UNIVERSITY OF PÉCS

DOCTORAL THESIS

Developing Pakistani Contract Law Regarding Gender Equality Issues

The Lessons of Comparative Contract Law Questions of Anglo-Saxon and Continental European Legal Systems

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Submitted by the Requirements for
the Degree of PhD by Doctoral School of Faculty of Law of PTE

Pécs, 2022

DECLARATION

I, **Hassan Amna,** do hereby declare that this dissertation is my original work compiled from university library books and online educational platforms and that it has not been presented and will not be presented to any other learning institution for a similar or any other award.

I can confirm that my thesis was copy edited for conventions of language, spelling and grammar through the online tool *"Grammarly".*

ACKNOWLEDGMENT

During my research work, there are some people who in one way or another made significant contributions to enable me to reach this final stage. Though, it is hard to mention them all by their names; however, I would love to mention some of them. I would like to show my appreciation to the members of my supervisory committee, Dr. Máté Mohai, Dr. Réka Pusztahelyi, Dr. János Erdődy, Prof. Dr. Herger Csabáné and my colleague Dr. Krisztina Fajtai, for their support and assistance in the completion of this dissertation.

I am highly indebted to my supervisor, Prof. Dr. József Benke, who inspired my interest in the field of comparative contract law and played a key role in supervising me with an unending support and guidance, despite having other responsibilities.

I deeply appreciate Tempus Foundation and Stipendium Hungaricum Scholarship for their financial support during my four years of study in Pécs. I also value the friendship and efforts of the staff of the Continental law Department, Doctoral School of Law at the University of Pécs, Administrative Staff of Faculty of Law, and PTE Language School with a special mention of Ms. Szilvia Becs. I also convey my sincere gratitude to my family and friends especially Sanjai Kumar and Adnan Hayat for their support, encouragement, constructive ideas and kindness that enabled me to undergo the whole academic requirements including this study more effectively. Special thanks goes to my friends in Pécs, Budapest and my colleagues for supporting me during the whole period of undertaking the study. I appreciate their contributions. Thank you!

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ABBREVIATIONS

Art.	Article
CISG	Convention on Contracts for the International Sale of Goods
EU	European Union
FCC	French Civil Code
GCC	German Civil Code
Sec.	Section
TLTs	Theoretical Legal Techniques
UK	United Kingdom
UN	United Nations

DEVELOPING PAKISTANI CONTRACT LAW REGARDING GENDER EQUALITY ISSUES

THE LESSONS OF COMPARATIVE CONTRACT LAW QUESTIONS OF ANGLO-SAXON AND CONTINENTAL EUROPEAN LEGAL SYSTEMS

Abstract

The legal provisions of a contract vary from one country to another, therefore, forming a contract between parties from various legal systems runs the risk of a fault or imperfection in the formation of a contract, which might affect one party's rights in the event of a contractual dispute. Although both the continental and Anglo-Saxon legal systems employ similar legal theoretical techniques with regards to the interpretation of a contract, yet they differ in their meaning and applicability. Therefore, this study aims to develop a comparative analysis relating to the role of contractual legal techniques between the Contract law of Pakistan – an Anglo-Saxon country, and the European (EU) countries – continental law countries, especially Germany and France. Not only this, but the study also aims at comparing women's general as well as the contractual status between the two different legal systems for the purpose of addressing issues of gender equality and proposing suitable recommendations. The thesis consists of four major chapters. Chapter 1 provides insight into the reasons for comparing contract law between two different legal systems. Chapter 2 focuses on the prevailing Shariah law and women's rights in Pakistan at length. Chapter 3 highlights the need for a uniform European contract law and analyses several contractual theoretical legal techniques between Pakistan and the EU in a comparative method. Chapter 4 comprehensively compares the legal and contractual status of women in Pakistan and the EU to propose reforms in the existing unequal treatment of the female gender in Pakistan. Finally, Chapter 5 summarizes the entire thesis work compactly, providing solutions to existing problems in Pakistan either by incorporation of the EU laws into the domestic legislation or amendment to the current legislation concerning contracts and gender equality issues.

Key Words: *Comparative Contract Law; Pakistan v. EU; Anglo-Saxon v. Continental; Theoretical legal Techniques; Gender Equality Issues.*

Chapter 1: Comparative Contract Law – Pakistani v. European Contract Law

Abstract

In the words of Shannon L. Alder, "the only chains you should wear in life are the chains of commitment,"[1] this chapter also contributes towards the significance of commitment (or precisely speaking) the contract and laws of contract in an international scenario by applying a comparative law method. This chapter aims to provide a comparison of Pakistani and European contract law to find solutions to the lacunas existing in them, for they both belong to a different set of legal systems, Anglo-Saxon and Continental legal systems respectively. In the beginning, the chapter opens up with a brief introduction stressing 'contract' as a part and parcel of any society, be it in any form, from prehistoric times till to date. Gradually, it states the reasons for choosing the contract law for comparative analysis amongst the other branches of private law. The primary reason is the international character of the contract law as witnessed in the incorporation of contract law in certain international conventions like the Contracts for the International Sale of Goods (CISG). The chapter then chalks out the justifications behind employing the comparative methodology for this research analysis in detail. As the British ruled Pakistan for a long time, therefore, both share the same legal system - the Anglo-Saxon legal system, whereas the European member states follow the Continental legal system based on the French and German civil codes. This provides the impetus for explaining the motive for developing Pakistani contract law regarding gender equality issues to propose solutions or reforms for future. The surge does not end here, it continues to explore the working of the laws of Contract Act of both the legal systems through case-study analysis which proves the formulation of some common principles of contract law that are internationally validated. In the end, the Chapter revisits the essence of the research by summarizing the need for comparative analysis.

Keywords: *Comparative Law Methodology; Contract Law; CISG; Anglo-Saxon v. Continental legal system; Pakistani and European Contract Law; Case-Study Analysis.*

[1] Alder, Shannon L., Contracts Quotes, GOODREADS AUTHOR, 2011. https://www.goodreads.com/quotes/tag/contracts, accessed March 12, 2019.

Introduction

Generally speaking, a contract is defined as an agreement that is legally binding upon the parties to the contract, be it oral or written[2]. To monitor the application of contract law, the nature of society must be kept under consideration. For if an individual were all alone by him/herself on the earth, it would be far easier to believe that he/she could survive alone without the aid of such contracts or laws. All that he/she requires would come in handy when and where needed without any dependence or reliance on anyone else. However, to imagine a society without having to deal with contracts or alike laws is unbelievable in modern times. During the prehistoric times, people were nomads, moving from place to place, who shared the necessities among themselves like food and shelter. The prevalent method to buy and sell goods was through the barter system in those times. That is to say, the parties would meet, inspect the goods, and exchange them with other goods if they so desire. But there was no need for any future contractual obligations between the parties like the implications of future non-performance etc.

Moving on, feudalism was prevalent in entire Europe till 1400, where the legal status of an individual was recognized by the group or class, he/she belonged to and giving up on that would leave him/her isolated or towards abhor. For instance, if a person bears the status of a landlord or servant, he/she must perform their role without any contract. It is their legal status that gives them their role of duties to be performed, and not only this, but their future generations were also to inherit the same[3]. To be more specific, an employee had to work on the wills and wishes of the master that is to say everything he so demanded. In return, he/she was promised food and shelter. The situation only got better through enthralling changes in the economy and the enhanced vision for division of labour, which encouraged the people to enter contracts with free will and mind. This entire shift from 'legal status' to 'binding contracts' took almost four to five centuries for Europe to be accomplished. This shift relies heavily upon two basic reasons. One reason is the change of economy, that is, mostly agricultural to a large industrial economy, and the second reason is the vital change in perception of the society. The ideals of Liberalism were adopted which allowed for freedom for every single individual to shape his/her life according to his/her own choice. For this to take place, the free will of the parties was seen as a necessary evil, thus leading to the possibility of laissez-faire or freedom of contract.

1.1. Why Contract Law and NOT other branches of the Private law?

Besides North Korea, the world today has predominantly moved towards a market economy that emphasizes the need for freedom of contract in the exchange of commodities or services based on the mutual terms and conditions of the parties to the contract. In such a market economy, the government has no decisive role in the quantity of production of goods or fixing the price of any commodity. It is regulated keeping in view several factors like the need of people, supply and demand mechanism, and market price for a given product etc. Therefore, setting the ground for the vitality of *'contracts'* in any market economy, be it in any form – the continental Rhineland, Nordic social model, English-American capitalism or China's

[2]Indian Contract Act, 1882: Section 2(h).

[3]Shuchman, Philip: Aristotle's Conception of Contract. In: The Journal of the History of Ideas 23/2 (1962) 257–264.

socialism. To safeguard the real essence of a contract that is binding in nature and bears legal consequences if not performed, *'Contract Law'* comes into play. Here, Contract Law becomes the stronghold of the modern world by regulating the transactions of all kinds under the contracts to keep the ongoing market economy intact. It does so by providing an opportunity to all the actors in the market economy including individuals, companies, certain governments, and non-governmental bodies (NGOs), charities, etc. to engage in the socio-economic life. A simple example of the working of the Contract Law to ensure smooth working of this market economy can be seen in cases where customers turn back on their orders thus ruining the business of the manufacturers or where landlords keep the tenants under the impression to evict them at any time they want. In such instances, the Contract law gives the solution by providing a network of rules and regulations to be enforced through mutual consent of the society. This has been validated by Aristotle himself in his renowned work, The *Rhetoric's* where he said that there exists no mutual intercourse among men in case the authority and sanctity of a contract is destroyed.

By keeping this consideration in mind, contract law would be the focus among other pillars of the law of obligations, since it *is considered to be more dynamic in nature, that is to say, it is not static* like other branches of private law like family and succession laws. There exist legal variations besides the socio-cultural, economic, and political variations among the laws of various countries. They might not be so significant concerning other branches of private law e.g., family law, inheritance law or property law owing to the degree of national vision in such areas, but such legal variations under the realm of contract law are considered to be an obstacle to the international transactions. Therefore, it is deemed to provide for legal predictability and security in contract law to promote international trade and minimize the risk of international businesses. A detailed emphasis of this paper/chapter upon contract law would suffice the cause for choosing contract law besides other branches of private law under the upcoming sub-heading *"International Character of Contract Law"*[4] which proves why Contract Law is considered to be international in substance and character.

1.2. International Character of Contract Law

According to the historical perspective of teaching and learning Contract law, it can be seen that it has been mostly domestic in nature, that is restricted within the boundaries of a specific nation. The proof for the aforementioned perspective can be analysed from the contract law textbooks of any given nation. Such textbooks are intended to impart students with a fundamental knowledge of contract law in their native language that is subject only to the jurisdiction of such a nation. However, besides these conventional textbooks, there is a lot of material available online or in print form that offers students with global or comparative aspects of contract law, which enhances their knowledge from a fundamental level to an international perspective. This answers my choice for research on choosing contract law above other branches of private law. Contract law is considered to be a discipline that assumes an international character by way of a comparative approach. That is to say, the fundamentals of all contract laws are based on the same principles and methods, as validated from the employment of comparative method same as for any other academic field e.g., economics, or psychology.
There exist two arguments to substantiate the international character of contract law. According to the first argument, it is believed that substantive law is no more considered to be the sole

[4]Goode, Roy: International Restatements of Contract and English Contract Law. In: The Uniform Law Review 2/2 (1997) 231-247. Available online at https://doi.org/10.1093/ulr/2.2.231.

product of any specific nation and it should be reflected in the textbooks as well. To support this argument, European Union (EU) legislation can be cited. Law in the EU is shared equally by the legislation of individual Member states as well as the EU Legislation and Court of Justice. Moreover, the regulation of the Convention known as, 'Contracts for the International Sale of Goods-CISG' has increased the potential of contract law as the applicable legal regime among the signatories of the said Convention. All this leads to the perspective of considering contract law in an international aspect, rather than focusing on the domestic aspect alone. If applied, this perspective would help future law graduates in possessing the expertise of contract law, not limited to their jurisdiction but also related to other jurisdictions which they can imply in their professional field to sort out the best possible outcome through a comparative approach.

The second argument states that contract law is not only about theory, but also about practice too. To be clear, mastering the substantive law alone would not give desired results unless the methods to master the field of contract law are unrevealed. Therefore, it is necessary to think and act like a lawyer instead of just knowing the facts of the case or sections of a particular statute, for they are bound to change with time. Similar to the approach of economists, who do not depend upon the economy of one country but analyse various economies, lawyers should take the contract law as a practical method to analyse the contract laws of various nations and apply the legal approach that best suits the given situation. Thus, widening the sphere of contract law and helping in making it international by a comparative approach. However, this approach does not imply that the differences among the contract law of various nations would be ignored. It is the variations among the legal systems of various nations that need to be harmonized to help explore and find the right solution for a given intricacy[5].

It is broadly accepted that contract law is the fundamental core of comparative law owing to its economic significance and the practical requirements emerging out of international transactions**.** Therefore, harmonizing the contract law is of great importance for the development of economic integration on both European and international levels. The international facet of contract law demands a non-tariff barrier regime to trade while national contract law considers such tariffs essential to trade. In such situations, where a conflict between the national and international character of a private law occurs, the solution lies in legal harmonization. That is, a balanced approach needs to be applied which favours the removing of national trade tariffs to promote international businesses and keeping the character of contract law international to advance legal predictability and security as aforementioned. The process of legal harmonization should be implied at both levels, European as well as international level, as they both impact one another.[6]

At this very point, the United Nations Convention on Contracts for the International Sale of Goods (CISG)[7] can be cited in support of harmonization of the contract law, substantiating its international character at a global scale. The CISG Convention is considered to be one of the influential Conventions for two reasons: 1) It has been ratified by a majority of the European nations and 2) It plays an essential role in the national law of some nations. In effect since August 1st, 2011, the CISG Convention is playing a significant role in the domestic law regime. Over eighty-seven (87) countries govern their sale of goods internationally through the said

[5]Smits, Jan M.: Contract Law: A Comparative Introduction. Second Edition. (UK: Edward Elgar Publishing, 2017). Preface to the Second Edition.

[6]Glenn, H. Patrick: The Aims of Comparative Law. In: Smits, Jan M. Second Edition, Elgar Encyclopedia of Comparative Law (Cheltenham/Northampton, MA: Edward Elgar, 2012) 69-70.

[7]United Nations Convention on Contracts for the International Sale of Goods, 1988.

Convention. It is believed that this international Convention is made by compromising the laws of the contract between both the legal systems namely, the Anglo-Saxon law system and continental law system.[8] But this does not mean that every single provision of the CISG is a unique law, or it was made from a compromise between the afore-said legal systems. Not at all, but most of the provisions of the CISG are based on the doctrines or principles embedded in the contract laws of either the Anglo-Saxon law system or continental law system. As it is well known that once adopted, the CISG becomes the part of national law of the Contracting State. Therefore, it can be seen that every Anglo-Saxon law country has some civil legal rules to abide by in cases of international sales and vice versa, as the applicable law is the CISG which is a mixture of laws of both the legal systems.[9] Since the objective of the CISG Working Group was based on finding the suitable solution by comparison for every sales problem at a global level, therefore, it gave preference to the legal rules of one legal system above the other. The intention was not to disregard the rules of other legal systems, but it was presumed that certain areas were better addressed by one particular legal system than the other to promote the best at international sales regime. In the light of the above, it can be said that the CISG Convention can also be utilized as an educational source for academic purposes, where contract law could be taught and learnt in the light of a comparative approach[10].

1.3. Why Choose Comparative Methodology (CM) for Research?

Nowadays, the majority of the contracts are written based on either English or American models of contracts, even though they originate and regulate the legal relationship under either the Anglo-Saxon legal system or the continental legal system. Such models of contracts are written based on the needs and nature of a said Anglo-Saxon law or continental law system where they are meant to be enacted. Resulting therefore in part effective and part non-effective contract model, that is to say, some parts of the contract remain validated while other is held void or redundant, in case the law that governs the region is opposite to their legal system. So, to strike a middle ground between both the legal systems, it is likely to subject such contracts to certain non-state law sources, also known as 'soft law'. These non-state sources of law can help reduce the tension between both the systems by taking under consideration the concepts of fair dealing and good faith existing under them which justifies the use of the aforementioned comparative methodology approach for finding a common ground between the two[11].

According to the comparative law approach, it is stated that most of the differences and tensions between both systems could be concentrated towards a *common core* that is mutual for both of them. To find this common core or junction, it is highly appreciated to analyse the legal problem or issue in totality existing under each system and then sort out the solution to the problems in totality as permitted under each system. In so doing, it can be achieved that the result was the same no matter how unique or different the procedure or method employed to find that solution. Once sorted out, these common results make up the common core for both

[8]Bianca, C. Massimo / Bonell, Michael Joachim: Commentary on the International Sales Law: The 1980 Vienna Sales Convention. In: MUNOZ, Edgardo. Teaching Comparative Contract Law through the CISG. (The Indonesian Journal of International & Comparative Law, 2017). Reference 2.

[9]See CISG: Art 1 (1) (a) and (b).

[10]MUNOZ, Edgardo: Teaching Comparative Contract Law through the CISG. In: The Indonesian Journal of International & Comparative Law 4/4 (2017) 727.

[11]Moss, Giuditta Cordero: International Contracts between Anglo-Saxon law and Continental law: Is Non-state Law to Be Preferred? The Difficulty of Interpreting Legal Standards Such as Good Faith. In: The Global Jurist. 7/1 (2007)1-40, esp. 1-2. Available online at http://www.bepress.com/gj/vol7/iss1/art3.

the legal systems.[12] Although the idea of finding a common core is quite significant, yet it may prove to be of no use in case it is employed to sort out disputes between individual parties without causing any impact upon the improvement of legislation or the academic field. For in cases of disputes among individuals, the need for finding common core is not always necessary. The only thing a lawyer needs in such instances is a strong knowledge of the applicable laws under the circumstances. However, in the latter sense, where finding a common core is the essence of a dispute resolution and result in legislative or academic improvement, the emphasis must not only be on the similarities of the legal systems but also on their differences to chalk out the proper framework of rules and regulations that can work out unanimously for both the legal systems in instances of international friction[13].

Moreover, this research focuses on the comprehensive analysis of both the legal systems in a comparative manner which in itself justifies the reason for the use of the comparative methodology. According to H. Patrick Glenn, the use of this comparative methodology has certain aims[14] which he listed as 1) A means for acquiring knowledge and learning the law with a better understanding, than elsewhere, 2) Understanding the evolutionary process in the study of law by comparing various legal systems, their similarities and differences etc., 3) An opportunity to make better improvements in the existing legal system, and 4) Paving way for harmonization of the various legal systems.

Whenever legislators or scholars think to bring changes to their legal system, they cannot help ignoring the bigger picture. They cannot bring anything to the table with a narrow vision, and therefore, must think out of the box by implying the concept of *tertium comparationis*[15] which may involve importing some rules and regulations from foreign legal systems and comparing them to find out a balance. But this cannot be a permanent solution as it may not be suitable for every circumstance. Hence, it requires a comprehensive contextual approach which also helps suffice the need to find out a comparative analysis of the evolutionary phenomenon between both the legal systems. This type of comparative methodology which takes the socio-economic or historic aspects into account has been stressed out by many scholars, for it substantiates the authenticity of the resulting analysis.

1.4. Why Compare Contract Law Between Pakistani and Anglo-Saxon Legal System and Continental European Legal Systems?

There exist two major legal systems worldwide that have marked influential namely, the Anglo-Saxon legal system, and the Continental Legal system (to be specific - the French and German Civil Codes). Nearly all the countries around the world have adapted to either of the two legal systems. During the times of colonization, the British ruled over the huge empire and wherever they went, they took their laws with them. [16] They enacted an Anglo-Saxon legal

[12]Pejovic, C: Continental law and Anglo-Saxon law: Two different paths leading to the same goal. In: The Victoria University of Wellington Law Review 32/3 (2001) 839-841.

[13]Pejovic (2001) 839-841.

[14]Glenn, H. Patrick: The Aims of Comparative Law. In: Smits, Jan M. Second Edition, Elgar Encyclopedia of Comparative Law (Cheltenham/Northampton, MA: Edward Elgar, 2012) 65-72.

