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Daughters' inheritance, legal pluralism, and governance in Pakistan

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This paper explores social actors' arguments regarding daughters' inheritance, their use in court, and the implications of legal pluralism on governance in Pakistan. It scrutinizes the notion of custom, non-state law, and positive law as crucial dynamics that shed light on the ways social actors make sense of power and governance. In Foucauldian terms, this paper deals with the formation of statements – their temporalization and their becoming but in particular sheds light on the potential logics of the perpetuation of gender discrimination in inheritance laws. This paper suggests that the everyday arguments that play a role in the elaboration of the story told to the courts and received by the judge have the role of *actants*. Within the framework of proceedings it is possible to isolate the micro-units on which the legal discourse is elaborated either for state- or non-state jurisdiction, or for both of them, not necessarily seen as antagonistic places, and not necessarily seen within a framework of justice and injustice. This paper concludes that notwithstanding polarized discourses on centralized and decentralized governance, everyday practices of law in Pakistan tend rather to perpetuate non-state law together with positive law as continuous and concomitant interlegalities in and beyond the state instead of exclusive and conflicting sources of legitimacy.

Keywords: inheritance laws; gender; custom; governance; legal pluralism; interlegalities; Pakistan; Punjab; South Asia; governance; Gilgit Baltistan; intersubjectivities

Introduction

Empowerment of women through improved legal consciousness has gained a prominent role in the programmes of social activists aiming at gender equality in South Asia. Family law has been amended so as to increasingly favour women, at least formally, and codified personal laws recognize women's inheritance rights even if this is in conflict with custom. The *Muslim Personal Law (Shariat) Application Act*, 1937 and successively the *Muslim Personal Law (Shariat) Application Act*, 1961 of the former West Pakistan provided for limited inheritance rights for Muslim women (contrary to the customs that instead would disinherit women): as a general principle daughters have a right to half the share of their brothers or 2/3 if there are no brother/s with further differences depending on the configuration of the family and depending on the sect. The Constitution of 1973 broadly speaking also protects women's inheritance and the *Prevention of Anti-Women Practices (Criminal Law Amendment) Act*, 2011 specifically prohibits women's disinheritance with section 498 A and 498 C, reported hereafter for the convenience of the readers:

> *498A. Prohibition of depriving woman from inheriting properly*. Whoever by deceitful or, illegal means deprives any woman from inheriting any movable or immovable

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property at the time of opening of succession shall be punished with imprisonment for either description for a term which may extend to ten years but not be less than *five years* or with a fine of one million rupees or both.

498C. Prohibition of marriage with the Holy Quran. Whoever compels or arranges or facilitates the marriage of a woman with the Holy Quran shall be punished with imprisonment of either description, which may extend to seven years which shall not be less than three years and shall be liable to fine of *five hundred thousand rupees*.

Explanation - Oath by a woman on Holy Quran to remain unmarried for the rest of her life or, not to claim her share of inheritance shall be deemed to be marriage with the Holy Quran.

As this paper shows, Muslim women in Pakistan not only can count now on the support of socio-legal activists but their inheritance claims in court are often granted credibility at their onset. As our paper also suggest, the number and the rate of success of women initiated suits in the Muslim contexts may be underrated (see Rosen unpublished draft). Nevertheless, it is also a fact that women seem to prefer relinquishing their inheritance rights by signing away their shares to their brothers. Feminist and socio-legal scholarships have abundantly highlighted the link between gender inequalities and the access and control of property. The feminist standpoint is therefore a point of depart here for a complementary approach that investigates the production of the locally significant social practices in relation to gender. While we do not refute the evident gender imbalance of inheritance practices in Pakistan, we adopt a skeptical approach to investigate the arguments of women's disinheritance as well as the circumstances and temporalization in which women can successfully claim their share. Our paper draws on qualitative case studies collected both out of court and in court in Punjab and on a published case law in Gilgit Baltistan. Thus, this paper offers a range of situations chosen by the authors as representative, even if not exhaustively, of the variety encountered in the long-term fieldwork carried out by the authors. Terms and conditions of daughters' inheritance-claims as outlined in the three different settings will throw light into the relationship between law and custom and their use in court in two different settings of governance: the Punjab, which is considered to be the main decision-making source in Pakistan, and Gilgit Baltistan, which is to date still a contested territory to many extents.

Methodological remarks

The material and the analysis offered hereafter are the outcome of a collaboration between two anthropologists whose research interests and fieldwork have developed along similar lines for what concerns the favour for qualitative methods, the attention to non-state jurisdiction, and the pragmatic approach to data-analysis. One author was born in Pakistan and has long-term experience of fieldwork and academia in Germany. The other was born in Italy and has long-term experience of fieldwork and academia in South Asia. Such an essentialist positioning is proposed here to acknowledge the potential social perceptions of our collaboration. Although we are not always on the same page, on the basis of the comparison of our data we have found several points of agreement that we will signal by talking in first person plural.

Similarly to some of our respective works, we privilege here the data collected in the field through direct observation and interviews. However we also pursue a multidisciplinary dialogue between law and anthropology by including the analysis of published and non-published case law. This is not done without a careful consideration of the different settings and modalities of data collection. The published case law is interpreted in the

light of the analysis elaborated in the field, and the data collected through interviews with the judiciary is acting as a link between the fieldwork out of court in the everyday life and the specialized setting of law courts and legal technicalities.

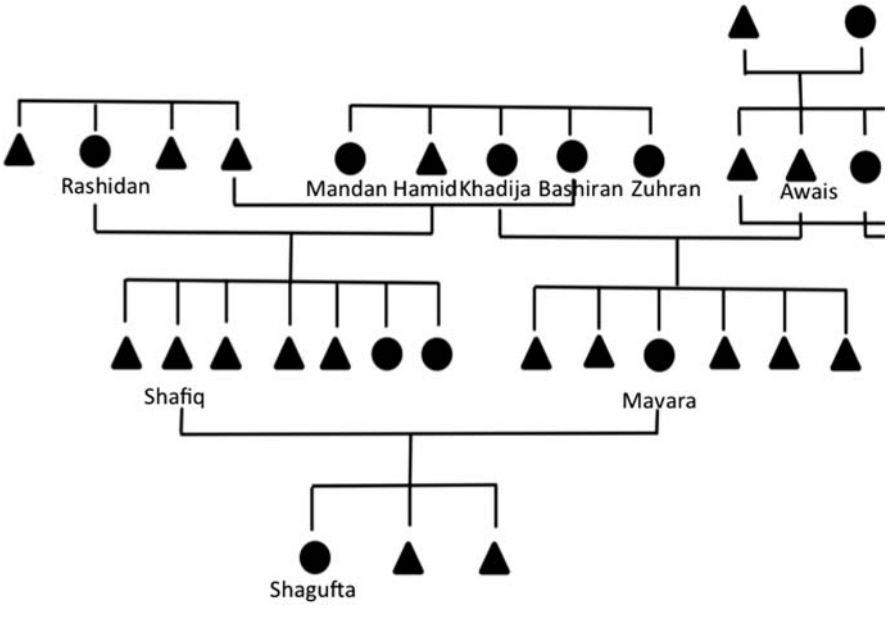
Because of our emphasis on the social actors' arguments, we will propose hereafter the case studies first of all and will progressively include our analysis without however overindulging in theoretic definitions. Although presented here in the format of case studies the following may be better understood as polyphonic narratives in the sense of accounts of facts that meet the approval of the involved social actors. For this reason the points of analysis that stem directly from the social actors' narratives will not be removed from the accounts. Eventually as our conclusion will show even though these cases are not absolutely commensurable the interest of their comparison lies in their similarities in spite of the difference of their settings.

