

The Rule of Law Problems in Pakistan: An Anthropological Perspective of the Daughter's Traditional Share in the Patrimony in the Punjab

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Abstract

This article is a contribution to the ongoing debate about implementing rule of law in Pakistan. Rule of law requires the unity of law which is mostly in the form of state law. Pakistan is a legally plural society where completely different and independent systems of law like the Islamic law, the state law and the traditional law exist. The state and the state law though do not acknowledge and accept the non-state laws as laws but the reality is that the dominant practiced law in Pakistan is the traditional law. Traditional law is found in a variety of forms like *panchayats*, *jirgas*, informal meetings of families, is dispensed by *pirs*, or *chaudharys*, etc. This is because people practice law according to their social structure and value system. This article discusses the traditional law and uses the case study of daughter's traditional share in her parent patrimony to prove the above assumption. The daughters do not claim their shares in the patrimony but have other rights and obligations which in my view suit the local cultural logic and practices. The state law does not fit well with the existing cultural values and practices. If the state wants to implement rule

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of its law it has to first implement uniform socialization in the form of universal formal (school) education.

Introduction

The active debate about the rule of law is comparatively a recent phenomenon in Pakistan. It all started with the dismissal of Chief Justice of Pakistan on Nov. 2007¹ by the then military chief/President General Pervaiz Musharraf. The lawyers launched a movement for the restoration of the Chief Justice. This movement is often referred to as the movement for the rule of law.² People from all sections of the society Lawyers, civil-society organizations, human-rights activists, journalists and academics participated in this movement. The electronic media played an especially active and dominant role in making this movement popular and successful. Some political parties like Muslim League (Nawaz) made the restoration of the independent judiciary (the rule of law) a major agenda point in the 2007 elections and earned tremendously the public vote and sympathy as a result. The Chief Justice who henceforth became a symbol for free judiciary himself in his several speeches stressed the importance of the rule of law for Pakistan. The many seminars and talk shows on a number of mainly news TV channels discussed the issue of the rule of law in Pakistan. The demand and introduction of Nizam-e-Adal (also sometimes translated as Sharia or Islamic law) or even insurgency in Swat is often interpreted as the lack of the rule of law.³ What is meant by the rule of law and how to achieve it has but never been properly discussed.

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- 1 Chief Justice of Pakistan Iftikhar Muhammad Chaudhary was suspended by President General Musharraf on March 9, 2007, when he refused to bough down to Musharraf's demand to resign. This 'no' gave rise to the historic Lawyers' Movement which achieved its first victory in the form of reinstatement of Chaudhry on July 20, 2007 only to be re-suspended by suspending the constitution and declaring a state of emergency. In March 2009, Nawaz Sharif and the Lawyers started a decisive movement to reinstate Chaudhry Iftikhar and other deposed Judges. Long March from all over the country was declared. Finally the Government reinstated Chaudhry Iftikhar and other deposed Judges on 16 March, 2009 through an executive order by the Prime Minister of Pakistan.
 - 2 Rubina Saigol, "Pakistan's Long March", *Development and Cooperation (D+C)* Vol.36, No.5 (2009) p. 208. <http://www.inwent.org/ez/articles/111037/index.en.html>, Internet accessed June 15, 2010.
 - 3 *Dawn*, May 26, 2009.

We know from the relevant literature⁴ that there are at least three broad types of laws prevailing in Pakistan: the state law, the Islamic law and the customary law.⁵ The same literature also reveals that the most prevalent law of the country is customary law.⁶ The rule of law requires the implementation of the national law or the law of the state (details later). We know that the official law and the customary law are two different things.⁷ The traditional law is said to function according to the local values/culture of the people which is caste/kinship/tribe based.⁸ The official law follows values like individualism which are imported values/concepts of Western society⁹. The question is; how could the implementation of the state law be achieved in such

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- 4 See E. Adamson Hoebel, "Fundamental Cultural Postulates and Judicial Lawmaking in Pakistan" in *American Anthropologist*, Special Publication Vol.67 No.6, (1965), pp 43-56; M. Azam Chaudhary, *Justice in Practice: Legal ethnography of a Pakistani Punjabi Village* (Karachi: Oxford University Press, 1999); and Bernard C. Cohen, "Law and the Colonial State in India" in June Starr and Jane F. Collier eds. *History and Power in the Study of Law: New directions in Legal Anthropology* (New York: Cornell University, 1989).
 - 5 "..., in Pakistan ... multiple legal systems and parallel means of dispensing justice co-exist. At least three systems – the formal legal system, religious courts and customary traditional dispute settlement – persist side by side in a complex, hierarchical and stratified society. Pakistan's laws were basically derived from the Anglo-Saxon tradition and British colonial legal structures. In the course of Pakistan's history, Shariat Courts were added during General Zia's era of Islamisation. The Federal Shariat Court and its subordinate courts constitute a parallel system that contradicts, and occasionally colludes with, the main body of laws. At the level of villages and smaller towns, customary and tribal laws and systems based on jirgas and other local forms regulate the lives of people." Saigol, "Pakistan's Long March", p.209.
 - 6 See M. Azam Chaudhary "Law as Cultural System: Chaudhary, Mullah and Judge in Pakistani Legal Culture" in Rubya Mehdi, Hanne Petersen and others eds. *Law and Religion in Multicultural Societies* (Copenhagen: DJOF Publishing, 2007).
 - 7 "The law of the police and courts is not the law of the people". Hoebel, "Fundamental Cultural Postulates and Judicial Lawmaking in Pakistan", p.45.
 - 8 "In the village council, a dispute is seen as part of the environment from which it grew. The individuals, their families, the community and the histories that led to the discord are on trial". Erin Moore, *Conflict and Compromise: Justice in an Indian Village* (New York: University Press of America, 1985) p.6. Also see Cohen, "Law and the Colonial State in India"; and Hoebel, "Fundamental Cultural Postulates and Judicial Lawmaking in Pakistan".
 - 9 A dispute in the court room is examined "under 'laboratory conditions'. The court room is seen as a vacuum into which only carefully circumscribed testimony and evidence are presented and manipulated by professionals." Moore, *Conflict and Compromise*, p.6.

