in South Punjab with Special Reference to Gender Issues". He is currently teaching as a visiting lecturer at Gillani Law College, Bahauddin Zakariya University (BZU) Multan. He also is a Bahawalpur-based High Court Lawyer; Mariam Vine and Fatima Malik are BFA (bachelor Fine Arts); Mariam Ahmed, has BA in communication design from NCA, Lahore, she is freelance communication designer. She is also teaching Art and Design at BZU and Beacon house school system, Multan; Fatima Malik, is MA in Arts she has a teaching experience at BZU, Multan. Currently she works as fashion designer in Canada.

Subordinate Courts Advocates: Balochistan 2,144; Khyberpakhthunkwa 10,606; Punjab 22,000; Sindh 9,214 (Hussain 2011).

We do not know the exact number of female advocates. But it is clear that the number of female advocates, though remarkably less compared to men, has been visibly increasing to a greater extent. The Bar Council Act says:

Rule 29. "Eligibility of women for admission – "No women shall be disqualified for admission as an advocate for reason only of her sex."<sup>3</sup>

### **Criteria for Enrolment as an Advocate in Pakistan**

Criteria for enrolment as an advocate of the lower courts in Pakistan are a minimum Bachelor Degree, LLB (3 years) from Pakistan or abroad; in case of a Pakistani LLB degree one has to pass an "Intimation Exam" conducted by the Provincial Bar Council, from which 45% marks are required to qualify. Then the lawyer is to undergo training with a Senior Advocate for at least six months. Thereafter, an apprenticeship certificate is given by the senior lawyer, and the candidate also provides a list of cases in which he/she has been appearing along with the senior lawyer. On completion of the apprenticeship the candidate appears before two elected members of the Provincial Bar Council and takes a *viva voce* examination. If declared successful in the examination a license to practise in the lower courts is awarded by the Provincial Bar Council. All courts below the High Court are lower courts. However, all the above steps are exempted if the person is foreign qualified and license to practise in the lower courts has been awarded.

After two years of practice in the lower courts, the case is processed by Provincial Bar Council for enrolment of the lawyer as an Advocate of the High Court.

To get a license for appearing in the Supreme Court a minimum 10 years standing as an advocate of the High Court is required; a list of cases conducted in the High Court along with reported cases is to be provided; two senior High Court judges give a *viva voce* exam and if the applicant passed, a fitness certificate is issued. Thereafter the case is sent to the Pakistan Bar Council, and the advocate has to appear before one or two judges of the Supreme Court of Pakistan and one member of the Pakistan Bar Council (Committee) to take another *viva voce* exam. If passed and after completion of formalities and re-signing of the roll of Supreme Court of Pakistan the advocate becomes an advocate of the Supreme Court of Pakistan.

### **The Development of the Court System under Colonial Rule: Culture of Legal Profession in Pakistan**

It will help to understand female advocates and their situation in the legal profession if we briefly look at the historical background of the origin of courts in colonial times and their development in post-colonial Pakistan. In 1726 letters patent of George I enabled the courts in India to give judgments according to justice and right.

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<sup>3</sup> LEGAL PRACTITIONERS & BAR COUNCILS ACT, 1973 [XXXV OF 1973] WITH RULES AS AMENDED UP TO SEPTEMBER, 2005. PUNJAB

Islamic and Hindu rules were retained in personal statutes, though these rules were interpreted by British judges or by indigenous judges with British training. The central aim on the part of the British was uniformity of laws but this uniformity was provided at the cost of imposing rigid Islamic or Hindu rules. They underestimated the diversity in the vast territory of India and had a text-book approach (Anderson 1993). The values of the British legal culture were different from the values of Indian legal culture. For example equality before the law and clear-cut decision instead of compromise were at odds with Indian legal culture (Chaudhary 2011: 37). Therefore there was a direct clash of the values of the two societies. "It is argued that the British norms brought to the new judicial arrangements in the Deccan were adopted, reshaped, and reconstructed by Indian litigants who sought to pursue their cases in British-administered *panchayats*. Their cases focus upon the construction of stories that fit the new administration's definition of justice, equity, and fairness" (Jaffe 2011: 61). In the words of another writer: "Indians in response thought only of manipulating the new situation and did not use the courts to settle disputes but only to further them" (Cohn, 1989). Courts were used as a competition for social status and political and economic dominance in the village. Cases were brought to the court to harass one's opponents to satisfy the insulted and for revenge (Cohn 1967). The natural outcome of this scenario and the deep distrust towards state courts gave rise to the emergence of legal plural institutions for the dispensation of justice. This situation exists until today.

In the early post-independence period in Pakistan the common-law style courts persisted. Even after Islamisation of laws not only the basic structure of the common law legal system stayed intact but the original character of the courts in the common people's mind continued (Chaudhary 1999).

A legal career, however, became increasingly attractive. With the passage of time the legal profession became overcrowded. Dropouts from other places become lawyers, therefore now there are all categories of lawyers: those who have passed examinations after studying "Guides to Examination" and the ones who are foreign-qualified from prestigious law schools. The chambers where lawyers sit are usually around the courts and they also differ according to their economic standard. Some of them have fine offices, while other sit with a table and chair which are traditionally locked together with chains after working hours to prevent them from being stolen. These open-air chambers can be compared to the fish market where clerks are still found with their old-fashioned typewriters. In the seventies the description provided by Rahman about the lower courts more or less still persists till today. He wrote:

"...lawyers are also known not to have any respect for code of conduct. For example they are known for having contact with the judges, state attorneys, police officers and other higher officers.... They also get money from their clients in the name of judge, state Attorney, police or other higher officers of the courts" (Rahman 1978: 174-175).

"They are also known for keeping 'touts'. This has [an] old history from the colonial period. They bring clients for the advocates, provide bail bonds, and provide witnesses. This is considered to be a very strong group in the courts and many efforts to abolish them have failed. And those who support to clear them have also faced violence at their hand. *Munshis* (clerks) of the advocates also play an important role. They are considered to be the right hand of the advocates." (Rahman 1978: 188).

Yasin and Shah (2004: 86-87) note:

“The legal profession is also partly responsible for the delays in court cases. At times lawyers oblige their clients who are interested in delaying their cases by seeking adjournments and filing frivolous appeals and revisions”.

However one of the new developments in Pakistan after the movement for the independence of the judiciary, it should be noted, are reconstructions of District Courts Buildings at least in the major cities of Pakistan. It remains to be seen if this would also affect the above mentioned situation of the lower courts of Pakistan.