[15]Hoecke, Mark Van: Methodology of Comparative Legal Research. In: Law and Method, 2015. Available online at https://www.bjutijdschriften.nl/tijdschrift/lawandmethod/2015/12/RENM-D-14-00001#content_RENM-D-14-00001.5738700789.

[16]Daniels, R. J. / Trebilcock, M. J. / Carson, L. D.: The legacy of empire: The Anglo-Saxon law inheritance and commitments to legality in former British colonies. In: The American Journal of Comparative Law 59/1 (2011) 111-178, esp. 111-117.

system (also known as, the Anglo-Saxon law) in the countries they ruled for example North America, Australia, New Zealand; some parts of Africa, and Asia, most significantly the subcontinent (India). However, the influence of the Anglo-Saxon legal system remained restricted to Wales, Ireland and at the least Scotland. Since their independence, the Latin American states based their legal systems mostly after the Roman and French continental legal system.

However, the influence of continental law seems to be more effective on the Islamic countries, where parts of the principles of continental law are deemed to be derived from their holy book - the Quran, and some parts from the previous colonizers like the French in the Maghreb countries. Turkey is also continental law country that has imported the Continental legal system from the European Civil Code. As far as East Asia is concerned, it is believed that legal systems existing in Japan, Korea and China today were all considered to have been designed on Western legal style, with a few variations in certain ways.

If we analyse the European countries, it is seen that they have a majority of continental legal system operating in their countries. The two famous codes that became influential in Europe include the French Code[17] and the German Code civil[18]. The laws contained in these codes were adopted into the EU law and they penetrated the legal systems of the member states, thus making the European regime mostly continental law in nature.

The afore-going discussion makes it quite clear that Pakistan has quite a different legal system than that of Europe's legal system. Pakistan follows the Anglo-Saxon legal system since the times of British rule in the Subcontinent[19] and therefore, the contract law in Pakistan differs from the European contract law, which is made under the continental legal system. This difference of legal system between the two provides a sound ground for a comparative analysis of the contractual intricacies that arise and help find a common core for such problems in future. It is based on the presumption that if the desired results or outcomes are the same, then it does not matter that the tools or techniques to achieve those results were different. There exist certain areas in the contract law of Pakistan that need a solution, and this may be true for the European contract law as well. The answers to such issues can be sorted out by doing research based on the application of comparative methodology between the two. But before that a clear understanding of the legal process under both the legal systems is essential. The law of contract is referred to as differing names under both legal systems. The Anglo-Saxon law refers to it as the law of contract/torts, whereas the continental legal system refers to it as the law of obligations. Commonly speaking, Anglo-Saxon law is defined as that body of law that is a consequent result of the decisions made in the courts or alike bodies such as the tribunals.[20] Notwithstanding, Anglo-Saxon law is characterized as the 'judge-made law' or more precisely as the law from 'precedents'. Such laws or precedents help resolve situations of conflict by looking into the past cases for relevant solutions.[21] Where parties to a contract have a difference of opinion, the judge possesses the authority to look into the previous cases of like nature to acknowledge the already passed judgment and apply to the current case, as need be. That follows the fact that if there is a case that has the same reasoning as involved in the

[17]Pothier, Robert-Joseph / Portalis, Jean-Étienne-Marie: The Code Napoléon, 1804.

[18]Savigny, Carl Friedrich von: Bürgerliches Gesetzbuch (BGB), 1900.

[19]The Code Napoléon, 1804.

[20]Garner, Bryan A ./ Black, Henry Campbell: Black's Law Dictionary. Tenth Edition. (St. Paul, MN: Thomson Reuters, 2014) 334.

[21]See Marbury vs. Madison Case, 1803 (5 U.S. 137).

previous case, the judge is bound to follow the afore-passed judgment, which is based on the principle of stare decisis. However, if the case at hand is entirely different from the previous cases and bears no authority in the Acts of Parliament, then in such instances the judges are allowed to use their reasoning according to the needs of the case and pass a decision that is a befitting solution for that case.[22] In giving such a decision, the judge gives his reasons for the decision and they are stated as the opinion of the judge which is synthesized with the previous decisions to form a binding precedent for future cases of alike nature at hand. From this perspective, it is clear that the Anglo-Saxon law stands in sheer opposition to the laws passed by the Parliament and enforced by the executive body, as both have different origins and modes of enforceability. For Anglo-Saxon law, the origin of law arises from the already decided principles of stare decisis, which apply similarly to all the cases with similar facts and this rule remains at the core of Anglo-Saxon law systems.[23]

Whereas the situation is reversed in instances of decisions that are based on the statutes of Parliament, as the judge is bound to follow the laws embodied in such statutes, both in letter and spirit. This scenario best fits under the continental legal system where the judges lack such authority as under the Anglo-Saxon law. If there is no statutory provision available for a case, the judges have no authority to act on their own. Therefore, it becomes necessary to define the continental legal system as well. Although the continental legal system originated in Europe, its basis lies in the principles articulated from the Roman law[24] that states the main principles of the system are codified into the Acts of Parliament which are referred to as the primary law source.

Theoretically speaking, continental law has its procedure, that is to say, it flows from the set ideals, generates basic principles, and differentiates between the substantive and procedural rules. Continental law considers precedents or judge-made law as a secondary source of law in comparison to statutory law. To view it from the perspective of a judge under a continental law system, it can be seen that he enjoys complete freedom of independence in interpreting the statutory texts, but he surely lacks the predictability factor, opposed to a common-law judge. Under the French code, it was forbidden for the judges to use their intellect and pass decisions based on their reasoning besides the statutory laws.[25] In continental law systems, the gap of judicial opinion is filled by the significance given to scholarly writings and literature.

The table below provides a comprehensive analysis of the differentiation of these two major legal systems.[26]

[22]Clarke, Desmond M.: Judicial Reasoning: Logic, Authority, and the Rule Of Law In Irish Courts. In: The Irish Jurist 46 (2011) 152–179, esp. 152.

[23]Carpenter, Charles E.: Court Decisions and the Anglo-Saxon law. In: The Columbia Law Review 17/7 (1917) 593–607.

[24]Mousourakis, George: Roman Law and the Origins of the Continental law Tradition. (Springer, Cham, 2014) 95-159.

[25]Clarke (2011) 152-179.

[26]Craig, P. M.: Structural Differences between Common and Continental law. In: SEMINAR-The Jurist 9/3 (1951) 50-71, esp. 53-54.

Table 1: Difference between Common and Continental law Systems[27].

	Anglo-Saxon law system (E.g. Pakistan)	**Continental law system (E.g. Europe)**
Sources of Law	*Primary:* Judge-made laws/Precedents. *Secondary:* Acts of Parliament.	*Primary:* Acts of Parliament. *Secondary:* Court / Judicial practice.
The extent of Judicial Independence	Judges enjoy a great degree of independence.	Judges enjoy complete independence from the organs of the state (Executive and Legislature).
Role in policy-making	Courts share their role in policymaking through judge-made laws to a greater extent than other organs of the state.	Courts share an equal role in policymaking as other organs of the state.
Trial procedure	Lawyers are in charge of representing the cases in courts where judges remain unbiased.	The entire procedure is dominated by the judges who analyze the cases on their prudence.
Qualification of Judges	Judges are either appointed or elected, commonly referred to as career lawyers.	Judges by career.
Commonly referred to as	Anglo-Saxon law or English Law.	Continental or European Law
Examples	UK, Pakistan, the US except for Louisiana, Australia, Canada etc.	All European states with few exceptions, Turkey, Iraq, Switzerland, Thailand etc.

There lie several arguments for comparing the contract law of Pakistan and Europe, besides the difference of common and continental legal systems. Let me introduce the three very significant reasons for which I chose to compare them for my research paper. The first and foremost reason lies in the fact that comparing the contract law of Pakistan and Europe, would lead to the transformation of contract law into an international facet, a transformation that reflects *'jus-gentium'* instead of *'jus-naturale'*. That is to say, it will pave way for the discovery of some common fundamental principles in the realm of contract law that would be

[27]World Bank Group: Key Features of Anglo-Saxon law or Continental law Systems. Public-Private-Partnership Legal Resource Center, 2016. Available online at https://ppp.worldbank.org/public-private-partnership/legislation-regulation/framework-assessment/legal-systems/common-vs-civil-law.

internationally recognized and adopted.[28] Thus, making the field of contract law an international attraction with a huge impact upon academic diversity.

The second reason for the comparison emphasis the need to explore the diversity of socio-legal evolution within the extended realm of social theories to understand the variations found in both systems. For that purpose, the contract law can help in providing a better understanding of the factors that led to such different evolutionary phases in the societies of both systems. Through this comparison of contract law across Pakistan and Europe, the forces and factors that lead to changes in the societies and systems can be easily examined. According to the Marxist approach[29], the particulars of the legal structure of any society can be easily witnessed in the change of economy of a society. The Marxist prove their point of view by indicating the response of several societies to the change in production, thus leading to the conclusion that the economic base of society impacts upon the type of legal system it adopts. Similarly, the perspective of the historian or social scientists would be based on the premise that the legal system of society originates independent of the economic base of a society and depends upon other factors like the cultural or historical aspects of society.[30] All these points towards the different forces and mechanisms in work for the development of such diverse societies and legal systems in the world which can be analysed by a comparative methodology. This approach can provide impetus in finding solutions for the lacunas of contract law in both legal systems via comparative research methodology.

The third reason amounts to a positivist or more appropriately, the utilitarian approach that is more common to England than anywhere else. This approach seeks to find the best solutions to the contractual legal problems by analysing and comparing the available laws and techniques in both systems. The purpose of adopting this approach is to determine better solutions in other legal systems to incorporate them later into one's national legal system. The evidence of this approach could be seen during the nineteenth century when the English contract law adopted and incorporated many Roman and Continental laws into its domestic law.[31]However, this was one-way traffic and no such signs of influence from the English contract law have ever been cited in the laws of France or Germany. Although it goes beyond the aims of this chapter to present the diverse history of thoughts on and analyses of legal transplants, yet the problems of legal transplants must not be overlooked before suggesting the incorporation or import of a law from another legal system.

Legal transplants, in fact, are often a multi-channel occurrence. They aren't limited to formal, government-driven one-way imports of government-created laws and notions.[32] Legal notions have been imported and exported all over the world, and they continue to do so.[33] It now appears logical in the growth of globalizing law for the national to borrow from the

[28]Collins, Hugh: Methods and Aims of Comparative Contract Law. In: The Oxford Journal of Legal Studies 11/3 (1991) 396-406.

[29]Miles, John: Social Classes in Classical and Marxist Political Economy. In: The American Journal of Economics and Sociology 59/2 (2000) 283–302.

[30]Unger, Roberto M.: Social Theory: Its Situation and Its Task. (Cambridge: Cambridge University Press, 1987) 80-170.

[31]Simpson, A.W.B.: Innovation in Nineteenth Century Contract Law. In: The Law Quarterly Review 91/2 (1975) 247-278.

[32]Fuglinszky, Ádám: Legal Transplants: Snapshots of the State of the Art and a Case Study from Central Europe– Post Transplantation-adjustment of Contractual Liability in the New Hungarian Civil Code. In: European Review of Contract Law 16/2 (2020) 274.

[33]Chen, M. Müller/ Müller, C./ Lüchinger, C. Widmer: Comparative Private Law. (Zürich/St. Gallen: Dike, 2015) Para 253.

international, and for one national to borrow from another national[34],' to be inspired by and regard the legal solutions of other countries as examples. The socio-cultural and historical embeddedness of legal systems should not be underestimated, though, because societies and cultures are always in contact; they seldom, if ever, evolve independently and completely. As cultures advance through comparable phases of development, there is some consistency in the creation of certain demands, and there is a natural propensity toward imitation, which may be prompted by a desire to speed progress or seek common political and socio-economic goals.[35] Those who reject the transferability of law in general (with regard to socio-cultural, economic, and political embeddedness) also deny a legal system's ability to evolve and adapt, because the law cannot change if it is chained by[36] (as a captive of) those particular metajuridical variables (whether legal transfers or internal evolutionary initiatives are blocked). Religion, climatic, socioeconomic, and political elements are unquestionably relevant; these factors, as well as the legal subsystem, impact each other, but they are not barriers to legal borrowing. Eörsi emphasizes in Hungarian literature that "legal migration" is a normal and natural phenomenon that is part of the global convergence in the legal realm.[37]

The reasons for legal borrowings have been classified in a variety of ways. Several publications have identified three distinct categories. The first is the 'cost-saving transplant,' which is typically linked to the objective of enhancing economic performance by simplifying the creation of efficient legal solutions[38] (if one solution has already worked, the legislative drafter or the judge may save time and thought by adopting it).[39] The externally mandated transplant, which may be traced back to the imposition of law by military conquest or expansion, is the second kind; these transplants are frequently sabotaged, resulting in a conflict between statutory law and legal reality.[40] Unless the provisions have already taken root owing to their reasonable authority, they will typically collapse if the driving powers vanish. As a result, in the long run, voluntary receptions have a greater chance of 'survival' (and effective operation). The so-called legitimacy-generating transplant falls within the third group (based on the prestige of the transplanted system or rule). They are also likely to fail as soon as the donor system's status is questioned.[41] Müller Chen, Müller, and Widmer Lüchinger mention 'semi-voluntary' and 'factual' transplants in addition to the 'traditional' voluntary and forced transplants. The former appears to be a voluntary import, but in the context of globally interconnected markets and other economic and/or socio-political necessities, bounds, and constraints, there is no other option than – for example – 'to pick the most efficient model.' The author cites another example: ‘if the recipient country wishes to keep up with alliance policies and/or join a particular association of States, then receipt of their harmonized law is a must.’ By that they mean "factual legal transplant," or in other words "spontaneous legal migration," which occurs when a group of individuals moves from one location to another and takes their

[34]Örücü, E.: Comparative Law in Practice: The Courts and the Legislator. In: Örücü, E. / Nelken, D. (eds): Comparative Law - A Handbook. (Oxford/Portland: Hart, 2007) 412.
[35]See Mousourakis, G.: Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach. In: Acta Juridica Hungarica 54/3 (2013) 219, 233.
[36]Rehm, G.: Rechtstransplantate als Instrument der Rechtsreform und -transformation. In: Rabels Zeitschrift für ausländisches und internationales Privat-recht 72/1 (2008) 31.
[37]Eörsi, G.: A közvetett károk határai’. In: Németh, J. / Vékás, L. (eds): Emlékkönyv Beck Salamon születésének 100. évfordulójára, 1885–1985. (Budapest: ELTE ÁJK – BÜK, 1985) 66.
[38]Miller, J.M.: A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process. In: American Journal of Comparative Law 51/4 (2003) 839, 842, 845–846.
[39]Graziadei, M.: Comparative Law as the Study of Transplants and Receptions. In: Reimann, M. / Zimmermann, R. (eds): The Oxford Handbook of Comparative Law. (Oxford: Oxford University Press, 2006) 459–460.
[40]Graziadei (2006) 456–457.
[41]Graziadei (2006) 457–458.

own law with them.[42] Kramer proposes a new typology: in addition to the factors listed above, he includes the fact that the recipient State is small (as with the reception of the Austrian civil code, the ABGB, in Liechtenstein) or underdeveloped (developing countries); the legislator is under time constraints (he mentions Kemal Atatürk's establishment of the Turkish Republic in 1922 and the transformation of the Central European States after 1990), and finally the neighborhood.[43]

In contemporary comparative studies, the potential, nature, and prospects of legal transplants (i.e., the infusion, dissemination, and mixing of legal solutions that hybridize even the most conservative national legal systems to some degree) have been hotly discussed themes. According to Watson, law evolves through legal borrowings, or the transfer of legal norms from one nation to another, since laws "may be effectively absorbed into a very different system and even into a branch of the law that is formed on quite different principles than the donor."[44] Legrand offers a rebuttal to this hypothesis, claiming that only meaningless forms of words may be transplanted; the rule itself suffers such major modifications that the propositional statement and meaning become disjointed, making replacement of the original rule impossible.[45] However, even if a rule undergoes major alterations throughout the transplanting process (as Legrand claims), the rule's nucleus or ratio may remain. The purpose of transplanting legal solutions or rules from another legal system is clearly to handle the demands and issues of society in "better or more efficient ways": the legislator can study and extract answers from the rules of other legal systems[46] before deciding to transplant them. Or, to put it another way, it's to see if the standard in issue fulfills its tasks effectively, or if another norm is a better fit for society's expectations, as Rheinstein puts it.[47]

Watson analyzes the notion of legal transplants in relation to law changes aimed at achieving the best possible rule.[48] It shouldn't matter where a solution came from if it looks to be beneficial.[49] The most important factor is that the rule be of high quality. Even if the presence and importance of legal transplants are acknowledged, there is still a secondary discussion over the role of sociocultural, economic, and political elements in the success or failure of legal borrowing. Kahn-Freund uses a vivid metaphor to express the socio-political embeddedness of legal concepts, asking if the transplantation of legal ideas is comparable to the transplantation of human organs, such as a kidney, or the swap of a wheel or carburettor in a car. He points out that there are different degrees of transferability, depending on where the rule falls on the spectrum between the organic kidney and the mechanical carburettor.[50] That is a strategy that can be agreed upon. Different laws are embedded differently in the socio-cultural and economic environment: some are more strongly bound by these conditions than others. The more a legal institution or a legal relationship is tied in this way, the less likely it is to be deemed an essentially proper answer, and vice versa. The degree of transferability, as well as the requirement, time, and intensity of so-called post-transplant fine tuning (adjustment), or even

[42]Miller (2003) 842, 847, 868.
[43]Kramer, E.: Hauptprobleme der Rechtsrezeption. In: Juristenzeitung 72/1 (2017) 5–7.
[44]Watson, Alan: Legal Transplants - An Approach to Comparative Law. Second Edition. (Athens : University of Georgia Press, 1993) 21, 55, 95 f.
[45]Watson (1993) 21, 55, 95 f.
[46]Örücü (2007) 43, 55.
[47]Rheinstein, Max: Einführung in die Rechtsvergleichung (Munich: Beck, 1987) 26.
[48]Watson (1993) 18.
[49]Smits, Jan: The Making of European Private Law, Toward a Ius Commune Europaeum as a Mixed Legal System. (Antwerp: Intersentia, 2002) 62.
[50]Kahn-Freund, Otto: On Uses and Misuses of Comparative Law. In: The Modern Law Review 37/1(1974) 1, 5 f., 12 f.

adaptation or re-creation, of the transplanted rule in the adapting legal system, is determined by this tightness. As a result, there is a difficulty for legal transplants to survive: compatibility with the receiving legal system. The chances of effective reception are harmed by a major structural clash with existing legislation. Two issues must be considered if a foreign solution is to be adopted, according to Zweigert and Kötz: if it has proven satisfactory in its nation of origin and whether it will work in the country where it is recommended to be adopted.[51] "In order to properly blend it with the current regulations of the borrowing system,[52]" a more or less extensive modification is required. The chosen theory is frequently "susceptible to considerable additional change" while undergoing a "comprehensive adjustment." [53] The conceivable consequences of legal transplants, according to Cohn's description, vary from "complete convergence" through "minimum fine tuning," "post-transplant transposition," "substantive change," and finally "distortion," "mutation," or even "rejection."[54]

Overall, the decision to undergo a legal transplant poses a number of issues. Is the selected rule effective in the context of its original legal system? Is it compatible with the receiving system's architecture and general principles? What adjustments do the rules go through when they're transplanted? Do the predicted side effects and distortions outweigh the benefits of the solution in issue, which served as an incentive to import that specific rule? Is the balance still favorable, notwithstanding all of the anticipated application problems in the receiving country?[55] Among all the afore-stated problems, two hold greater significance. Firstly, the change of socio-economic backgrounds of both societies may render such incorporation of foreign law redundant or inappropriate. Secondly, every legal concept is an off-shoot of a cluster of alike concepts which work and fit together into a framework of principles coherently and consistently, to regulate a certain aspect of society. In case a certain foreign legal concept is imported into one's legal system, this whole scheme of amalgamated concepts is disrupted. For no single concept can work without the fusion of others, thus leading to increasing confusion and volatility. For instance, the foreign doctrine of mistake (founded in Roman and French law) was incorporated into the English contract law during the nineteenth century under the pretense that the English contract law was established around the ideas of consent and agreement.[56] Consequently, the English contract law faces a great deal of confusion as far as the doctrine of mistake is considered.[57] Nevertheless, these two objections could be over-ruled and held to be overly exaggerated, for such import of legal rules must be allowed in areas of sensitive nature. But for that to happen, a comparative lawyer has to struggle hard to prove the viability of a foreign legal rule into the domestic legal rule by comparing every aspect of both the systems, be it social, economic, cultural or legal.[58] As a result, the odds of the transplanted principles fitting and running well are better if legal practitioners were dissatisfied with the

[51]Zweigert, Konrad / Kötz, Hein: An Introduction to Comparative Law. Third Edition. (Oxford: Clarendon Press / New York : Oxford University Press, 1998) 17.