Misalpur (Punjab)

Three case studies collected in Misalpur (Punjab) have been selected for this paper. These case studies have been followed over the last 20 years by Azam, thanks to his very close point of observation and participation in the context described here.[1] They should not be understood as absolutely representative of female inheritance cases in the Punjab and not even in Misalpur. Nevertheless they are chosen as discursive illustration of the modalities and potential of women's inheritance claims. Similarly to most qualitative case studies focusing on the temporal construction of arguments, these case studies exceed the narrow focus on women's inheritance to involve the interests of entire families. As such they will be particularly useful in highlighting the social implications of the relinquishment of inheritance rights by women in Pakistan.

Case study 1: Mavara, Khadija, and Mandan

Mavara is the only sister of five brothers. Her father has a small landholding of one and a half acres. She is married to Shafiq, the son of her maternal uncle. She is the third child



but was the first one to be married – as it is common for women to be married earlier than her male siblings. Her brothers received a good education, secured higher positions at different, mostly government institutions, and now they run their own business in Islamabad. Mavara did not receive any education. When Shagufta, the eldest daughter of Mavara, reached school age, she went to Islamabad to attend school and lived with her maternal uncle's family. Later on, Mavara's brothers established a business for Shafiq. Mavara joined her husband in Islamabad and started to live close to her brothers. Mavara is, however, not considered to be a part of the joint family system of her brothers, which does not mean that she is deprived of her family's support. On the contrary, Mavara's brothers, besides supporting the establishment of their brother-in-law's business, also help their sister in the daily affairs of life including the education of her children (two sons and one daughter) and her business. Mavara gets her gifts, collectively known as *dian* (daughter's gifts) in the Punjab, on all occasions including: yearly *Eids* (one called *Eid-ul-Fitar* celebrated at the end of Ramadan, the Muslim fasting month, and the second *Eid-ul-Azha*, the Muslim slaughter festival); occasional family ceremonies like marriages, circumcisions, birth of male children, etc. She quarrels with her brothers if the gifts she receives do not meet her expectations. She may even temporarily refuse to receive *dian* if she finds that it is not enough. Yet she would vehemently refuse any proposal to claim her share of family patrimony.

Khadija, Mavara's mother, has one brother and three sisters. Khadija's mother, Barkat Bibi, migrated at the time of partition of India in 1947 from Indian Punjab to the Pakistani Punjab and chose to settle in the village of her brother because Allah Bakhsh, Barkat Bibi's husband, was seriously ill and later on died during that same year. Khadija was married to a second paternal cousin, Awais. Khadija, who is considered to be an intelligent and resourceful woman, has great aspirations for her children. She has succeeded in getting higher education for her children and she also helped her paternal family in every possible way. Among other things she has managed to help her mother to organize the marriages of her two younger sisters and the second marriage of her only brother after he divorced his first wife. Khadija also helped her mother and brother, Hamid, to pay-off the loans that they have acquired to arrange all these marriages. Later on, she has also helped, to arrange the marriages of Hamid's four sons and two daughters. Eventually the second son of Hamid, Shafiq was married to Mavara, Khadija's daughter.

Disputes arose between Hamid and Khadija as a result of conflicts between the children of Hamid. Hamid wrote off three of his five sons from the inheritance to which Shafiq too has right to a share. Hamid transferred most of the landed property to his other two sons. The sons who were excluded called a village *panchayat* (council of village elders and respectable persons) that however failed to end the differences between Hamid and his sons. Khadija fell herself into disagreement with her brother and disgusted by his deeds she declared her intentions to claim her share of the patrimony. Hamid responded with a counter-claim for the share of Mavara who was also his daughter-in-law. Hamid laughed at the idea that Mavara and Khadija may even consider claiming a share. Eventually Khadija did not go to court nor called the *panchayat* to make the claim.

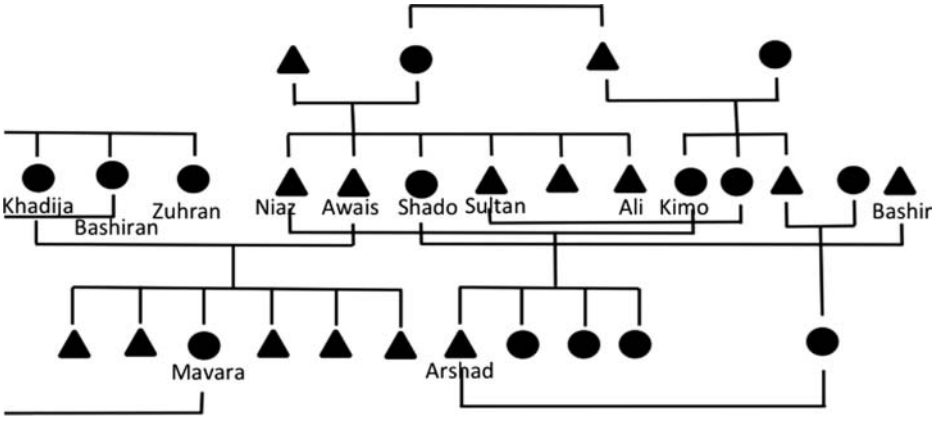
Mandan, Khadija's elder sister, had instead secured her share in the agricultural land of her deceased father through the intervention of the court. She was married to Ali Ahmed her cousin on her mother's side, who was living next door. Mandan was the eldest out of four sisters and one brother. Bashiran, the third one, and now the only living sister, recently expressed her desire to get her share, but Hamid made a counter-claim here too for Rashidan, his wife, who is the sister of Bashiran's husband. Zuhran, the youngest

sister of Khadija, had developed conflicts both with Khadija and Hamid on matters relating to the marriage of her children. Zuhran has four sons and two daughters. The only daughter of Khadija was engaged to the eldest son of Zuhran and Zuhran's two sons were engaged to Hamid's two daughters. Zuhran, however, got seriously ill and her husband lost his job in Saudi Arabia. Due to the deteriorating economic conditions of Zuhran, both Khadija and Hamid broke off the engagements. Zuhran and her husband both died and their children never mentioned the inheritance claims of their mother. The brothers of Rashidan sold their land and gave their sister her share in cash. Eventually the conflicts between Hamid and his sons were resolved and he decided to divide his land among his sons. He purchased the share of Bashiran and gave a cash share to the sons and daughter of Khadija who died last year. The share of Zuhran, which could be claimed by her six children, remains unresolved.