### **Women and the Legal Profession**

In the beginning of the history of Pakistan we do not hear much about women advocates and judges. To understand the courts in Pakistan, as a workplace for women, one big indication is that until recently there have been no toilets for women in the lower courts, even in the big cities of Pakistan. The High Courts and the Supreme Court are exceptions with their new modern buildings, where toilets are available for clients and professional women. However, in the District Courts of the big cities a separate bar room has been set up for women advocates with an attached toilet. But there are still no sitting places and toilets for women clients.

The atmosphere of the courts is very much ‘male and money’ dominated. Traditionally women do not contact the courts in Pakistan.

In this background where courts seem to be hard and crude, where all dealings are done by “only men”, the entrance of lady lawyers was a big change and resistance to provide space to them was natural.

The results of the interviews are put under the following headings.

### **Encouragement on the home front**

There were mixed instances how many female advocates got encouragement from their family members to join this profession. It is interesting to note that most of them were encouraged by their fathers to join the law profession. The experience of joining the profession was also varied. As one interviewee put it:

“I didn’t want to be a lawyer, but my father wanted his daughters to be independent, and he was keen that I pursue law. Once I started studying law, I too became interested in it and was fortunate to marry a man who has been supportive and encouraging. My husband and in-laws have helped with the raising of my two daughters. I couldn’t have managed without their support. Although juggling with my career and family life is pretty challenging, I feel being a lawyer allows me an independence no other profession can enjoy. I am self-employed, have my own timings, and answerable to no one. My success depends on my knowledge of the law, and I think it is the best profession for a woman in Pakistan.” (Interviewer: Mariam Vine, interviewee: Shamsa Qamar District Courts Multan).

The predicament of a young woman of a provincial town aspiring to be a lawyer is well illustrated in these words:

“Poverty, family quarrels, mother’s tensions, no hope for fee and books, no money to pay for transport, unorganised educational system, and social pressure to get married, above all countless hurdles from paternal uncles and aunts in a joint family system!

While handling all these hurdles I never had bad grades or excuses in education. I was determined to become a lawyer like my father. It was really building a new personality. Where girls are supposed to be quiet and inexpressive I developed abusive language. The sour experience took away the softness in my behaviour. But still I am a well-wisher and want good for everyone. Dream for a loving husband and for kids was still alive. But that dream was never in my way to become a lawyer. Actually nothing was in my way to become a lawyer!!

People started showing the horrible pictures to me that if I choose law as my father did, I will face criminals in the court and will always have to work among men with bad mentality. No one will look at me with grace; above all no one would like to marry me. My answer was I don’t want to be married to a guy who can’t accept me the way I am. I don’t mind facing criminals. I don’t care what society thinks of me. I care for God and He is my strength.

My mother was very supporting throughout my career as a lawyer. My father was a lawyer too but he was an addict and was never successful in his job.

I am a lawyer now. But struggle is never ending. I joined few lawyers to assist them and to learn how to work in courts. Everyone found me hardworking and tried to get their job done through me as much as possible. I couldn’t take it so I established my own chamber.” (Interviewer: Fatima Malik Interviewee: Mehreen, Court in South Punjab).

Some other accounts are as follows:

“My father wanted me to study law. My father’s friend encouraged me and I am the first girl of my village who has studied law. My family is very proud of me that I practise. Also my village is very proud of me because they think that I am the brave girl of the village.

...Advocate profession is a very hard job. We have to spend the whole day with clients and after that the whole evening studying for the next day.” (Interviewer RM Interviewee: Zuhr Nisa from the Attock courts).

Another described:

“For me personally it has been a struggle. My family was never encouraging. They were not happy with my choice of profession. When a woman comes into this profession the whole family looks at her critically, therefore most young girls do not join this profession. This is the reason that women are in a minority in this profession. My parents feel I haven’t achieved anything. They don’t understand that it takes time to establish oneself as a lawyer. Initially I had no guidance, no support and I was not very dedicated, so perhaps I have not gone as far as others have, yet. When I started to work long hours it took a toll on my social life, but I’ve reduced my work hours and it has affected my career.” (Interviewer: Mariam Ahmed, Interviewee: Farida, Courts in Islamabad).

Another said:

“I got my law education from Mardan, Khyberpankthunkwa. In my law class there were 100 boys and 13 girls and I am the only among the 13 who is working as an advocate. Though my father was not an educated man and I am the youngest of seven sisters, when I was born my father said she is like a son for me. Therefore I have always felt like a boy and I decided to prove to my father that he should be proud of me.” (Interviewer: RM, Interviewee: Farzana Jahangir, District Courts, Attock).

## **Marriage and profession**

There are again mixed experiences of female advocates concerning their married life in combination with the legal profession. They often seem to be divided between family life and profession.

“I do not want to get married because firstly it is difficult to find a husband who would allow his wife to work as an advocate. And secondly, even if a man says that he would allow me, I do not trust, and what would I do if he changes his mind after marriage?” (Interviewer: RM Interviewee: Farzana Jahangir, Attock District Courts)

One of the advocates said:

“I don’t think that I would have a problem with marriage as some people came and asked for my hand in marriage and my parents are looking for an appropriate match. I work to a limited extent and earn money which is enough for me. I don’t want to burden myself with too much work as this can affect married life. I think marriage is a protection for the female advocates. When the clients and other colleagues in the court know that she is married, nobody dares to say anything to her and in this way she can gain more respect.” (Interviewer: Rashdeen Nawaz, Interviewee: Faiza, District Courts Lahore).

Another said:

“It also becomes difficult for an advocate girl to get married. If they want to get married the family of husband’s side should be open-minded people otherwise if a female advocate is talking to another man this is difficult for the common families to tolerate. If a woman talks to a man outside the family, it becomes a question of honour for the husband’s family. However I would like to be married to a person who has full trust in me.” (Interviewer: RM Interviewee: Zuhr Nisa Jahangir, Attock District Courts).

Another confirmed:

“We have to face a lot of problems regarding marriage. Well, I have a personal experience of it. There came a proposal for marriage (*rishta*) for me from a family and my brother told my mother about the offer. That family didn’t know that I was a lawyer, so on knowing they neither visited the home nor wished to see me.” (Interviewer: Sajid Sultan; Interviewee: Fatima, Multan District Courts).

