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## Women Judges and Women’s Rights in Pakistan

LIVIA HOLDEN<sup>o</sup>

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### Abstract

Although the first appointment of women judges in Pakistan dates back to 1974, the significant appointment of “lady judges” in the past decade has caused a jump in female representation in the judiciary to more than one third in family courts – a quiet move that sends a message of adherence to the principle of gender equality as per the international treaties to which Pakistan is signatory. By investigating the everyday interactions and preoccupations of women judges in their daily management of justice, this paper explores the socio-legal reception of the human rights discourse from the perspective of the female judges. The challenge in this scenario is whether this change will only be formal or whether it will also lead to substantial and accountable justice. The findings here additionally elucidate how the global agenda impacts local expectations and conceptualizations of rights within and beyond the state.

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This paper is single authored even though I use alternatively “we” and “I” throughout. I use do fieldwork with Marius Holden, anthropologist and filmmaker. Since we develop our research sometimes together and sometimes independently, my considerations are sometimes inclusive and sometimes exclusive. Some language inaccuracies are inevitable since I am a non-native English speaker. I humbly ask my readers to consider that in our global world where English must be used in order to reach broader audiences, non-native speakers bear an additional burden.



**Key words**

Gender and judging; legal anthropology; South Asia; judiciary and diversity; women's rights; Islam; Pakistan

**Resumen**

A pesar de que la designación de juezas en Pakistán se remonta a 1974, la significativa designación de "señoras juezas" en la pasada década ha provocado que la representación de las mujeres en la judicatura haya pasado a más de un tercio en juzgados de familia -un cambio silencioso que envía un mensaje de adhesión al principio de igualdad de sexos consagrado por los tratados internacionales de los que Pakistán es firmante. Mediante la investigación de las interacciones y preocupaciones cotidianas de las juezas en su gestión habitual de la justicia, este artículo analiza la recepción sociojurídica del discurso de los derechos humanos desde la perspectiva de las mujeres que ejercen la judicatura. En tal estado de cosas, cabe preguntarse si este cambio se limitará a las formas o si, por el contrario, alcanzará a la justicia sustancial y comprobable. Los hallazgos permiten también elucidar la forma en que la agenda global afecta las expectativas y conceptos locales sobre los derechos, dentro y fuera del estado.

**Palabras clave**

Género y trabajo judicial; antropología jurídica; Asia meridional; judicatura y diversidad; derechos de la mujer; Islam; Pakistán

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## 1. Introduction

According to statistics from Pakistan's Law and Justice Commission (2009-2013), women now represent at least 1/3 of the judiciary in family courts in Pakistan. This figure makes Pakistan the country with the greatest number of women-appointed judicial officers among common law legal systems in Muslim majority states.<sup>1</sup> Given the overall scarcity of information—not only in Pakistan but throughout the world—regarding modalities of judicial appointments (especially as concerning social diversity), this figure should be taken with a certain degree of caution. Nevertheless, it seems to be a significant indicator of an increasing awareness regarding gender representation in the judiciary, which is not, however, the primary focus of this paper.<sup>2</sup> On the basis of qualitative data positioned on a national level by including state law and relevant legal precedents, this paper addresses the main concerns of women judges in Pakistan in their daily professional lives. This data assists in understanding how the global agenda of women's rights is received and implemented in Pakistan.

This paper starts with a brief methodological outline describing my research approach as qualitative data collection that is aware of quantitative findings. The paper then offers the socio-legal background to the appointment of women judges between 2009 and 2013. It subsequently goes on to explore the issues that women judges have expressed as the most significant in their private and public lives. This paper maintains that even though qualitative observation might not be directly commensurable with statistic data, it helps to put quantitative data into perspective. In particular, it assists in bridging the gap between the particularity of data on the appointment of women judges in a Muslim context, and the substantively similar issues relating to the appointment of women judges at the global level. The paper will ultimately expand on conclusions regarding the potential of a more substantial and accountable justice especially relating to gender equality.

## 2. Gender gap

In June 2011, the Thomas Reuters Foundation's poll of experts declared Pakistan among the three most dangerous countries for women "due to a barrage of threats ranging from violence and rape to dismal healthcare and 'honor' killings". The same report also signaled that 90% of women in Pakistan are exposed to some form of domestic violence. Even though our fieldwork experiences suggest that such quantitative data require scrutiny, these should nevertheless be considered as components of the social framework in which female judges work in Pakistan. As exemplifications of the image depicted by quantitative data collected at a global level, two series of data are provided below: the Gender Gap Index and the representation of women in the judiciary worldwide. The Global Gender Gap Report published by the World Economic Forum yearly, has placed Pakistan at the lowest ranks, often in the last place in the regional ranking, especially for what concerns economic empowerment. According to the United Nations Entity for Gender Equality and the Empowerment of Women (UN Women) report published in 2011 under the title *In Pursuit of Justice*, South Asia is behind Middle East and North Africa for what concerns women's representation in the judiciary. In addition, Pakistan does not have any female representation at the supreme, constitutional, and regional courts. We will see in this paper that these data are to a large extent confirmed by my qualitative study. Yet, on the basis of my qualitative data, I argue that only a combined reading of quantitative and qualitative data sheds light on the ways gender discrimination is perpetuated in spite of new legislation. Given the country's overall ranking concerning women's education, financial participation and political

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<sup>1</sup> Other common law countries with a Muslim majority population are Bangladesh, Brunei, Gambia, and Malaysia.