Case study 2: Awais Bibi nicknamed Shado

Shado is the sister of Awais, the husband of Khadija in the case study 1. When Shado's brothers gathered to divide their agricultural land there was a sour exchange among them. The cause of the quarrel was not only their sister's claim, but also the question of who shall get which piece of agricultural land, what portion of the house and which animal. As for the share of Shado, the sole sister, one brother, Ali, insisted on giving her the due share of land. The other brothers, most of them farmers, did not agree. Shado had not demanded her share until then and had never raised the issue with her brothers. However, she would not have refused to inherit either.

Her brothers, except Ali, explained that they felt ashamed because in their entire *shrika* (close patrilineage) no other woman had ever claimed her property. Shado, on her part, explained that she wanted her share because she was angry with her brothers especially the eldest two who refused to accept her daughters in marriage for their sons. Arshad, the only son of Niaz, her eldest brother, was married to his cousin on his mother's side. This was actually the fourth marriage between these two families – two brothers of Awais were married there, his sister Shado's first marriage and the marriage of Arshad: they had all married the children of their maternal uncle. Similarly, Khadija, the wife of Awais, also did not agree to a marriage between one of her sons (she had five sons) and one of Shado's daughters. Khadija, on her part, was angry for being 'ill



treated' by Shado as sister-in-law during the early years of Khadija's marriage. Shado was also angry that her brothers have not been generous in giving *dian* (gifts of daughter) for the marriage of her children. The brothers claimed that they had married her off twice and both times with full dowry and had given full *nankishak* (special marriage gifts given to the sister's children) at the marriage of her children. Her brother, Ali, was the only one to argue that Shado's share was her legal, Islamic right.

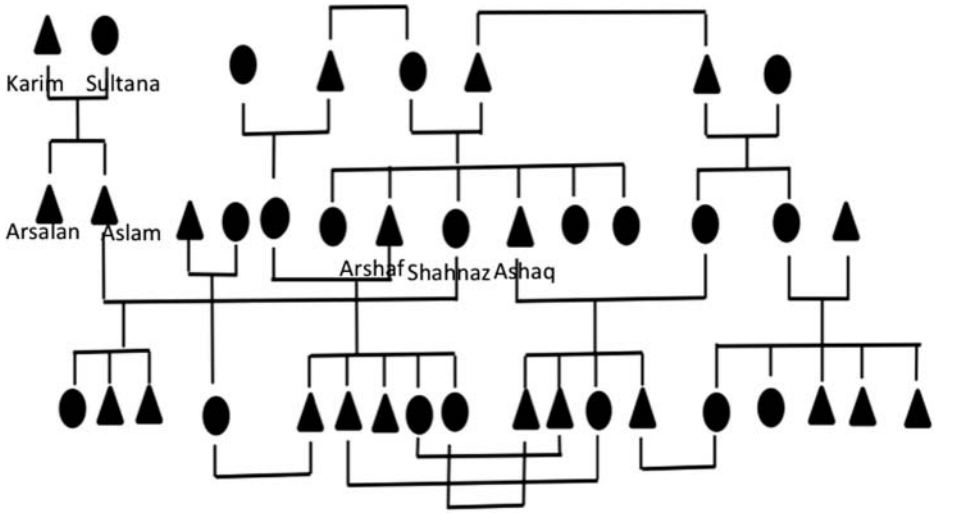
There is no wide support in the family for female inheritance. Two of Shado's brothers had married the daughters of their maternal uncle and these daughters never claimed their share of inheritance, which was taken by their brothers. Their husbands have also never asked them to do so. Ali, similarly, left it to his wife to decide and she did not claim her share. His father-in-law is still alive but has sold all his agricultural land and has instead bought a house in Islamabad. This house has been registered in the name of only one of his four sons. He has disinherited the other three sons because of family disagreements. Kimo, the wife of Niaz, the eldest brother of Shado, and Kimo's only daughter in-law are both against the idea of the women's share of inheritance. Kimo's three daughters and Niaz, all of them married with grown up children, do not want to claim their shares from Arshad, their only brother. Arshad, who is a clerk in a government office in Islamabad, on the contrary, is of the view that it is his father's property and he can do as he pleases. He is not very convinced either of the idea of daughters' inheritance' share. Sultan, another brother of Shado, has no daughters and only one son named Munir. Fatima, the wife of Sultan, died long ago. Sultan does not want his wife's share and his daughter-in-law, Kulsum, also does not want to claim her share. Actually one brother and one sister of Kulsum are living with them, which makes even more insignificant Kulsum's potential claim.

When Bashir, the husband of Shado, who lives in a distant village, came to collect the rent of his wife's newly claimed land nobody welcomed him in the family of his in-laws. The brothers of Shado, their children and wives especially, taunted him. They abused him for being greedy and claiming the share of his wife all the more in that he does not want to give his daughters their share. They further taunted him by assuming that he must be actually praying for the early death of his daughter-in-law's father so that he can soon collect the rent of her share too. Quite interestingly Shado and her husband Bashir are also against giving their own three daughters their inheritance.

Case study 3: Shahnaz

Shahnaz's husband, Aslam, is a *beupari* (Urdu middleman between farmer and consumer). He buys animals and agricultural products from farmers and sells them in the city. They live as a joint family with Aslam's elder brother, Arsalan, and parents. Arsalan who has lost one leg in an accident many years ago helps his father in farming. They have a very small landholding barely enough to grow some wheat for their own consumption and some fodder for one or two water buffalos that they keep for milk. The three sisters of Aslam are already married. Aslam leaves every morning after breakfast on his bicycle to travel to nearby villages or the city of Faisalabad for business. Sometimes, he will earn something but very often he will come home with little success. Aslam hands over whatever he earns to his father, Karim, who as the head of the house controls all the resources. The food is cooked and eaten together and Sultana, the mother, distributes the portions. The family has not much money and from whatever they earn they also try to save something.