There are varied experiences; however this can be seen from the following:

“Actually marriage is a positive thing in my life. I was becoming lonelier with time. Brothers were busy in their lives and with their wives. So I needed a companion. My husband doesn’t mind my work, actually it is a financial support for the whole family. But sometimes we get into fights when I don’t have time for him.

My mother-in-law who lives with us taunts me a lot that I work much but don’t earn enough, so I should stay home and help her in household activities. She does not mean it because without my earning the joint-family will be in trouble. When my children (I got two small kids) are ill I am much stressed, as I also feel guilty for not giving enough time to my children. I work hard at home too and try to help my sister-in-law’s interest towards studies and I also support my brother-in-law (both of them living with us) who has many psychological problems.” (Interviewer: Fatima Malik Interviewee: Mehreen, District Court in South Punjab).

### **Male-dominated profession**

Advocacy is seen as a typical male profession where a total commitment of the work is required. Women find it more difficult to sustain an intensive devotion to work at the expense of family over a longer period of time. Particularly married women find themselves unable to make that kind of total commitment to work. Faiza is a lawyer from an affluent family and has been practising in Islamabad since 2002. She describes her experience like this:



"When I entered the field in 2001 as an apprentice-lawyer for 6 months, it was and still is mainly a male profession. The system has been created for men, by men. Most men have a wife/mother/sister that ensures his breakfast is laid out in the morning; he simply has to pick up his briefcase and leave the house. Women on the other hand have to either prepare their own meals, or ensure their meals are prepared, and take care of the households' chores before they leave home for work. A woman is expected to take care of the mundane day to day matters of the home and her attention is thus divided between work at home and work at the office." (Interviewer: Mariam Vine, interviewee: Faiza, District Courts in Islamabad)

Female advocates do not all have a similar response to male dominance in legal profession. A young advocate coming from a comparatively strong social background argued:

"I think it makes a woman stronger knowing the law and being able to use it to her advantage. I can go as far as I want to be in this field, it all depends on the amount of work I put in. I don't have to kowtow to anyone to get ahead, at the end of the day it all comes down to sheer hard work. I can earn as much as the men in this profession." (Interviewer: Mariam Ahmed, interviewee: Shamsa Qamar, District Courts Multan).

Another explains the situation more bluntly:

"The lower courts are small rooms where the Reader is male, the *Pukaraa* (who announces the cases) is male and the judge is male. 90% of the people involved in the legal profession are male. Sometimes the *Pukaraa* or the Reader are rude, and being a woman I can't tell them off the way a man would, and if we're polite they just ignore us. Anything a woman does in and around the courts is subject to scrutiny and gossip. And gossip spreads like wild fire, your reputation suffers. Similarly the Record Room is always full of men. The clerks are men, and the rooms are again small and cramped, and when a single woman enters a room full of men they stare at you; that is very intimidating, at least for me it is. The clerks will just stare at us, deliberately delay or not do our work because we are women, they intentionally harass us." (Interviewer: Mariam Ahmed, Interviewee: Faiza, Districts Courts Multan).

A female advocate from Islamabad explains how they have struggled to make more space for themselves in the profession:

"When I started visiting the Islamabad District Courts in 2002, there were no separate toilets for women; you could smell the toilets from far away. We had to fight for them. There was no place for women to sit and relax, if you sit at the canteens men tend to stare and if you sit with the men they think you're fast. As the number of women has increased, these things have also improved, we now have our own bar room as well as a daycare. The new crop of female lawyers has been struggling to change the status quo." (Interviewer: Mariam Ahmed, Interviewee: Farida, Islamabad Districts Courts).

### **Discrimination against Female Advocates in the Profession**

When asked about the discrimination against female advocates in the legal profession, female advocates affirmed the presence of discrimination made by clients, male advocates, and male as well as female judges. However the incident of discrimination is interpreted in various tones. The following are expressions to show different feelings toward discrimination:

"A number of clients do not come to me because I am a woman and they do not trust and would not take their serious problems to a female advocate. Most of the cases I get are from

women with family cases of maintenance, custody of children and dissolution of marriage.” (Interviewer: RM, Interviewee: Farzana Jahangir, Attock District Courts).

“Females are discouraged to study law and once they study it they never practise it. If they practise they face much discrimination in the courts. When they appear before a judge some of them do not take them seriously and they are also discriminated by the clients.” (Interviewer: RM Interviewee: Zuhr Nisa Jahangir, Attock District Courts).

Another said:

“As I am a woman from the urban set-up I face fewer difficulties in being a professional lawyer. I don't experience much discrimination on the basis of gender. Moreover we are more trusted than men as women are hardworking, they are honest and don't much opt for unfair means. However I have been facing difficulties from amongst my own colleagues. Like when I win a case in front of a female judge the male opponent counsel in the court would say it's woman to woman solidarity. And when I defeat a male attorney in the court of a male judge, the same counsel would comment: 'Why not, she is after all a woman'.” (Interviewer: SJ; Interviewee Parveen Sunderdass, advocate H.C. Mardan Bar).

## **Attitude of Senior Male/Female Advocates towards Female Junior Advocates**

“If we ask a senior about something they do guide us but no proper system is working here to provide guidelines to the new male or female lawyer who joins here. If a system is set up in the courts (*kachehri*) for newcomers and the Bar should tackle it by itself, then many of the problems shall stand solved. Look, the female senior lawyers have very little work so they cannot afford the juniors with them. So it's a problem for them to adjust a junior female lawyer with them.” (Interviewer: Sajid Sultan Interviewee: Fatima, District Court Multan).

One of the biggest problems for the female junior advocates is financial and their seniors, who are mostly males, do not support them:

“When I joined this field I thought of doing a lot of things like this and that - but when I entered the courts (*kachehri*), the first thing I had to face was the financial crisis. Such are the problems that the seniors do not accommodate the juniors. Even they do not refer the cases to juniors. What I think is that seniors should refer the small and minor cases to their juniors.” (Interviewer: Sajid Sultan, Interviewee: Fatima, Multan Districts Courts).

“The attitude of the senior female lawyers has not been very positive. They want to reap the benefits of their labour not share them, so they don't take the time to help or encourage fresh young lawyers, in fact they can be very discouraging. Most of them don't have time for you and very few of them will deal well with a new female lawyer. They don't take the time to discuss your case with you, they just want results. It's not all about reading and research; you need guidance on a practical level which just isn't there if you work with a senior female lawyer. There are very few women at the upper level, and perhaps that's because most of them had some other form of financial support so they didn't need to struggle and pursue their careers the way men do.” (Interviewer: Mariam Ahmed Interviewee: Farida, Islamabad District Court).