<sup>2</sup> I have developed elsewhere an analysis of how Pakistani judiciary has interpreted and applied the principle of social diversity in judicial appointments (Holden 2011).

empowerment, the significant presence of women judges in Pakistan is remarkable. Indeed, notwithstanding the tiny population of educated professional women in Pakistan, female judges now represent more than 1/3 of the judiciary at the level of family courts. Moreover, during the time of our fieldwork women judges were appointed at the High Court level in Quetta (Balochistan), Lahore (Punjab), Karachi (Sindh), and Peshawar (Khyberpakhtunkhwa) and even at the Shariat Court. Marius and I argue that while quantitative data are crucial to set the trends and patterns of women's condition in Pakistan, qualitative data are necessary to provide the depth of analysis that is necessary to fully appraise the potential of female judges' appointments in Pakistan.

### 3. Ethnography and feminism during the Chaudhry court

Between 2009 and 2013 Marius Holden and I were granted unprecedented access to law courts in Pakistan, where we spent more than three years observing legal proceedings in the four provinces of Punjab, Sindh, Balochistan, and Khyberpakhtunkhwa. 2009-2013 has been also called as the Chaudhry court among the judiciary from the name of the sitting Chief Justice. Iftikhar Muhammad Chaudhry was appointed as Chief Justice in 2005 by President Musharraf but was asked to resign in 2007 and as a result he was suspended from office. A number of Justice refused to take oath under the Musharraf refime. It ensued a protest and civil unrest that took the name of Lawyers' Movement, which obtained the restoration of Chief Justice Chaudhry and an independent judiciary.

I was working full time as professor of anthropology in Lahore and some of my colleagues were active in the Lawyers Movement, which was for us an excellent entry point. I needed to combine my fieldwork with my teaching load but some sessions were carried out also with my class. In average, we could dedicate an average of one week per month for three years and followed up to ninety cases a day when we could stay the full day in court. We filmed one hundred twenty hours of legal proceedings in court and forty hours of interviews, sometimes in the judges' chambers and sometimes at their homes. Data were collected also through observation and un-structured interviews conducted both in English and in Urdu.<sup>3</sup> From 2013 to 2015 we moved to Gilgit Baltistan and expanded our focus to legal proceedings in Northern Pakistan but this paper is only concerned by the first phase of our fieldwork in Pakistan when we were based in Lahore. During this entire period, Pakistan transitioned from its last dictatorship to two successive elected governments. These elected governments featured opposite political agenda but perhaps similar failures regarding the protection of human rights, and especially women's rights.

Since we were not only working and living in Pakistan but also doing fieldwork with the judiciary between 2009 and 2013, we had the opportunity to witness the culmination and crumbling of the Lawyers Movement: from paladins of the judiciary after the fall of the Musharraf dictatorship in 2008, to vehement opponents during the political turnover of leadership leading to the retreat of Asif Zardari and the Pakistan People Party in favor of the Muslim League headed by Nawaz Sharif in 2012. Eventually, the same social rights activists that had fought together with the Lawyers Movement for the independence of the judiciary, started to accuse the members of the apex judiciary of corruption. The judiciary responded harshly by blocking criticism in the media through charges of contempt of court and limiting the access of the media in a climate that led to increasing criticism against the Chaudhry court.

During the tumultuous years of the rise and fall of the Chaudhry court, we were permitted to film court proceedings and social interactions in the courts presided

<sup>3</sup> As one can see in *Lady Judges of Pakistan* (2013) many female judges are fluent in English. However Marius and I speak Urdu and do not need the help of an interpreter in the field.

over by female judges.<sup>4</sup> The first outcome was the documentary film *Lady Judges of Pakistan*, launched in 2013.<sup>5</sup> I will provide elsewhere some insights into our ethical concerns as anthropologists in a dangerous and intelligence-controlled fieldwork situation. However, at all times we abided by the 'do not harm' anthropological principle as well as adhered to the principle of academic freedom and independence from any undue influence. The combination of these principles allowed us to observe two discrepant trends: on one hand the increasing pressure for filling the gender gap in the judiciary, and on the other the adoption of measures that were finding little or partial implementation. The leading question of our research has been how the appointment of women judges could co-exist with some extremely male-oriented practices in Pakistan, whether the appointment of women judges would have an impact on women's rights, and whether women judges would continue to be substantially represented in the Pakistani judiciary.

The primary focus of our research was the everyday practice of legal proceedings and especially the legal discourses that social actors elaborate in support of their claims. However, within the above framework we also explored the ways women judges respond and adjust to the complex and intersecting demands of Pakistani society as part of the global world, especially with regard to gender equality. Hence, this paper has developed around the appointment of women judges and their daily lives. Similar to our previous research in South Asia, my position is inspired by the feminist multidisciplinary trends that criticize the male monopoly of knowledge (Hesse-Biber *et al.* 1999), and by the classical studies of power (Foucault 1969, Clastres 1974, Godelier 1986, Bourdieu 1994, Dirks *et al.* 1994). My standpoint is the feminist denunciation of the conventional scientific knowledge that has prioritized men's values as the paradigm of human experience (Harding 1987, Hirsch and Keller 1990, pp. 370-385). My methodological approach has privileged law and society through the lenses of gender and power since my first fieldwork in South Asia around 1995. However, with the passage of time I have increasingly taken into account the criticism that women's movements in Asia have directed at North American feminists for their exclusive focus on gender (Mohanty *et al.* 1991). Additionally, I have become increasingly aware of the risk to over-emphasize the role of personal laws in South Asia and thereby undermining their negative impact on women's rights (Parashar 2015).