circumstances? The first necessary step for the implementation of the rule of law is achieving the unity of law.¹⁰ An important question in this regards is if the unity of law is achievable? To be able to answer this question we need to know if customary law is undergoing a change more particularly whether local culture could be socially engineered to achieve this unity of law. This article is an attempt to discuss these and some other questions with the particular focus on the relevance of culture for the rule of law in Pakistan. Some of the background questions are: What is meant by the rule of law? Why there is rule of law in some countries, for instance, Germany¹¹ and why it is absent in others, like for example, Pakistan? The final and important question is if the achievement of the rule of law which requires fundamental changes in social structure is a desirable step?

The daughter's share in the patrimony in the Punjab where the author did his fieldwork has been chosen as a case study to illustrate the whole debate. Anthropologists are may be unanimous in their views that: "the way a people settle disputes is part of its social structure and value system."¹² There is a wide gap between the official/Islamic law and the customary law practices with regards to the share of the daughter in the property of her father. The overwhelming majority of the people in the Punjab particularly in the rural areas follow customary law which is that the daughters do not claim¹³ any share in the property of their parents. In my view the social structure of the Punjabi society in

10 By achieving the unity of law we do not mean to have one law theoretically (that we have already in the form of official law) what we mean by this is brining the unity of cultural values and the official theoretical law.

11 The mention of Germany comes from my experiences with the functioning of rule of law there when I was staying there for my studies and research.

12 Cohen, "Law and the Colonial State in India", p.154.

13 The use of the word "do not claim" is intentional to show that the women as sisters and daughters do not claim their shares from their brothers/fathers instead of are not given. I asked several times groups of women like from students in the M. Sc. classes I teach at Quaid-i-Azam University if they would like to claim their share in the patrimony? The frequent answer was like 1 out of 12, 2 out of 13, or non in a class with 10 females who raised their hands. In a question about preference between husband and brother the preference for the later was very clear. Later on when I presented the view that Pakistani/Punjabi society is basically a blood kinship society where brother was the kern relationship and that not claiming means more than half a share almost all agreed.

general and the rural Punjab in particular is such that for the daughters/sisters not getting a share in the patrimony is socio-economically more beneficial than the legal half share (compared to their brothers) they have claim to. The Punjabi society is a kinship based society. The ideal/kern relationship is a brother/sister relationship and not a husband wife relationship. Claiming the share by the sisters would mean taking away from brother and handing over to the husband which is said to be a relationship of three words – talaq pronounced three times - whereas the brother-sister relationship is an ideal of the Punjabi kinship relationship.

My view is that if we want to change, for instance, the traditional law of daughter's patrimony for implementing the official/Islamic law the social structure particularly its kinship base has to be changed fundamentally. Because the rule of law as Krygier and Mason define it is "a state of affairs, with complex, multi-layered elements of various provenances, rather than any particular set of institutions. ..., most aspects of a society – its balance of power, economic structure, family patterns, education, media, as well as legal institutions – are relevant to the degree the rule of law prevails with it."¹⁴ Having said this, it is important to bear in mind that the socially engineered changes do not only often fail in achieving the desired results¹⁵ they may also frequently lead to totally undesired 'side effects'. In other words implementing official share of daughter in the patrimony means changing marriage practices, destruction or at least replacement of present (joint/extended) family and kinship system with a nuclear family making individual as supreme as in the West (discussed in detail in later part of the article). The question is not only if such changes are instantly possible the more important question is if these changes are desirable as destination. I am personally not very sure if the Western styled individual based 'contract' society with free market ideology, individualism and capitalism is a preferable

14 See Martin Krygier and Whit Mason, *Interpersonal Violence, the rule of law and its enforcement*, (Unpublished paper, School of Law, university of New South Wales, Sydney, Australia, 2008).

15 In 1998 Asian Development Bank funded \$350 million in Pakistan to finance a project called "Access to Justice" with almost no results except some technical improvements. For more details see *Ibid.*, p.4.

alternative to the 'status' based kinship society. The idea that change could be brought in one area i.e. law of inheritance without affecting the other i.e. the nature of social structure and kinship may not possibly work.

The main theoretical underpinning for this paper is provided by the hermeneutic school, where law is considered as "culture system". Culture "denotes an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes towards life."¹⁶ According to this approach, "culture is everything", and law forms just one part of this "combined totality [which] has internal systemic connections."¹⁷ Law is furthermore "tradition driven" and is both reflective and constructive of social life in this scheme. Geertz, a prominent proponent of this school, defines law as "local knowledge" in the sense of "... vernacular characterizations of what happens connected to vernacular imaginings, stories about events cast in imagery about principles ... and not placeless principle."¹⁸ Followers of this approach are of the view that it is not only the unofficial law which is different even the state law in practice functions according to the cultural values.¹⁹ For example Rosen who has worked in Morocco concludes that courts present the cultural characteristics of the broader society to which they belong in ways comparable to a monastery, a market center or a men's club.²⁰ How could this interpretative anthropological approach help us in furthering the

16 Clifford Geertz, "Local Knowledge: Facts and Law in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretative Anthropology* (New York: Basic Books, 1983), p. 89.