## **Attitude of the judges**

“Some of the judges are very polite with lady advocates but some judges are very rude. Lady Judges prefer to work with male advocates as they learn more with them.” (Interviewer: Rashdeen Nawaz, Interviewee: Parveen, Lahore Districts Courts).

“Similarly gender sensitisation workshops have made a difference by improving the attitude of judges towards female lawyers. Some are very nice, though those are few in number, about 30-40% of the total Judges, others have a dirty mind, you can tell. Some tend to treat you like an imbecile if you are a woman or try to discourage you. In my early years as a lawyer, a judge was once very rude to me in court and I didn't have the confidence to speak up for myself, but now I do. If a judge crosses the line I tell him off very politely. But as I said, things are improving; new female lawyers are now being awarded pro-bono cases, whereas previously judges would prefer giving them to the men.” (Interviewer: Mariam Ahmed, Interviewee: Farida, Islamabad District Court).

### Issues with social attitudes

The following words of a female advocate reveal a positive attitude of the general public towards female advocates

“My uniform (white *shalwar kameez* and black coat) is respected wherever I go. If a woman is dressed as a lawyer, men don't stare at her or treat her as a woman, they treat her like a lawyer, as they would treat a male lawyer. We are as respected as the men in our profession, perhaps more. I have never felt at a disadvantage being female as a lawyer.” (Interviewer: Mariam Ahmed, Interviewee: Shamsa Qamar, District Courts Multan).

On the other hand one can also notice clearly the difficulty of social attitudes towards them:

“The law is a tough profession especially for women; you work long hours and have a lot of public dealings. I have to deal with people from all levels of society. Some are very crude, they think because you're a woman working in a male environment you have no morals. As a female lawyer I have to be very careful about how I present myself and who I'm seen with. You can't wear much make-up, you have to be properly covered, wearing our white *shalwar kameez* and black coat with our sensible closed shoes. If you dress like this you are taken seriously, if you wear flashy jewelry or heels you are thought frivolous. How you dress is very important. Similarly how you deal with male lawyers is also very important. Initially I tried breaking the barrier between myself and my male colleagues, but the feedback I got was very negative. The way society and people start discussing you, is very discouraging. I think men tend to treat you differently and it is they who keep the barriers in place.” (Interviewer: Mariam Ahmed Interviewee: Shamsa Qamar, Multan District Courts).

### Harassment

We came across some female advocates who faced harassment, which is expressed by them in these words:

“Personally speaking I was a very submissive and subdued young woman when I entered the profession. I came from a much protected environment where I never had to deal with the people from different walk of life especially crude men. I remember my first experience outside the courts where a man touched me inappropriately and I scolded him out loud, I was more embarrassed by the incident than angry. Since then I've learned to deal with such incidents, but initially it caused me a lot of grief. I had no support at home; there was no one I could discuss these issues with. If I had mentioned these incidents to my family they would have said that it had been my decision to become a lawyer, so I should deal with it myself. So I grew up, and now I can face the world with confidence.” (Interviewer: Mariam Ahmed, Interviewee: Faiza, Courts Islamabad).

Another female lawyer said:

“When someone passes by commenting over us then it’s troublesome and in my opinion it’s great harassment when they comment. And if they want to talk to us they can do that on the face, but they say such things while crossing or behind us and then make that thing spread throughout the courts. So it’s a wrong thing and whatever is the problem can be cleared on the face.” (Interviewer: Sajid Sultan, Interviewee: Laila, Multan District Courts).

### **Integration with the Culture of the Court**

Culture of the court includes a few practices which have become customary or tradition of this working place. This includes the way advocates conduct public relations, which is a part of promoting their profession. These relations include wider contacts through attending family wedding parties, funerals and other social occasions. This also includes how advocates increase their clientage and other connections in and outside the courts to successfully conduct their cases.

#### *Networking*

Female advocates feel professional isolation as a hindrance in their way to progress in profession, which they describe in these words:

“The only other disadvantage I feel is the networking and making contacts. I cannot go to men’s offices and leave my card or have tea and *chitchat*. A lot of our clients are referrals that come to you through your contacts, and in Multan mostly men tend to hire lawyers; women usually have a male family member acting on their behalf.” (Interviewer: Mariam Ahmed, interviewee: Shamsa Qamar, District Courts in Multan).

Another described:

“The major problem for the females is that their PR ship is too low to talk to their male colleagues and clients as the male advocate can do with their clients. Male advocates can *chitchat* easily with clients and have drinks, tea and lunch in the canteen. Whereas the major problem with the female lawyers is that if they even talk to their male colleague, the next day it will be spreading throughout the courts that who is having an affair with whom. (Interviewer: Sajid Sultan, Interviewee: Fatima, Multan Districts Courts).

One more maintained:

“The females have to face a lot of problems to get a case because of the shortage of a wider network. When we go home from the courts then we usually remain home and later it is difficult for the females to come out to meet and visit people, therefore females have a very small number of cases because of limited social network.” (Interviewer: Sajid Sultan, Interviewee: Fatima, Multan Districts Courts).

Another one confirmed the statements of others:

“It’s all about PR as far as clients are concerned. Men feel more comfortable with other men, male lawyers can take their clients or prospective clients out for dinner, or visit them at their offices. As a woman society will label me if I was to take a male client out to dinner, my parents would not approve of it, and I personally do not feel comfortable doing it.” (Interviewer: Mariam Ahmed, Interviewee: Farida, District Courts Islamabad).

### *Corrupt dealings*

One of the biggest challenges for female advocates in the profession is so-called “manly dealings” which has become almost the legal culture of the country and may not be considered appropriate for women to do. Here are some descriptions of it:

“It so happens that as the staff is habitual to demand money from the male lawyers as their share (*khercha*), they of course demand the same from females, but females do not give them this, at least I don’t give money and even I refuse.” (Interviewer: Sajid Sultan, Interviewee: Laila, Multan District Courts).

Another can see the pressure and is more compromising:

“I don’t think it’s good to make payments to the court personnel to move the cases in the court, but now it has become the culture. For example when we need a short date for the case or need a copy of papers we always have to pay money for that. We have to act according to the culture of the court, otherwise we will not be able to progress with our cases and in the profession.” (Interviewer: Rashdeen Nawz, Interviewee: Parveen, District Courts Lahore).