Shahnaz and her husband quarrel almost daily. She wants money to buy shoes, clothes and books for her children. Aslam does not even tell her how much he earns – "It is not



your concern" – he tells her. She has a very heavy daily workload which includes going to the *haveli* (farm house) early in the morning where she milks the buffalos, gives them fodder, cleans the stalls, etc. Afterwards having cleaned the house she cooks for everybody and washes the clothes. After all this work she does not get even small pocket money. She was beaten by her husband's elder brother, Arsala, and by her father-in-law on several occasions for demanding money and a separate house for her. She complained to Aslam but he flatly told her that he cannot prevent his father and elder brother from beating her especially when she demands a separate house or money. In the five years of her married life, she has left her husband's house seven times after fighting with her in-laws. Every time, the elders and relatives belonging to the two families gathered and made peace between them. In the meantime, she had three children. Her two brothers and father send her some money every month for the school fees of her children and for their clothes and books. All this is by no means unusual in the village. The daughters of the village in the early years of their marriage have these conflicts, which are known as "*lar ke aie*" or "*gharaun kad diti*" (Urdu literally means "came having quarrelled" or "was thrown out of the house").

Shahnaz's *maike* (Urdu maternal home) consists of two brothers and four sisters. Ashraf, the eldest brother, is married to the paternal uncle's daughter. Ashaq, the younger brother, is married to the maternal uncle's daughter. Three sisters of Shahnaz are also married within the close family. Shahnaz is the only sibling who is married outside the "*sharika*" (Urdu close patrilineage). Two brothers of Shahnaz and her father on several occasions considered getting a divorce for her. They know that it will be very difficult to find a new husband for their divorced daughter especially as she already has three children. All these years they hoped the situation would change for the better. Her brothers once made plans to beat Arsalan and Aslam but this came to nothing as beating the husband of one's sister reflects to their own disgrace.

Shahnaz fell seriously ill – it was thought she had a cancer – and was not taken much care of at the house of her in-laws. Ashraf, her elder brother, brought her back to her parental family along with all three children. Her brothers took her to the hospital and proper diagnostic tests were performed. She was diagnosed with tuberculosis. She stayed

with her brothers until she recovered. The brothers bought clothes for her and her children and gave her money for the medicine. Shahnaz and her other three sisters have written off their claim of property in favour of their brothers.

Ashaq, the younger brother, has three sons and one daughter and Ashraf has three sons and two daughters. Two sons of Ashaq are married with Ashraf's two daughters and one son of Ashraf is married to the only daughter of Ashaq. One son of Ashaq is married outside of the close family because (as Ashraf told) there was no girl in the close family. One of the two remaining sons of Ashraf is married to the mother's sister's daughter. The last is still unmarried. The agriculture land and the commercial property owned by the two brothers have already been transferred to the names of the sons. The two brothers are of the view that daughters and sisters should not get any share because they anyway come to the brothers if they have any difficulty. Their share is safe with the brothers but not if it is transferred in their names because then the husbands take it over like the dowry. Shahnaz is still young and insecure in the family of her in-laws. This will most probably change after the death of her father-in-law and mother-in-law.

Temporalization of claims

From a conventional feminist standpoint, the reported case studies can be viewed as merely confirming the ethnographic scholarship signalling that women in Pakistan do not get their share of inheritance (see among others Ali 1997; Alavi 1972; Chaudhary 2010; Haque 2000; Mehdi 2002; Patel 1979). And in fact in the early 1990s in Misalpur only two women out of a population of more than 15,000 inhabitants were reported to have claimed their inheritance. These cases were very well known in the village and referred to as "bad practice". Socio-legal scholarship has detected a wide spectrum of causes for women's disinheritance in South Asia. These causes range from women's illiteracy, scarce legal consciousness, and poor access to justice, to the post-colonial scrutiny of legal transplants and including materialistic analysis of the customs that perpetuate the accumulation of wealth. All these suggested perspectives can apply in the Misalpur case studies as well.

It is generally argued that women fear the police and avoid initiating law suits because of the shame that this would bring not only to themselves but to their family as well (Ali 1997; Haque 2000; Mehdi 2002; Patel 1979). It has also been argued that the cross-cousin marriage system itself is structurally informed by the effort to keep the property inside the family. This analysis is confirmed by the popularity of *watta-satta* (Urdu exchange marriage) according to which brides are exchanged between two families: Bashiran and Rashidan in Mavara's case study, and the marriages between the children of Ashaq and Arshad in Shanaz' case study. The practice of the marriage to the Quran, now forbidden but apparently recurrent in the absence of a suitable groom, seems to also confirm the same widespread anxiety for keeping the property from being transferred outside the family (Mehdi 2002). Marriage to the Quran has been considered to have been envisioned "to deny women their rights of inheritance and out of fear of property being passed on to outsiders through the daughters or sisters [i.e. their spouses or children]" (Al-Shafey 2007, http://www.asharq-e.com/news.asp?section=3&id=9656). Similarly Khan (2009, http://www.albaspectrum.com/Articles1/Women/00994.html) writes:

> However primitive it may sound – however primitive it is – it is very easy for a Sindhi to declare his sister, daughter or wife as shameful, and thus opt to kill her . . . when ever there is a monetary, land, property related or other petty dispute, many unscrupulous persons use their sisters, wives, mothers or even daughters as a tool to have upper hand in settlement of the dispute. . . .It is also a common practice in Sindh to marry one's daughter to inanimate and holy

> objects, like the Quran, or even a tree, for example [. . .] The main purpose behind this inhuman act is to avoid the transfer of land property out of family hands at the time of marriage of their daughter or sister.

While the quest for gender equality by the above scholarship is only laudable we argue that further scrutiny of the relationship between custom and religion will throw light on the reasons for the perpetuation of women's disinheritance in spite of legislative amendments. First of all it would be misleading to assume that the origin of these customs is necessarily a religious one. In fact similar customs, as various forms of *karewa* (Hindi levirate) and the marriage to a tree due to the absence of a suitable husband (also used to allow a subsequent marriage that would be otherwise inauspicious if it were a first marriage), are well known for being practiced among Hindus in India and inherently implying some kind of iniquitous control over women and property rights. Custom, as we see here, is often overlapping but also exceeding the personal laws recognized by the state. It is important to point out the danger of the essentialized interpretations that sometimes are found in the official legal contexts as well as in certain scholarship that too easily equate customs with personal laws (see also Introduction, Parashar, Shah, and Menski in this special issue). If we look at the modalities of women's inheritance claims – their temporalization and their becoming – it becomes clear that there are other factors underlying the apparently non-sense choice of forfeiting one's own share.