17 Sally F. Moore, "Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999" in *Journal of the Royal Anthropological Institute* (N.V.) No.7 (2001), p.96.

18 Geertz, "Local Knowledge: Facts and Law in Comparative Perspective", p.215.

19 See Moore, *Conflict and Compromise*; Cohen, "Law and the Colonial State in India"; and Hoebel, "Fundamental Cultural Postulates and Judicial Lawmaking in Pakistan".

20 Lawrence Rosen, "Islamic "Case Law" and the Logic of Consequence," in June Star and Jane F. Collier eds. *History and Power in the Study of Law: New Directions in Legal Anthropology* (New York: Cornell University, 1989), p.309.

debate relating to the rule of law has been discussed in the following pages.

Legal Anthropology and the Rule of law

M. Kryger and Mason, both jurists, write:

Our world affords no starker contrast than that between societies where peace generally prevails and those where violence is commonplace. The former are generally blessed with the rule of law; the later cursed by its absence... the rule of law is an important goal for all modern, modernizing and would-be modernizing societies".²¹

Another jurist writes about Pakistan:

... the majority of Pakistanis living in the rural areas live the life of their ancestors, unaware of the laws of the cities. In the villages state laws are bypassed in favour of arbitration or, even more frequently, conciliation according to traditional procedure.²²

These two citations do not define the rule of law but they may be taken as an indication of the jurists mind set. Majority of them have a very negative view of the customary laws and procedures (they do not accept it as law at all) as is particularly clear in the second quote. The main problem for Mehdi with local practices in rural areas seems to be that they are old (from the time of the ancestors), they are not the laws of the cities and that arbitration and conciliation are used as methods. The first quote equates the traditional law to violence and according to authors for those societies which want to develop or modernize it is imperative to achieve the rule of law, which actually can only be the state law. It is important for the rule of also known as supremacy of law that laws are well known and that these are applied without discretion.

We can conclude from the debates of the jurists that the first and the most important precondition for the functioning of the rule law is the existence of well known and well defined 'one law' — unity of law — "law is and should be the law of the state, uniform for all persons exclusive of all other laws, and administered by a single set of state institutions".²³ And that the law must has a

21 Krygier and Mason, *Interpersonal Violence*, p.1.

22 Rubya Mehdi, *Islamization of the Laws in Pakistan* (Richmond Britain: Curzon Press, 1994), p.70.

23 John Griffiths, "What is Legal Pluralism?" *Journal of Legal Pluralism and Unofficial Law*, Vol. 24, No.1. (1986), p.3.

scientific and rational nature that should be based on the principles of the basic human rights and democracy besides ideally being universally applicable. Further these laws are enacted through the modern western styled courts with lawyers and judges with guaranty to ensure the due process. The rule of law is not only desirable it is a must for development and most importantly it is achievable rather it must be achieved by social engineering. This is above and in addition to the availability of the whole set of institutional infrastructure and mechanics for the proper functioning of the rule of law.

What is the problem for me as an anthropologist with this state of affairs called the rule of law? Let me start by saying that anthropologists have no problems if the unity of law (in the sense that no or at least no major and basic difference exists between the law of the state and the local culture) already exists. Having written this it is a fact accepted by all including jurists that the unity of laws does not exist in the developing countries like Pakistan. We know that even the most developed countries in the world are culturally and legal plural.²⁴ The difference between the developed countries like UK, Germany, etc. and the developing countries particularly those having a colonial past like Pakistan is the degree of the gap or difference between the official law and the local culture or customary law, the gap being largest in the developing countries. The problem for anthropologist is not only that “the paradigmatic concept of law is ... one and only law of the national state”²⁵ but the idea that the unity of law is achievable and has to be achieved. I would like to present the view below that the attempts to achieve the unity of law in the name of science and rationality are actually implementing the customs of the majority and dominant groups/countries at the cost of the dominated, weak and minority.

24 See, Moore, “Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999”; and Hanne Petersen, “Legal Pluralism and its Relevance for Women’s Law”, in Rubya Mehdi and Farida Shaheed eds. *Women’s Law in Legal Education and Practice in Pakistan: North South cooperation*, (Copenhagen: New Social Science Monograph, 1997).

25 Petersen, “Legal Pluralism and its Relevance for Women’s Law”, p.153.

Jurisprudence in my view remains the most conservative of all the social sciences particularly ideas like the rule of law because it is based on the same principles of rationality and universality found in the 18th and 19th century debates of natural law and positivist²⁶ principles. This is “most evident today in current arguments about universal human rights”²⁷ The natural law theory assumes “the existence of a universal, underlying system of ‘justice’ and ‘right’ which is distinguishable from mere human enactments, norms and judgments”.²⁸ Positivist theorists were disturbed with these ideas of the natural law only for its being “unscientific, that it was grounded on a mythical entity, and that it confused law with morality.”²⁹ The social sciences are, at least since the last quarter of the 20th century, very critical of any ideas of ‘universally valid reality’ and particularly the view that this reality could be found out by the so called ‘scientific’ methods. The Orientalism related debates have brought forward the views that texts (laws) exist in contexts i.e. cultural contexts and that there are no methods discovered for detaching knowledge, or so called ‘facts’ from politics and ethnocentrism.³⁰ (Said 1995: 13)

The most problematic aspect of the ‘doable’ view in the rule of law is that it is approached in a very what Krygier has called “breathtakingly mechanistic’ way. It is assumed that “Aid providers know what endpoint they would like to help countries achieve – the Western-style, rule-oriented systems they know from their countries ... ”³¹ In spite of the fact that we know that “law related practices ... developed over long periods, and ... with little deliberate design to produce the results they have. To pluck out of this dense thicket of institutions, cultures, traditions, mores and practices, merely the formal rules or architecture of legal

26 Similar views were also expressed by H. Petersen: “Most theories of international law are rooted in positivism and are aimed at explaining law as an existing, static phenomenon, unaffected by political and other trends”. Petersen, “Legal Pluralism and its Relevance for Women’s Law”, p.153.