One described:

“I think that lady lawyers tend to be more honest as they go by the book, accepting no bribes etc. And that’s why people, even men clients, prefer us to contest their grievances.” (Interviewer: SJ, Interviewee: Ms. Naureen Mumtaz, Attorney, District Session Courts Rawalpindi).

Another said:

“Clients also feel that male lawyers can be more aggressive, and few have scruples when it comes to bribery or pay offs. I discourage these dealings right from the start so that their first impression of me is that I don’t do any backhand deals, if anyone asks me for a bribe I politely explain to them that I don’t work this way. There are a few women, who do, but they never do it directly, it’s always through a clerk or junior staff member. The majority of women are not corrupt, and although we haven’t wiped out corruption, we have created a hindrance against it”. (Interviewer: Mariam Ahmed, Interviewee: Farida, District Courts Islamabad).

### **Participation in the Organisational Life of the Courts**

Female lawyers tend to organise themselves and feel the need for it. In their own words, they said:

“When I joined I tried to establish an NGO of my own. Everyone discouraged me that you can’t do this, and what would you do ahead and people whisper this and that over it. I heard a lot over it but at least I got it registered. I got my NGO, Bandagi Law Associates, registered and now am working on it and we also provided lists in the courts.” (Interviewer: Sajid Sultan, Interviewee: Fatima, Multan Courts).

“I fully participate in the social activities of the Bar room and sit with male and female colleagues to chat over a cup of tea. I have never been a candidate for election but I fully participate in the election activity. I think Lady Lawyers should have an organisation where they can discuss their problems and this platform should work for the promotion and encouragement of lady lawyers. It should also work for the economic security of lady lawyers and unite them on one platform.” (Interviewer: Rashdeen Nawaz, Interviewee: Parveen, District Courts Lahore).

### *Organisation through Committee club/system*

Mostly in the provincial settings it is noteworthy to observe that female advocates organise the legal professional community through the committee club/system for money saving. The system works that a fixed amount of money is deposited by participants of the committee members every month and the total amount collected is given to one member each month. Turn of member receiving money is usually fixed through a lottery draw. The system runs basically on a relationship of trust. Besides monetary connection committee members tend to become socially attached to each other. This system of committee is usually run by women. For example one of the female lawyers said:

“Reader of the court is more sympathetic toward me as we are members of the same committee club”

This is an indication of different methods of networking women lawyers use in this male-dominated milieu.

### **Lawyer’s Movement: Participation of Female Advocates**

In the movement for the independence of the judiciary in 2007/08, an internationally known historical movement in the history of Pakistan, some female lawyers actively participated while others were completely isolated.

“I was not part of the lawyers’ movement because I was too busy studying for my examination.” (Interviewer: RM Interviewee: Farzana Jahangir, Attock Districts Courts).”

“I was also active in the lawyers’ movement and also went to the Rawalpindi Bar Council call for meeting.” (Interviewer: RM, Interviewee: Zuhr Nisa, Attock Districts Courts).

“I came all the way long from Abbottabad and joined hands with the civil society/political and human rights activists in their rallies against Musharraf, and chanted slogans like “Go Musharraf Go, Go Musharraf Go”. During one of the protest rallies, right in front of Chief Justices’ residence, I was arrested along with 10-15 other activists, including women and we were taken into custody in police station secretariat, Islamabad. (It’s worth noting as well that the tear gas chemical that was used was not for riots, rather for military use as it was much more potent). I remained under police custody for two days, whereas till date I am forced to be present in the courts on different dates as I was released on bail. I have spent almost Rs 50,000 from my own pocket as I would be shuttling from Shangla Park, Swat (in Malakand Division, my work place) all the way long, residing in hotels/guest houses in Islamabad.”(Interviewer: SJ, Interviewee: Qamrunissa, Advocate, H.C. Peshawar).

### **What make Female Advocates Different from Male Advocates?**

Under this heading some popularly expressed features about female advocates are depicted. It is however arguable if the following features associated with female advocates can be attributed to their weakness and limitation or something which may lead to positive contributions for delivery of justice and the legal profession.

#### *Softness and care*

Softness and care is traditionally considered to be a feminine attribute.

“I can earn as much as the men in this profession, but I am perhaps soft hearted. If I feel my clients are unable to pay my rates, I often reduce it; sometimes I even take cases for free. I

try to resolve issues out of court specially those concerning families and divorce. Naturally women prefer dealing with other women when it comes to personal matters, so I find myself counseling them as well.” (Interviewer: Mariam Vine, Interviewee: Shamsa Qamar, District Courts Multan).

“It is said that females are weak hearted so I think they are even afraid of being dishonest (*haira phairi*).” (Interviewer: Sajid Sultan, Interviewee: Fatima, Multan District Courts).

### *Hardworking and time abiding*

“I think lady lawyers have contributed to make discipline and are time abiding. I don’t think that lady lawyers have much contributed for the delivery of justice. I work hard and believe that with hard work everything could be achieved and all hurdles can be overcome and desired targets achieved with consistency and hard work. (Interviewer: Rashdeen Nawaz, Interviewee: Parveen, District Courts Multan).

“As the profession requires hard work and women being more hardworking than men, proved to be the best attorneys and judges.” (Interviewer: SJ, Interviewee: Ms. Naureen Mumtaz, Attorney, District Session Courts Rawalpindi).

### *Understanding in family cases*

It is commonly assumed that women can better understand family problems. The following is the view of two female lawyers:

“Female clients feel more comfortable with women, especially when discussing personal matters, so we tend to get a lot of family cases. The better judges also give more weight to your argument if you are a female lawyer in such cases and often they give you a lot of relief in family cases.” (Interviewer: Mariam Ahmed, Interviewee: Farida, Districts Courts Islamabad).

“Besides that in family matters, cases can’t be dealt with by men lawyers, because in male milieu men don’t try to listen and understand female clients.” (Interviewer: SJ, Interviewee: Ms. Naureen Mumtaz, Attorney, District Session Courts Rawalpindi).