In fact the principal blind spot of the current socio-legal framework are the reasons why in spite of the rapidly changing infrastructure and improving social awareness of gender inequality, women in South Asia still avoid claiming their inheritance shares. When looking at the circumstances of Khadija's claim we see that her interest in the share materializes at a specific time. After the death of her father, Khadija was by far better off than her natal family because her in-laws were rich and treated her well. Her own concern was instead to support her mother and to help her marrying off her sisters. She had no interest in challenging the authority of her own brother from whom she was getting everyday support that constituted respect and social stability. The situation however changed after Khadija's brother disinherited some of his own children thereby impacting also on the well-being of Khadija's daughter who had been married to her brother's son. This had caused the utter discontent of Khadija. Hence her inheritance claim which however she might have very well never fully finalized if she were still alive because the threat of exercising this right amounts also to power that might be more useful in embryo.

Our case studies suggest that inheritance claims are more easily initiated by women who have secured their position in their husbands' family. This happens after women have children, especially sons as in the case of Rashidan, or where they have played a role in the financial and social stability or even mobility of the family as in the case of Khadija. Khadija's case furthermore shows that tensions with the woman's brother or brothers, here due to divergences in the choice of the children's marriage, can trigger women's initiated inheritance claims. Court sanctioned rights on the other hand, as in Shado's case study, may indeed be linked with urbanization and formal education, but are likely to be met with the overwhelming resistance within the village social context.

Eventually our analysis as refuting the sweeping generalizations that equate custom with personal laws against women's rights may appear, at first sight, to support nativist perspectives that diametrically oppose conventional feminism by arguing for the intrinsic logics of women's disinheritance in South Asia. However we suggest the unproductivity of the polarization between tradition and modernity because this fails to explain the *de facto* co-existence of inheritance and disinheritance claims. These claims are better

understood if we take into account the circumstances of their materialization and eventually their strategic role in terms of power and agency. The picture will acquire more details if we have a closer look at how inheritance claims are managed in the setting of official law in Pakistan. Our hypothesis is that a better understanding of the use of customs and of the arguments upholding it in court, may lead to an integrated perspective overcoming the polarization between nativist and modernist approaches.

Punjab – District and session court Kasur

The following is a case that Livia has collected with the collaboration of one of the women judges who have participated on the *Lady Judges of Pakistan* project, during which she has filmed legal proceedings in Pakistan between 2009 and 2012. This case, as one of the 25 pending cases on women's inheritance at the time of Livia's fieldwork, was chosen for this paper because it appears to be representative of the management of these claims at the level of state courts. Again here, we will focus on the micro-units of the legal discourse of the social actors, which play a role in the legal outcome. The use of notion of actant (Greimas 1974, 1976) as later developed by Latour (1987, 1988) with the Actor Network Theory is suggested here as being the directional concretion of forces in a given text or discourse. Hence actant hereafter will be the micro-units of the legal discourse that will be significant in terms of legal outcome.

Nimrah Begum

Nimrah Begum's father died in 1961 after transferring 61 kanals of land (1 kanal = 1/8 acre) to his daughter. For some reasons Nimrah Begum did not think of making use of that land before 1991. Furthermore, knowing that the land had been transferred in her name during the lifetime of her father she did not bother checking whether her property rights had been registered continuously in her name at the land revenue office. In 1991, after her children were all married, she thought to claim the land that in the meanwhile had been used by her brother under what she had considered to be a temporary arrangement. When she made her claim, however, her brother responded that she could not claim back what he had been gifted many years earlier! Nimrah Begum filed a suit against her brother to recover the property and a decree was passed in her favour in 1997. Her brother appealed twice before the High Court but twice it was decided in favour of Nimrah Begum with a last decree passed in 2005.

Remarkably, Nimrah Begum's right was never doubted by any judge and her suit had been successful from the very beginning. However, in 2011, the suit was still pending because of being stuck at the level of execution. The closer examination of Nimarah Begum's very bulky file revealed that a fake donation had been produced at the land revenue office to transfer the property in the name of the brother. According to the judge who was handling the case this kind of fraud have been nothing but widespread for a long time. However, the judge maintained that such fraud would now be more difficult due to the implementation of the computerized identity cards by NADRA (National Database and Registration Authority).

Although this is not the place to digress on the reliability of NADRA, it should be appropriate to note that fieldwork data show that for the time being it is highly unlikely that NADRA may fully substitute the more traditional system of *lumberdar*, which is *de facto* still operative and very much needed in many rural and sub-urban areas in Pakistan. The role of the *lumberdar* dates back to the British rule in the South Asian sub-continent. The

lumberdar had the task of collecting the taxes from the landowners and was chosen among the most influent local landowners. As a result he was also given power to settle justice and keeping law and order at the local level. The *lumberdar* had also an important role of supervision, record keeping, and acted as trustworthy witness for court disputes. Similarly to other non-state jurisdictions such as *panchayat* and *jirga* in the Indian sub-continent *lumberdars* continue to play a role in the settlement of justice at the local level and they are still called in court as witnesses and trustworthy persons who are informed of what happens in their areas.

In Nimrah Begum's case, in fact, one might argue, as the judge did, that had the revenue office required ID cards, the brother in question would not have been in the position to change the property deed with the simple declaration of another woman posing as his sister. However it could also be argued out that it was instead the failure to acknowledge the *lumberdar* system of registration that facilitated the vacuum in which to easily concretize the fraud.

From a general perspective, Nimrah Begum's case confirms the widely reported empathy of Pakistani law and the judiciary for women's inheritance. Shaheen Sardar Ali (1997, 220), reputed women's right activist and member of the NGO Shirkat Ghar notes that "from 1947 to date we find that whenever a woman has approached the superior courts for protection of her right to inherit, she has met with a very positive response". Mehdi (2002) likewise reports the very positive attitude of the judges towards the women approaching courts to demand their share in the family's patrimony. Mehdi (2002, 38) in particular quotes many cases at length but one in particular is interesting for our paper as it mentions another recurrent argument used for thwarting women's shares:

> the brothers in question claimed that they had spent one million rupees on the two marriages of their sister, ten thousands rupees for the settlement of a murder resulting from her divorce and this on top of the traditional gifts due to sisters.

The judges refused to accept dowry, protection and maintenance as replacement of her right in inheritance and said that "if beyond the bare necessity [the father] does anything concerning the daughter, it has to be treated as gift and not something which would have to be returned by daughter by compensating the father in the tangible property" (PLJ, SC 1990: 155 as quoted in Mehdi 2002, 40). Mehdi (2002, 37) further reports that even in cases of relinquishment deeds, such as it happened for Nimrah Begum, in which women give up their property rights in favour of the male members of their family, judges tend to believe the women who challenge those deeds in court.

Nimrah Begum shows something more: that even in spite of the high level of success of women's inheritance claims, as a matter of fact women are still likely to remain deprived of their rights because of lack of execution. This has been constant in the legal proceedings observed during the past three years in Pakistan, especially concerning maintenance and inheritance at the level of family courts (see Holden and Holden 2013). At the level of the sources of law and their dynamics, Nimrah Begum's case highlights furthermore how custom, Muslim personal law, and state law are not necessarily autonomous fields and instead depend on one another, the overarching factor lying at the level of the praxis in the specific modalities through which women's claims are successful in court (see also Holden 2012).