27 Sally F. Moore, “Law” in Adam Kuper ed. *The Social Science Encyclopedia* 2nd edn. (Lahore: Services Book Club. 1989), p.446.

28 *Ibid.*

29 *Ibid.*

30 Edward Said, *Orientalism*, (London: Penguin Books, 1995), p.13.

31 Krygier and Mason, *Interpersonal Violence*, p.5.

institutions is simply to pick at leaves.”³² We also are aware that: “most of the greatest success stories of the rule of law owed nothing to professional rule-of-law promoters.”³³ The notion is based on the assumption that ‘a country achieves the rule of law by reshaping its key institutions to match those that are considered to have the rule of law.’³⁴ So in short “build them and they will come.”³⁵

In short in debates about achieving the unity of law for the rule of law the local cultures especially those of the minority groups become irrational, unscientific at worst an irritant or an evil necessity that need to be removed. The attempt to bring about the unity of law for the rule of law does not end in the national boundaries. Looking at the transnational impacts including the colonial past the unity of law is deemed to end up in attempting to convert all the non-western laws into the Western law. My basic focus in this paper is not to show how the unity of law is attempted at the cost of the local cultures but to show that local culture is not irrational and illogical as it is presented in the unity of law and the rule of law debates. Being cultural relativist I am of the view that customary law as part of culture has its own logic and that this local cultural logic needs to be understood in its own cultural context. In the following pages I want to elaborate this with the case study of the daughter’s share in the Punjabi patrimony. But I also want to highlight that investigating the existence of and contents of different practices does not automatically mean accepting the values they are based upon neither calling them better than the other practices. I am also aware that acknowledging the existence of local norms and values may be understood as endangering the uniformity of national law. But we are of the view that:

if the process of internationalization and regionalization of law is not to end up as a totalitarian process, alienating ordinary women and men from their development, ... it is important to underline the understanding that law grows and is grown, not just given by a single law-maker, and that

32 *Ibid.*

33 *Ibid.*

34 *Ibid.*, p.2.

35 *Ibid.*

ordinary people also participate in (and are responsible for) the process of cultivating law.³⁶

This means we acknowledge that the professional lawyers are not the only experts in creating orders and solving conflicts. Similarly we accept that official law is not the only law there are other systems to sanction the behaviour of individuals as members of the society. This recognition of plural legal orders within a given legal culture is known as legal pluralism sometimes also called legal polycentricity.³⁷ Legal pluralism defined very simply means “the condition in which a population observes more than one law.”³⁸ Griffiths, another proponent of the legal pluralism defines it as.

... a state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs. The legal order of all societies is not an exclusive, systematic and unified hierarchical ordering of normative propositions depending on the state, but has its sources in the self-regulatory activities of all the multifarious social fields present in the society.³⁹

Talking about legal pluralism in countries like Pakistan is acknowledging the existence and relevance of several legal orders instead of ignoring them as the jurists at least officially do. The rule of the state law may be taken as an ideal to be achieved in the long run. Important for achieving this idea is also realization that the gap between the practice and official (ideal) should not be so big that it is impossible to bridge. Therefore a practical approach should start by accommodating the local culture (legal pluralism) and adopt a slow and steady long term approach to achieve the ideal (more details in conclusion). If we want to bridge the gap we have to learn the logic in the local customs – so to say to find the local wisdom instead of only looking towards the West – and to accommodate it in the reconstruction of the state system of law.

36 Petersen, “Legal Pluralism and its Relevance for Women’s Law”, p.157.

37 *Ibid.*

38 Gordon R. Woodman, “The possibilities of co-existence of Religious Laws with Other Law” in Rubya Mehdi, Hanne Petersen and others eds. *Law and Religion in Multicultural Societies*, p.26.

39 Griffiths, “What is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law* Vol. 24, No.1. (1986) cited in Petersen, “Legal Pluralism and its Relevance for Women’s Law”, p.152.

This is a theory that can account for a situation in which different value systems of somewhat equal moral validity can operate together by accepting the norms generated with multiple centers and by creating semi-autonomous fields for their implementation.

The logic in traditional practice of daughter inheritance

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

Allah chargeth you concerning (the provision for) your children: to the male the equivalent of two females, and if there be women more than two, then theirs is two-thirds of the inheritance, and if there be one (only) then the half.⁴⁰

At the end of the same Surah, there is a provision for the collaterals:

They ask thee for a pronouncement, say: Allah hath pronounced for you concerning distant kindred. If a man die childless and he have a sister, hers is half the heritage, and he would have inherited from her had she died childless. And if there be two sisters, then theirs are two-thirds of the heritage, and if they be brethren, men and women, unto the male is the equivalent of the share of two females.⁴¹

In order to make these provisions imperative and enforceable, God promises divine reward for abiding by them and prescribes divine punishment for disregarding them in the following words of the Quran:

These are limits (imposed by) Allah. Whoso obeyeth Allah and His messenger, He will make him enter Gardens underneath which rivers flow, where such will dwell forever. That will be the great success. And whoso disobeyeth Allah and His messenger and transgresseth His limits, He will make him enter Fire, where such will dwell forever; his will be a shame full doom.⁴²

The practice in the Punjab especially in the rural areas is that the daughters or sisters do not claim any share. The prevalent practice is that the daughters/ sisters relinquish their patrimony

40 *Al-Quran* 4:11. All the Quranic citations in this section are translations taken from Hamid Khan, *The Islamic law of Inheritance* (Karachi: Oxford University Press, 2007), pp.28-29.