Notwithstanding, I have also taken into account the scholarship studying women's movements in Pakistan, that has shown how Islamic feminism has literally redefined women rights' agenda in Pakistan within the religious-political discourse to the point of creating an opposition between secular and Islamic feminism (Barlas 2006, Wadud 2006, Zia 2009, Hassan 2013). This picture is complicated by institutional standpoints that do not always reflect popular expectations. As we will see in this paper, the Federal Shariat Court has most of the time held positions that are more progressive than the Council of Islamic Ideology for what concerns women's rights. This is understandable if one looks at the different nature of these institutions, notwithstanding their overlapping competence regarding the compliance of laws with Islam. The Federal Shariat Court belongs to the judiciary and is competent to examine the compliance of Pakistani laws with *shariat* (article 203 Constitution). The Council of Islamic Ideology is a constitutional body founded in 1961 with an advisory role to the Parliament and the government for what concerns the conformity of laws with Islamic injunctions (articles 229 and 230 Constitution). Pakistani institutions and the judiciary, including the Federal Shariat

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<sup>4</sup> In order to film in law courts in Pakistan, similarly to the other countries where Marius Holden and I have been allowed to film in law courts, we obtained the required permits from the various levels of involved jurisdictions and concerned offices (District Court, High Court, Supreme Court, as well as Provincial and Federal Academies as applicable), and from each individual that we have filmed.

<sup>5</sup> The title of the project during which data for this paper were collected is inspired by the fact that women judges are addressed as "Lady-Judges" in Pakistan. The documentary film is also titled *Lady Judges of Pakistan*. In similar vein, we also sometimes use the appellation *lady-judges*.

Court have shown so far a considerable independence and distance from the controversial views of the Council for Islamic Ideology. The latter is known for having opposed much of the pro-women legislation, especially the Women's Protection Act 2006 that punishes rape, the Domestic Violence (Prevention and Protection) Bill 2012, and the Muslim Family Law Ordinance 1961 and amendments, that provide for divorce at the woman's initiative and also requires the consent of the first wife for the husband to take a second wife. In May 2016 the Council for Islamic Ideology sparked outrage among social activists by arguing in favor of light beating of the wife (Khan 2016).

Since women judges, during our fieldwork, were implicitly acting as spoke-persons for the judiciary, this paper is also inspired by the institutional theories that examine social structures as both imposed and perpetuated by social actors (Scott 1985 and 1990). However, the position that I have developed during my research in South Asia also differs from Scott in that I investigate the discourse of social actors for its potential resistance rather than acquiescence to the overarching norm (Raheja and Gold 1994). By focusing on both legal proceedings and everyday professional interactions with colleagues as well as the challenges and concerns that women judges cope with at home, I have analysed both the mundane and institutional aspects of women's rights from the perspective of female judges. Hence, this paper connects with the scholarship that has highlighted the relationship between gender and judging (Schultz and Shaw 2013), and the authors who have especially treated the appointment of women judges in Muslim majority countries (Sonneveld and Lindbeck 2017), including also the applied perspective of donors in setting priorities in their action for gender equality (Addison *et al.* 2016).

#### 4. The appointment of female judges in the Chaudhry court

In order to better appraise on one hand the pro-women reforms that one expected to see during the Chaudhry court due to the increased representation of women in the judiciary, and on the other hand, the awkward implementation of these expectations, it is important to set first the relevant socio-legal framework.

Gender, language and ethnicity together with religion, do not figure among the formal criteria for the appointment of judges. The only explicit provision for the appointment of female judges is to be found in the *Family Court Act, 1964* as amended by the *West Pakistan Family Courts (Amendment) Act 1994* (Federal Act XXI of 1994). On this basis women should preside family courts all over the country.

##### Establishment of Family Courts

(1) Government shall establish one or more Family Courts in each District or at such other place or places as it may deem necessary and appoint a Judge for each of such Court:

Provided that at least one Family Court in each District, shall be presided over by a woman Judge to be appointed within a period of six months or within such period as the Federal Government may, on the request of Provincial Government, extend.

(2) A woman Judge may be appointed for more than one District and in such cases the woman Judge may sit for the disposal of cases at such place or places in either District, as the Provincial Government may specify.

(3) Government shall, in consultation with the High Court, appoint as many woman Judges as may be necessary for the purposes of sub-section (1).

In 1974 the first woman, Khalida Rashid Khan, was appointed as judge in Pakistan. She was appointed as anti-corruption judge in 1974, which is interesting in the light of the discussion developed later in this paper about gender and corruption. She was then elevated to the High Court in 1994; and in 2003 she was nominated as permanent judge elected by the General Assembly of the United Nations. While her career is undeniably a success for a country that does not score highly in gender equality, many among the judiciary itself maintain that judge Rashid's nomination



to the General Assembly of the United Nations had the hidden objective of not allowing her to access the Supreme Court of Pakistan. Although our focus was in particular on the female judges that were appointed during the Chaudhry court, we registered at least one other case in which a female judge, Rukhsana Ahmed, was terminated on medical grounds in 2010. This was apparently because she used to decide cases on merit. Such an ambivalence between legislative provisions facilitating the appointment of women judges at all levels of jurisdiction including but not limited to family law, and everyday obstacles that remain in the realm of plausible deniability, seem to add to the leitmotif of the increasing presence of women judges among the Pakistani judiciary.