[52]Markesinis, Basil / Fedtke, Jörg: The Judge as a Comparatist. In: Tulane Law Review 80/1 (2005–2006) 11, 69.

[53]Fedtke, Jörg: Legal Transplants. In: Smits, Jan M.: Elgar Encyclopaedia of Comparative Law. (Northampton/USA: Edward Elgar Cheltenham, 2006) 434, 435.

[54]Cohn, Margit: Legal Transplant Chronicles: The Evolution of Unreasonableness and Proportionality Review of the Administration in the United Kingdom. In: American Journal of Comparative Law 58/3 (2010) 583, 593.

[55]Fuglinszky, Ádám: The Reform of Contractual Liability in the New Hungarian Civil Code Strict Liability and Foreseeability Clause as Legal Transplants. In: The Rabel Journal of Comparative and International Private Law 79 (2015) 75.

[56]Miles (2000) 283-302.

[57]Smith, Stephen A.: Contract Theory. (New York: Oxford University Press, 2004) 365-371.

[58]Cartwright, John.: Contract Law: An Introduction to the English Law of Contract for the Continental lawyer. Third Edition. (UK: Bloomsbury Publishing, 2016) Part II: 7(II).

previous rule(s) in the first place[59], or if there was no specified answer to a specific problem, resulting in societal conflicts. The greater the tension, and the more direct the bad effects of the previous rule and/or the lack of legislation on the corresponding subject on the day-to-day operation of law and order, the greater the likelihood of the transplanted rule's success.[60]

The transplanted rules, principles, and concepts must be adjusted, transposed, fitted, and so on to the recipient legal system (a posteriori); and, to put this phenomenon in retrospective perspective, care should be taken (a priori), because it is not enough that the concept to be transplanted "has proven satisfactory in its country of origin"; a compatibility check must be run before the transplantation to see if it will work in the legal system "where it is proposed[61]." To summarize, as far as outcomes can be expected, an a priori study and evaluation of the transplant's appropriateness and application for legislative and judicial practice should be conducted.[62]

Legal transplantation, like any other therapy, may cause two types of negative effects. For starters, the transplanted regulation may have contradictions and interpretation difficulties of its own (inherent malfunctions). Second, during the so-called post-transplant adjustment period, compatibility concerns with the borrowed legal system's structure and other norms may occur (coherence issues). The transplanted rule's future is also determined by the views of academics and practitioners in the borrowing legal system, as well as whether they are willing to rely on the donor's academic literature and judicial practice. A thorough examination of the experiences of other legal systems where the regulation has been in place for a longer period of time can aid in minimizing the negative consequences.[63]

Therefore, a balance of all the factors has to be maintained to find a better solution, but this balance has always been hard to sustain. To validate this approach certain legal steps have to be taken to ensure the smooth working of this approach. Step one involves the determination of a national legal aspect that seems to be ambiguous or confused. The second step should focus on the issues caused by this legal confusion in the society among various citizens. The third step should be to examine the laws or rules of other legal systems to identify the methods or techniques that they employ to handle or avoid the same issue. The fourth step evaluates the superiority of the legal rules or techniques of the other legal system in opposition to the national legal system. Lastly, the fifth step should involve a review of the national legal system to analyze the conceptual hurdles in the contemplation of the desired goals in policy or method. A familiar example of such a legal problem in English contract law can be the aforementioned 'doctrine of mistake' imported from the Roman and French continental legal system. It is a clear indication of a confusing concept in the law, where the rules dealing with aspects of providing relief are uncertain and rely on concepts of abstract nature. To avoid this confusion in the English contract law, the steps aforesaid shall be taken with due diligence. Therefore, promoting a mutual understanding and harmonization[64] of basic concepts of both the English and French (European) contract laws.

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[59]Péteri, Z.: Jogegységesítés és jogharmonizáció. In: Fekete, B. / Koltay, A. (eds): Péteri Zoltán – Jogösszehasonlítás, történeti, rendszertani és módszertani problémák (Budapest: PPKE JÁK, 2010) 237.
[60]Fuglinszky (2020) 275.
[61]Zweigert/Hein (1998) 17.
[62]For further analysis see: Fuglinszky, Á.: Applied Comparative Law in Central Europe. In: Journal of International and Comparative Law 6/2 (2019) 245, 251–253.
[63]Fuglinszky (2015) 112.
[64]BERGER, Klaus Peter: Harmonisation of European Contract Law — The Influence of Comparative Law. In: International and Comparative Law Quarterly 50/4 (October 2001) 877—900.

1.5. Differentiating Theoretical Legal Techniques (TLT) of Contract Law to Address the Issue of Gender Equality in Pakistan

As aforementioned, there are several basis for making a comparison between both the legal systems of Pakistan and Europe. Nevertheless, it is difficult to give preference to anyone system based on any of the above-stated differences. In this subchapter, the basic aim would be to pinpoint differences in some key theoretical legal techniques between both the legal systems, along with the legal status of females, without providing extensive details on them. The purpose of this subchapter is to provide an overview that shall be discussed in length in another chapter. Amongst the key theoretical legal techniques or concepts, I would like to draw attention to a few including the concept of contract, consideration, the frustration of contract, duty to perform, and breach of contract.

Concept of Contract: The interpretation of the concept of contract varies in both the legal systems, yet the freedom to enter a contract is granted in both legal systems, irrespective of the gender. In Pakistan, for instance, the Constitution declares all citizens equal before the law and entitles them to equal protection. No one shall be discriminated on the basis of sex and the State is allowed to make special provisions for the protection of women and children[65]. Therefore, when an individual intends to enter a sale or purchase of property contract with another person, he/she has the constitutional right to acquire, hold or dispose of property[66] in any manner he/she desires provided such act is not against lawful restrictions. This freedom of contract is safeguarded through Section 14 of the Indian Contract Act, 1872. Where *free consent* is defined as: "Consent is said to be free when it is not caused by: 1) coercion[67], 2) undue influence[68], 3) fraud[69], 4) misrepresentation[70] or 5) mistake[71]. The Anglo-Saxon approach is greatly inspired by the Contract Act of 1872, which is a British Indian legislation, and the State promotes fair and reasonable agreements between persons. The courts and the state respect contract freedom, but they also believe it is appropriate to intervene when one of the parties does not have such freedom. "If a condition in a contract is judged to be illogical or unfair, one must look at the relative negotiating strength of the parties," the Supreme Court noted in a judgment. [72] This demonstrates that Pakistani courts are committed to ensuring the parties' equality and freedom. To justify any intrusion, courts have used phrases like "so unconscionable as to shock the conscience of the Court" [73].

Consideration: Consideration is commonly known as the price paid for a contract or something bought in lieu. As Pakistan is a Anglo-Saxon law country, it puts great emphasis on the existence of consideration in a contract, without which a contract bears no binding effect. By consideration, it is meant that one party must agree to something of value like making a promise of performance or paying a price for the contract to another party. Whereas this is not the case in Europe as it follows a continental legal system. In the European legal system, the emphasis

[65]Constitution of the Islamic Republic of Pakistan, 1973: Article 25.
[66]Constitution of the Islamic Republic of Pakistan, 1973: Article 23.
[67]Indian Contract Act, 1872: Section 15.
[68]Indian Contract Act, 1872: Section 16.
[69]Indian Contract Act, 1872: Section 17.
[70]Indian Contract Act, 1872: Section 18.
[71]Indian Contract Act, 1872: Section 19.
[72]See Life Insurance Corporation of India v. Consumer Education and Research Center, 1995 (AIR 1811, 1995 SCC (5) 482).
[73]See Ferro Alloys Corp Ltd v. AP State Electricity board, 1993 (AIR 2005, 1993 SCR (3) 199).

is laid upon the existence of a lawful cause behind the contract.[74] By cause, it is meant that there must exist some lawful reason for the contracting parties to enter a contractual relationship. It must be noted here that cause is different from consideration, for the reason for entering into a contract cannot be equated as something paid in return. An obvious example, in this case, is a gratuitous contract e.g. a present given to a boy on his birthday by his uncle, where the uncle takes on the legal duty to perform the contract without taking anything in return. This difference of existence of consideration and cause in both the systems gives rise to another significant issue; h rights of third parties and the concept of privity of contract. Pakistani legal system favours the concept of privity of contract and ignores any benefits arising from the contract to the third parties. It means only the parties to the contract can enforce the contract[75] for they are the ones who have paid something in return i.e. consideration. However, the European legal system speaks quite differently and respects the rights and benefits of third parties arising under a given contract. For instance, according to the German Civil Code (Article 328), it is stated that "a contract may stipulate performance for the benefit of a third party so that the third party acquires the right direction to demand performance."[76]

The frustration of Contract: Initially under the Anglo-Saxon law based Pakistani legal system, the rule of non-performance on the ground of impossibility was not allowed and rendered strict liability. If the parties to the contract wanted to invoke the rule, the only way they had was to provide for an exemption of liability in an express manner written in the contract, itself. However, over time, this rule was modified in the 19th century. The law allowed for the existence of concepts involving non-performance based on impossibility and frustration, which means that in cases where the supervening circumstances of the case do not allow for the performance or frustrate the purpose of a contract. In such cases, the party in default of performance is excused of his/her duty to perform and the contract stood terminated without any damages. This concept was in sheer alignment with the concept of force majeure as conceived in the European continental legal system. Although originally extracted from Roman law, the concept of force majeure was adopted into the European legal system. It means the impossibility of performing a contract due to some unforeseen or unexpected happening/event that was not in the control of either of the parties. Consequently, the party in default of performance is excused of any liability. In short, this concept of force majeure affects the obligation or duty of one party alone in the European legal system. Whereas in the Pakistani legal system it impacts the whole contract itself.[77]

Duty to Perform: In every contract, the essential duty of performing the contract is construed, be such contract under the continental legal system or Anglo-Saxon law system. This 'duty to perform' is one of the significant essentials of a valid contract under the Anglo-Saxon law system and English lawyers have rejected the 'Holmes theory[78]' based on the claim that there exists no real duty to perform a contract between the parties. In case a party delays or fails to perform his/her duty, such party would have to face the consequences under both the legal systems. Under the European legal system, if a debtor delays the performance of his contract,

[74]See French Civil Code: Article 1131.

[75]See Dunlop Pneumatic Tyre Co v Selfridge & Co case, 1915 (AC 847, 853).

[76]See French Civil Code: Article 1121, Italian Civil Code: Article 1411, Swiss Code of Obligations: Article 112(2), and Japanese Civil Code: Art 537, for they all contain the same provisions.

[77]Pejovic (2001) 817-842.

[78]Atiyah, P.S.: Holmes and the Theory of Contract. In: The Essays on Contract. (US: Oxford University Press, 2001) 57-66.

the creditor has the right to put him under a notice of default.[79] Such notice is aimed at providing the debtor with a warning, along with a grace period to fulfil his/her duty in the given time. If the debtor so fails, then the creditor would be held justified in recovering his/her damages as the debtor stands at fault. However, the case is quite reversed under the Pakistani legal system, where no such notice of default is required. According to the general principle of Anglo-Saxon law, no notice is required in excuse for the duty to perform. The performance is considered due from the date of contract within a reasonable time.[80] An example is found in Section 29 (3) of the Sale of Goods Act 197. It states that 'where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.'

Breach of Contract: Breach of contract means the violation of a contract by any means. Once a contract is breached, it construes liability on the party in default. When seen under both the legal systems, the basic principles for enforcing liability in case of breach of a contract are the same. The only exception is linked to the damages. The European legal system demands proof for the existence of fault by the claimant to recover damages while the Pakistani legal system puts no such condition of fault to provide damages to the claimant in the instance of breach of contract.

Besides these theoretical legal differences between both the systems, the legal status of women (females) regarding contractual freedom (or rights) in the respective systems of Pakistan and Europe also provide enough impetus for distinction/comparison between the two legal systems. In pre-historic days, women were nothing but a sex tool for the men who would use them for pleasure-seeking alone. They had no real rights, or one can say, they were not even considered as human beings. They were just regarded as any other good or item a man had or used. It was not until the 1960's that women got recognition as dignified human beings through the right to vote and the campaigns to treat women equally with the men in every sphere, be it social, economic, cultural or political etc. The history remains true to the fact in the context of Europe as the evolution of the women happens to be in concurrence with Europe's evolution itself. In modern times, it has been witnessed that European women enjoy a high legal status in every aspect in contrast with the women in other parts of the world. They exercise equal and independent status with men in contractual rights and obligations. They can enter into a contract with anyone they so desire and seek remedy in case of breach of contract through the courts as the men do. This reflects the autonomy of the European women and the struggle of the European government in coming through with the process of gender equality in the society, unlike some Asian countries including Pakistan.

Pakistan is the Islamic Republic where Islamic or Shariah law prevails. Under this Shariah law, the rights of women fall in a different scenario. Although Shariah law treats women equal to men, yet there are certain matters in which women are treated unequally. They are allowed to enter into a contractual relationship with others but do not enjoy the same kind of autonomy in contractual matters as European women do. For instance, marriage is a contract required to be signed with the due consent of the Muslim female and under Islamic law, this condition is already upheld. But the Shariah law does not grant her the right to revoke such marriage by way of divorce as the male does. In case she wants to divorce her husband, she will have to file for the cancellation of marriage or 'Khula' in the court after seeking the consent of her husband

[79] See German Civil Code: Article 284.

[80] Trietel, G.H.: The Law of Contract. Ninth Edition. (London: Sweet & Maxwell, 1995) 743.

and give up her dowry or 'Haq-Mehr' (gift from husband upon marriage)[81]. In contrast, a male just has to pronounce 'I divorce thee' thrice and the divorce takes place. Moreover, Muslim males are provided with the opportunity of contracting four marriages in their life with all wives co-habiting, commonly known as polygamy. While Muslim female is only allowed to marry one man and only after his death, can re-marry. There are also certain other unequal treatments rendered with Muslim females in cases of re-marrying the same person after undergoing the process of 'Halala' and prohibition of marrying a non-Muslim. Apart from this, Muslim females are also treated unequally as witnesses in business transactions and their share of the inheritance. Their status as a witness is secondary to the Muslim male, that is in the case of a debtor-creditor transaction, the testimony of a Muslim female stands half in contrast to a Muslim male. It can be witnessed from the verse of the Holy Quran itself, 'Whenever you give or take credit for a stated term, set it down in writing...And call upon two of your men to act as witnesses; and if two men are not available, then a man and two women from among such as are acceptable to you as witnesses, so that if one of them should make a mistake, the other could remind her.'[82] The same is true for her share of inheritance in comparison to the Muslim male.[83]

1.6. Case-Study

Under this sub-section, the aim is to determine the working of the contract law on distinguishing the concept of *'offer'* from that of *'invitation to offer/treat'* in both the Anglo-Saxon and Continental legal systems, specifically referring to the legal systems of the afore-mentioned countries – Anglo-Saxon law in Pakistan and Continental law in Europe.

In Anglo-Saxon legal systems, especially England and Pakistan, *Carlill v Carbolic Smoke Ball Co.* case[84] is considered to be the outstanding case law on the said concept. It holds paramount significance in distinguishing between an offer and an invitation to treat. The facts of the case state that a company named Carbolic Smoke Ball Co. published an advertisement in some newspaper claiming to award damages amounting to £100 in case anybody caught influenza after buying and using their products according to the given instructions. To advance their intention to enter this legal relationship[85] once their claim in the advertisement was accepted, the company deposited a sum of £1000 in a bank that was to act as the award for damages. One consumer, named Mrs Carlill, bought the products (smoke balls) of this company and caught influenza regardless of following the given instruction for proper use. She brought a suit against the company in the court of law claiming the damages as promised by the company. The company refused to award any damages on the plea that their advertisement was not an offer but a mere invitation to treat. The reason is that the company never intended to do so as an offer cannot be made to the world at large. Technically speaking, the claimant did not give her acceptance when the offer was made, so it does not follow the legal formalities of a valid contract that could bind the company. The company tried to divert from their claim on the plea of insufficient wording of their advertisement. Under these circumstances, the issue for the court was to decide that whether the company's advertisement amounted to an invitation to

[81]Mohammad, Imani Jaafar / Lehmann, Charlie: Women's Rights in Islam Regarding Marriage and Divorce. In: The Journal of Law and Practice 4/ 3 (2011) 2-10.

[82]The Holy Quran. Surah 2: Verse 282.

[83]The Holy Quran. Surah 4: Verse 7 (*Men shall have a share in what parents and kinsfolk leave behind, and women shall have a share in what parents and kinsfolk leave behind).*

[84]Rush, Jon / Ottley, Michael: Business Law. (US: Thomson Learning, 2006) 48-49.

[85]Hepple, B. A.: Intention to Create Legal Relations. In: The Cambridge Law Journal 28/1 (1970) 122–137.

treat as it so claims or a plain offer. In deciding the issue, the Court of Appeal concluded that the company's advertisement amounted to a unilateral contract (that is the invitation to offer/treat) for which Mrs Carlill gave the acceptance by following the prescribed conditions. Thus, making the company liable for paying the damages to Mrs Carlill. In a further statement, the Court made it clear that the company's prior deposit of £1000 in the bank negates the argument of the company that it lacked the intention to stay bound by the advertisement. Furthermore, an offer can be made in rem, that is, to the world at large and for such an offer the wordings need to be reasonably clear.

The continental legal systems, specifically Germany and other European states also acknowledge the difference between an offer and an invitation to offer/treat. They treat these concepts with the same legal rules as the English contract law by making it clear that for an offer to account as an invitation to offer the decisive parameter is the *'intention to be bound'* by such an offer, once it is reciprocated with acceptance by any member of the society/world at large[86]. This similar working of both the legal systems give rise to the common core for issues of like nature and can help shape certain common principles of contract law that are internationally accepted and adopted. Thus, making the character of contract law more international and dynamic than other branches of the private law[87].

1.7. Summary

Since time immemorial, the existence of contracts and their necessity in social life cannot be denied. Every society relied on the concept of contract when making a deal or bargain among its individuals. Thus, making it a necessary evil in everyone's life, be it in any form either barter system or modern-day commitments. As society progressed, the need to regulate such commitments was felt and this gap was filled by the introduction of Contract law by the national legislation of every country[88]. Although contract law is a branch of domestic continental law, yet the discipline found its parallel in the international arena through the comparative law method. The comparative methodology made contract law international by fostering certain common principles that got accepted internationally.

Therefore, this chapter focuses on comparing the contract law between Pakistan and Europe to augment the international character of contract law. They both belong to different legal systems which constitute different laws of contract on several aspects. This difference of law can be employed to find solutions to the existing problems in the contract law of Pakistan. While so doing, the exchange and applicability of foreign legal concepts into the domestic legal systems of either of them will initiate international acceptance of those imported legal rules. Notwithstanding, the chapter also serves to justify in detail the various arguments involving the selection of contract law as the supreme choice for comparison, the use of the comparative methodology for the purpose, the comparison of contract law theoretical legal techniques with special regard to gender equality issues and thus, concluding on the case-study as a proof to the internationalization of contract law in essence.

[86]Dannemann, Gerhard / Vogenauer, Stefan: The Common European Sales Law in Context: Interactions with English and German Law. (Oxford: Oxford University Press, 2013) 263-264.