41 *Al-Quran* 4:176.

42 *Al-Quran* 4: 13,14

rights especially landed property rights by signing away their inheritance to their brothers. I do not want to follow here the argument that dowry and other gifts to the daughter/sister are equivalent or not of her share. The village where I did my fieldwork only two sisters have claimed their inheritance and both of them were married and lived in the same village and as a first instance had conflicts with their brothers.⁴³ This is in spite of the fact that all those women who have contacted official courts for securing their inheritance rights got a sympathetic verdict.⁴⁴ Shaheen Sardar Ali⁴⁵ a prominent Pakistani lawyer and activist in the field of women rights and status in Pakistan provides us very interesting detailed analysis of inheritance disputes from the record of the higher courts in Pakistan. She writes: "From 1947 to date we find that whenever a woman has approached the superior courts for protection of her right to inherit⁴⁶, she has met with a very positive response." She remarks further that: "..., in comparison to other areas of family law, the quantum of cases raising issues of inheritance and succession rights for women is extremely low".⁴⁷ She asks: why in spite of favourable decisions by the courts there are so few cases for patrimony keeping the fact in view that almost

43 The case of one of these two women who claimed and got their share has been dealt in detail in another article published in the book form; see M. Azam Chaudhary, *Cultural Analysis of Politics, Law and Religion in Pakistan: Some Essays in Interpretative Anthropology* (Koeln: Ruediger Koeppel Verlag, 2008).

44 Shaheen Sardar Ali, "A Critical Review of Family Laws in Pakistan: A Women's Perspective", in Rubya Mehdi and Farida Shaheed eds. *Women's Law in Legal Education and Practice in Pakistan: North South Cooperation* (Copenhagen: New Social Science Monograph, 1997), pp.220-21.

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

46 In a footnote Shaheen Sardar Ali wrote that: "We came across more than a 1 000 cases concerning substantive issues of dissolution of marriage, dower, maintenance, divorce, etc. On the other hand, one does not see more than 100 cases reported concerning succession and inheritance." Ali, "A Critical Review of Family Laws in Pakistan: A Women's Perspective", p.220. This is in spite of the fact that every woman is entitled to inheritance and as we know very few get/ are given this inheritance. *Ibid.* The first is against the husband the second against the brother. This becomes clear when we also compare the name given to mother's brother Chand Mamon. The most lovable relationship of a person in the Punjab is mother's brother.

47 *Ibid.*

no women receive their share? Answering the self raised question she writes that the pressure from both family and society to forego one's inheritance is so compelling for women that they are simply unable to raise their voices and forced to settle off of court.⁴⁸

My question is why this pressure does not function when the same women go to courts against their husband for divorce and custody. I am of the view that women do not want to claim their share because they will end up as losers. As has already been mentioned it means that the Punjabi society is a kinship based society where brother-sister make the kern of the system compared to husband and wife which is a contract relationship. Claiming share by the sister would simply mean taking from the brother and giving it to the husband.

Brother-sisters as kern Relationship in Punjabi kinship system

The brother sister relationship has to be understood in the light of the marriage rules and family system of the Punjab. The central assumption of this paper to state once more is that because sister-brother and not husband-wife make the core of the social structure and kinship system of the Punjab the daughters/sisters do not claim their share. The question is how this kinship structure influences the not demanding of share in the patrimony by the sister? First let me explain how it is the sister and brother and not husband and wife that lie at the centre of the Punjabi kinship. I want to start with one of the most famous love epics of the Punjab, Mirza Sahiban.

According to the details relevant for us Mirza came to take Sahiban away before her family married her of to somebody else. Sahiban tells Mirza on their way how cruel and strong her brothers were and that they would kill both of them if they found them. Mirza proudly told her his marksmanship with his bow and arrows. As a demonstration he successfully aimed at the peak of a flying pigeon. During their further journey Mirza got tired and they stopped for a rest where Mirza fell asleep. As soon as Sahiba saw her brothers approaching she broke the head of all the arrows. Sahiban's love for her brothers overtook her love for Mirza or even

48 *Ibid.*

love of her own life. I think this love epic shows the ideals of the Punjabi kinship.

In several M. Sc. classes at the Quid-i-Azam University, Islamabad I asked female students as to who among them would demand her share of the patrimony? The response average ranged between zero and one among ten female students. The sisters in the Punjab continue to dominate the houses of their fathers and brothers long after their marriages. A wife is considered an outsider who comes and destroys the family which is ideally joint and extended. This is expressed in proverbs like: *Ooan prayan jayan laraon sakyen bhayan* ('the alien come into the house and make the brother fight each other'). The relation between the family of the groom and the family of the bride is of antagonism and mistrust. This may be observed at the time of marriage ceremony. The groom's party enters the village of the bride shooting in the air, using crackers for making noises, beating drums, riding cars resembling an attack on the village as if it was a 'marriage by rob'. The groom and his people could be asked to perform a challenging job that could include things like shooting at a difficult aim, solving a puzzle, or a challenge in riding, etc. before they are given the hand of the bride.