Prior to the completion of *Lady Judges of Pakistan*, neither the public nor the socio-legal scholarly community were aware of the significant presence of women at the lower level of the judiciary in Pakistan. To a great extent, this remains the case for reasons that this paper will identify. It is noteworthy, for example, that in spite of appropriately highlighting some of the problems faced by female judges in Pakistan, none of the recent petitions by social activists is able to provide the actual number of women judges among the Pakistani judiciary or go into any depth on the reasons and modalities of their poor representation among the higher ranks of the judiciary. In November 2012, the Aurat Foundation petitioned for the empowerment of women in relation to access to justice and the judiciary. However, they did so without acknowledging the already existing appointments of women judges at the family courts level (Aziz and Abdullah 2012):<sup>6</sup>

11. Take administrative measures to engender all echelons of the Judiciary through:

- gender parity in appointments at all family courts, sessions and civil courts;
- affirmative action in appointment and elevation of women judges to the High Courts and the Supreme Court of Pakistan;
- gender-sensitization and gender equality training for all judges at all levels.

Around the same time in 2012, the UN Special Rapporteur Gabriela Knaul, Human Rights Watch, and the Asian chapter of the Human Rights Commission petitioned against the inadequate representation of women in the higher judiciary and denounced the harassment of female judges in Pakistan. As the following extract highlights, the Human Rights Commission requested a female representation of 33 percent, as recommended by the UN conference in Beijing, without specifying whether the prescribed percentage had been reached among the lower ranks of the judiciary (Asian Human Rights Commission 2012):

Pakistan has ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) but the judiciary believes that it is also beyond any international obligations. The Asian Development Bank has spent more than USD 350 Million for the reforms in the judiciary and has mentioned that women judges should be appointed. The same has been said under the US Aid programme of gender equality and a huge amount is reserved for it under the Kerry-Logger Bill. It also demands that more support is given to women. The Asian Human Rights Commission urges the government and parliament to follow the international obligations it has agreed to by becoming a signatory to CEDAW. Women judges must be elevated to the Supreme Court and other judicial offices. The discrimination by the judiciary will not improve unless it starts at the top with the Chief Justice. If Mr. Chaudry does not change his mindset the other high-ranking members of the judiciary cannot be expected to change theirs. Women must be permitted to fill those 33 percent of the seats they are entitled to.

Almost a year later in 2013, this petition mentioned above was reformulated, this time mentioning instances where female judges had encountered resistance and

<sup>6</sup> The Aurat Foundation is a civil society organization established in 1986 with the aim of promoting women's empowerment and citizen's participation in governance. In common with most activist organizations in Pakistan, the Aurat Foundation is funded mainly by international donors.

blatant discrimination by male colleagues and in society, which then led to their resignation. Others encountered more subtle obstacles hindering their career advancement. In particular this petition deciphers the apparently successful career of Khalida Rashid Khan –the first woman to become a judge in Pakistan– in the light of preventing her elevation to the Supreme Court. Khalida Rashida Khan was appointed as civil judge in Peshawar in 1974, worked as an anti-corruption judge from 1981 to 1982, and was eventually elevated to the High Court in 1994. However, according to the Human Rights Commission, the reason for Khalida Rashid Khan's nomination in 2003 as one of the permanent judges elected by the General Assembly of the United Nations, was purely to make her elevation to the Supreme Court in Pakistan impossible.

In 2012 Marius and I were pleased to acknowledge the availability of the staff of the Law and Justice Commission, after an initial refusal in 2010 (Holden 2011). The consultation of the available statistics at the Law and Justice Commission and press releases indicates a considerable number of brief appointments of female judges, with very frequent moves. It was not our aim to record all the contract lengths and transfers of female judges, but we could follow the careers of some of them also through the newspapers, which use to advertise judges appointments and it was possible to record the occurrence of several short appointments and many transfers. While we acknowledge that brief appointments could be due to factors other than gender, and revolving around security as well as neutrality concerns (see also Holden 2011), we have considered the occurrence of short contracts as indicators of potential issues. Hence, I argue in this paper for the need of a better understanding of societal and professional expectations in relation to gender in the judiciary. However, before proceeding in this direction, we briefly set out the legal framework within which women judges have been received in Pakistan.

Since 2009 Pakistan has seen a significant induction of female judges at the lower level, unprecedented appointments and elevations to the High Courts, both from the bar and from the lower judiciary. Yet, recommendations to provide gender-sensitive training and reports on the number and ranking of women in the judiciary date back to 2005 CEDAW considerations of periodic reports of Pakistan as state party to the convention:

The Committee also recommends gender-sensitive training on violence against women for public officials, in particular law enforcement personnel, the judiciary and health service providers, to ensure they are sensitized to all forms of violence against women and can adequately respond to it. [...] The Committee invites the State party to provide, in its next periodic report, comparative data on the number and ranking of women, compared to men, at federal and provincial levels of government service and in the judiciary and trends over time.