### *Understanding of legal pluralism in Pakistani society*

It reflects through the interviews that female advocates tend to use alternative methods of resolving disputes more than male advocates. Alternative methods may include mediation and in provincial courts also ‘metaphysical’ means which is widespread practice in the South Punjab. A female advocate coming from a rural background of South Punjab described:

“I also pray for my clients and sometime recommend them to get amulets and use metaphysical means of resolving disputes.” (Interviewer: RM, Interviewee: Zuhr Nisa Jahangir, Attock District Courts).

“I have strong belief in prayers. I read the Quran and understand the meanings of the lines and recommend people to read specific lines for specific purposes or solutions. Or, I tell different names of God for solution to different problems. I do that with my clients too. Before I start a case, I pray to God and ask for help. I tell my clients at the start of the case to pray for their best too.” (Interviewer: Fatima Malik, Interviewee: Mahreen, District Courts in South Punjab).

## **Comments**

After looking through the above interviews on different aspects of female advocates and their professional lives, we can make the following comments:

Women entrances in the male-dominated profession have not been easy for the female advocates in Pakistan. But their struggle and appearance has raised many issues. These issues can be divided into five.

The first type of issues are widely related to gender discrimination and demand for gender equality, for example issues faced by women on the home front, male dominated profession and discrimination against female advocates in the profession.

There is dire need which is also expressed by the interviewees themselves is gender sensitisation workshops and other training. The main practical side of the issue is daycare for children.

The second is the economic aspect in the lives of lady-lawyers

The third is the cultural perception of justice and corruption which is in grounded in the legal system of Pakistan from the colonial period when “Indian litigants sought to adopt themselves to the newly-imposed system of British justice at the same time that they sought to use the system to project and restructure their standing in this new world.” (Jefte 2011: 76). The question is that of adjustments. What differences can the emergence of women in the legal profession make in long-rooted practices; or manipulated justice which has become the requirement of materialising the interaction of varied systems of justice? Further questions arise that if women are to become successful lawyers, do they have to master this “manipulated justice” or is there way to free oneself from the jargon of justice created in the colonial times?.

The fourth aspect is what difference women can make with their special ways of looking at the profession. It also seems that females have more consideration for alternative methods of resolving disputes, while our legal system seems to have fully closed eyes from this fact.

Fifth is the ways female can organise themselves in the professional life to get integrated and break through the isolation which is also a hindrance in their progress.

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**Book Review**  
**By**  
**Erin E Stiles**  
**Embedding *Mahr* in the European Legal System**  
Edited by Rubya Mehdi and Jørgen S. Nielsen  
DJØF Publishing, Copenhagen

This welcome new volume addresses a timely and important subject: how a particular principle of Islamic law, *mahr*, is being handled in European legal contexts. *Mahr* is often translated into English as “dower” and references an obligatory transfer of property or money from a husband to his wife in a Muslim marriage; *mahr* is often, but not always, written into a marriage contract. The collection, edited by Rubya Mehdi and Jørgen S. Nielsen, brings together ten papers from a 2009 workshop on *mahr* in Copenhagen; most of the contributors are legal scholars, lawyers, and anthropologists. The chapters will be of great use to scholars, legal professionals, and policy makers who are interested in legal pluralism and the legal consequences of globalization and migration—particularly the way in which Islamic legal principles are interpreted and addressed in Western legal systems. The editors’ choice to focus on one issue in Islamic law—*mahr*—works very well. As the contributors show, the way in which Western legal systems handle questions of *mahr* are as complex and varied as understandings and practices in Muslim-majority countries. On the whole, the chapters are absorbing and well-written, and they complement each other remarkably well. Most address the way which marital disputes involving *mahr* are handled in European countries (Sweden, Denmark, Norway, the United Kingdom, Germany, the Netherlands, and France are discussed), and many of these elucidate the difficulties inherent in attempting to classify *mahr* according to pre-existing Western legal notions; there is little consensus—even within individual European countries—on how questions of *mahr* should be handled. It is also important to note that many authors make specific recommendations about *mahr* can be more effectively addressed in European legal contexts.

The brief but inclusive introduction to the volume, written by the two editors, makes clear the timely nature of the subject matter, and introduces the reader to the complexity of *mahr* practices and understandings of its meanings. *Mahr* can fulfill both social and economic functions: it may be understood as a gesture of respect for the wife, as an aspect of marital maintenance, or as providing economic security in case of divorce. The authors note that although *mahr* has been “more sympathetically treated by European courts than any other aspect of Islamic family law” (13), there is not one standard by which *mahr* is applied in European courts, as the subsequent chapters illustrate. Following the introduction, the chapters are divided into three parts—each with a different focus.

The three papers in Part I set the stage for the later chapters; the first two examine *mahr* in the Middle East and the third considers the somewhat comparable European legal category of the “morning gift.” Annelies Moors shows that considerations of *mahr* in Palestine are varied even within relatively small

communities; understandings and norms of *mahr* change over time and from urban and rural contexts. Moors looks particularly at the increasing frequency of registering a deferred dower. In reference to European contexts, Moors questions whether it is possible to deal with *mahr* cases outside of cultural and historical contexts in which they are entrenched. Susan Dahlgren's thought-provoking chapter also shows the complexity of *mahr* in a Middle Eastern context by examining sometimes fervent debates in Aden, Yemen about the meaning and appropriateness of *mahr* according to Islam, local custom, and women's rights. The third chapter in Part I, by Inger Dübeck, is quite different from the first two in that it explores the practices of and legal rules concerning morning gifts in European history, with a particular focus on Denmark. However, the chapter provides a useful transition to Parts II and III in that Dübeck notes similarities between morning gifts and *mahr*, for example the idea of separate spousal property.

The chapters in Part II look at the way *mahr* has been handled in different European legal contexts in recent years; the chapters all take a comparative approach and most recommend ways *mahr* could be handled more effectively in Europe. Lene Løvdal looks at *mahr* and gender equality in judgments from England, France, Norway and Sweden, particular in regard to the European Convention on Human Rights. Løvdal raises questions of conflicting norms concerning gender, and recommends that European courts apply a "gender equality norm of equal worth" while accommodating gender differences in handling cases involving Muslim law. She also recommends courts use comparative methods to gain a better understanding of the complexity of legal issues such as *mahr*. Susan Rutten's chapter critically considers the way in which *mahr* has been qualified in accordance with various legal categories in European courts. She assesses the utility of the qualification, a tool of Private International Law, and argues that the inconsistency of judgments concerning *mahr* is highly problematic in that it "damages the true nature of *mahr* and often does not coincide with the intentions of the parties" (145). Rutten concludes that *mahr* should be viewed as an acquired right. In Chapter 6, Katja Jansen Fredriksen compares disputes involving *mahr* from Norway and the Netherlands, and shows that disputing Muslim couples may both use *mahr* strategically in marital negotiations and strategize where they take disputes involving claims of *mahr*. Fredriksen observes that European courts are not solving Muslim family disputes adequately, which presents serious problems for Muslim immigrants, who may, for example, end up in "limping marriages"—when they are considered divorced in the country of domicile but not the home country. She notes that Norway and Pakistan have recently agreed to discuss such issues, but that progress has not been made. Fredriksen recommends that applying Muslim Personal Law in Europe could limit such complications.