[87]Glenn (2012) 69-70.

[88]Zumbansen, Peer. The Law of Society: Governance Through Contract. In: The Indiana Journal of Global Legal Studies 14/2 (2007) 191–233.

Chapter 2: The Shariah Law in Pakistani Legal System and the General Legal Status of Women in Pakistan

Abstract

This chapter put emphasizes the prevailing Shariah law, along with the Anglo-Saxon law system, in Pakistan and its impact on the status of women residing in Pakistan. In the beginning, the chapter opens up with the prime focus on elaborating the concept, origin and historical background of Shariah law. As Shariah law is commonly referred to as the Islamic law or Islamic Jurisprudence, it is related to the teachings of the Holy Quran and Sunnah of the Prophet (PBUH) and this chapter seeks to address specifically those teaching of the Shariah that are related to Muslim women. The chapter then chalks out in detail the historical background of the Shariah law system in Pakistan, since independence to date. Moving on, the chapter then focuses on analysing the status of women in Pakistan through the lens of the prevailing Shariah law system. The status of women is analysed on two basic parameters, that is, based on their rights provided under Shariah law and based on their rights under Constitutional and other legal Statues in Pakistan. This elaboration is considered imperative in the view of making a comparison of the status of women in Pakistan to that of the women of Europe, in the next chapter (Chapter 4). In the end, the chapter concludes with comprehensive essence of the entire topic.

Keywords: *Shariah Law; Pakistan; Status of Women; Rights of Women; Constitutional Rights; Legal Rights.*

2.1. Introduction to Shariah Law

The Shariah law (also known as Islamic law) has been in existence for a long, even before the establishment of Islamic states in the 18th and 19th centuries, along with some other cultural norms[89]. Traditionally, Shariah law was construed by independent muftis (commonly referred to as jurists), based on the teachings of Islam and various legal sources. However, at present, these Shariah laws have been replaced by European Statutes or Codes in majority Muslim countries, while retaining the classical rules of Shariah under the realm of family laws[90]. The Legislative bodies in the Muslim countries aimed at codifying the rules of Shariah in an attempt to modernize them with the changing needs of the hour, without abandoning their basis in traditional jurisprudence. In the 20th century, Islamist movements called for the complete implementation and enforcement of Shariah law, together with hudood punishments e.g. stoning to death[91]. There are certain Muslim minority countries, in addition to Muslim majority countries, that enforce Shariah laws in matters relating to a personal status like marriage, divorce, inheritance, property etc.

To define, Shariah law is a fundamental religious law that forms the core of Islamic tradition. According to the long-standing theory of Islamic Jurisprudence, there exist four fundamental sources of Shariah law, namely the Holy Quran, Sunnah (acts and sayings of the Prophet), Ijma (juridical consensus) and Qiyas (analogical reasoning)[92]. Several schools of thought in Islam, (including Hanafi, Maliki, Shafi'i, Hanbali and Jafari) developed their legal methodologies under the teachings of these four basic sources of Islamic law[93]. The traditional jurisprudence, referred to as *fiqh* under Shariah law, makes a distinction between two fundamental branches of Shariah law into ibadat (rituals) and muamalat (social relations). This distinction gives rise to a variety of topics[94], which leads to overlapping of certain Shariah law notions with that of the Western law, whereas certain Shariah Law issues remain intact emphasizing the need to live by the teachings of All-Mighty Allah.

The fiqh was expounded through the help of religious scholars, mostly by way of legal opinions (also known as *fatwas*) issued by expert jurists. Historically, fiqh was enforced in the Shariah courts by a judge, who was appointed by the ruler of that time. It was the duty of the judge to settle issues relating to civil disputes and societal matters. While criminal justice was ensured and administered by the Sultanic courts, police, and market inspectors, who were given the discretion to decide such matters either following the Shariah law or State law[95]. The minority communities (usually non-Muslims) enjoined the legal independence in matters of personal status, where Shariah law was no longer applied and they were given autonomy to seek justice in the light of their religion. It took centuries for the Sunni jurists to acquire a credible position

[89]Otto, Jan Michiel: Shariah Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present. (Leiden: Leiden University Press, 2009) 615–616.

[90]Otto, Jan Michiel: Shariah and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy. (Netherland: Amsterdam University Press, 2008) 19.

[91]Mayer, Ann Elizabeth: Law. Modern Legal Reform. In: Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009) 381-389.

[92] Esposito, John L. / DeLong-Bas, Natana J.: Women in Muslim family law. (US: Syracuse University Press, 2001) 2.

[93]Esposito, John L.: Islamic Law. The Oxford Dictionary of Islam. (Oxford: Oxford University Press, 2014).

[94]Calder, Norman: Law. Legal Thought and Jurisprudence. In: Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009).

[95]Ziadeh, Farhat J.: Criminal Law. In: Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009).

in the state bureaucracies[96], thus struggling to complement the laws enacted by Muslim rulers related to economics, criminal and administrative law[97]. The very first sign of their struggle was witnessed in the Ottoman Civil Code (1869-1876), where these jurists sought to codify the Shariah law together with the State law[98].

Nevertheless, at present, several Statutes based on European models are in regulation in most of the Muslim countries attempting to replace the classical Shariah laws[99]. Not only this, but the Muslim countries also brought their legal education and judicial practices in accordance with the European practice. Although most of the Muslim countries still hold onto the notions of Shariah law in their constitutions, yet those classical notions of Shariah law have been strictly specified to the family laws or personal status laws. The Legislative bodies in the Muslim countries aimed at codifying the rules of Shariah in an attempt to modernize them with the changing needs of the hour, without abandoning their basis in traditional jurisprudence[100]. In the 20th century, Islamist movements called for the complete implementation and enforcement of Shariah law, together with hudood punishments e.g. stoning to death. In certain cases, this Islamization led to classical legal reform, whilst in other cases, some progressive reformers advocated for the reinterpretation of Shariah by the qualified judiciary[101]. Although these *hudood* punishments are held with symbolic importance in seeking international attention, the Muslim countries are seen reluctant in enforcing these *hudood* punishments in their territories and their implementation is based in accordance with the political climate of the country[102].

There are several instances where non-Muslim countries allow for the use of Shariah law for their Muslim minority in matters of personal status[103]. While there are some other non-Muslim countries where their significant Muslim minority has made several calls for the adoption of Shariah law in the legal system and these calls have become the hot issues of international debate[104]. In addition, several Islamic movements in the Muslim-majority countries have called for re-instating Shariah law in the legal system referring to their demand as *'a longstanding goal for Islamist movements'*[105], and such calls for re-instating or expanding Shariah law accompanied with controversy[106], violence[107], and even warfare.

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[96]Dallal, Ahmad S. / Hendrickson, Jocelyn: Fatwā. Modern usage. In Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009).

[97]Stewart, Devin J.: Shari'a. In: Böwering, Gerhard / Crone, Patricia: The Princeton Encyclopedia of Islamic Political Thought. (US: Princeton University Press, 2013) 500.

[98]Mayer (2009) 381-389.

[99]Otto (2008) 19.

[100]Mayer (2009) 381-389.

[101]Rabb, Intisar A.: Law. Continental law & Courts. In: Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009).

[102]Treitel (1995) 20.

[103]Stahnke, Tad / Blitt, Robert C.: The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries. In: Georgetown Journal of International Law 36/4 (2005) 13-19.

[104]Brooks-Pollock, Tom: The countries where a majority of Muslims want to live under Shariah law. The Independent(December 15, 2015).

[105]Lapidus, Ira: The Cambridge Illustrated History of the Islamic World. (Cambridge: Cambridge University Press, 1996) 293–98.

[106]Iijima, Masako: Islamic Police Tighten Grip on Indonesia's Aceh. Reuters(January 13, 2010).

[107]Ibrahimova, Roza: Dozens Killed in Violence in Northern Nigeria. Al Jazeera (July 27, 2009).

2.1.1. Types of Legal Systems within Muslim Countries

The legal systems of Muslim countries may be grouped into three categories: Classical Shariah legal system; Secular legal system; and mixed legal system. In the Classical Shariah legal system, Shariah law provides the basic substance or subject matter and this system is shared by a very small minority of people. Under this system, the ruler of the state acts as the supreme judicial authority and he is vested with the power to implement and enforce laws in certain legal domains. However, the classical religious scholars (known as *ulama*) are pivotal as they play an influential role in the interpretation of Shariah laws. This system is practised by Saudi Arabia and some of the Gulf-State countries. Iran also shares many features of the classical Shariah legal system, but the distinction lays in the fact of possessing certain features of a mixed legal system as well, for instance, the parliament and codified laws.

In the secular legal system, Shariah law has no role to play in the legal system of the country and any kind of interference by religion in matters of state, politics, and law is prohibited strictly. One of the well-known examples of this legal system can be found in Turkey that keeps religion in the realm of private affairs. Some other countries in West Africa and Central Asia also fall under this category.

In the mixed legal system, the Shariah law works in consonance with the constitution of the country, while providing the opportunity for the Shariah law to influence certain areas of domestic law. This kind of legal system finds its parallel in most Muslim countries. In this system, the laws are largely codified either based on the European models or Indian codes and the politicians or jurists run the legislative role, instead of the religious scholars and mullahs. Pakistan is one such country that bears a mixed legal system along with Egypt, Malaysia, and Nigeria[108]. Some other Muslim minority countries also bear an example to this system, for instance, Israel, as it administers Shariah law for its Muslim population.

2.1.2. Domains of application of Shariah Law

The Muslim countries try to integrate Shariah law with their State law (Constitution) at a certain specific level. Their constitutions usually regard Shariah law as a fundamental source of law, though this consideration is not in itself predictive of the extent to which their legal system is prejudiced by Shariah law, and whether this prejudice bears a conservative or modernist nature[109].Their constitutions also suggest the applicability of universal principles like democracy and human rights, leaving their actual practice in the discretion of the legislators and judiciary to decide[110]. Conversely, there are some other countries like Algeria whose State-law refers to no express mention of Shariah law, yet it possesses family laws based on Shariah laws. In his word, Nisrine Abiad mentioned, '*Bahrain, Iran, Pakistan, and Saudi Arabia as countries with strong constitutional consequences of Shariah on the organization and functioning of power*'[111].

Except for Muslim countries with secular legal systems, all other Muslim countries provide for family laws to be regulated based on Shariah law in matters relating to marriage, divorce,

[108]Otto (2008) 8-9.

[109]Dallal / Hendrickson (2009).

[110]Otto (2008) 18–20.

[111]Abiad, Nisrine: Shariah, Muslim States and International Human Rights Treaty Obligations: A Comparative Study. (UK: British Institute of International and Comparative Law, 2008) 38–42.

property, inheritance etc. These laws normally reflect the impact of several modern-day reforms and the ambiguity regarding classical and modernist explanations of these laws, both in legislation and judicial decisions. However, Nigeria is one such country that provides its Muslim population with the '*option to choose'* between Shariah and Secular court to decide in such matters[112].

The majority of Muslim countries around the world follow the criminal laws enacted in the French Criminal Code or Anglo-Saxon law and various cases a mixture of European legal traditions. However, Saudi Arabia has always been reluctant on adopting any other criminal legal system and is still adamant about the continuation of classical Hanbali jurisprudence in practice for criminal offences. During the process of Islamization, many Muslim countries like Libya, Pakistan, Iran, Sudan, Mauritania, and Yemen incorporated Shariah laws into their criminal codes, which were originally based on European or English law models. Some countries only incorporated *hudood* penalties, while some also enforced the provisions for qisas (law of retaliation) and diya (monetary compensation). Nonetheless, the fact is that the countries providing legal cover for *hudood* penalties do not actually use such punishments (e.g. stoning or amputation of hand) on a routine basis, and usually prefer applying constitutional punishments instead[113].

2.1.3. Contemporary Status of Shariah Law

The term shariah refers to the entirety of God's directives written in the Qur'an and the Sunnah. It is the code for Muslims to conduct this worldly existence. It regulates every area of life, from problems of ceremonial purity to international politics. Some components of the shariah, such as the precepts of 'ibadah, are unenforceable by any governmental power and hence constitute a code of conscience. Other components, such as civil transaction regulations, criminal sanctions, and the like, are in principle enforced by the state, and therefore comprise legal norms in the technical sense of the term[114]. One of the most fundamental topics in pre-modern Muslim legal history was the link between the shariah and qanun (state-laws), or the Islamization of the laws by Muslim political authorities. In previous Muslim nations, such as the Ottoman Empire, this problem was overcome by the supreme mufti of the state exercising influence over the legislative process (Shaykh al-Islam)[115]. In modern Islamic governments where the shariah has been declared the source of law, this question falls under the purview of the highest bodies established to protect the constitution (Constitutional Court in Egypt, Council of Guardians of the Constitution in Iran, etc.) In the past, even though it conformed with the shariah, legislation in ancient Muslim governments was not referred to as shariah law; instead, it was referred to as qanun. It existed separately in the legal systems of Muslim governments as well as in Muslim mentality. This distinction is dissolving in modern Islamic governments, and new words such as qanun-e-Islami ("Islamic law") are intended to bridge the gap between the shariah and the qanun. Imran Ahsan Khan Nyazee, a modern Pakistani scholar, for example, refers to Islamic law as "the spreading tree[116]." This tree's roots are the usul (sources), which are the Qur'an and the Sunnah; its trunk is the permanent component, which

[112]Otto (2008) 18–20.

[113]Brown, Jonathan A. C.: Stoning and Hand Cutting: Understanding the Hudood and the Shariah in Islam. In: Yaqeen Institute for Islamic Research, 2017.

[114]Kozlowski, Gregory C.: Islamic Law in Contemporary South Asia. In: The Muslim World 87/3-4(1997) 226.

[115]Akgunduz, Ahmet: Osmanli Kanunnameleri ve Hukuki Tahylilleri. (Istanbul: FEY Vakfi, 1996) 81-87.

[116]Nyazee, Imran Ahsan Khan: Theories of Islamic Law: The Methodology of Ijtihad. (Malaysia: A.S. Noordeen, 2016) 54.

consists of norms derived by the fuqaha' from particular pieces of evidence; and its branches are flexible, and consist of norms defined by the state from general principles. Using traditional Islamic terminology, the fixed section of the tree are the norms mentioned clearly in the Shariah scriptures (the Qur'an and the Sunnah) or deduced from them by the rigorous analogy of fiqh, and the branches of the tree are the qanun or state law.

During the nineteenth century, European/Western modernism, defined as a new worldview, social organization, and way of life, infiltrated Muslim nations. This tendency resulted in drastic changes in Muslim nations' way of life and thought. Sovereign nation-states, science-based technology, bureaucratic rationalization, profit maximization, and secularization are the "five pillars of modernity." Tawhid's worldview has a profound impact on cultures[117]. The altered role of the shariah in the organization and operation of Muslim societies was one sign of this influence. Essentially, Western modernity crept into the Muslim world through the Muslim elite's modernization programs, such as tanzimat in the Ottoman state, and by European colonial powers' armed invasion of Muslim countries, such as the French occupation of Algeria. Bosnia and Herzegovina, for example, saw the Ottoman project of tanzimat from 1839 to 1878 and the Austro-Hungarian ambition of military conquest from 1878 to 1918[118]. The expansion of Western civilization throughout the Muslim world resulted in several significant changes in the relationship between the western and Muslim cultures. The following modifications were made: The Qanun's scope was broadened. The list of legislation issued in the Ottoman state during the tanzimat demonstrates the trend of expanding the qanun's realm from areas where the shariah was quiet (such as modern banking, marine trade) to areas where traditional fiqh answers were not quite widespread (for instance, constitutional and administrative law)[119]. The shariah-qanun duality has existed since pre-modern times, although qanun has always been subject to the shariah, at least theoretically. The modernizing reforms regarded the field of qanun as relatively autonomous of Islamic law since it dealt with issues that had not been adequately addressed in Islamic law and its contents did not clash with Shariah standards. This mindset resulted in a steady expansion of the scope of qanun. Eventually, qanun began to dominate in the arena of public law, while the shariah was consigned to the world of private law. (ii) Muslim rulers' kanuns were replaced by non-Muslim rulers' kanuns. In Muslim legal history, qanun was acknowledged as Muslim rulers' legislation in subjects where there are no precise Shariah principles. However, the content of qanun law has altered throughout time. The modernizing Muslim elite began to accept European laws in the form of qanun legislation, thereby replacing Muslim history, customs, and values with foreign ones.

Non-Muslim colonial authorities in the Muslim world, on the other hand, took over the legislative prerogatives of Muslim monarchs and imposed European laws in nearly every legal department save personal status and the administration of Islamic religious matters. In this fashion, European colonial powers introduced their various legal systems into the Muslim world, which was split into nations influenced by European continental law (for example, in North and West Africa) and those influenced by Anglo-Saxon law (for instance, in South and South-East Asia). (Hi) Changes were made in Shariah's restricted domain. The shariah was primarily focused on personal standing (al-ahwdl al shakhsiyyah). In Ottoman and Middle

[117]Safi, Louay M.: The Challenge of Modernity: The Quest for Authenticity in the Arab World. (Lanham/New-York/London: University Press of America, 1994) 22.

[118]See Karcic, Fikret: The Bosniaks and the Challenges of Modernity: Late Ottoman and Hapsburg Times. (Sarajevo: El-Kalem, 1999).

[119]Berkes, Niyazi: The Development of Secularism in Turkey. (Montreal: McGill University Press, 1964) 168.

Eastern law, "personal status" referred to issues such as legal capacity, marriage and family relationships, inheritance, and endowment[120]. The rising trend of secularization and reduction of religion to a "private matter" resulted in the limitation of the shariah to personal status. Muslim scholars, on the other hand, saw the articulation of the idea of personal status and emphasis on its implementation of the shariah as the "final stronghold" for the preservation of Islamic identity. The shariah laws governing personal status were also susceptible to two types of alterations: form adjustments and content changes. In the case of the former, a new type of codification was brought into the field of Islamic personal law. This form made its way into the Muslim world as a result of the 19th-century codification drive in Europe.

During the twentieth century, the majority of Muslim nations chose to codify the shariah standards in the area of Islamic law. The codification of Ottoman family law in 1917 was the first in this sequence, followed by Egypt in 1920 and 1929, Syria in 1953, Tunisia in 1956, Iraq in 1959, Pakistan in 1961, and numerous other Muslim nations. The second type of reform, in terms of material and procedural Shariah standards, was implemented through codification in Muslim nations influenced by European continental law or stare decisis theory in countries influenced by Anglo-Saxon tradition. Certain institutes and regulations of Islamic personal law as applied in pre-modern periods were altered in this way. Polygamy was outlawed, the power of a husband to unilaterally repudiate a marriage was curtailed, the right of a woman to the custody of her children after a divorce was expanded, and the concept of an "obligatory testament" was established into inheritance law[121]. The techniques used to implement these modifications varied: picking teachings from schools of law other than the prevailing school (madhhab) in a specific country; and takhayyur, or eclecticism or combining diverse interpretations in producing a single provision (talfiq) or new ijtihad. Sometimes, as in the instance of "Anglo Muhammadan law" in India, adjustments were made by referring to the legal theory and practice of non-Muslim laws.

In the Muslim world, a new phenomenon emerged in the 1970s. a return to Islamic identity and a reversal of secularization? "Islamic revival," "Islamic resurgence," "Islamic renaissance," "Islamic fanaticism," and other terms have been used to describe it[122]. These phrases contained a variety of forms, ranging from calls for the shariah to be incorporated into Muslim nations' national legal systems to heightened personal religiosity. We can distinguish the manifestations of Islamic revival in Muslim majority nations and Muslim minority situations in terms of the relative prominence of the various parts of this phenomenon). In Muslim-majority countries, Islamic Revival and Shariah The failure of modernizing efforts in Muslim nations was a major factor in the resurrection of Islam. Muslim modernist reformers erroneously associated Europe/West with modernity, believing that any culture wishing to modernize must first become European/Western[123]. Furthermore, they were more concerned with normative rather than structural reform in society. The tanzimat's modernists, as well as those who came after them, were primarily concerned with institutions, legislation, and social ethics. They failed to see that without a sufficient social foundation, norms and institutions cannot operate correctly. As a result, Muslim nations' wholesale adoption of European laws has failed to provide the legal security enjoyed by European governments. This was because modernized Muslim

[120]Mahmood, Tahir: Personal Law in Islamic Countries. (New Delhi: Academy of Law and Religion, 1987) 1-14.