The fourth and most recent report on the status of CEDAW's implementation by Pakistan, discussed on March 1, 2013 cannot have appeared very convincing. The committee expressed several concerns, in particular regarding patriarchal attitudes and the perpetuation of gender stereotypes that would be supported by the constitutional recognition of the Shariat Court (CEDAW 2013):

The Committee is also concerned that the jurisdiction of the highest courts in the Constitution does not apply to the whole territory of the State party, hence women could be deprived of their constitutional rights, as well as about the ambiguity caused by the recognition in the Constitution of the Federal Shariat Court. It is also concerned at the lack of awareness by the judiciary of women's rights and relevant domestic legislation. It is further concerned at the existence of parallel justice systems (jirgas and panchayats), despite the ruling against their legality, and of different informal dispute resolution mechanisms (Musalihah Anjuman), which discriminate against women.

It is further concerned that patriarchal attitudes and deeply rooted stereotypes regarding the roles of women and men in society result in the forced disenfranchisement of women and impede and discourage their participation in

elections (as candidates and voters). It reiterates its concern at the low participation of women in the judiciary in the superior courts and the total absence of women judges in the Supreme Court (CEDAW 2013, para. 32).

Interestingly on December 30, 2013 Mrs. Ashraf Jehan, additional judge at the High Court of Sindh, was appointed as the first female judge in the Federal Shariat Court. There is some ambiguity about whether this should be interpreted as fighting gender discrimination or perpetuating it, but it was saluted as an historical moment by the media both in Pakistan and abroad.

The admissibility of women to the judiciary had been challenged twice before the Federal Shariat Court, in 1982 and again in 2010. To my knowledge, these judicial decisions have not been analyzed in depth.<sup>7</sup> We find them interesting since the arguments used by the petitioner bear a close resemblance to arguments commonly used in the everyday socio-legal context of Pakistan and may help shed some light on them. *Burney v. Federation of Pakistan* in 1982 (published in 1983) outlined the reasons of the petition as follows at page 75:

This petition has been filed to challenge the appointment of women as judges or Magistrates for the following reasons: -

- (1) They discharge their functions of Qazi [A. judge] without observing Pardah [P. curtain, religious practice of gender segregation] which is a clear violation of the Injunctions of Islam.
- (2) During the period of the Holy Prophet and his rightful companions the duties of the Qazi were never entrusted to females since it appears to be a violation of the Injunctions of Islam.
- (3) According to Muslim Law the evidence of a woman is half of that of a man and her share in the inheritance is equal to half of that of her brother. The judgment of two ladies only can be equivalent to that of a male.
- (4) The ladies do not fulfill the qualification of Qazi according to the established principles of Islamic jurisprudence.

Eventually all four reasons were refuted, with one exception. The first and third reasons were not accepted since the court did not consider the seclusion of women an injunction of Islam and because rules regarding inheritance and evidence were not held to have any bearing on the qualities required in a judge. Similarly, the magistrates of the Federal Shariat Court found that the fact that there were no women judges at the time of the Holy Prophet could not serve as proof that their appointment conflicted with Shariat.

The petition against the appointment of women judges relied on the following reasons: the Holy Prophet saying that there will be no blessing or prosperity for a nation which is ruled by a woman; the sovereignty of men over women; and the principle of men as the providers for women. In order to evaluate the objections, the court also engaged in an historical and philosophical survey and ascertained that the subordination of women had been widespread in the Greek and Judaic views as well as in the Hindu, Buddhist, and Confucian tradition, as well as in 18<sup>th</sup> century England and 19<sup>th</sup> century North America. The court went on to affirm the unprecedented recognition of women's rights by Islam, saying at p. 80 (*Burney v. Federation of Pakistan* 1982) that:

27. Islam on the other hand placed woman and man both on the same footing in economic independence, property rights and legal process. She may follow any legitimate profession, keep her earnings, inherit property and dispose of her belonging at will. (The Quran. 4:32)

The judgment devotes almost ten extra pages to rebutting the inadmissibility of women judges. It is worth mentioning that the bench used the historical discussions supporting the nomination of Fatimah Jinnah for the presidential elections of 1964

<sup>7</sup> See however Mehdi 2012.

as confirming the fact that women can be appointed as judges. The learned judges reasoned that although art. 41 of the Constitution says that the Head of the State should be a Muslim male, two of the most renowned Ulemas of the 20<sup>th</sup> century, Maulana Ashraf Ali Tanvi and Allama Syed Sulaiman Nadvi, and even Jamat-e-Islam (Islamist organization and political party) endorsed the view that a woman could be elected as president of Pakistan. The conclusion was that if a woman could be elected as president of Pakistan there should be no contention that a woman could also be a judge. It is perhaps equally telling that the current wording of the Constitution states:

41. The President.

(1) There shall be a President of Pakistan who shall be the Head of State and shall represent the unity of the Republic.

(2) A person shall not be qualified for election as President unless **he** is a Muslim of not less than forty-five years of age and is qualified to be elected as member of the National Assembly [present authors' emphasis]

In 2010 a new petition, *Murtaza v. Federation of Pakistan and others*, was submitted to the Federal Shariat Court. This petitioner argued that the appointment of female magistrates to the family courts was repugnant to Islam. It stated at page 2:

The main contention of the petitioner is that a woman cannot act as a Qazi/Judge or Munsif and is, therefore, not competent to decide matters between the litigants in respect of family cases and vice-versa. It has also been asserted that a Muslim Ruler or Head of the State cannot appoint a woman as a Qazi/Judge with powers to record evidence of the parties and decide cases between the litigants.