Part III is comprised of four chapters that examine *mahr* cases in particular European countries. In her contribution, Nadjma Yassari stresses that important economic function of *mahr*, and considers how German jurisprudence has addressed *mahr* in recent decades. There was no consensus on how to handle *mahr*, and it was categorized variously as matrimonial property, maintenance, inheritance, and in other ways. Yassari recommends characterizing *mahr* consistently as part of matrimonial property regime to "ensure that both the *mahr* and the financial equalization of the

spouses' property upon divorce are governed by the same law" (211). However, in a postscript, we learn that in 2009, the German Supreme Court decided to characterize *mahr* as an effect of marriage. Camilla Christensen looks at *mahr* in Danish case law, and observes the problems that arise when *mahr* is categorized in accord with Western legal ideas; she notes in particular the undue burdens this can place on the wife or husband. Christensen considers whether *mahr* could be considered a gift under Danish law, and concludes that Muslim women in Denmark would be better served by Danish law if they arranged *mahr* as gift in a prenuptial agreement; she recommends that figures like imams provide more instruction to couples about Danish marriage law. Matilda Arvidsson's engrossing chapter on Swedish courts centers on the fact that courts handle *mahr* issues in marriages contracted in Sweden differently from those contracted elsewhere, such as in Egypt. The latter are generally handled under private international law, and Arvidsson criticizes judicial handling of the former, in which judges do not recognize or consider common legal practices of Swedish Muslims like *mahr*. Arvidsson argues that Swedish courts thus fail to provide legal solutions for Muslim disputes, which results in the marginalization of Sweden's Muslims. She writes that since Swedish judges know nothing about *mahr*, its interpretation is "left to the stronger of the parties with the better resources for being heard at the court" (259). The final chapter, by Samia Bano, considers Muslim women and *mahr* in the United Kingdom. Bano draws primarily on data from interviews; most interviewees were British Pakistani Muslims. Bano's interviews show that while many women did not give much thought to *mahr* when they were married, it became an important issue when marriages ended in divorce. Also, many marriages were not registered in civil law, and many women were not aware that this was required. In recent years, however, British Muslims have developed a standard marriage contract in an attempt to remedy problems of gender inequality in divorce.

There is little to criticize in this excellent and readable volume. The volume opens the door for much future research on the way Islamic legal issues are handled in Europe and elsewhere; a future volume including even more ethnographic work on the subject would be an excellent complement to this one. One minor drawback of the collection is that many, though not all, of the chapters repeat a basic overview of *mahr* in Islamic law as if the reader is unfamiliar with the concept; it would have been helpful to have perhaps extended this sort of discussion in the introduction, and then have the authors assume a basic understanding of *mahr* in the remaining chapters. Also, although it is certainly not the norm in an edited work such as this one, the volume could be strengthened by a concluding chapter written by the editors. Because the chapters fit together so well, and because so many make recommendations for improving handling of *mahr* in European courts, it would be helpful for the reader to have an insightful conclusion which brings together their observations and recommendations. Overall, this important collection is highly recommended for legal professionals, scholars, and students interested in issues of legal pluralism and Islamic law.



**Book Review**  
**by**  
**Zoran Lapov**  
**Women, Judging and the Judiciary**  
**From difference to diversity**  
by Erika Rackley (Routledge, 2013)

The book is both illustrative and challenging in its purposes. What's more, it innovatively invites to rethink a set of basic notions surrounding the issue of judiciary and gender. But, why there would be a need for undertaking such a step? – as a matter of fact, certain ideas of judges and judging have been too rooted and overlooked as “normal”, hence accepted in an unproblematic way of thinking by both academy, institutions and public opinion. Thereby, the problem calls for a new light to be shed over the perception of gender-profession dichotomy.

Behind these assumptions, the authoress addresses the discourse of women in legal profession by exploring academic debate, everyday case studies and statistical data, added by indispensable retrospective glances; in order to make its pathways complete, the analysis is supported by an international panorama (yet focused on the United Kingdom), pouring a comparative approach into it. Gender, legal profession, justice/judging, rights, equity, difference versus diversity, appointment, merit etcetera, are just some of the key-concepts that thought-provokingly permeate the lines of the present work. In this way, the reader is prompted to take a journey through a multilevel analysis of the women's representation – both quantitatively and qualitatively – in the given professional sector.

As suggested by the title, *Women, Judging and the Judiciary* moves from *difference to diversity* in relation to the roles that the genders have been bestowed with in this arena. Women used to be deemed as different (in many senses) for so long periods of time, and this view keeps being the rule in several realities to date. In addition to its specific time and place demarcation, such a reputation of women has turned the question of genders into a question of differences. It is widely known that the social status of women has been gradually enhanced in a good portion of the globe in the last five to six decades, being vestiges of the process reflected in their representation in the legal profession too. Being affected by novel approaches to the gender issue of the last decades, the discourse has progressively shifted its routes under the banner of diversity, without leaving the legal profession out from its trends nor deprived of the resultant fruits. Rather to make it different, the aim of these approaches is to widen and enrich the issue: diversity of genders, dragging judging potentials and opinions in, is expected to spread over various levels of judiciary.

Yet, the outcome? – if compared to their male counterparts, the women unsurprisingly keep being underrepresented in the said professional domain especially on higher ladders of the judiciary pyramid. Everyday practices testify that the reality and the aforesaid propositions are not matching: the women involved in the legal profession are still facing several difficulties in taking important positions in decision-

making processes. As a final result, the number of women judges is still low. Further details concerning the phenomenon, namely its dimensions on the international scale, corroborate the finding: this condition affects not only particular societies marked by as much particular societal characteristics (as it could be expected), but applies to a row of the so-called “western democracies” too.

Brilliant the recollection of the little mermaid’s sacrifice.