[121]Benard, Cheryl: Mapping the Issues: An Introduction to the Range of thought in Contemporary Islam. In: Benard, Cheryl: Civil Democratic Islam. (US: RAND Corporation, 2003) Chapter 1: 3.

[122]Dessouki, Ali E. Hillal (ed.): Islamic Resurgence in the Arab World. (New York: Praeger, 1982) 10-13.

[123]Voll, J.: Mistaken Identification of the est with Modernity. In: The American Journal of Islamic Social Sciences 13/1 (1996) 1-12.

nations did not acquire the intellectual underpinnings, values, and attitudes necessary for European laws to function effectively in society.

In many cases, modernization was reduced to autocratic control by a military or political elite cut off from its people, institutionalized corruption, sanctioned exploitation of the poor, human rights violations, and so on. Naturally, when the disillusioned masses began to respond, the sole unifying point for them was the ideal standard of the shariah, which had previously succeeded in the construction of "the golden period" of Muslims. In Muslim majority nations, Islamic revival has taken the shape of a radical desire for social transformation. The shariah was the term of Islamic renaissance[124]. One of its key chants was "Return to the shariah." The appeal had two purposes: political and ideological. Return to the shariah was exploited by revivalist organizations as a political platform to delegitimize the reigning class. It was also employed by the governing class as a basis for legitimizing their rule in the face of revivalist claims. In terms of ideology, the shariah was used as a tool for public mobilization as well as an Islamic assessment of Muslim societies' existing political and legal institutions, social values, and norms. In certain cases, like in Iran, successful revivalist efforts were eventually transferred into the realm of positive legislation. Under the influence of the revivalist trend, revisions in positive law were made in a few additional circumstances (constitutional clauses of the shariah as a source of law in many Middle Eastern countries, the inclusion of the shariah prohibitions in the national legislation, etc.) In any event, the focus of Islamic revival was on Islamic public law, particularly constitutional law, penal law, and economic law[125]. Other areas of law, such as 'ibadat, continental law, torts, and international law, have been mostly neglected. After prior codification efforts, the law of personal status almost remained unchanged, except a few areas when modernizing measures were overturned (for example, Iran, Pakistan). Islamic renewal stressed social emblems of Islamic identity such as clothes (hijab), look (beard for males), and social ethics outside of the rigorous legal domain (greetings, etiquette, etc). In certain situations (Iran, Pakistan), attempts at Islamizing public law were extensive, while in others they were confined to the entry of particular shariah institutes into the arena of public law (Malaysia).

In Pakistan, for example, the Council of Islamic Ideology published a strategy for the "Establishment of an Islamic society" in 1978, identifying six areas as critical to the project's completion[126]. Religious doctrines and worship ('aqidah and 'ibadah) educational system, the economic system, judicial system, broadcasting and publishing, and culture were among these areas. Law has been identified as one of the areas that should be Islamized. Islamization of existing laws, as well as the enactment of new Islamic laws in both the public and private legal domains, has been proposed[127]. The implementation of the SharVah laws under Ziaul Haq fell short of this objective, owing to the overall character of the government and its preference for applying criminal law provisions before attempting to construct a just social order. Although Islam is the Federation's religion (Article 3 of the Constitution), yet it has always been limited to Muslim personal law in Malaysia. When the Islamic resurgence swept Malaysia in the 1980s, there were calls for the shariah to be recognized as the law of the country in both the private

[124]Mallat, Chibli: The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi'i International. (Cambridge: Cambridge University Press, 1993) 2-3.
[125]Benard (2003) 4.
[126]Muslim, Abdul Ghafur: Islamization of Laws in Pakistan: Problems and Prospects. In: Islamic Studies 26/3 (1987) 272-275.
[127]See, for example, Rahman: Tanzilur: Islamization of Pakistan Law. (Karachi: Hamdard Academy, 1978).

and public spheres[128]. These viewpoints, on the other hand, were not widely embraced. Non-Muslims are not subject to Islamic law, which has traditionally been limited to Muslim personal law[129]. In Muslim Minority Situations, Islamic Revival and Shariah. In Muslim minority circumstances, Islamic revival has concentrated on preserving Muslim identity in the face of secularization and assimilation. Minorities who had a history of using the shariah in personal affairs demanded that the position of the shariah courts be improved, as well as the codification of laws (for instance in Singapore and the Philippines)[130]. There were no requests for the reinstatement of Islamic law in the situation of Muslim communities in the Balkans, where the shariah was abolished after WWII. The need of preserving Islamic identity via devotion to religious-ethical values was emphasized. Finally, certain Muslim minorities in Western nations (Australia, Canada, and the United Kingdom) have called for the shariah to be recognized as the Muslim personal law[131].

New requests for the shariah to be applied have highlighted two significant questions: what is the best way to explain the shariah standards and how should they be applied in current times. Because of all the acknowledged benefits of codification, such as consistency, systematization, and accessibility, most modern Muslim nations prefer codified Islamic law. Codification is also a viable method for introducing substantive and procedural modifications to Islamic legislation. In the practice of modern Muslim nations, however, codification was not always linked to changes in the standards that were subject to this approach. Codification is frequently used as an adequate approach by Muslim countries attempting to carry out a thorough project of Islamization. In Pakistan, for example, prominent scholar Tanzilur Rahman proposed "codification and re-statement of Islamic law," citing three key reasons for preferring this form over fiqh texts. The following reasons were given: (1) the law as embodied in classical books of fiqh does not contain all of the provisions of law relevant to the needs of our modern society, which is full of complexities of various kinds; (2) exclusive recourse to classical literature combined with literal adherence to a particular school of fiqh will confine the entire body of law to a rigid mould, preventing it from growing; and (3) Pakistani courts have been trained to interpret and enforce the law[132]. On the other hand, other groups were opposed to codification, believing that the ancient writings were adequate for the modern-day implementation of the shariah.

This viewpoint was particularly held by traditional ulama, who not only criticized codification but also scrutinized the text of codified legislation. A majority of Pakistan's ulama, for example, opposed several parts of the codified criminal code enacted during the Ziaul Haq government as being antithetical to conventional fiqh, such as the hadd of 100 lashes instead of stoning for adultery[133]. Islamic law is practised in the non-codified form in Muslim nations that have not yet faced the difficulties of Western civilization. Saudi Arabia is one example of this. Even in such nations, new sectors of contemporary life (labour law, industrial law, etc.) are governed

[128]Yasin, Norhashimah Mohd: Islamization/Malynisation: A Study on the Role of Islamic Law in the Economic Development of Malaysia, 1969-1993. (Kaula Lumpur: A.S. Noordeen, 1996) 220-226.

[129]Harding, Andrew J.: Islam and the Public Law in Malaysia: Some Reflections in the Aftermath of Susie Teoh's Case. In: Mallat, Chibli (ed.): Islam and Public Law: Classical and Contemporary Studies. (London: Graham and Trotman, 1993) 203.

[130]Siddique, S.: The Administration in Singapore. In: Abdullah T./Siddique, S.(eds.): Islam in Southeast Asian Studies. (Singapore: Institute of Southeast Asian Studies, 1986) 317.

[131]Buttar, P.A.: Muslim Personal Law in Western Countries: The Case of Australia. In: Journal of the Institute of Muslim Minority Affairs (JIMMA) 13/1 (1992) 49-53.

[132]Benard (2003) 5.

[133]Kozlowski (1997)225.

by state laws based on the idea of al-siyasah al-shariah. The second question was answered by several Muslim scholars who are sceptical of the present practice of using the shariah. According to these academics, such as Fathi Osman, the implementation of the shariah is viewed as a dynamic process based on individual and societal conscience and is accomplished via the use of appropriate techniques aimed at achieving a set of goals and priorities[134]. Disputes and problems over the dress code for women in Iran, or among the female staff of international agencies working with Afghan refugees, or political alliances in Malaysia, or allowing the production and distribution of liquor in certain Muslim countries, or allowing interest, banking, insurance, and mortgage in many countries? All of these disagreements and challenges highlight our incapacity to recognize modern problems and respond to them according to shari'ah principles and ijtihad concerns, as well as our failure to set priorities for fruitful Islamic reform in contemporary Muslim societies[135]. Islam's current status is founded on two essential assumptions: The Islamic world has experienced a lengthy period of backwardness and relative weakness; various diverse methods, such as nationalism, pan-Arabism, Arab democracy, and Islamic revolution, have all failed, resulting in frustration and fury. At the same time, the Islamic world has drifted more and further away from modern western culture, relegating it to the periphery of the global economy. Muslims disagree on what to do about it, what it has accomplished, and what their communities will look like in the future. We can identify four important places, as indicated in the preceding paragraphs. To begin with, the Fundamentalists present a militant and expansionist version of Islam that is not afraid to use force. Islam's current status is founded on two essential assumptions: The Islamic world has been defined by a lengthy period of backwardness and relative impotence; numerous alternatives, such as nationalism, pan-Arabism, Arab democracy, and Islamic revolution, have been attempted without success, resulting in frustration and fury. Around the same time, the Islamic world began to drift away from contemporary Western culture, relegating it to the periphery of the global economy. Muslims disagree on what to do about it, what it has done, and what their communities will look like in the future. We can identify four important places, as indicated in the preceding paragraphs. To begin, the Fundamentalists present a militant and expansionist version of Islam that is not afraid of force[136].

Their point of reference is not the nation-state or ethnic group, but the Muslim community, the ummah; it may be a step on this road to gain control of particular Islamic countries but it is not the main aim. Inside fundamentalism, we can differentiate between two strands. The first strand is theologically based and appears to have some origins in one or another form of a religious institution, we will refer to as the *scriptural fundamentalist* e.g. the Shia of the Iranian revolutionaries, the Wahhabis, and the congregation Kaplan in Turkey. The second strand, the *radical fundamentalists*, is much less concerned with the actual nature of Islam that they either knowingly or in ignorance of traditional Islamic doctrines take significant liberties. They typically have no religious "institutional" affiliations but tend to be diverse and self-taught in their knowledge of Islam. In this category belong Al Qaeda, the Afghan Taliban, Hizb-ut-Tahrir, and a significant number of other radical Islamic movements and decentralized organizations around the world. Fundamentalists don't necessarily approve of past Islamic activities. More specifically, they build on them, applying some of the harsher rules more rigorously than the original Islamic community has ever done, practising an arbitrary selectivity that allows them to disregard or remove more egalitarian, democratic, inclusive

[134]Osman, Fathi: Shariah in Contemporary Society. (Los Angeles: Multimedia Vera International, 1994) 18-33/53-60.
[135]Osman (1994) 60.
[136]Benard (2003) Chapter 1: 3.

elements of the Qur'an and the Sunnah, and inventing some new rules of their own. It is particularly true of the radical fundamentalists. Not every fundamentalist supports or even endorses terrorism, at least not the indiscriminate form of terrorism that targets civilians and frequently destroys Muslims along with the "enemy," but fundamentalism as a whole is incompatible with civil society ideals and the Western conception of democracy, political order, and culture. Secondly, the traditionalists are also sub-divided into two distinct groups: the *conservative traditionalists* and *reformist traditionalists*. The conservative traditionalists believe that Islamic law and practice must be followed rigorously and practically and they see a role in promoting or at least supporting it for the State and political authority. They do not, though, necessarily support aggression and extremism. Their experience has guided them to direct their attention on the day-to-day lives of people, where they seek to hold as much power and control as possible, even though the government is not Islamic. They are accustomed to their activities under shifting political circumstances. In the social sphere, their goal is to maintain to the fullest degree possible orthodox standards and values and conservative conduct. The modern-day temptations and lifestyle are considered as significant threats to this. They bear aversion or resistance to improvement and change in their attitude[137].

Additionally, there are often significant differences between conservative traditionalists living in the Islamic world or the Third World at large and those living in the West. Traditionalism, being an essentially moderate position, tends to be adaptive to its environment. Consequently, conservative traditionalists who remain in fundamental cultures are likely to embrace rituals that are common in such communities as child marriage and to be less educated and less able to differentiate local traditions and customs from real Islamic doctrine. Those who live in the West have adopted more progressive viewpoints on these topics and appear to be well informed and more linked to the transnational orthodox debate. Reformist traditionalists think that Islam must be willing to make certain compromises in the practical interpretation of ideology if it is to remain alive and desirable in the ages. They are ready to debate changes and reinterpretations. Their attitude is one of gradual adaptation to change, being agile in maintaining the spirit of the law on the letter of the law. Thirdly, the modernists actively pursue far-reaching improvements to the existing conservative interpretation of Islam and its implementation. They want to remove the negative ballast of local and national culture which has mixed or intertwined with Islam over the years. They further believe in Islam's historicity, i.e. Islam as it was practised during the Prophet's days reflected eternal truths as well as historical circumstances that were appropriate to that time but are no longer valid. In addition, they believe that the 'essential core,' which reflects changing times, social and historical conditions, will not only remain undamaged but will also be strengthened by the changes, including considerable changes. The aspects that modernists respect and admire in Islam are more theoretical than those appreciated by conservative traditionalists. The fundamental principles – the primacy of the individual conscience and a community based on social responsibility, equality, and freedom– are readily consistent with contemporary democratic norms. Fourthly, the secularists believe religion to be distinct from the political and state problems and that avoiding transgressions in any way presents the biggest obstacle. In the private practice of religion, the State will not interfere; in the same manner, religious practices must comply with land law and human rights. The Turkish Kemalists, who put religion under the state's influence, are Islam's new example. These positions should be regarded as points on a spectrum, not as distinct divisions. There are no clear distinctions between them such that

[137] Benard (2003) 4.

some traditionalists clash with fundamentalists; the most modernist of the traditionalists are also modernists, and the most extreme modernists are similar to secularists[138].

Furthermore, the secularists are further sub-divided into three categories: Political secularists who support the distinction of religion and state, with the State as the impartial leader of day-to-day life and administration and the basis of a rule of law in the world; Liberal secularists view religion as an independent moral matter (but one which must remain separate from the political realm) or in some cases as a collective matter; and Authoritarian secularists who make religion along with other social institutions subservient to the purposes of the state and the ruling party. It is noted that liberal secularists were among the most consistent with Western political and social values, in strictly ideological terms. We have observed that "democratic governments have achieved tremendous achievements in maintaining influence, prestige and even prominence, and democratic revolutions. A more prosperous country in the Islamic world, Turkey, has progressed into an extreme secularist strategy[139]." Secularism can be a risky posture for a Muslim, whether practising, non-practising, or having openly or de facto left the faith. Many secularist activists are pseudonymous and resist appearing in public.

Each of these defined positions takes a distinctive stand on main topics of contention in the current Islamic debate. And there are also distinct "laws of evidence" for defending such positions. "Lifestyle" issues are the areas in the contemporary Islamic struggle in which the contending positions seek to stake their claims and use them to signal their influence. Doctrine island/territory and is being fought for. This illustrates the relevance of these problems in an intellectual and political sense. The benefit of "mapping" the opinions of the different Islamic ideologies is that, on issues of ideology and culture, they stick to relatively distinct and credible forums that describe their identities and act as markers for like-minded others - a kind of "passport." Therefore, although groups can hide their approach to aggression, to prevent punishment and penalties, these are the aspects that characterize them and draw new participants. For example, conservative traditionalists recognize the validity of previous traditions, particularly though they disagree with modern standards and principles, under the basis that the initial Islamic culture reflects a pure and everlasting standard, but no longer automatically seek to reintroduce these activities. Sometimes, though, their justification for doing so is not because they would not want to do so, but because they find it to be momentarily or indefinitely impossible to do so. Reformist traditionalists reinterpret, rebut or counter behaviours that appear controversial in today's environment. Modernists consider the same rituals as part of a historical shift that changes and evolves; they do not treat Islamic roots or the early years of Islam as something that one has to recreate today. Secularists forbid activities that clash with social standards and laws and disregard them as belonging to the private domain of the person. Secularists are not worried about what Islam may or may not need. Moderate secularists want the state to guarantee people's right to practice their faith, while at the same time ensuring that religion remains a private matter and does not violate any human rights or continental law standards[140].

Religion is largely opposed by radical secularists, including the communists and laicists. While conservative traditionalists follow advice from orthodox Islamic sources: the Quran, Sunnah,

[138]Benard (2003) 5.

[139]Rabasa, Angel/ Benard, Cheryl/ Schwartz, Lowell H./ Sickle, Peter: Building Moderate Muslim Networks. In: Secular Muslims: A Forgotten Dimension in the War of Ideas. (US: RAND Corporation, 2007) Chapter 9: 121-122.

[140]Benard (2003) 6.

Shariah law, fatwas, and the esteemed religious scholars' opinions. Reformist traditionalists use the same sources but, when pursuing alternate interpretations, tend to be more creative and violent. They are aware of the contradictions between modernity and Islam and want to reduce them to keep Islam viable in the future. They try to reinterpret traditional content, find ways around the constraints or decisions that threaten them or stand in the way of desirable reforms or that hurt Islam's reputation in the eyes of the rest of the world. In addition, the way religious fundamentalists and modernists address the issue of transition is surprisingly close. They also refer to the Quran, Sunnah, Shariah laws, Fatwas, and the authorities in keeping with the standard (of course, they choose specific choices from each one). However, both positions are inspired by their respective perceptions of the ideal Islamic society. Therefore, each of them feels empowered to define and interpret the individual rules and laws in accordance with that vision. This allows them much greater manoeuvring power than the traditionalists had. Fundamentalists have as their aim an ascetic, extremely regimented, authoritarian community in which all citizens closely observe the criteria of the Islamic rituals, in which immorality is avoided by the division of sexes, which in effect is accomplished through banishing women from the public sphere, and in which culture is clearly and continuously infused through faith. This is authoritarian in its negation of the private domain, instead of assuming that the state authority has to compel the person to submit to correct Islamic conduct anywhere and anywhere. In reality, it wants to extend this system - which it claims to be the only valid one - until it dominates the entire planet and everybody becomes a Muslim. Modernists conceive of a culture in which people articulate their faith in a manner that is uniquely important to each adult, determine certain spiritual concerns and lifestyle problems based on their consciences, strive to lead ethical lives out of inner belief rather than outer coercion, and focus their democratic structures on ideals of justice and equality. This program is intended to coexist respectfully with other orders and faiths. Modernists consider ideas within Islamic doctrine that affirm the freedom of Muslims, both as people and as groups, to make adjustments and modifications to specific rules and documents[141].

When a problem emerges that is not answered by Islamic Orthodox scriptures, even when it is, however, they do not like the response, fundamentalists and modernists turn directly to their ideal vision and instead invent a solution. Since innovation is not generally accepted in Islam, they define it as something else. Modernists talk of "faith-based objection" to particular facets of Islam, of the "good of the community" as a principle that overrides only the Quran, of the "group or community consensus" (ijma) that legitimizes only drastic change. Radical fundamentalists revive ijtihad, the divisive method of reading, or suddenly point to "higher standards." No traditionalist can ever contend that the conservative material of the Quran or hadith may be "technically defensible" but also be contradictory to the "spirit of the religion of the Prophet" and should thus be abandoned[142].

2.2. Shariah Law in Pakistan

2.2.1. Historical Background

Despite being founded on an Islamic ideal, Pakistan has had a government based on the Westminster constitutional model, which is the norm in the Commonwealth. The country is governed by English Anglo-Saxon law, but conflicts arise within its framework, such as a gap in the country's constitution that allows for the institutionalization of Islamic law in the absence

[141] Benard (2003) 7.

[142] Benard (2003) 121-124.

of an expert council of Fakihs to formulate the practical application of these noble expressions. The following is stated in the preamble of the 1973 Constitution:

"Whereas sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust; Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed; Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and Sunnah; Therein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship, and association, subject to the law and public morality[143]."