The petitioner's arguments were almost identical to *Burney v. Federation of Pakistan* (1982) with the exception of a *fatwa* [a non binding but authoritative legal decision] issued by the Mufti Azam of Saudi Arabia affirming that a woman cannot become the head of an Islamic state or Qazi.<sup>8</sup> Hence, the petition was dismissed because the same arguments had already been evaluated more than twenty years before and no law had indeed been challenged. In fact, apart from the Family Court Ordinance, 1964, which provides for the appointment of female magistrates, no law in Pakistan has formally introduced the appointment of women judges, presumably because there was no hindrance *ab initio*.

The appointment of judges in Pakistan has generated controversies with regard to accountable justice and the overarching principle of judicial independence. However, to date the crux of the matter was how much authority the elected political representatives of the Federation had over the selection of judges, rather than over the judges' gender (see also Holden 2011). Hence, whilst on one hand from 2009 onward the appointment of female judges has increased, this has not been facilitated by a supportive implementation as it has been for other matters. For instance, the independence of the judiciary has continued to be treated as a priority for the Chaudhry court.

## 5. Professionalism, culture, and stereotype threat

On the basis of the accounts that we collected during our visits to the law courts presided over by women judges in the four provinces of Pakistan, the appointment of women-judges has never ceased to arouse heated debates. Some people, including lawyers and members of the judiciary, seemed to worry that the process of judicial decision-making may become too soft and therefore inefficient due to the inclusion of women in the judiciary. While this is an argument that is often brought forward in countries with Muslim majorities, it is worth noting that it has also been raised with other gender stereotypes in Europe and North America, ever since

<sup>8</sup> Several fatwas were issued against women judges. See *inter alia* Shah 2010.

women have entered the legal profession (Schultz and Shaw 2013). However, the question of “softness” is more faceted than one might think at first sight.

Perceptions of “softness” as a woman-related characteristic should be examined for the danger of reformulating gender segregation as a “natural” quality of the “naturally” unapproachable gender. Ironically, this would make women better judges than men. Although this vision has evident upsides, it might also be challenged in terms of the implementation of decisions by women judges and the potential manipulations of the legal process because women, being unapproachable, may also be considered less capable of dealing authoritatively with men. It should be noted that this debate generated the most vehement reactions amongst our respondents. They argued that, apart perhaps from having a soft spot for children’s custody, female judges are no different to male judges with respect to both their characteristics as judges, and law and records (*Lady Judges of Pakistan* 2013).

In fact, the competence of female judges in Pakistan includes both civil and criminal cases and, marking a difference with other Muslim countries, does not differ at all from that of male judges. The current practice in Pakistan is that at least one woman should be appointed as judge at the level of each District and Sessions Court, and women judges are preferentially appointed to Family Courts. As mentioned earlier, it is sometimes a source of surprise among the international audiences to know that in countries with a Muslim majority the appointment of women judges is not very recent and has indeed increased dramatically during the past twenty years. But it is an even greater source of surprise to the general public outside Pakistan to know that the Pakistani audience itself is astonished to hear that the proportionately higher percentage of women judges has been appointed in Khyberpakhthunkwa, the Northern area of Pakistan, which is very often portrayed within the country as the stronghold of Islamic extremism and patriarchy. Hence the following account collected in Peshawar and since published by various local newspapers.<sup>9</sup>

When women judges were appointed in Khyberpankhthunkwa, anxiety grew regarding the reception of what could appear as a too innovative institution among the most conservative strata of society. Nevertheless lady-judges were sent even to the most remote areas of Khyberpakhthunkwa and attention was put into providing them at least with suitable accommodation and appropriate security. The most surprising outcome was not only that many of them adapted easily to their new location and found their experience as valuable, but that when Justice Naseer Ul-Mulk visited the area he was expressly thanked by the elders for sending lady-judges instead of men to settle justice. The reason was that lady-judges are more capable than men to deal with family matters and most of all that they are not corruptible because as women they are not approachable. (District and Session Judge, Peshawar, audio extract from *Lady Judges of Pakistan*, 2013)

As this account epitomizes, women judges in Pakistan appear to make the most of the cultural principle that may favor varied degrees of gender segregation, by turning this potential downside into an upside that makes them inaccessible to undue pressure and affords them a privileged position. Hence the humorous accounts of the women judges who, in spite of social constraints, can look with detachment and irony at the ruses of male lawyers who attempt to influence court proceedings or, even worse, to discredit their work. For example, most women judges argue that since it is inappropriate for male lawyers to go to the chambers of female judges, they are at less risk than men of being accused of cutting deals out of court (see also *Lady Judges of Pakistan*). Interestingly, the most frequently recurring statement among lawyers and judges was that the induction of women into the judiciary has been an improvement in terms of leading to more balanced decision-making process (especially as concerns family law) and fighting corruption,

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<sup>9</sup> See for example *The Nation* 2012.

thanks to the widespread assumption that women are less approachable than men. From these conflicting views stems another set of data pointing to the conditions allowing women judges to successfully negotiate their professional lives. We shall see that these data are almost never free of controversy.

However, the downside of unapproachability is often the difficulty of executing judicial decisions. This is due to the prevailing situation of *de facto* legal pluralism, where a certain amount of negotiation with local actors is expected. By way of example, some female judges from Balochistan and Sindh confessed to having their hands tied when feudal lords or elders sought to protect insolvent husbands. As a consequence it appears that judicial education would benefit from including a better understanding of indigenous laws. Even though unapproachability in its contextual interpretation is linked with integrity and respect for local values, the overvaluation of this aspect might translate into less authority, and thereby limited justice.