Marriage negotiations that take place before the actual marriage are also full of mistrust. Both parties exaggerate in matters, for example, relating to economic status, education, age, etc. All the social networks are used to reach the truth. This mistrust continues after the marriage, at least the first years. The mother-in-law fears that the bride wants to establish an independent household, i.e. try to disintegrate the joint family of her sons. She therefore does not want her sons to be intimate with their wives. Thus, it is a common value in the village that the men of honour and prestige spend little time at home with their women folk. They come to their homes only for short whiles and even eat preferably at men's places like *dera, hawaili and thara*. The wife similarly fears being divorced and robbed of her dowry including the costly golden jewellery. In the worst case the relation of husband and wife is said to be a three words relation ('divorce,

divorce and divorce’) and woman is often compared to shoes which one wears if they fit.⁴⁹

In contrast the relationship of sisters and brothers is of love, obedience, respect and trust in the Punjab. ‘The most cruel person turns into wax for daughters and sisters’, goes a saying. Paradoxically though daughters and sisters are called ‘guests’ (*prouhnian*) at the homes of their parents. Thus, parents start preparations for their daughter’s departure, i.e. marriage, right after their birth. The issue of the daughter’s departure is so emotionally charged in the Punjab that people already start crying or at least get moisture in their eyes when this topic is mentioned, for example, in folk wedding songs like: *Dhian tae dhan praya be bawla tun piayar kiyun aina paya be bawla* (‘Daughters belong to the others why did you fell in love them oh father’). There are similar songs of daughter’s complains of married of to places far away from the homes of their father and brothers: *Bawal da baira shad ke wieran tu door challi ...* (‘Going for away from the courtyard of the father and brothers, far away from toys and joys’). Much of these might be ideals but they shape the nature of Punjabi society. The closest relationship for a woman in the Punjab is that to her brother. The other most loveable relationship in the Punjabi kinship system is of mammon i.e. mother’s brother. The maternal grandparents, particularly the grandmothers, are famous for their love of the children of their daughters, though parents are more worried if their sons do not get children, especially male.

The daughters continue affecting the life in the houses of their brothers at least as long as their parents live. If sisters have quarrels or difficulties with their husbands, the wives of brothers face the same. This is most clearly the case in exchange marriages. Women even after their marriage call their natal villages and families as their ‘real’ (*sada pend* or *sada ghar*) villages and houses. From daughters/sisters the women directly become mothers – consanguine relatives - without ever becoming wives in the Western sense. Only by becoming mothers, particularly of sons, women get their place in the household of their husbands.

49 Original Punjabi saying goes: “*Aurat te paer de juti ae puri aie te palaie neh te badal laie*”.

Now a woman can hardly be divorced. If the husband dies, the woman will be kept in that household only if she has children, particularly sons; otherwise she goes back to her parents' house.

That the relation of brother and sister decides the nature of the Punjabi family and society is also evident from the system of gift exchange called *Vartan Bhaji* in ethnographic literature on the Punjab. *Vartan Bhaji* consists of two words: *Bhaji* is usually translated as 'sweats' and *Vartan* as 'distribution' or 'dealing', combined 'dealing in or distribution of sweats'. This is a very elaborate system of gift exchange that Eglar called 'dealing in relationships'.⁵⁰ *Bhaji* is not the whole gift exchange but the sweats only. These are the sweats a woman brings from her parent house, i.e. actually the house of her brother, for her in-laws. These sweats are meant for distribution in the *sharika*, i.e. patrilineage of her husband, which is actually also her *sharika*. Thus women in the Punjab lose their *sharika (biradari)* after marriage and become a part of their husband's *sharika*. This is why people say that women have no *zat*, no *biradari* or *sharika* of their own.

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

50 Zekiye Eglar, *A Punjabi Village in Pakistan* (New York: Columbia University Press, 1960), p.105.

enmity. The relation of *Vartan Bhaji* between brothers and *biradari* brothers are dealt with by the women, i.e. wives, and then transferred to daughter-in-laws. Here lies the crux: Wives are strangers between the brothers and due to competition and mistrust the brothers become enemies in the form of cousins.

Married sisters also get their share of the *Bhaji* that their brothers' wives bring from their brothers' or fathers' houses. *Bhaji* with sisters/daughters is, however, not operated by the wives but is dealt with by their mother, father or brothers themselves. The gifts which the sisters/daughters get are called *Thehi Tehan*, an expression which can be translated as 'giving to the daughter'. On occasions such as religious festivals (*Eids*), marriages of brothers, birth of sons, their circumcision, or later on the sad occasions of parents' deaths, in short every time the daughter/sister visits her family.

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

In my view, the traditional rights of the daughters/sisters in the Punjab are compatible with their position and role in the family and society. The State/Islamic law reserves the share of the daughter in the property of her father. It is my assumption that the daughters do not claim their official/Islamic share in the property of their fathers/brothers because what they have to give up is more than what they would get. What she has to sacrifice against her legal share is her relationship to the natal family. In other words if

a women claims her part of inheritance she will have to do it at the cost of her relationship with her stem family. This is particularly important for her in a society where women can be divorced without any claim on the property of their husbands. The women return to the family of their parents/brothers in case of the death of their husbands in case the couple was still childless. There are hardly any examples and possibilities of women to live alone, i.e. without men who are her fathers, brothers, husband and sons. However, a woman who claims her legal/Islamic share of her parental property decides for such a fate for her. In other words she becomes a brother instead of a sister.⁵¹

The next section brings a brief sketch of the prevalence of the rule of law in Germany from my fieldwork experiences there. This short introduction and discussion I believe should enable us to better understand the problems relating to the rule of law of Pakistan.