The following question imposes itself as introductory to the debate: what are the reasons of failure in the scope of judicial diversity and inclusiveness? In the attempt to answer the question, Erika Rackley not only reaffirms the persistence of gender inequity in the judicial system and decision-making worldwide, but makes depart a thorough analysis of multiple causes and consequences that underpin the phenomenon.

On the background of the outlined scenario, the authoress provides a theoretical frame that the concepts of ‘diversity’ and ‘difference’ are embedded in. The definition of the two is followed by three concepts which prove to be vital for the discourse of judicial diversity itself: legitimacy (in relation to the public confidence), equity, and (once more!) difference. How and to what extent does the gender diversity introduce changes in the world of law – in terms of its phenomenology, professional dimensions, practices, institutions, social actors etcetera; and the other way around: what have these processes and changes meant for the female perspective? Setting off from these conjectures, one could move on to the representation and status of women in the legal profession availing her/himself of statistics, case studies, life stories, individual contributions, perpetual obstacles, everyday practices, and other relevant developments offered by the book with the goal of making the picture full and fully credible. Crossing a vast battleground of deep-rooted imageries, preconceptions and interpretations surrounding the involved social actors, especially the persona of judge, the reader lands back to the field of difference and diversity: actually, s/he is challenged to experience the subject under several frameworks – excluding difference, embracing difference, reclaiming difference, up to arrive at the issue of judicial diversity being positioned behind the question: “*A diverse judiciary is a better judiciary?*” Why we might want it to be more diverse then?

Well, if adopted in terms of cross-cultural and professional enrichment, the diversity should be welcomed in the legal profession to a higher degree, with particular attention to the realm of judicial appointment and adjudication: the judicial diversity and inclusiveness will definitely affect the role of the (woman) judge and the process of judging. In the lines of *Women, Judging and the Judiciary*, the need to introduce a broader openness to the judicial diversity and to appoint more women to the judiciary is particularly pointed out. The authoress exposes reasons (*why?*), modalities (*how?*), and envisaged outcomes (*what?*) of this purposeful invitation, namely: why, how, and to what extent these goals might be achieved. Meaning that further policy development is still a work in progress in this context. In conclusion: the matter of judicial diversity, especially at senior levels, remains so a complex and scorching subject in the legal profession.





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CALL FOR PAPERS FOR SPECIAL ISSUE 2013  
Special Issue of the Journal of Law and Social Research  
On:

Law and Run-Away Women  
Editor: Dr. Rubya Mehdi  
Host Editor: Dr. Tahira S. Khan

**The Journal of Law and Social Research (JLSR)** is a peer reviewed annual journal striving to improve the quality of legal education, encourage legal research, and build a strong tradition of vigorous academic discourse and publication in Pakistan.

JLSR aims to publish original and innovative legal scholarship in the diverse sub-fields of law. JLSR is also keen to publish interdisciplinary socio-legal research that explores the interface between law and political, economic, social and legal institutions.

History bears testimony that a consistent social pattern has been present in every society regarding acts of running away of slaves (male and female) and family women (daughters, wives) due to oppression and unhappiness. A cursory glance at the information available through current print and electronic media highlights increasing “active protest” of family women against their oppression in the form of running away from home and this phenomena is occurring across the board in the developing and developed societies. Women’s act of running away from the site of violence has been due to multiple factors such as; (a) running away to tie the knot of marriage with the man of her choice; (b) running away to untie the knot of marriage from the disliked or abusive husband; (c) running away to avoid the knot of marriage with the man of her parents’ choice. The act of running away brings implications for private sphere by shattering so called sanctity and honour of family and for public/political sphere by posing challenges to socio-economic and legal institutions of state. Published research and media reports record occurrence of run-away cases among immigrant communities of the Asian, African origin living in the West European countries, the US and Canada, as well as in the Asian and African societies. The run-away incidents demand systematic theoretical investigation and

empirical evidence related to similarities and differences between causes of occurrences and their implications for state and society.

We invite legal researchers, academics and senior students in the social sciences, humanities, law, economics, and history to submit their research articles related to the topic. We also encourage contributions from legal practitioners in the domain of social activism and human rights activists. We invite scholars from various countries to reinvestigate occurrences of run-away cases, redefine concept of dis/honour, shame and reinterpret state and society's response to such cases. We are looking for multi-disciplinary contributions in the form of case studies, comments, research articles and book reviews. Contributors are welcome to address these aspects from a national, international and comparative perspective. Some of the possible but not exclusive themes for enquiry may be:

- Factors behind women's running away (Socio-economic, cultural, ethnic)
- Unmarried and married women's act of running away (similarities/differences)
- Refuges for run-away women
- State response to run-away women's protection and support
- Non state actors' support
- Implications for legal and economic system

Please see "Information for Contributors" regarding format of your proposed article. Contributors are requested to submit an abstract and CV to the editors by 15th January, 2013, Dr. Tahira S. Khan [tahirak2010@gmail.com] Dr. Rubya Mehdi [rubya@hum.ku.dk]. The deadline for the submission of finished papers is the 30<sup>th</sup> May 2013.

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Contributions must be complete in all respects including footnotes, citations and list of references.

Articles should also be accompanied by an abstract of 100-150 words and a brief biographical paragraph describing each author's current affiliation.

Articles usually are expected to be in the range of 3000 to 6000 words and presented double-spaced in Times New Roman 12-pt. Longer or shorter articles can be considered.

Please use British English orthography (of course, do not change orthography in quotations or book/article titles originally in English). Use the ending -ize for the relevant verbs and their derivatives, as in 'realize' and 'organization'.

Italics are used only for foreign words, titles of books, periodicals, and the names of organizations in the original language (except when the original is in English).

Dates are written in this format: 11 April 2006.

For numbers please use the following formats: 10,500; 2.53 for decimals; 35%; 5.6 million.

If a footnote number comes together with a punctuation mark, place it after the mark.

Contributors are requested to submit a soft copy of their article and abstract to Dr. Rubya Mehdi E mail: [rubya@hum.ku.dk](mailto:rubya@hum.ku.dk) in Word format.

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Please use the Harvard system of referencing which has grown in popularity in academic writing in education and the social sciences. In the main text, a reference or quotation is annotated in parentheses with the surname of the author, the date of publication of the work and the page number from which the quotation was taken. The full bibliographic details are then provided in a list of the references at the end of the work.

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