On a related note, virtually all women judges expressed a wish to have more opportunities for communication with peers and consultation with seniors at different stages of their career. Gender appears to have a strong impact on the modalities through which consultation with colleagues is deemed acceptable. In some courts where senior women judges have been given an advisory role, junior women judges seem to have felt more comfortable in their first appointment.

It is evident that, as women judges are becoming professionally accomplished, they are also developing an articulated self-reflection. Their situation generates unique qualities combining cultural and professional attributes that deserve acknowledgement as these women judges combine gender segregation with accountability. However, here again the risk might be to create areas of lesser justice or to simply negate opportunities for social change and professional challenge. These may be hints of the need to balance cultural specificities with accountability and to differentiate it from the independence of the judiciary and the advantages of gender segregation.

Even though it has been several decades since women joined the legal profession as lawyers, the systematic induction of women judges is still recent in Pakistan. There is widespread concern regarding whether the current framework of legal education equips the newly inducted judicial officers with the necessary instruments for responding to the specific demands of their professional environment. A recurrent finding was that the beginning phase is possibly the most delicate part in the career of a woman judge, but perhaps this holds equally for all judges. This should not be surprising, since many professionals can relate to the feeling of not having been sufficiently prepared for the "real" expectations of the workplace. In our conversations with women judges, they often expressed a wish that their training would focus more on problem-solving situations and on typical situations of judicial proceedings. It is worth noting that the Supreme Court of Pakistan has already taken steps in that direction by collecting data on the judicial training in the four provinces of Pakistan.

Many of the women judges whom we met expressed an eager interest in legal training abroad because the perception is that these opportunities are given to those who are in the good books of the upper judiciary, or that anyway, it would be a good channel for their career. This wish should come as no surprise, given the widespread assumption that Pakistan is a developing country that lacks even basic infrastructure. However, the modalities and the outcomes of the current projects of trainings abroad might deserve attention. After all, most faculty members at the best Pakistani universities hold North American and British degrees, and many members of the Pakistani judiciary not only hold foreign degrees, but also have wide access to international training programs. Furthermore, the curriculum of the Federal Judicial Academy regularly includes classes and workshops led by judges and academics from abroad, especially the UK and North America. The higher courts also exhibit the highest levels of legal sophistication, citing international case

law as well as the finest English and Persian literature. Some of these decisions have recently been made available in Urdu to make them more widely accessible (see also Holden 2011). Hence it is evident that more complex implications revolve around access to and the management of international training, especially because this is about “educating” the élites that have the power to inform the political dynamics of Pakistan. Judicial education in South Asia has always been close to the concerns of the British and perhaps more recently the US, because it is the way to inform the mindset of powerful élites.

One of the most frequently recurring requests by lady-judges during the course of our fieldwork was the wish for more childcare facilities and flexible working hours. In particular, they would find it difficult to participate in training (especially in the capital and abroad) because they would not be allowed to take their children, not even their youngest. In particular, we heard several accounts of female judges who had to stop breast feeding due to the need to travel for training and because their requests to bring a relative or a nanny who could take care of their babies in the proximity of the judicial academy was declined.

At the international judicial conference in Islamabad in 2011, where we screened extracts of the footage filmed for *Lady Judges of Pakistan*,<sup>10</sup> we argued at the request of some female judges that childcare and flexible work hours should be considered to support the successful professional integration of female judges. It goes to the credit of the Honorable Justice Mian Sakirullah Jehan and the Honorable Chief Justice Iftikhar Chaudhry that they publicly announced that childcare facilities were under construction at the Federal Judicial Academy and that more would be built for law courts and judicial academies in Pakistan. The need for childcare facilities was not expressed without a certain caution in the very formal context of the Judicial Conference. We had in fact anonymized the voices in the footage we screened because we did not want to expose our informants unfavorably; nor did we want to favor the impression that the women judges may be voiceless; and neither did we want to unfairly undermine the current efforts of the judiciary to support the newly inducted lady-judges. We felt nevertheless that it was our duty, as social scientists, to highlight not only the many merits of this overall process of women’s induction into the judiciary, but also the areas that could be improved, specifically from the input of the women judges themselves. It was our way to respond to their demands for action.

“Quite interestingly” –an international scholar, who was also presenting at the same panel at the International Judicial Conference in Islamabad pointed out– “women in China do not hesitate to leave their children behind if given the opportunity for international training”. This scholar was referring to his experience of selecting Chinese law students for judicial training in the UK and he described how prospective women trainees are likely to answer questions regarding children. On the basis of his observation, one could infer that some of these junior women judges may not necessarily share the anguish that most Pakistani female judges expressed at having to leave their children behind. One could also think that leaving one’s own families behind when seeking professional experience abroad may be exactly what some women want. In brief, we may have over-interpreted our respondents when supporting their claim for childcare and flexible work hours.

However, this anecdote points to another factor that also pertains to class. It appears that the women judges whose family members are already in the legal profession adjust more easily and quickly due to the greater support they receive in terms of advice and understanding, but also regarding such practicalities as childcare and hectic work schedules. Hence, it was perhaps less the alleged feelings of motherhood and more about financial means that would make the difference here. Indeed, the issue might be reformulated by asking what happens to the

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<sup>10</sup> This specific footage was not used in the final version of *Lady Judges of Pakistan*.

young women with babies and young children when their extended family is not able to provide adequate support? We still remember the tears of the young lady-judges who had to stop breastfeeding because not even a domestic helper would be allowed on the premises during their legal training at the Federal Judicial Academy. One could sideline this issue by indulging in the stereotypes of local inadequacies or perhaps also the anti-Western rhetoric that objects to childcare as being a Western imposed value. Nevertheless, we argue that a greater level of social diversity in the legal profession would be encouraged by providing childcare and other facilities (places for worship, catering, and restrooms), which would better support women in their professional lives without expecting exclusive choices. If one thinks of the ongoing discussions in places where professional women have postponed having children or even having a partner because of the real or perceived incompatibility between family and career, it also appears clear that what is at stake here, overflows the boundaries of the local because it interrogates the overall aims and management of development and education programs.