Hence, we argue, legal pluralism is not a static construct that can be constraint within the boundaries of the state because it includes the finite variety of sources that are observable in the everyday praxis. Law in the everyday praxis is not only linked to the

amendable mechanisms of the state recognition and interpretation by the judiciary, but is entrenched within people's intersubjectivities, defined as the shared representations and stereotypes that impact how social actors (judges and practitioners included) make sense of facts and develop arguments in the legal process.[2]

Finally we propose hereafter a case decided by the Chief Court (equivalent of the High Court) of Gilgit Baltistan, a contested territory in the North of Pakistan nestled between Pakistan and India-controlled Kashmir, Afghanistan, and China.

Female inheritance in Hunza: Bibi Sitara

This published case law is of particular interest here because it involves a lengthy disquisition on the sources of law and the role and features of inheritance customs as well as a detailed consideration of the value and use of academic sources in a court of law. Thanks to this case we will be able to compare the data collected in Punjab with the situation in Gilgit Baltistan. Significantly enough, Punjab is referred to down as "down country" in Gilgit Baltistan, sometimes resentfully so for being the hub of governance in Pakistan, whereas Gilgit Baltistan in spite of belonging to Pakistan has still an uncertain status.

Bibi Sitara and her sisters and brother are grandchildren of the late Sangi Khan, resident of Hunza who died leaving four daughters and no sons. Amanullah Khan is the nephew of late Sangi Khan who took possession of Sangi Khan's land after his death. The living daughters of Sangi Khan together with their grandchildren and the grandchildren of the late Sangi Khan, among them Bibi Sitara, initiated a suit against Amanullah Khan claiming themselves heirs of Sangi Khan under the Islamic Law of Inheritance. To this however Amanullah Khan resisted by claiming to be the sole heir of Sangi Khan "under the custom prevailing in Hunza State, whereby daughters are 'deprived' [sic] of their inheritance in favour of their collaterals in consanguinity" (Bibi Sitara 2010, 1237). Amanullah's argument was accepted by the Civil Judge but Bibi Sitara challenged his decision before the District Court in first appeal. Amanullah Khan's arguments were once again accepted and the first appeal was dismissed too. However Bibi Sitara appealed again before the Chief Court against the concurrent findings of both the lower courts. The counsels of both parties submitted their arguments and evidence before the Chief Court: two precedents decided by the Judicial Commissioner, apex judicial authority in Hunza until 1974. Both precedents, in spite of partially conflicting one another, were in favour of women's disinheritance and therefore disregarding Muslim personal law that instead provides women's right to a share. Interestingly, among the submitted evidence figured also three academic publications, one of which was ethnographic: *Tribes of the Hindoo Koosh* by John Biddulph, Indus Publications Karachi Edn, (1977), *Between Oxus and Indus* by R.C.F. Schomberg, London (1935), and *Materialien Zur Ethnographie von Dardistan* (Pakistan) by DLR Lorimer, Austria (1979). But even more interestingly, the Bench, after hearing the parties at length, engaged in a historical survey deemed necessary to their subsequent considerations regarding the applicable law. It was said (1237):

> This Bench heard both the learned counsel for the parties at length, they assisted the Court with the force of above cited cases in support of their divergent pleas but we deem it proper to draw a historical sketch of Hunza State, "[A]s it was ruled by Mirs (Rajas) of Hunza who were having exclusive powers of law making, judiciary and administration within the State. The Mirs of Hunza and Nagar enjoyed the above powers even after accepting the sovereignty of Pakistan. The peoples of both the states were administered, adjudged under the traditions

> and customs framed by the Mirs and regular laws were not extended even by the Government of Pakistan until the Rajgi System was dissolved by the regime of late Zulfiqar Ali Batho in the year 1974 and then regular laws were extended to both the states including the Islamic law of inheritance". The above historical account makes acquainted ones mind to understand the legal System of the Hunza State [. . .].

After the said historical overview the Bench started to consider the precedent by the Judicial Commissioner recognizing the authority of the above-mentioned texts. And the decision report his words (p.1238):

> What is the custom in a certain area is always a question of fact. It was denied to the petitioner in the order under review mainly on the ground that the witnesses were not unanimous and some of the witnesses had also accepted Shariah as a rule of practice in the area. This is challenged vehemently in the present petition that the custom, as alleged by the petitioner, was so strongly prevalent in the area that the flimsy evidence in the case could not operate to negate or refute the same. That there are text books of admitted worth and authenticity which prove the custom, and which in spite of best efforts could not be made available at the previous occasions. The text or treatises relied upon in this behalf were the authentic works of the British and German writers who extensively visited the Northern Areas and minutely studied the origin, habits and customs of the tribes of this area. It is unfortunate that no such publication by any locals/Pakistanis are so written and available.

It is worth noting here that not very differently from the context of transnational litigation and asylum proceedings in which Euro-American and Australian courts grapple with law and legal systems that are largely unknown to them, the issue here is the source and evidence of custom. The danger in using academic works as evidence lies in the confusion between the descriptive and prescriptive aspects of custom as practice observed or otherwise studied by the authors (see also Holden 2008, 3–17). Descriptive features of customs are overrated and as a consequence cultural aspects that are relevant in the specific social setting from which they originate are essentialized and frozen in misleading representations of *jus cogens*. The opposite proceeding is not very helpful either as it leads to the blind exclusion of any source other than positive law, which brings at least in the short term, the complete annihilation of those claims that constitute a threat to societal intersubjectivities such as daughter's disinheritance (see the lack of execution of the forever pending cases notwithstanding women favourable decisions).[3] If instead attention is drawn to the modalities of the translation of the academic discourse in court as object likely to be treated as an evidence or to produce evidence, and to become actant in the legal proceedings, it is possible to highlight the useful distinction between descriptive and prescriptive qualities of the discourse. Whereas socio-legal objects of the academic discourse are apt to produce fair legal outcomes in specific cases but in combination with all the other necessary elements of the legal process, it would be inappropriate to use them alone to legitimize or delegitimize specific practices of law (Holden 2011a, 8, see also Parashar and Menski in this special issue). We will see that the Gilgit Baltistan Bench was partially aware of the above difference but said (p.1238):

> We also have gone through the above treaties and are in consonance with the view taken by the learned Judicial Commissioner that all the above three authors are unanimous on the point that the custom was rule of inheritance under which no female heir of a propositus having any Share in hereditament, if propositus died without male issue and the property was inherited by male collaterals whichever was clearest to the propositus and the custom remained in practice having force of law all over the Rajgi System in the State but with a positive modification by the ruler Mir Muhammad Nazim Khan, who made female heirs entitled to a limited Share not under Islamic Shariah, but under the custom itself, which is one Chuqe out of seven

> Chuqe of land. The learned Judicial Commissioner Mr. Muhammad Nawaz Khan was moved to decide the same point of custom or Islamic Shariah in the Hunza State during Rajgi System, the learned Judicial Commissioner discussed the judgment passed by the learned Mr. Justice Sardar Muhammad Raza in detail and also the text books cited by the learned Justice in his judgment, but has divergently held with the reasons in his own words.