The rule of law in Germany: Some observations⁵²

A small group of pedestrians waited on a red traffic signal when I reached the spot. I looked first right then left and having found no traffic in sight set my foot to cross the street. “Rooot! (Red!), cried somebody from the group. This was by no means an exception (in the sense that I was a foreigner though that might sometimes strengthen the check), you often hear people shouting at, for example, smokers in non-smoking zones “Nichtraucher” (no smoking), or bicyclists going astray to the pedestrian portion: “Fussgaengerweg!” (footpath!). Once I witnessed an old man walking on a bicycle path. A young lady came riding a bicycle. She rang the bicycle bell constantly and started shouting as she approached the old man who could barely hear but definitely move only at a slow pace. Astonishingly some two meters free space on the right side was available as well as over a meter on the left side of the bicycle path. The lady stopped and insisted upon the privilege of her bicycle lane. The best examples come from the

51 Most of the above details in this section have been reproduced here from an earlier article: see Chaudhary, *Cultural Analysis of Politics*.

52 The ethnographic details of this section have been adopted from an earlier publication: see Chaudhary, *Cultural Analysis of Politics*.

household waste management. Household garbage is sorted into different categories like organic, inorganic, paper, glass, compost, etc. and families living in different apartments of a building share common garbage containers. Depositing the garbage into the wrong container or garbage not sorted out leads to a number of disputes. Shocking for many will undoubtedly be the revelation that the neighbours know even minor details about the contents of one's garbage. I have observed with amusement people washing their plastic garbage before throwing it into garbage containers.

Gellner provided us a detailed account of how a relative 'homogeneity' of views or what Geertz has called 'civil sentiment' is achieved through state run formal education in industrial societies. In his view:

Men acquire the skills and sensibilities which make them acceptable to their fellows, which fit them to assume places in society, and which make them 'what they are', by being handed over by their kin groups (normally nowadays, of course their nuclear family) to an educational machine which alone is capable of providing the wide range of training required for the generic cultural base. This educational infrastructure is large, indispensable and expensive. Its maintenance seems to be quite beyond the financial powers of even the biggest and richest organizations within society, such as the big industrial corporations.⁵³

This education that Gellner has named 'exo-socialization' is "the production and reproduction of men outside the local intimate unit"⁵⁴ furthermore this exo-socialization is "universal, standardized, and generic"⁵⁵ and is "now the norm"⁵⁶ in industrial societies. This, in his views, linked the state and culture which as a result has made the informal socialisation by the family and open society identical or insignificant compared to the exo-socialization that has been mentioned above. The loyalty to the kinsman is superseded by the loyalty to the state. Gellner called this state of affairs in the industrial society 'the Mumruk conditions becoming universal'.⁵⁷

53 Ernest Gellner, *Nations and Nationalism* (England: Basel Blackwell Publishers Ltd., 1983), p.37.

54 *Ibid.*, p.38.

55 *Ibid.*, p.29.

56 *Ibid.*, p.38.

57 *Ibid.*

Let us go back to the case of Germany to see the impact of state socialization. The focus of the socialization here is making children independent individuals in life. This starts already from the birth on. Babies get their own beds, toys, bedrooms, etc. After reaching 18 years of age the pressure starts growing to leave the parents' house and those who do not manage it in time may be called *Muttersöhnchen* ('weaklings'), or the like. One might hear one of the parents, mostly the father, saying '*was sucht er hier noch*' ('what is he doing here')? The successful partnerships or marriages now a days in Germany are considered those where partners have maximum independence. People learn to live independently and are not ready to give up their independence. This socialisation produces individuals, disintegrates the family and destroys kinship system. This vacuum is filled by the state through socialization that we called formal socialization (schools, Universities) that is rational even scientific.

In sharp contrast to industrial societies like Germany, there are several different forms of socialisations prevailing simultaneously in post-colonial societies like Pakistan. We can divide these forms of socialisations in Pakistan into two main categories, i.e. informal (family, kinship, peer groups, society as large, etc.), and the formal, i.e. imparted at the private/public educational institutions {religious schools (*madaris*), private and government run school systems}. There is no universal education in Pakistan. Similarly the education imparted at the different formal institutions - the *madrasa*, private schools, and government schools - is very diversified in nature. In most of the private schools for example, the medium of instruction is English and the syllabus is imported. Most of the government-run schools still seem to follow the colonial agenda of producing clerks. The *madaris*, further, appear to be teaching as if in the middle-ages, both in terms of style and content. Furthermore, formal school education is acquired primarily to secure government/quasi government jobs. The socialisation in the families, kinships, peers and the society at large - that which may be considered 'real' socialization - is markedly different from formal or state socialisation. The informal local socialisation furthermore differs from group to group and region to region. As a whole we could say that the main characteristics of

education in Pakistan are cultural differentiation and cleavage rather than homogeneity, as is the case in industrial society.⁵⁸

Discussion and Conclusion

This article discussed the rule of law problems in Pakistan with the help of a case study of daughter's patrimony in the Punjab. The rule of law if defined as dominance of the well defined and well known laws – state law - is almost absent in Pakistan and if defined as a state of affairs which is almost never complete and there is always a degree of prevalence then Pakistan falls in the very low degree of prevalence category of the rule of law countries. The rule of law requires unity of law which is achieved in the form of state law. Pakistan is legally plural having state law, customary law and Islamic law being practiced here. The dominantly practiced law in Pakistan could be safely said to be the customary law. We wrote in the case of daughter's share in the patrimony that the theory of the official law is very different from the prevalent customary practices. This phenomenon is not limited to the daughter's patrimony alone, it is found in many other fields too. Daily newspapers frequently report stories relating to the marriages where the customary practices still prevail despite ruling of the Supreme Court of Pakistan for the reverse in case of the so called love marriages⁵⁹.