The delicate balance between academia and advocacy is further highlighted by another anecdote constituting the most recent development of the discussion on female judges and childcare, initiated in 2012. While most younger female judges felt elated by the positive response of the Chief Justice to the childcare request, after almost one year a senior female judge approached me discreetly, arguing that these childcare claims were nothing other than misleading attempts to emulate the West. She explained that she would never entrust the care of her children to any institution. As if unwilling to exemplify the point we make above in this paper, she added that she never needed her salary and had always been able to afford the services of a Philippina nanny for her children. Even if she was apparently contradicting herself, this rhetoric is not unusual among some of the well-travelled and cosmopolitan upper middle classes in Pakistan (but not only), who tend to justify the denial of basic rights to the lower classes by claiming a nativist perspective that refuses interference from "outside".

## 6. Conclusions

In conclusion, the tension between judiciary and the executive which has informed the rise and fall of the Lawyers Movement, also transpires in the protection of women's rights in Pakistan: whilst the Federal Shariat Court, which belongs to the judiciary, has substantially defended so far the appointment of female judges, the Council of Islamic Ideology which is rather a government body, has opposed most pro-women reforms in Pakistan. This paper, in particular, has shown the ways Pakistani women judges construct their own image, their reactions vis-à-vis the stereotype of the submissive Muslim woman, and their interpretations of women's rights. Female judges tend to recognize a significant role to Islam, as infusing a certain legal awareness regarding women's rights. As such this paper confirms Zia (2009) who has highlighted the impact of Islamic feminism for reformulating gender equality, and a certain degree of resistance to patriarchy, but within the tenets of Islam. I argue, furthermore, that although the binary opposition between secular and Islamic feminism does not fully make sense of women's movements in Pakistan, it adequately points at how class-shared values have impacted the reception of the women's rights agenda. Feminism and women's rights in Pakistan have an elitist matrix but are gaining some credit in the format of Islamic feminism.

Women judges in Pakistan express a keen wish for international acknowledgement that takes cultural specificities into account. Perhaps, from the point of view of the lady judges themselves, the most all-encompassing conclusion of this paper should be that the lady-judges of Pakistan are skillful and creative in combining culturally informed expectations with the needs of their profession. The leading example of such creativity is gender segregation reformulated as an indicator of accountability and a way for female judges to be accepted even by the most conventional strata of Pakistani society.



Women judges' narratives develop in Pakistan also around themes that are significant at the global level: experiential teaching and problem-solving learning; childcare; "softness" as a controversial argument that has the potential to act as a plus and not as a minus; difficult execution of state-courts' decisions in a situation of *de facto* legal pluralism that exceed the state; and communication with peers and seniors. Hence, this paper, to some extent confirms Sonneveld and Lindbeck (2017) in that "the woman judge" does not exist, but the findings here go further to suggest that the ways women judges see themselves and develop their expectations from society, has a relational impact at the local level: female judges in Pakistan claim the acknowledgement of a professionalism that relates to the local context as much as it connects with the global.

The struggle becomes therefore for the social scientist to adequately make sense of these socio-political and economic dynamics without becoming an instrument in their hands. As this paper has shown, context-informed analysis will benefit from taking into account the making and re-making of identity-processes that go beyond the narrow concept of nation in order to highlight the local implications of the global development agenda. The international trend is that the representation of women in the legal profession is crucial to a just decision-making process, and the lady judges of Pakistan are evidently filling the gap implied by quantitative data. The challenge lies in whether this change will be mainly a formal one or also one that leads to a consistent inclusion of women at all levels of the judiciary. As Schultz and Shaw (2013) have shown only too well, the inclusion of women in the judiciary should be considered an achievement regardless of the issue of whether a gender-balanced judiciary is indeed more accountable and just. Obnoxious arguments highlighting the obstacles to women's participation in social life a justification for their exclusion, have received credit for too long.

This paper has also provided evidence of the facile manipulation of the global development agenda by both national and international actors: on one hand short-term gender representation for the sake of international image and on the other the international donors who appear to conveniently reformulate women's rights in order to avoid the cost related to childcare and security of employment. All this in the backdrop of a social activism that, in spite of its goodwill and good cause, too often lacks the expertise for appraising the complexity of social facts at the ground level. Hence, the gaps of information in the human rights reports, which this paper has filled by discussing the achievements as well as the failures of female judges' appointments. Such a complex social phenomenon also hints at for-profit strategies that intoxicate some of today's international aid. Eventually, this paper shows that women judges in Pakistan share similar preoccupation with the other women and men in the judiciary around the world regarding better working conditions, training, and the combination of family and profession. Yet, the sustainability of female representation in Pakistan might depend also on whether or not their specific claims for a context appropriate professionalism will indeed strengthen their legitimacy within Pakistani judiciary as to break the glass ceiling on the longer term.

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