In other words, without challenging the evidence submitted by the counsels regarding the disinheritance customs described by the academic sources, the Bench accepted and elaborated two other arguments: the dynamicity of custom and the authoritative source of law. Not only are customs not immutable but they can be modified by the legislative power that is *de facto* considered as authoritative, in this case the Mir of Hunza. Thus it was concluded (p.1238) that:

> The Mirs in Hunza State had exclusive powers to make laws and to enforce them along with having exclusive administrative powers; as such Mir Muhammad Nazim Khan introduced some amendments into prevailing customary laws and under the amendment, he made the lady members of the families entitled to limited share under the customary law itself and not in recognition of Islamic right of inheritance of female members. So it cannot be termed as change of custom into personal law or discontinuation of custom. The custom once probed in a specific area then it applies to all similar cases and it varies not from case to case in respect of particular families if pleaded categorically in defense [. . .] The lower Courts have ignored the amendment made to the custom by the then law maker of the State and have deprived the petitioners even from the limited share granted by the custom itself as such, we are inclined to modify both the impugned decrees as such that the petitioners shall be entitled to 1/7th share of the property of propositus under the custom and the suit is decreed to the above extend.

In doing so, the Bench legitimized the woman's inheritance share, thanks to the authoritative source of the Mirs of Hunza. Such an articulated management of custom as interlegalities not only within but also beyond the state is very different from the customary law developed under the British in some areas of the sub-continent, including the actual Pakistan, according to which "as a rule, daughters and their sons, as well as sisters and their sons, were excluded by near male collaterals" (Gilmartin 1988, 48). This was known as the 'agnatic theory' of inheritance based on the legal assumption that the exclusion of daughters in favour of male collaterals, no matter how distant, should always be taken as a basic judicial presumption (Gilmartin 1988, 49). The British argument that daughters were not given a share because of the exogamy could not be more far from the Muslims marriage system of the sub-continent, which instead prefers endogamy as confirmed by our first three case studies.

Eventually the issue is whether colonial and post-colonial state-driven interpretations of customs should act as an obstacle to the consideration of sources of law that are not (exclusively) elaborated within the realm of positive law. As Sousa Santos (1987, 288) says:

> Socio-legal life is constituted by different legal spaces operating simultaneously on different scales and from different interpretive standpoints. So much is this so that in phenomenological terms and as a result of interaction and intersection among legal spaces one cannot properly speak of law and legality but rather of interlaw and interlegality.

From our case studies, it is also clear that inheritance claims are overlapping several legal spaces linked to kinship, financial power, and the marriage arrangements of the children of siblings – this should alert us to the difficulty of executing certain legal decisions that grant inheritance shares to women and perhaps for the unrealistic implementation of a state-only driven social change that excludes any other source of law.

Personal laws and legal pluralism

On the basis of the above data it is not surprising that post-colonial states in the sub-continent, not very differently from the British colonizers, have perpetuated women's disinheritance. On this basis, the attention might be first shifted from the potential danger of legal pluralism to the understanding of the modalities by which the state re-interprets the law – intended in a broader sense as including customs and personal laws – in order to safeguarding patrilineal interests (see also Basu 2005 and Chowdhry 2005, 188). If we look at the practices of law, with an awareness of the ideological framework in which they develop, and in particular at the successful arguments in court, we see not one but a combination of sources of law drawing on state law, codified personal law, and customs. Thus in the case studies reported at the beginning of this paper the claims of Khadija, Mandan, Mavara, and Shado appear closely interwoven with the kinship obligations of the brother–sister relationship. If this latter is faulty and the women are in a strong position vis-à-vis the other family members and only then can the inheritance claim acquire legitimacy in the claimants' intersubjectivities.

In the above framework of intersubjectivities, the daughter's inheritance claim constitutes what Steele (1997) calls a stereotype threat (i.e. a challenge to the shared social assumptions that daughters should not claim their inheritance rights) – hence the difficulty of execution of judgments in favour of women's inheritance. The discourse developed by law courts, even though formally favourable to women, does not possess the authority for a substantial empowerment. It appears in fact misleading to say that Muslim women (and in general South Asian women) do not approach the court to claim their rights. In fact as Lawrence Rosen is pointing out in his forthcoming article, the number of successful litigations initiated by women in the Muslim contexts might be much higher than reported. The massive number of property-related litigation afflicting all kinds of jurisdictions in Pakistan and often concluding in women's favour, however also shows the discrepancies between the formal terms of the litigation and the aims that are in practice pursued by the litigants.

On the basis of the above case studies, we argue that state law (defined as inclusive of codified personal law) is not a self-sustaining system. In fact although significant political considerations can be drawn by the studies that have successfully argued for the independence from religion of the legal domain in South Asia (Pirie 2006), it seems that much more is yet to be discovered when one is ready to accept that everyday litigation is impacted by factors that are not necessarily classifiable as belonging to one domain only (see also Foblets, Renteln, and Gandreault-DesBiens 2010).

As it has been abundantly reported by the socio-legal scholarship focusing on South Asia and social activists alike, state law does not always make sense for the social actors. We have seen on one hand that inheritance claims are preferentially avoided perhaps because of the endogamic marriage system that favours a strong brother–sister relation (see also Jamous 2003). In India, not differently from Pakistan, official justice is better avoided for women's inheritance claims because such cases breed animosity and "destroy harmonious brother-sister relationship which [are] a vital element of the Bohra social structure" (Basu 1995, 38–39). Nevertheless Muslim personal law as recognized by state law in Pakistan, similarly to India, provides for women's right to inheritance. And as Merchant has pointed out for India "[T]here is scope for justice within the constraints of law. With the help of forward thinking lawyers and judges, women could get a fair share". This point is crucial because judicial activism in India and in Pakistan has afforded very significant room for interpretation even beyond the legislator's purpose (Basu 2012; Menski 2001; Holden 2011b). Nevertheless, as this paper has shown, positive law alone is failing in adequately supporting daughter's inheritance claims.