The Court has de facto powers, allowing it to hear judicial review cases, such as when military dictatorships repealed the constitution and issued Legal Framework Orders. The President appoints Supreme Court judges after consulting with the Chief Justice, according to Article VII, Chapter 2 of the Court's constitution. The Supreme Court judge must be a Pakistani citizen with at least five years of experience as a High Court judge or fifteen years as a High Court counsel. When General Ziaul Haque's military regime took power in a coup de etat in 1977, the roots of Islamic jurisprudence were sowed[144].

Pakistan bears a mixed legal system, that is, a combination of Shariah law and Anglo-Saxon law. When Pakistan got independence in 1947, English laws remained in force until a new constitution was chalked-out. The founder and father of Pakistan - Muhammad Ali Jinnah – envisaged a legal system for Pakistan in complete compliance or consonance with the teachings of Islam, which could not come true during his life. But his vision was long carried on and bore a lasting impact on the lawmakers in Pakistan in later times. The regime of General Zia-ul-Haq bears witness to Jinnah's vision, as Shariah law was incorporated into the Constitution of Pakistan, paving way for the Islamization process in the country[145].

Nevertheless, Jinnah was successful in formulating the political ideology of the country. During the time of his stay at Lincoln's Inn for studying law, Jinnah found British liberalism attractive and appealing. This ideal of British liberalism appealed to him so much so that he adopted the English Anglo-Saxon law into the Pakistani legal system upon its independence. He assumed for himself the role of the ceremonial figurehead of Pakistani politics and therefore, Pakistan became a Anglo-Saxon law system country, possessing adversarial court procedure and other Anglo-Saxon law practices like judicial precedent and the idea of *stare decisis*. However, there are considerable differences in the Pakistani Anglo-Saxon law system with that of the traditional one. Firstly, the laws in Pakistan are entirely codified, be they civil or criminal laws. This is due to the enactment of Statutes by the British during their rule in the subcontinent. Secondly, the idea of jury trials no longer exists in Pakistani Anglo-Saxon law due to dissatisfaction in its operation and mistrust from both the judiciary and the public. One Pakistani judge is reported calling these jury trials *'amateur justice'*. Thirdly, Pakistani

[143]Constitution of the Islamic Republic of Pakistan, 1973. Available online https://www.refworld.org/docid/47558c422.html.

[144]Akhtar, Zia: Constitutional Legitimacy: Shariah Law, Secularism and the Social Compact. In: Indonesia Law Review 2/1 (2011) 112-113.

[145]Saigol, Rubina: Pakistan's Long March. In: Development and Cooperation 36/5 (2009) 208–210.

jurisprudence is by and large influenced by the US-style Federal Structure with regards to its constitution. Fourthly, Shariah law along with the traditional jirga system bears influence in the judicial development of the country.

Keeping in view Jinnah's vision of an Islamic state[146], the ulama or Islamic clergy got in near association with Jinnah and acquired strength. After Jinnah's demise (just one year after independence), one of the ulama's namely Maulana Shabbir Ahmad Usmani portrayed Jinnah as the greatest Muslim after the Mughal Emperor Aurangzeb and also compared his death to the demise of Prophet (PBUH). Maulana asked the entire nation to memorize Jinnah's message related to *'Unity, Faith and Discipline'* and to work in the direction of fulfilling his dream: *'Jinnah wanted to create a solid bloc of all Muslim states from Karachi to Ankara, from Pakistan to Morocco. He wanted to see the Muslims of the world united under the banner of Islam as an effective check against the aggressive designs of their enemies'.*[147]

The initial steps to transform the country into the desired Islamic state, as postulated by Jinnah, were taken by the very first Prime Minister of Pakistan – Liaquat Ali Khan. He presented before Objectives Resolution before the Constituent Assembly in 1949[148], which gave the entire sovereignty in the universe to Allah Almighty[149]. Not only this, the then president of the leading political party (Muslim League) in Pakistan shared his intentions of bringing together the entire Muslim nations in the world into one entity, i.e. a pan-Islamic entity[150]. One of the initial researchers on Pakistani politics - Keith Callard also witnessed the essential faith of Pakistanis in the power of unity among the Muslim nations, stating:

'Pakistan was founded to advance the cause of Muslims. Other Muslims might have been expected to be sympathetic, even enthusiastic. But this assumed that other Muslim states would take the same view of the relation between religion and nationality[151].

However, this pan-Islamic approach was not received in the same context by other Muslim nations at that time, due to the simple reason of the origin and basis of development of such nations. In many Muslim nations, the ideals of nationalism arose based not only on Islam but also on other essential factors like ethnicity, language and culture. Such Muslim nations were against this pan-Islamic approach of Pakistan as they weighed other essential factors more than the religion. Besides their opposition, however, a large number of Islamists were attracted towards Pakistan based on its pan-Islamic approach, including figures like the Grand Mufti of Palestine, Al-Hajj Amin al-Husseini, and leaders of Islamist movements, e.g. the Muslim Brotherhood.[152]

The advance of European influence on South Asia (and, subsequently, the Ottoman Middle East) did not result in the abolition of mufti-based systems of jurisprudence or fiqh. Local muftis' labour was simply blended with imperial strategy in ways that enhanced the legal

[146]Paracha, Nadeem F.: The first Pakistani?. DAWN (April 12, 2015).

[147]Balouch, Akhtar: Muhammad Bin Qasim: Predator or preacher?. DAWN (April 8, 2014).

[148]Saigol, Rubina: What is the most blatant lie taught through Pakistan textbooks?.Herald (August 14, 2014).

[149]Rafi, Shazia: A case for Gandhara. Dawn (February 19, 2015).

[150]Lapidus, Ira Marvin: A history of Islamic societies. (Cambridge: Cambridge University Press, 2002) 382–384.

[151]Saigol (2009) 208–210.

[152]Dhulipala, Venkat: Creating a New Medina: State Power, Islam, and the Quest for Pakistan in Late Colonial North India. (Cambridge: Cambridge University Press, 2015) 489.

autonomy of the state[153]. Working with "advisory" muftis after gaining control of the Mughal courts in Bengal, for example, British agents pushed for a more thoroughly centralized pattern of legal oversight: translating fiqh digests to engage Islamic law more directly; combining fiqh terms with European notions of "justice, equity, and good conscience"; promulgating statutes that superseded specific elements of fiqh; and, after 1861, distancing themselves from advisory qanun. The history of Muslim law is littered with examples of legal centralization in which private muftis and advisory qazis were supplanted by governmental power. Pakistan's history is similar; once again, the state claimed its authority to establish the bounds of Islamic law. In Pakistan, constitutional debates have traditionally centred on such issues[154].

Understanding the constitutional situation of Pakistan's parliament concerning the definition of Islamic law necessitates knowledge with three main groups of players, each defined by their views on how Islamic law should be treated in the contemporary state. The first is concerned with "traditionalist" muftis who are linked with various schools of Islamic law or fiqh. This group is made up of madrasa-based ulema who are united by a strong belief in the fatwas' formal autonomy. The irony, of course, is that this commitment (favouring autonomy from the state's "corrupting" influence) is frequently linked to the work of political parties such as the Jamiat-i Ulema-i Islam or JUI (Party of Islamic Ulema) and the Jamiat-i Ulema-i Pakistan or JUP (Party of Pakistani Ulema) – parties that criticize the state they seek to control's expanding reach. Group 2 blends a love of the state's uniting work with a love of sharia's "dynamism" (emphasizing the need for "advisory" qazis working alongside a state with unrestricted legislative authority). In Pakistan, this group comprises "nationalist" politicians like Mohammad Ali Jinnah, as well as progressive religious ideologues like Mohammad Iqbal, who united an appreciation for Islam's dynamic quality with that of an elected legislature. It includes lay religious actors such as Ghulam Ahmad Parwez and modernist religious intellectuals such as Fazlur Rahman, as well as dictators such as General Mohammad Ayub Khan. These individuals created a pragmatic religious-political clique united by their belief that the state's creative power might be used to channel the historical growth of Islamic law[155]. Unlike nationalist figures like Jinnah and Iqbal, who emphasized the dynamic legislative power of an unfettered parliament, Parwez, Rahman, and Ayub Khan emphasized the executive's unconstrained power.

The third and last group believes that Islamic law does not lend itself to a dynamic "legislation" process. In reality, this group viewed the state's authority through the glasses of Abu'l ala Maududi, a well-known Islamist theorist who emphasized the uniting potential of a sharia-focused state with limited legislative autonomy. Islamic law is not only a set of "principles" guiding an otherwise unrestricted legislature in this case (Group 2). It is also not buried behind academic and sectarian arguments (Group 1). Group 3, on the other hand, maintains that the state does not define shari'a; rather, it only enforces it as a collection of historically unchangeable requirements. As a result, legislation is often seen as anathema for Group 3, even though state-based enforcement is widely regarded as indispensable. Since the founding of Pakistan in 1947, traditionalists and Islamists in Groups 1 and 3 have teamed together to resist

[153]Kugle, Scott Alan: Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia. In: Modern Asian Studies 35/2 (2001) 257–313.

[154]Choudhury, G.W.: Constitutional Development in Pakistan. (London: Longman, 1969) 589-600.

[155]Qasmi, Ali Usman: God's Kingdom On Earth? Politics Of Islam In Pakistan, 1947-1969. In: Modern Asian Studies 44/6 (2010) 1197–1253.

the nationalists' assertion of "unfettered" legislative authority. The tensest conflicts, on the other hand, have frequently occurred inside Group 2[156].

Pakistan's first Constitution, ratified in March 1956, was remarkable for its focus on legislative primacy: a unicameral parliament with 310 members evenly divided between East and West Pakistan. 15 The country was renamed the Islamic Republic of Pakistan, and the Objectives Resolution (1949) was added to the constitution as a nonbinding preamble. In a series of nonjusticiable articles known as the "Directive Principles of State Policy," more comprehensive religious regulations, including the obligatory teaching of the Qur'an for Muslims, were laid down. Finally, the essential subject of "repugnancy" was addressed in Articles 197–198, which stated that the president was expected to designate both (a) an organization committed to Islamic study and (b) an institution devoted to Islamic education and (b) an "advisory" commission charged with making recommendations for the Islamization of existing laws (while protecting the Constitution and sectarian diversity within "Muslim personal law" from the specific encroachments of this process), with the National Assembly making the final decision on the correction of ostensibly "repugnant" laws[157].

However, in reality, the president took nearly two years to designate anybody to the advisory panel outlined in Articles 197 and 198. The country was obsessed with political instability caused by a quick succession of prime ministers: Chaudhury Mohammad Ali (1955–56), Hussain Shaheed Suhrwawardy (1956–57), Ibrahim Ismail Chundrigar (October–December 1957), and Feroz Khan Noon (1957–58). Pakistan's new constitution was repealed within three years. President Iskander Mirza disbanded Pakistan's National Assembly and imposed martial law in October 1958, only to be exiled three weeks later by his own chief martial law administrator, Mohammad Ayub Khan. The original constitution of Pakistan advocated a strong parliament. Throughout the mid-1950s, however, the executive of Pakistan had considerable influence. Chief Justice Mohammad Munir, not unexpectedly, backed the military takeover led by Chief Martial Law Administrator General Mohammad Ayub Khan. Even before Ayub began work on a new Constitution, he took the initiative to issue an executive order outlining a series of "Islamic" legal changes — reforms that would pave the way for some of the most important religious clauses to appear four years later in Pakistan's second Constitution (1962). The Muslim Family Laws Ordinance was the most major reform (MFLO 1961)[158].

Ayub's new Constitution, together with the MFLO (which many traditionalists and Islamists considered as the embodiment of "nationalist" legislative hubris), set a new high watermark for the unconstrained lawmaking authority commonly associated with Group 2[159]. However, its most ambitious institutional changes were also short-lived; in reality, it is the 1962 Constitution as revised in 1963 (reinstating key components from the 1956 Constitution) that determined the connection between Islamic law and the limitations of the postcolonial state. Ayub's Constitution began by altering the country's name to "The Islamic Republic of Pakistan" (removing the term "Islamic") and keeping the Objectives Resolution as a non-binding preamble that was carefully rewritten to eliminate religious restraints, as follows: *"Whereas sovereignty over the entire universe belongs to Almighty Allah alone and the authority to be*

[156]Qasmi (2010) 1197–1253.

[157]Choudhury, G. W: Democracy on Trial in Pakistan. In: Middle East Journal 17/2 (1963) 1–13.

[158]The Muslim Family Laws Ordinance, 1961. [Ordinance No. VIII of 1961].

[159]Qasmi (2010) 1229-1235.

exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust, . . . this Constituent Assembly . . . resolves [. . .]."

Indeed, Ayub went on to ensure that Pakistan's Directive Principles of State Policy were diluted to ease the possibility of ulema-imposed constraints, noting that "the Muslims of Pakistan should be enabled... to order their lives in accordance with [the teachings and requirements of Islam as set out in the Holy Qur'an and Sunna] the fundamental principles and basic concepts of Islam. Moreover, in Article 198, Ayub abolished similar limits to emphasize that, in the future, "no law shall be established which would be contradictory to the teaching and obligations of Islam[160]." These changes were meant to emphasize that, according to Ayub, Islamization and the abolition of "repugnancy" could only take place if the many schools of conservative thought succeeded to achieve the very difficult job of "developing consensus" concerning "the principles of Islam."

Naturally, Groups 1 and 3 were adamantly opposed to all of these changes. In reality, as a result of their resistance, each was overturned within a year. Article 198 was revised in particular to guarantee that, in the course of state-based efforts to ensure that no legislation was hostile to Islam "as laid down in the Holy Qur'an and sunna," the term "Qur'an and sunna" was read to imply "the Qur'an and sunna as interpreted by each sect." Article 6 of the amended Constitution of 1963 reiterated that, as in the 1956 Constitution, official decisions regarding repugnancy (and its correction) would be made by the National Assembly, not the Supreme Court: "Our courts are not conversant with... religious knowledge, [so]... it would be a great mistake to leave this matter to the courts," noted Law Minister Khurshid Ahmed[161]. Returning to the opinions of the Pakistan Education Conference (1947), Ahmed maintained that the greatest choice was to go through education, since "by education... we develop such a public sentiment that we can Islamize our legislation" through parliament.

The Constitution of 1962–63 simply reiterated elements first articulated in 1956 to prevent the courts from correcting instances of repugnancy on their own, even as it provided for a set of institutions to support the Islamization of existing laws (drawing attention to the nonbinding advice of Pakistan's Advisory Council of Islamic Ideology in Article 199). Indeed, while higher courts were given the authority to evaluate legislation that violated certain basic rights, they were not given the authority to unilaterally change every statute suspected of having connections to "Islam." This was partly due to Article 6 (which established parliament's primacy over Pakistan's "principles of law-making"), but it was also due to the Fourth Schedule (which stated that certain laws, including the MFLO, that fell under the heading of "Muslim personal law," would not be subject to judicial review). When Ayub Khan's Muslim Family Laws Ordinance (MFLO) sought to revisit (and revise) the parameters of "Muslim personal law," this Fourth Schedule stepped in to ensure that it was protected from any articulation of judicial review that might seek to challenge its "unfettered" (nationalist) power. In other words, Muslim personal law legislation, like the Constitution itself, was shielded from judicial examination, while judicial attempts on other legal issues were limited to a description of what was not "Islamic" (rather than what was). Parliament was given the responsibility of determining what was Islamic in a positive legislative sense[162].

[160]Choudhury (1963) 177-189.

[161]Nelson, Matthew J.: Islamic Law in the Islamic Republic: What Role for Parliament?. In: Bali, Asli U./Lerner, Hanna: Constitution Writing, Religion and Democracy. (Cambridge: Cambridge University Press, 2017) 247-252.

[162]Nelson (2017) 247-252.

Bhutto kept practically all of the previous clauses relating to the Islamization of law in the 1962–63 Constitution (including reframing Ayub's Fourth Schedule as a new "First" Schedule to shield Muslim personal law from judicial examination). The dictatorship of Ayub and the democracy of Bhutto had little in common when it came to drafting an "Islamic" constitution (even to the point of introducing broadly "secular" provisions at first and then, following violent protests by Groups 1 and 3, backtracking via "religious" amendments the following year). Simultaneously, the Supreme Court made a major decision affirming the primacy of parliament in questions of Islam. The Supreme Court emphasized in the State v. Zia-ur-Rahman case in 1973, that the judiciary's function in interpreting Islamic law was restricted to declaring what was not Islamic rather than what was. In effect, the Court ruled that the state's role in establishing Islamic law in a "positive" sense was limited to parliament; neither the (nonbinding) Objectives Resolution nor the judiciary possessed anything resembling an overarching supra-constitutional jurisdiction[163].

The 1973 Constitution renamed Pakistan's "Advisory" Council of Islamic Ideology the Council of Islamic Ideology or CII (Article 228) and stated (again) that any law determined to be repulsive by the CII would be brought back to the legislature for modification (Article 230). The Objectives Resolution, on the other hand, was kept as a nonbinding preamble, with Article 2 identifying Islam as Pakistan's state religion (and, in Article 41, the president's religion, with both the president and prime minister expected to swear an oath that Mohammad was God's final prophet – in other words, an oath rejecting the Ahmadiyya's views). In reality, in 1974, a Second Constitutional Amendment was drafted to classify the Ahmadiyya as "non-Muslims" under the law. Both the 1973 Constitution and the Second Amendment were overwhelmingly approved. Massive political divisions remained, however, just beneath the surface; in fact, Bhutto's opponents banded together in a united show of defiance when Bhutto called new elections (1977). Regrettably, the election was rigged (in favour of Bhutto). As the demonstrations grew, General Zia-ul-Haq, the army chief of staff, stepped in to reinstate martial law[164].

In 1979, General Zia signed a historic constitutional change that, for the first time, gave provincial high courts the authority to decide whether legislation was "repugnant" to the tenets of Islam on their own. He proclaimed that "repugnant" legislation should be referred back to the president (federal laws) or his designated governors (provincial laws) for change, modifying past efforts to provide the Supreme Court and the National Assembly with similar powers. (Appeals were thereafter submitted to the Shariat Appellate Bench, a separate Supreme Court bench.) Zia, on the other hand, appointed the judges who sat on that appeal panel and ensured that any authority to revise disputed legislation would be used by his own CII appointees working in tandem with the administration.) However, Zia changed this legislation just a year later, in 1980. He disbanded his provincial Shariat courts in particular to establish, with the help of an entirely new chapter in the Constitution (Chapter 3A), a body known as the Federal Shariat Court (FSC) comprised of a chair (nominated by the president from among those eligible for appointment to the Supreme Court) and four members (again, nominated by the president). This FSC is frequently regarded as the "apex" shariah court. However, theoretically, this court remains part of Pakistan's regular judicial structure (with appeals sent to the Shariat Appellate Bench of Pakistan's current Supreme Court)[165].

[163]Nelson (2017) 253.

[164]Nelson (2017) 253-254.

[165]Nelson (2017) 257-258.

Furthermore, rather than enabling the FSC to evaluate any shariah-related legislation, a separate clause (Article 203-B) was added to ensure that the FSC could not review (a) the Constitution itself or (b) any "Muslim personal law" (including, apparently, Ayub Khan's Muslim Family Laws Ordinance[166]). In 1988, Zia intervened to (a) dissolve the National Assembly and (b) issue his own "Enforcement of Shariah" Ordinance, thereby ending this long-running defence of parliamentary sovereignty. This law, on the other hand, was proposed as a presidential ordinance rather than a constitutional amendment. And, because no legislation passed the law for the following four months (during which time Zia was also murdered in a strange plane crash), it just expired[167].

As Pakistan was, from the beginning separated into two wings -East and West Pakistan, the East Pakistanis were suffering enormously at the hands of the minority West Pakistan wing. Therefore, in 1971, the East wing finally got independence from the West wing and became a new country (now known as Bangladesh). As a result of the elections already held in 1971, the Pakistan People's Party (PPP) won the elections and became the first elected government of West Pakistan (now known as the Islamic Republic of Pakistan) in years from 1947. This party was successful in constituting a legislative body capable of bringing a landmark constitution in the country in 1973[168], known as the Constitution of 1973. Under this Constitution, the country was declared to be the Islamic Republic that is Islam became the state religion. It also declared that the entire laws in force in the country be brought in accordance with the teachings of Islam as enshrined in the Holy Quran and Sunnah of the Prophet (PBUH). It further stated that no law in derogation of the Islamic teachings is to be enforced in the country.[169] For that purpose, several institutions were established in-country, for instance, the Shariah Court and Council of Islamic Ideology (CII)[170].