We know from other enumerable cases that the court verdicts have almost no validity. The families of the women are ready to go to any length for acting upon their custom. Many couples have been killed in-spite of the verdicts of the superior courts. Another important area to mention is related to honor killings and blood

58 For a more detailed analysis of the socialization in the Pakistani Punjab see the chapter on *the socialization in the Punjab* in an earlier book from the author of this article: see Chaudhary, *Cultural Analysis of Politics*.

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

feuds in Pakistan. According to the report a famous *Jirga* (council of village elders) in Sindh met to decide an old blood feud. In its verdict the *jirga* ordered some innocent girls to be given in marriage to the aggrieved family. The interesting aspect of this case was that a Member of the National Assembly, the District Mayor and the *Tehsil* Mayors (all of them are supposed to represent the state and uphold the state law) were members of this *jirga*.⁶⁰ This is by no means an exceptional case.⁶¹ Exceptional is perhaps that the Supreme Court of Pakistan took a *suo motu* action, cancelled the verdict of the *jirga*, and declared that it was an illegal, parallel system. The next day there was a “province wide crackdown against the *jirgas* by the police”.⁶²

The giving of girls in marriage to end blood feuds, usually of ancient origin, is known as *Swara* or *Vanni* and is an age-old practice in the tribal areas of North West Frontier Province, Sindh and Balochistan. The panchayats/*jirgas* are headed by powerful, influential, aged and respectable personalities. In the above case the *jirga* included political leaders from almost the highest level in the area. The meetings of the *Jirgas/Panchayats* are made on the request or by the consent of the parties involved and most of their decisions are compromises arrived at after discussion with these parties. The decisions of these panchayats/*jirgas* in my view reflect the values/traditions/culture of the people. The decision of the court is made keeping in view the laws which have their origin in the West and which as Moore wrote “examine one distinct dispute under ‘laboratory conditions’⁶³ following the western values of

60 “Chaudhry intervened in the decision of a traditional tribal council called *jirga*. It had ruled that five little girls aged two to six were to be handed over to a rival party in the context of a dispute settlement. The *jirga*, by the way, was headed by Hazar Khan Bijarani, the country’s current education minister.” Saigol, “Pakistan’s Long March”, p.208.

61 Reports of such cases can be found on daily basis in newspapers such as: “Minor girl handed over in compensation”: *Dawn* 10 June, 2009, page 9.

62 “LARKANA: Sindh Inspector-General of Police Jahangir Mirza has said that no *Jirga* will be allowed henceforth and anyone daring to do so will be dealt with severely. Instructions have been issued to the police to proceed against *Jirgas*, he said while responding to queries from newsmen at the DIG Larkana Office during his first-ever visit to the city on Saturday. The IGP said the Supreme Court has ruled that the *Jirga* system is a parallel judiciary system that has no provision in the Constitution.” *The News International*, 2 August, 2006.

63 Moore, *Conflict and Compromise*, p.6.

individualism, universal human rights, women right, etc. Nothing against them but since they are not according to the local values hence they remain rather an empty slogan.

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

The important question to conclude the discussion is what should be done? The views about the lack of the rule of state law in Pakistan could be summed up in two groups:

- First group is of the view that lack of the rule of law is due to technical reasons. This group consists of mainly the jurists. They believe main problem is the lack of technical facilities which includes lack of courts rooms, computers, less than required personals like judges, police, and their low salaries. This group considers culture only relevant as a

hurdle and holds culture for old, conservative, anti-development and anti-modernization therefore at best needs to be removed. This group prefers continuity of the present state of affairs i.e. the state law as theoretically the only law in its present nature following the ideals of the universal values of justice, equity, fairness, basic human rights, women rights, etc. They further believe that the state needs to implement laws forcefully to reach the rule of law.

- The second group consists of social scientists mainly anthropologist who see the main problems of the rule of law in the difference between the state laws and the local customs. The lack of technical facilities is important but the main hurdle is the gap between the state laws and the culture – following the old wisdom where there is a will there is a way. In the long term we need to change both the official law and the customary practices to minimize if not totally bridge the gap between the two. For the start the first most important step is to make the base of the state laws polycentric and plural so that local culture is accommodated. It is important that the local culture is treated at par with the official law. My view is that social engineering is most effective if done in piecemeal manners. Legal pluralism means acknowledging the plural base, defining different sub-fields and giving them some autonomy for following the culturally suitable practices. We have already shown with the example of the traditional practice relating to daughter's share in the patrimony that there is an internal cultural logic of this practice. If we want to change this custom we have to bring about a change in the social and kinship system. It takes a long time to change the kinship and social system of a people. In my view this system developed over a long period of time and is suitable to the prevailing local circumstances. The change in the kinship and social system can be achieved if the state takes over responsibilities like socialization of the people and taking care of their social and health securities which are at present performed by the kinship and social system. The change of system is best achieved if the state takes into her

hands the education of its citizen which has to be uniform and universal as was mentioned by Gellner in the case of industrially developed societies mostly of the West. Krygier and Mason wrote that about Germany and Japan:

“In post-war Germany and Japan, the occupiers took charge of education and transformed schools into transmitters of the attitudes that the Germans and Japanese would need in order to sustain and give substance to the new institutions being built.”⁶⁴

64 Krygier and Mason, *Interpersonal Violence*, p.33.