Custom, religion, and governance

Another point that this paper made is the misleading assumption that customs are necessarily linked with religion together with an assumption of exclusion of inter-religious fields (on the notion of religion and secularism see Shah in this special issue). Nelson (2011), however cautious of talking about legal sources outside state law and beyond a strictly pragmatic perspective, shows that customary laws in the area of the Punjab was not always religiously driven and that possibly religious polarization was part of an historic process. Nelson furthermore shows that the shift from customary law to personal law including Shari'ah did very little or nothing at all in order to overcome the agnatic constraints that legitimized women's disinheritance. In the words of the Nelson (2011, 194):

> The point [. . .] did not lie in avoiding the district courts. Nor did it lie in the production of any substantive or enforceable decree (rendered, as quickly as possible, within the terms of postcolonial laws). On the contrary, the point lay in the protracted process of postcolonial litigation itself.

This is confirmed by the case of Nimrah Bibi where once again the obstacle was not the recognition of her inheritance rights but the protracted litigation and the execution of her judgment. Nelson sees in the recurrent pattern of property-related litigation in Punjab the attempt to systematically circumvent the law by all means including the deliberate use of state law as a delay tactic in order to achieve a better outcome out of court. By describing the agencies of both voters and politicians, for accessing and circumventing the resources of the postcolonial state, Nelson also points at the class conflicts between the political power of rural élites and the state but then concludes with the ontological difficulty of an Islamic democracy.

The authors of this paper agree with Nelson's analysis concerning the relative but not exclusive independence of custom and religion. However it is worth noting that many of the processes admirably described by Nelson with precision of details and methodological rigor, as being the features of Islamic contexts, are also common to non-Islamic contexts: namely the delay tactics and the shifting arguments in order to circumvent the law (for an example of delay tactics in the Mediterranean context see Holden, Holden, and Manfredonia 2004). To this regard it is useful to remind the readers of the interesting use of academic texts and analysis of custom by the Gilgit Bench. While refusing the prescriptive meaning that the precedents had given to academic works their analysis and data were used to make sense of the relationship between law and governance that was so important to an authoritative decision in the matter of daughter's inheritance. This contextual reasoning might be the perfect reply to the doubts formulated by Fuller (1994) regarding the usefulness of a narrow notion on legal pluralism as constrained by within state law. In his words (Fuller 1994: 8):

> [I]t is clear not only that 'legal' orders are not all equally legal, but also that legal pluralism is at least partially a relation of dominance, and possible resistance that must be understood as such, and that must be situated within and largely explained by its wider, non-legal context.

Conclusions

The legal pluralism outlined in our case studies as both within and beyond state law in a constant dynamic with governance throws light also on the larger conflicts between

judiciary and executive in Pakistan. In fact since the restoration of an independent judiciary in 2009, much of the effort of the judiciary has concentrated on consolidating its own independence which has also generated the fear of an overly independent judiciary lacking democratic legitimacy, and perhaps becoming a self-governing body.

This risk of overstepping the division of powers in governance is acutely evident in our Hunza case study where the judiciary in 2010 takes the liberty to override state law in favour of a custom modified by the Mirs of Hunza who lost their sovereignty in 1974 when the area became part of Pakistan. However, if one looks at the way custom is scrutinized by the Gilgit Bench, it also appears clear that the contextual significance of designating an authoritative law pronounced by an authoritative source without falling into the mere perpetuation of iniquitous principles. Ultimately it is a matter of law and governability intended, as Foucault (1991) so well argued in his works on the genealogy of the modern state, as the ensemble of rationalities that constitute the rule. Foucault's theoretical framework could be very usefully applied to the conflict that has agitated the Pakistani judiciary since the very first steps of this young country whose judiciary is increasingly accused of trespassing the boundaries of a democratic division of powers.

Socio-legal scholarship has pointed out, especially in the domain of Muslim family law, the subtle implications of what has been called South Asian judicial activism (Menski 2001; Pearl and Menski 1998; Serajuddin 2011). At the same time, but interestingly unrelated and to a great extent unnoticed, some anthropological studies have shed light on the specific modalities in which stability and apparent accountability of the legal machinery in Pakistan has been largely supported by the many procedures of out-of-court justice (Chaudhary 1999; Mehdi 2002). Most recently, in India, alternative dispute resolution has been moderately incorporated into the governance agenda (Solanki 2011) with consequent neutralization of those instances of resistance sometimes provided by the *fora* of customary dispute settlement (Basu 2012; Holden 2012). It should also pointed out that with these *fora* of alternative dispute resolution and adjudication with the state's imprimatur (see also Vatuk in this special issue) the caste or community-based *fora* (Hindi/Urdu *jati panchayat* and *biradari panchayat*) have continued to settle justice in many areas of the sub-continent (Holden 2008, 82 note 5; see also Sbriccoli in this special issue).

In Pakistan, while on one hand judicial activism has been a mixed blessing (Lau 1996; Menski 2001) and on the other out-of-court systems such as *jirga* and *panchayat* have been largely tolerated by the state, observers have instead concentrated almost exclusively on the dangers of overstepping boundaries between the judiciary and the executive. It should be pointed out however, that the judiciary has been always part of the process of the modernization and liberal governance that began with the Independence of Pakistan – sometimes also when moderately supporting Islamization and non-state sources of law (Lombardi 2010a; 2010b). From a broader perspective, as Nader and Mattei (2008), and Chomsky (2006) have convincingly argued, one might be short-sighted when subscribing to harmony theories that soothe the majorities while pursuing the programme of a strong state. Recent debates about development and legal pluralism also confirm the need for a closer scrutiny of the state monopoly of law (Woodman 2012).

In fact, socio-legal scholarship might not yet have fully realized the reasons why this judiciary-executive stand-off in Pakistan, and more recently in Egypt, have been the object of a great reaction at the international level – although being comparable to similar confrontations in Southern Europe and Latin America. What are the future prospects in this polarized landscape between the proponents of an exclusive rule of law that is not itself free from criticism and the variety of non-state laws on the ground? As we have seen with the analysis of the discourse developed by social actors in Misalpur, the difficult

execution of state personal law favouring women in the Punjab, and the tight-rope reasoning of the Bench in Gilgit Baltistan, the legal pluralism that afford the inclusion of interlegalities within and beyond the state may be of complex management but are also the ones that are likely to bring concrete outcomes in matters of gender equality and social diversity in the current circumstances.

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Notes

1. Parts of case study 3 were used in two of Azam Chaudhary's previous articles: 'The logic in the Traditional Share of the Daughter in Father's Patrimony: A Case Study of the Punjab' In *Journal of Law and Social Research* Vol. 1. No.1, 2009–2010, 27–40; and 'A Woman's Marriage to the Quran: An Anthropological Perspective from Pakistan' In *Anthropos* 106.2011: 411–422.
2. For the notion of subjectivities and intersubjectivities see Goffman 1959 and Garfinkel 1967.
3. For a theory on the stereotype threat, see Steele 1997.

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