On July 5th, 1977, the government of PPP was overthrown by a military coup led by the then Army General Zia-ul-Haq[171]. About two years before the government of PPP was overthrown by this military coup, the party had to face vigorous opposition from the Islamic revivalist united under the banner of *Nizam-e-Mustafa* (meaning the 'Rule of the Prophet'). These Islamic revivalists believed in the establishment of Pakistan in accordance with the laws of Shariah in totality. That meant a return to the system of justice and rule of the like in the days of the Prophet (PBUH)[172]. In an attempt to support this wave of Islamization, the PPP Prime Minister – Zulifqar Ali Bhutto banned several vices against Islamic teachings including wine drinking or selling by Muslims or in nightclubs or during horse racing etc[173].

[166]Benard (2003) 67-68.

[167]Ali, Amjad: Autobiography of an Ex-Ambassador of Pakistan to U.S., 1953. (Lahore, 1992) 91-93.

[168]Haqqani, Hussain: Pakistan: Between Mosque and Military. (US: Carnegie Endowment, 2010) 18.

[169]Saigol (2009) 491.

[170]Paracha (2015).

[171]Khan, Sher Ali: Global connections: The crackdown on HizbutTahrir intensifies. Herald(February 12, 2016).

[172]Diamantides, Marinos /Gearey, Adam: Islam, Law and Identity. (UK: Routledge, 2011) 196.

[173]Iqbal, Khurshid: The Right to Development in International Law: The Case of Pakistan. (UK: Routledge, 2009) 189.

However, when Zia took over Bhutto's government, the centrepiece[174] of his governmental policy[175] was Islam and Islamization. He committed himself to establishing Pakistan as an Islamic state by enforcing the Shariah law. He established a parallel court system by forming the basis of Shariah courts and separate court benches[176] to decide legal cases by employing Islamic doctrines[177]. He also added several new criminal punishments and offences to the existing Criminal law of the country, including the offences of adultery, fornication, and blasphemy to be punished by whipping, amputation, or stoning to death etc. The concept of 'interest' was replaced with that of 'profit and loss' for bank accounts and an annual 2.5% tax was imposed on bank accounts for Zakat donations. The syllabus of academic institutes along with the libraries was reviewed to remove any un-Islamic material[178].

All the institutes including offices, schools, and factories were asked to provide facilities and space for prayer in their territory. He also bolstered the impact of ulama's and Islamic political parties, through which these conservative scholars became regular television figures[179]. Not just this, he also instated around ten-thousand Jamaat-e-Islami activists in the government posts to make certain that his Islamization struggles would continue even after his demise[180]. The Council of Islamic Ideology was recruited with majority conservative ulama's. He also established separate electorates for the minorities in the country, for instance, the Hindus and Christians in 1985, besides the dissatisfaction of minorities with such a decision[181].

Until Zia came into power, the Islamic revivalists had no real force in the country. But upon his arrival, they changed the entire foundation of Pakistan's legal history. Zia played a pivotal role in the move towards Islamization possibly due to his piety[182] and desire to acquire a political stronghold[183].

2.2.2. Contemporary Status of Shariah Law

The battle that these Islamic rules have sparked is between the seminary educated Taliban and its mainstream sympathizers, and Pakistan's liberal rulers, who are descended from the country's English medium school's westernised elite. The Hudood Ordinances, a set of statutes collectively known as the Hudood Ordinances, are the source of conflict in terms of the legislation that the Pakistani state has enacted. When Gen. Zia-ul-Haq first proposed these measures, they sparked outrage[184]. This was the start of what he hoped would be the

[174]Grote, Rainer: Constitutionalism in Islamic Countries: Between Upheaval and Continuity. (UK: Oxford University Press, 2012) 196.

[175]Lapidus (2002) 198.

[176]Kepel, Gilles:Jihad: The Trail of Political Islam. (London: I.B.Tauris, 2002)100, 101.

[177]Michael, Siam Heng-Heng / Ten, Chin Liew: State and Secularism: Perspectives from Asia. (Singapore: World Scientific, 2010) 360.

[178]Haqqani, Hussain: Pakistan: Between Mosque and Military. (US: Carnegie Endowment for International Peace, 2005) 395.

[179]Jones, Owen Bennett: (2002). Pakistan: Eye of the storm. (New Haven / London: Yale University Press, 2002) 16, 17.

[180]Human Rights Watch: Double Jeopardy: Police Abuse of Women in Pakistan. *(New York, 1992)19*.

[181]Wynbrandt, James: A Brief History of Pakistan. (US: Facts on File, Inc., 2009) 216, 217.

[182]Talbot, Ian: Pakistan, a Modern History. (New York: St. Martin's Press, 1998) 251.

[183]Long, Roger D./Singh, Gurharpal/Samad, Yunas/Talbot, Ian: State and Nation-Building in Pakistan: Beyond Islam and Security. (UK: Routledge, 2015) 167.

[184]Note: General Zia's Martial Law Proclamation stated that all orders, ordinances and Martial law regulations were to become law when he assumed power on the 5th. July,.1977.

construction of an "Islamic" court system in the country. The laws he introduced came into force as the Prohibition Order 1979[185]; The Offence of Zina[186]; and Enforcement of Hadd[187]. Propriety, qazf (false allegations of adultery), adultery, and prohibitions are all covered in the third par[188]t. In essence, Hudood is one of the four forms of punishment in Islamic Penal Law, along with Qiyas, which relates to retribution; Diyya, which is recompense provided to the victim's heirs; and Tazir, which is punishment generally delivered corporally at the judge's discretion. Theft, highway robbery, illicit sexual intercourse, false claims of impropriety, consuming alcohol, blasphemy, and apostasy are among the Hudood transgressions. Acts against the "claims of God" are described as a violation of Hud prohibitions, and the sovereign is responsible for punishing them. All other offences were defined as "claims of [His] servants," and responsibility for prosecution rested on the victim. This includes murder, which was treated as a private dispute between the murderer and the victim's heirs. The heirs had the right to compensation called diya and to demand execution of the murderer i.e., qisas, but they could also choose to forgive[189]. The imposition of these ordinances in Pakistan has been criticized because they make no distinction between adultery and rape; for example, a woman who is a victim of rape must bring the testimony of four male adults who witnessed and can testify that the act was carried out using violence before an Islamic court. If the victim is unable to present these witnesses, she may be charged with adultery and sentenced to jail, according to the regulations[190].

The case of Zafra Bibi[191] in Pakistan went to trial against the complainant who claimed she had been raped. Zafran Bibi was married for 13 years to Naimat Khan of Kari Sher Khan village in Kohat, who was convicted of murder and sentenced to 25 years in jail. Jamal Khan, her husband's brother, harassed her on several occasions as she continued to live with her in-laws. She protested to her mother-in-law about his behaviour, but she instead placed the responsibility completely on Zafran's shoulders and told her to change her ways. She was raped by Jamal Khan after that, and the situation was buried again, but when she became pregnant, she had no choice but to go straight to the authorities. The ordinances facilitated her adultery trial, and she was found guilty of Zina. However, as the movement to amend the rules gained traction and word of her plight spread, the Federal Shariat Court overturned the appeal court's decision, quashing her conviction and releasing her. The court found that if a woman is forced to commit Zina, she would not be held accountable under Hud laws. The Hudood laws have now been declared outdated, based on the claim that this element of Sharia is incompatible with a humanist or Western view of human rights. When the government passed the Protection of Women Act in 2006, opponents of this interpretation of Hudood legislation that penalize the complaint were justified. By putting rape within the Pakistan Penal Code, 1860 (as revised in 1965 and 1980), which is not based on Sharia law, this clause has changed the Hudood

[185]The Enforcement of Hudood Ordinance, 1979: P.O No 4 of 1979.

[186]The Enforcement of Hudood Ordinance, 1979.

[187]The Enforcement of Hudood Ordinance, 1979.

[188]Note: The Hudood Ordinances are now obsolete as Women Protection Act, 2006 affirms the laws relating to Zina and qazf in conformity with the stated objectives of the Constitution and the injunctions of Islam.

[189]Okon, Dr Etim E.: Hudud Punishments in Islamic Criminal Law. In: European Scientific Journal 10/14 (2014) 227-237, especially 232-234.

[190]Note: The Council of Islamic Ideology (CII) in 13/12/05 agreed to amend the controversial Hudood ordinances to bring it in accordance not only with the Quran but also the Penal Code and the Criminal Procedures Code, a CII press release said. This was later enforced through the Women Protection (Criminal Law Amendment) Act in 2006.

[191]Azam, Hina: Sexual Violence in Islamic Law: Substance, Evidence, and Procedure. (Cambridge: Cambridge University Press, 2015) 3-4.

legislation. According to Gerhard Endress, a leading researcher on Islamic law, significant social reforms occurred at the time of Islam's arrival, including the creation of a new system of marriage and family, as well as legal prohibitions such as the prohibition of polygamy. "The social system established a new structure of marriage, family, and inheritance; this system treated women as individuals as well as providing social security to her and her offspring. Polygamy under legal control was a significant improvement over the various loosely defined arrangements that had previously been both possible and current; it was only through this provision (along with severe punishment for adultery) that the family, the heart of any sedentary society, could be placed on a firm footing," explains Endress[192].

The Pakistani Constitution recognizes God as the supreme sovereign of the universe, with Parliament acting as a delegate. Pakistan's constitution stipulates that all legislation must be based on Islam and must not contradict the Quran or Sunnah. The Council of Islamic Ideology examined British-era law and decided that most of it did not violate Sharia[193]. The 1991 Enforcement of Shariat Act proclaimed Sharia the supreme law of Pakistan. Section 4 mandates that courts choose an interpretation of the law that is consistent with Islamic principles and jurisprudence[194]. The Federal Shariat Court was established to determine whether Pakistani laws are in accordance with Islam as outlined in the Quran and Sunnah[195]. It has original, appellate, and revisional jurisdiction. It comprises eight judges, including three ulama who must be Sharia certified[196]. Over the course of 30 years, the Federal Shariat Court invalidated 55 federal legislation and 212 provincial statutes. Certain legislative instruments, including the Muslim Personal Law, the Constitution, fiscal and procedural legislation, were originally excluded from the Federal Shariat Court's authority[197]. The Supreme Court ruled in 1994 that the term "Muslim personal law" used in Article 203B, which precludes the Federal Shariat Court's authority under Article 203D, solely refers to the personal law of each Muslim sect as interpreted by the Quran and Sunnah. As a result, the Federal Shariat Court ruled in 2000 that any other legislation affecting Muslims, in general, fell under the jurisdiction of the Federal Shariat Court under Article 203D. The court also ruled that the Federal Shariat Court's position was not meant to be diminished by the Constitution[198].

Sharia-compliant evidentiary legislation has been enacted in Pakistan. However, just nine provisions of the British period 1872 Evidence Act required to be modified. The distinctions in the Islamic version are mainly focused on the quantity, character, and skill of eyewitnesses. In financial or future concerns, for example, the Law of Evidence states that evidence must be sworn to by two men or one man and two women. The Law of Evidence also requires a court to establish a witness's competency by referring to Islamic injunctions in the Quran and Sunnah[199]. For offences like murder and harm, Qisas and Diyat laws impose retaliatory punishments or compensating blood money. In Pakistan, the Qisas and Diyat laws treat murder as a private offence against the victim and their family, rather than a public offence against the

[192]Endress, Gerhard: Islam: An Introduction to Islam. (Columbia: University Press, 1988) 31.

[193]Mehdi, Rubya: The Islamization of the Law in Pakistan. 1st Edition. (UK: Routledge, 2013) 209.

[194]Waheedi, Salma/Stilt, Kristen: Judicial Review in the Context of Constitutional Islam. In: Delaney, Erin F./Dixon, Rosalind: Comparative Judicial Review. (UK: Edward Elgar Publishing, 2018) 137.

[195]Cheema, Shahbaz Ahmad: The Federal Shariat Court's Role to Determine the Scope of 'Injunctions of Islam' and Its Implications. In: Journal of Islamic State Practices in International Law 9/2 (2013) 95.

[196]Cheema (2013) 92.

[197]Cheema (2013) 94.

[198]Giunchi, Elisa: Adjudicating Family Law in Muslim Courts. 1st Edition. (UK: Routledge, 2014) 80.

[199]Wasti, Aarij S.: The Hudood Laws of Pakistan: A Social and Legal Misfit in Today's Society. In: Dalhousie Journal of Legal Studies 12/63 (2003) 76-77.

state, as it was during British rule when the Qisas and Diyat laws were abandoned because they made enforcing law and order difficult. After all, the victim or victim's family could be pardoned or receive blood money as compensation. The Qisas and Diyat laws were initially adopted by presidential decree in 1990, and later codified in 1997[200]. The majority of crimes in Pakistani law are classified as tazir and siyasah[201]. The Pakistan Penal Code is recognized as a tazir code, although it also incorporates siyasah offences, despite the absence of the name siyasah. The Hudood Ordinance separates Zina, qazf, drunkenness, and stealing into two categories: those punishable by hadd and those punishable by tazir. Tazir penalties are left to the discretion of the Shariah[202]. Hadd infractions can be punished with tazir (discretionary) sanctions if the severe evidential standards for hadd offences are not met. Fines, imprisonment, and flogging are examples of tazir penalties. The hadd penalty of amputation on thieves is subject to extremely rigorous circumstances[203]. The guiding premise is that the accused will be saved from hadd punishment if there is a small question, and the court will utilize all legal methods to avoid inflicting a hadd penalty. As a result, no one has ever been amputated for stealing. Theft done under duress is not punishable by hadd. The relationship between the victim and the perpetrator, as well as the value of the stolen goods, are also taken into account. Section 13 of the Ordinance, on the other hand, stipulates that tazir can be used to penalize theft that is not subject to hadd. Theft punishable by tazir is punishable by fines or imprisonment under the Pakistan Penal Code. Robbery (harabah) is also classified as a hadd offence in Pakistani law[204].

The Zakat and Ushr Ordinance, issued by President Zia ul Haq, established the Zakat system in Pakistan (1980). During Ramadan, Pakistani banks remove 2.5 per cent of the Nisab amount from bank accounts. The collection is sent to the Ministry of Finance by the banks. The Zakat and Ushr Ordinance spells forth which persons are entitled to receive zakat. Religious students, orphans, and the ill are among them. The ushr legislation in Pakistan charges a 5% tax on harvests from artificially irrigated farms and a 10% tax on harvests from non-irrigated lands[205]. Interest on domestic transactions was abolished in Pakistan, but not on international loans. Profit and loss sharing plans were implemented, as well as contract markups. Profit and loss, on the other hand, were termed riba by the ulama. Ghulam Ishaq Khan, the finance minister at the time, stated as much in 1984, saying that illicit profiteering and stockpiling had to be eradicated. The Federal Shariat Court ruled in 1991 that riba is haram and that 32 financial legislations are un-Islamic. Two private banks disputed the judgement, claiming that while they acknowledged the decision, there was no other option. "The government does not dispute that interest is contrary to the Quran," the federal law minister said, "but the system is so thoroughly ingrained that it cannot be eradicated overnight[206]".

[200]Wasti, Tahir: The Application of Islamic Criminal Law in Pakistan: Sharia in Practice. (Leiden: BRILL, 2009) Chapter 6.

[201]Khan, A. U./Ullah, S./Abdullah, K.: Personal-cum-political security & blasphemy laws in Pakistan: A critical analysis. In: Pakistan Journal of Criminology 10/1 (2018) 121.

[202]Mehdi (2013) 109-110.

[203]Wasti (2003) 74-75.

[204]Okon (2014) 227-237.

[205]Weiss, Anita M.: Islamic Reassertion in Pakistan: The Application of Islamic Laws in a Modern State. (New York: Syracuse University Press, 1986) 74.

[206]Malik, Iftikhar: State and Civil Society in Pakistan: Politics of Authority, Ideology and Ethnicity. (Berlin/Heidelberg:Springer, 1996) 53.

Pakistan's blasphemy laws have made it illegal to convert to another religion[207]. In 2006, the government submitted a law to a parliamentary committee for consideration that would put apostates to death. The bill has yet to be passed[208]. The premise is that if there is a gap in the law, Sharia should be used to fill it. Martin Lau speculated that, despite the lack of a formal statute, apostasy may already be punished by death in Pakistan due to this concept[209]. Apostasy and treason are both hadd offences, according to the Federal Shariat Court. In 2010, the Court ruled that provisions of the 2006 Women's Protection Act that overrode the Zina and qazf Ordinances were unconstitutional[210]. In 2010, the Court ruled that provisions of the 2006 Women's Protection Act that overrode the Zina and qazf Ordinances were unconstitutional[211]. Many Sunni Muslims had reservations about basic components of medieval Islamic legal philosophy as a result of social and political developments in the nineteenth century[212]. There were cacophonous discussions all across the Sunni Muslim world concerning who had the power to interpret Islam, what techniques those interpreters should use, and, by implication, what Islamic nations were allowed to do. Multiple factions arose in practically every country, each splintered into sub-factions[213]. In the Shiite world, similar questions and disputes would emerge later and in a somewhat different form.

"Traditionalist" organizations in the modern Muslim world continue to think that the state must legislate in line with the universal precepts of Islam and the public interest, as defined by the fuqaha[214]. Many new Muslim groups have opposed these traditionalists, claiming that conventional techniques of interpreting Islam's universal precepts and old methods of determining the public interest are severely flawed. "Scriptural literalists" (also known as fundamentalists) believed that the universal rules should be found directly in scripture, and that interpretation could be done by people who had a thorough understanding of the scriptures but only a limited understanding of the fuqaha's traditional exegetical methods. Finally, a large group of people I'll refer to as "modernists" advocated for extremely unconventional approaches to understanding Islam's restrictions on governmental discretion, many of which were strongly based on utilitarian reasoning. Modernists themselves were split into several, often antagonistic sub-groups. These parties disagreed on what constituted a public good, and even those who agreed on how to define the good may disagree about whether a particular rule produced positive outcomes. Some were liberal, while others were not. States could no longer expect that conventional processes of consultation with the fuqaha would provide its legislation with legitimacy in the eyes of all citizens—or even a majority of them—as dissent developed. Other systems, on the other hand, were unsure if they would appeal to a wider audience. Some

[207]Forte, D. F.: Apostasy and Blasphemy in Pakistan. In: Connecticut Journal of International Law 10/27 (1994) 28.

[208]Clarke, Ben: Law, Religion and Violence: A Human Rights-Based Response to Punishment (by State and Non-State Actors) of Apostasy. In: Adelaide Law Review 30/1 (2009) 140.

[209]Lau, Martin: The Role of Islam in the Legal System of Pakistan. (Leiden/Boston: BRILL, 2006) 137.

[210]Cheema (2013) 100.

[211]Parolin, Gianluca P.: Religion and the Sources of Law: Shariah in Constitutions. In: W. Cole Durham, Jr. /Ferrari, Silvio/Cianitto, Cristiana/Thayer, Donlu (eds.): Law, Religion, Constitution: Freedom of Religion, Equal Treatment, and the Law. (UK: Routledge, 2013) 103.

[212]See Zubaida, Sami: Contemporary Trends in Muslim Legal Thought and Ideology. In: Hefner (ed.), Robert W.: The New Cambridge History of Islam: Muslims and Modernity: Culture and Society since 1800. (Cambridge: Cambridge University Press, 2011) 270.

[213]Heffner, Robert W.: Sharʿia Politics: Islamic Law and Society in the Modern World. (US: Indiana University Press, 2011) at Introduction.

[214]Zaman, Muhammad Qasim: The Ulama in Contemporary Islam: Custodians of Change. (New Jersey: Princeton University Press, 2007) 38–59.

Muslim intellectuals began to believe that making a formal pledge to its citizens that its laws would honour Islam was futile and useless[215].

In accordance with this negative outlook, Muslim countries are rapidly abandoning any constitutional attempts to ensure that they would follow Islamic law. Almost no majority Muslim country had a constitution that specifically obliged the state to operate in conformity with scripture and state practice by the time of the First World War. SGCs codify in Muslim nations' constitutions the notion that state law must be consistent with sharia. The SGCs' absence was simply a blip on the radar. The public's interest in Islam grew during the twentieth century. Furthermore, many secularist regimes' failings to provide for their people or to protect their rights fueled a backlash against secularism. In some nations, an increasing number of Islamists asked that states recommit to the goal of legislation in line with sharia, tacitly agreeing to postpone substantive talks about what the sharia needed[216]. States in the Sunni Muslim world began to cave to Islamist pressure in the final quarter of the twentieth century, including SGCs into their constitutions[217]. In the second part of the twentieth century, states that adopted SGCs committed to an ideal whose ramifications were hotly debated[218]. As a result, they found themselves in a predicament similar to that faced by states claiming to be "liberal" and struggling to interpret and enforce constitutional provisions safeguarding individual rights. The sense of religious discipline that the Pakistani Muslim feels for the Islamic family regulations is difficult for an outside observer to comprehend. Any earthly intrusion is strongly despised as an attempt to undermine the individual's personal and spiritual ideals since the divine gift provides the perfect social order[219].

Hanafi law is the "social order" about which David Pearl writes. As previously stated, the Hanafi theory is one of the four surviving basic doctrinal groupings of Islamic law, and it is Pakistan's dominant legal philosophy. The Gate of Ijtihad was arguably never closed under Hanafi philosophy, because the Hanafis maintained to regard unrestricted use of human opinion as valid, but only when another way of arriving at a rule would have resulted in bad outcomes. Indeed, as Pearl points out, some groups are vehemently opposed to any meddling with the social order, even from inside it. Traditionalists in Pakistan believe that laws can only be decreed by God. That is, acceptable legislation is that which is spelt down in the Qur'an (Islam's holy book) and the Sunnah (the Prophet Muhammad's acts and sayings), or as a consequence of ijma (consensus). As a result, the application and interpretation of that legislation, known as ijtihad, has generally been restricted to religious leaders who are engaged in the preservation of a conservative society. In response to Traditionalists, Pakistani Modernists are fighting for a broader understanding of legislative and judicial power that includes human efforts as well as supernatural ones. Modernists contend that people can

[215]Lombardi, Clark: State Law as Islamic Law in Modern Egypt: The Incorporation of the Shariʿa into Egyptian Constitutional Law. 1st Edition. (Leiden: Brill Academic Publishers, 2006) 49–58.

[216]See Haddad, Yvonne Y./Voll, John O./ Esposito eds., John L.: The Contemporary Islamic Revival: A Critical Survey and Bibliography. (US: Greenwood, 1987).

[217]Lombardi, Clark B.: Constitutional Provisions Making Sharia “a” or “the” Chief Source of Legislation: Where Did They Come from? What Do they Mean? Do They Matter?. In: American University International Law Review 28/3 (2013) 733.

[218]Heffner (2011) Introduction / Lombardi (2006) 78–118.

[219]Pearl, David: Islamic Family Law and Anglo-American Public Policy. In: Cleveland State Law Review 34/1 (1985-1986) 113.

establish, amend, and enforce rules. The Marriage Commission, for example, was a Modernist enterprise that transformed the Anglo-Saxon law, as will be discussed more below[220].

While independent legal reasoning, or Ijtihad, and the subsequent interpretation and application of family laws (both in the Qur'an and Sunna and later, in the Muslim Family Law Ordinance), were previously limited to Mujtahids, the Commission specifically claimed in its Report that any secular judge could participate in this endeavour. Any man or woman might participate in ijtihad.' The Modernists introduced a new form of separation of powers in the process of widening the scope of ijtihad: although Mujtahids had historically produced and applied Islamic law, the Modernists envisioned independent legislative and judicial roles. Furthermore, the judiciary would not be restricted to experts versed in Islamic law who would mechanically implement the code. Instead, the court would be made up of secularly trained judges who would be able to understand and apply both the code and the Anglo-Saxon law in tandem, on a case-by-case basis. As a result, most traditionalist opposition to Modernists centres on the concept of ijtihad and the credentials of individuals who can perform it. The actual issue is that each party has two distinct goals in mind, not the two different methods they pretend to support. As a result of the structural transformation, the Modernists desire social fairness. To resist Western cultural imperialism, Traditionalists wish to limit the scope of autonomous legal reasoning[221].The Islamization of Pakistan under Zia had disastrous effects on women's rights, allowing for an increase in violence against women. The Zina Ordinance featured various loopholes that could be exploited by rapists, making rape victims even more vulnerable. The Law of Evidence, on the other hand, gravely questioned women's status as equal members of society. A woman's testimony in a criminal case was worth half as much as men. Under the Law of Evidence, violent crimes like "honour" killings and acid assaults on women became inadmissible in court without the presence of male witnesses. Victims became the ones who were prosecuted. According to Zafar Imran Kalanauri, the Zina Ordinance and the Law of Evidence have resulted in the imprisonment of nearly 15,000 rape victims[222].

After Zia's death on August 17, 1988, there was no immediate progress in repairing the harm that Islamization had caused to women's rights. Benazir Bhutto, the daughter of Zulfiqar Ali Bhutto, was elected as Pakistan's first female Prime Minister in 1988. She broke several pledges she made during her campaign for the government. The commitment includes the repeal of the Hudood Ordinance. Women's Studies Centers were established across Pakistani institutions by the Ministry of Women's Development in 1989. However, due to a lack of government support, this program failed[223]. Later, in 1996, the Bhutto administration signed the Convention on the Elimination of All Forms of Discrimination Against Women, which appeared to be a step forward for Pakistani women's equality. Unfortunately, the Convention mainly served as a stopgap solution to quell international outrage about the country's violations of women's rights. Similarly, the Women's Protection Bill of 2006, which was approved under President Musharraf's tenure, did nothing to genuinely change the Zina Ordinance and instead served as a tool to calm down the country's mounting anti-Zina rallies. Progressive legislation has been passed in recent years, and it has been fairly successful in reducing discrimination and violence

[220]Al-Hibri, Azizah: Islam, Law and Custom: Redefining Muslim Women’s Rights. In: American University Journal International Law 12/1 (1997) 1, 7.

[221]Haider, Nadya: Islamic Legal Reform: The Case of Pakistan and Family Law. In: Yale Law Journal and Feminism 12/287 (2000) 291-292.

[222]Kalanauri, Zafar Iqbal: A Review of Zina Laws in Pakistan. Available online at https://zafarkalanauri.com/wp-content/uploads/2020/05/A-Review-of-Zina-Laws-in-Pakistan.pdf.

[223]Asian Development Bank: Women In Pakistan: Country Briefing Paper. (Institutional Document, 2000). Available online at https://www.adb.org/sites/default/files/institutional-document/32562/women-pakistan.pdf.

against women. The 'Protection Against Harassment of Women at Work Act of 2010' and the 'Acid Control and Acid Crimes Prevention Bill of 2011' are two examples[224].

The UN General Assembly passed CEDAW in 1979. It contains 30 articles advocating for the abolition of gender discrimination. The Convention will focus on several elements of public and political life, such as education, employment, and health[225]. Unless otherwise noted, every country that signs the Convention is legally bound by its terms. Every four years, national reports on actions performed are required to be filed. CEDAW is a forward-thinking convention that has been compared to an international bill of rights for women. The word "discrimination against women" is defined in Article 1 as "any differentiation, exclusion, or restriction created based on sex." "States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women and, to this end, undertake: (a) to embody the principle of equality of men and women in their national constitutions or other appropriate legislation if not already incorporated therein and to ensure, through their national constitutions or other appropriate legislation, that the principle of equality of men and women is embodied in their national constitutions or other appropriate legislation if not[226].

Pakistan signed CEDAW in 1996. However, one statement made by Pakistan rendered the Convention's provisions completely ineffective: "The accession by [the] Government of the Islamic Republic of Pakistan to the said Convention is subject to the provisions of the Islamic Republic of Pakistan's Constitution[227]." Because the Convention was governed by the Constitution, it was also subject to the Shariat Court, which was established by the Constitution. As a result, without the consent of the Shariat Court, the signature of CEDAW became a weapon to stifle local and international criticism rather than a tool to genuinely repeal the Zina Ordinance from Pakistan's criminal legislation. The Protection of Women Act was approved by Pakistan's National Assembly in 2006, under President Musharraf's government. Two of the five Hudood Ordinances introduced into the Criminal Laws legislature were changed by the bill. The Zina Ordinance was the most significant change. The Shariat law had eliminated the Zina-bil-jabr penalty for rape, and it was now covered by the Pakistan Penal Code, which dealt with continental law. The Pakistan Penal Code makes rape punished by 10 to 28 years in jail, as well as life in the event of gang rape. (To prove a rape case, four male pious Muslims were no longer required as witnesses; instead, convictions would be based on "forensic and circumstantial evidence[228]"). Among other accusations, the Zina Ordinance now recognizes marital rape, which was previously unrecognized by the law. Despite its progressive appearance, the bill still enables discrimination against women, according to a report by Human Rights Watch (HRW). According to the reports, while the modification of the Ordinances is a step forward, the Women's Protection Bill does nothing to address the persisting prejudice[229].

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[224]Rathore, Minah Ali: Women's Rights in Pakistan: The Zina Ordinance & the Need for Reform. (US: University of Massachusetts Amherst, 2015) 12.

[225]UN General Assembly: Convention on Elimination of all Forms of Discrimination against Women (CEDAW) 1979. Available online at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm.

[226]General Assembly: Convention on Elimination of all Forms of Discrimination against Women (CEDAW) 1979.

[227]General Assembly: Convention on Elimination of all Forms of Discrimination against Women (CEDAW) 1979.

[228]Rathore (2015) 4.

[229]Human Rights Watch: Pakistan: Proposed Reforms to Hudood Laws Fall Short, 2006. Available online at https://www.hrw.org/news/2006/09/06/pakistan-proposed-reforms-hudood-laws-fall-short.

The Hudood Ordinances are intrinsically defective and prone to prejudice; hence they must be repealed completely. The Zina Ordinance, which makes adultery and fornication illegal, is one example. However, this is problematic for a country steeped in Islamic beliefs like Pakistan, which has already seen religious groups such as the Muttahida Majlis-e-Amal (MMA) accuse the government of secularizing the country and threaten to leave the National Assembly[230]. As a result, abolishing the Zina Ordinance may be more difficult than it appears. On March 9th, 2010, the Criminal Law Act on Sexual Harassment and Protection Against Harassment of Women at Work was approved. The law was met with hostility as 'un-Islamic'. These were groundbreaking in terms of categorizing workplace harassment, especially for women. Section 509 describes "insulting modesty or creating sexual harassment" as making sexual approaches, demanding sexual favours, or expressing words, gestures, or items that intrude on women's private, and is punished by a three-year jail sentence, a fine of five hundred thousand rupees, or both[231]. In addition, these restrictions were expanded to include public venues, marketplaces, public transportation, streets, private meetings, and, most crucially, workplace buildings and factories[232]. Although the law was approved in 2010, many women are still afraid to come forward since they are frequently assaulted and harassed when they report crimes to the police[233]. However, the expulsion of a professor from Quaid-e-Azam University in 2013 for sexually harassing his pupils demonstrates that the law can convict those who are guilty[234].

Several MPs, women authorities, and human rights advocates advocated for the Acid Control and Acid Crimes Prevention Bill in 2011. As the practice of throwing acid on women became more frequent, tougher sanctions were required of those who committed the crime[235]. *"Whosoever with intent or knowingly causes or attempts to cause hurt by means of a corrosive substance or any substance which is deleterious to the human body when swallowed, inhaled, come in contact or received into a human body or otherwise shall be said to cause hurt by corrosive substance[236]."* Section 336B, a new change to the bill, raises the severity of the penalty for criminals. "Whoever causes injury by corrosive material shall be punished by life imprisonment or a term of imprisonment of not less than fourteen years, with a minimum fine of Rs one million[237]." According to a UN Women assessment, the measure was exceptionally effective in lowering the incidence of acid-related offences. According to the study, 648 acid-related offences were registered in 2006. After the statute was approved in 2011, the number of acid-related offences decreased by 83 per cent to 106[238].

[230]Lau, Martin: Twenty-Five Years of Hudood Ordinances — A Review. In: Washington & Lee Law Review 64/4 (2007) 1294.

[231]Senate Secretariat: Acts, Ordinances, President's Orders and Regulations. The Gazette of Pakistan, 2010. Available online at http://www.na.gov.pk/uploads/documents/1300927775_931.pdf, 2.

[232]Rathore (2015) 2.

[233]Editorial: Sexual Harassment under Scrutiny. Daily Times (2nd Nov 2014). Available online at http://www.dailytimes.com.pk/editorial/02-Nov-2014/sexual-harassment-under-scrutiny.

[234]Haq, Riazul: Sexual Harassment: Quaid-i-Azam University Professor Fired. The Express Tribune (9th July 2013). Available online at http://tribune.com.pk/story/578892/sexual-harassment-quaid-i-azamuniversity-professor-fired/.

[235]Rathore (2015) 4.

[236]The Acid Control and Acid Crime Prevention Act, 2011 (Also known as the Criminal Law Second Amendment Act, 2011): Section 336A.

[237]The Acid Control and Acid Crime Prevention Act, 2011: Section 336A.

[238]The Acid Control and Acid Crime Prevention Act, 2011: Section 336A.

2.2.3. Major Ideological Schools and Shariah Law

The contemporary status of Shariah Law in Pakistan can be defined in the light of significant marker issues and perspectives of major ideological schools of thoughts existing in Islam and Pakistan, namely *radical fundamentalists, scriptural fundamentalists, conservative traditionalists, reformist traditionalists, modernists, mainstream secularists, and radical secularists*[239].

i. Democracy

According to the *radical fundamentalists*, the concept of democracy is a wrongful creed. They believe that the sovereignty and right to make laws belong to God alone. Whereas the s*criptural fundamentalists* consider that Islam is a form of democracy. The West bear no right as to defining the very concept of democracy and how it must look like, and the Islamic model is superior as it bears sound foundations from the teachings of true religion. The *conservative traditionalists* allow some room for the application of democratic instruments while interpreting the Islamic practices, both in social life and in certain other aspects of public life. The *reformist traditionalists* share a similar approach stating that Islam has been truly democratic in nature since its inception, as it considers the believers sovereign and relies on a democratic election system even for its earliest leaders. The *modernists* too believe that Islam contains democratic concepts which must be brought to the forefront as democracy is a primary concept for an Islamic society to function properly. In addition, the *mainstream secularists* state that Islam must align itself with the concept of democracy which can only be done with the separation of religion and state. On the contrary, the *radical secularists* are of the view that social justice is more important than democracy[240].

ii. Human Rights and Individual Liberties

Radical fundamentalists state that concepts of human rights and individual liberties are erroneous decadent which leads the way to corruption. Therefore, complete imposition of Shariah law shall be observed that results in a good and just society. *Scriptural fundamentalists* state that it is human nature to seek guidance and acquire control, but within a degree of fairness and reasonableness as prescribed by the Quran and Sunnah. They claim that Shariah provides all human beings with optimum guidance and opportunities for gaining control, therefore, concepts of equality and freedom are false. *Conservative traditionalists* also concede with the point of view of *scriptural fundamentalists* that Shariah provides all individuals with optimal opportunities based on their needs and wants. On the contrary, *reformist traditionalists* state that Shariah guarantees human rights and individual liberties and considers them just, provided they must be construed and applied properly. *Modernists* also believe in the same approach as the reformist traditionalists, with the exception that they allow freedom to do wrong as well. *Mainstream secularists* expound that Shariah guides people in their code of conduct in their private lives, where they may give up certain freedoms. Nevertheless, civil rights like human rights are fundamental and essential in social and political existence as a whole. While *radical secularists* state that the concepts of equality and justice bear more significance than the concept of individual liberties[241].

[239]Benard (2003) Chapter 2: 25-46.

[240]Benard (2003) 14.

[241]Benard (2003) 15.

iii. Polygamy

Radical fundamentalists permit polygamy and consider it superior to the Western unchaste practices of serial divorces and immoral conducts. *Scriptural fundamentalists* also allow for polygamy to increase collective and individual standards, but not for the sake of self-indulgence. *Conservative traditionalists* too permit polygamy but under particular circumstances which include treating all the wives equally as ordained in the Quran, and if the national law allows for it. However, they prefer monogamy over polygamy. *Reformist traditionalists* also share a similar point of view regarding polygamy as conservative traditionalists, in addition to the radical fundamentalists' argument which considers polygamy a better solution to the Western sexual disorder. *Modernists* do not permit polygamy, as they consider it as an ancient and less ideal practice thought to be in the process of being abolished by the Prophet himself. *Mainstream secularists* also favoured modernists' stance by not permitting polygamy postulating that it is against the modern-day laws and practices. *Radical secularists* are also against polygamy and do not permit it, yet few also view monogamy as a hypocritical conventional concept[242].

iv. Islamic criminal penalties, including flogging, amputations, stoning for adultery

According to the *radical fundamentalists*, Islamic punishments are an excellent method to facilitate an effective and deterrent justice. *Scriptural fundamentalists* also concede with the ideals of radical fundamentalists, provided such punishments might be enforced with discretion to secure a softer image of the Islamic state amongst the world public opinion. *Conservative traditionalists* consider the implementation of such punishments only if a country or state follows the Shariah law. They also believe that the harsh and severe Islamic punishments do bear effective deterrent effects, yet they can be alleviated by way of mercy, clemency, rehabilitation, and stringent rules of evidence. However, *reformist traditionalists* are of the view that such punishments shall not be implemented. According to them, the most austere punishments were ordained for a very limited number of cases, which have often been wrongly construed and implemented, thus lacking any Quranic basis. *Modernists* also share the same point of view as that of the reformist traditionalists. Whereas *mainstream secularists* consider these punishments illegal in most of the countries around the world, as they are against the ideals of international human rights and therefore, they believe such punishments are inapplicable. *Radical secularists* bear an extreme approach, who considers religion as a fallacy, and therefore, they view all religious laws as illegitimate[243].

v. Hijab or Veil

Radical fundamentalists' perspective on the hijab is one of extremity; they consider Muslim women to veil as mandatory Islamic teaching, including covering of their faces and hands in certain circumstances. They set the minimum at wearing a headscarf as an acceptable norm in a gathering. They believe that society has to ensure women observe the hijab/veil strictly either through persuasion or education. *Scriptural Fundamentalists* state that hijab shall be enforced coercively on women as a compulsory obligation. *Conservative traditionalists* view the hijab from a moderate point of view. They argue that it is preferable but the use of force to implement is not upheld by all the traditionalists. They postulate that in a conservative society, women should cover themselves except their hands and faces. But in modern society, women can wear a scarf and long clothing which is sufficient. *Reformist traditionalists* take on the stance that women must dress modestly, that is if their body is appropriately covered and does not fall under provocation. On the other hand, *modernists* are the opposite who believe that Shariah

[242]Benard (2003) 15-17.

[243]Benard (2003) 17-20.

does not demand women to do any sort of hijab or covering, as there is no substantial proof in the form of authentic texts. They stress upon the fact that it is every individual's own choice what to wear and women shall not be liable for men's immodest thoughts, as they are ordained by the Quran to "lower their gaze," in such instances and vice versa. *Mainstream secularists* also second the opinion of modernists along with the permission of prohibiting hijab under circumstances that might affect the performance or the rights of others. For *radical secularists*, hijab or veiling is a sign of backwardness and shall not be imposed by any means[244].

vi. Beating of wives

Radical fundamentalists allow the beating of wives by their husbands keeping in view its usefulness in controlling their behaviour and maintaining male superiority in the family system. *Scriptural fundamentalists* only allow for the beating of a wife under a condition where the husband intends to correct her erroneous behaviour for the betterment of the family and herself, as prescribed by the Quran as well. *Conservative traditionalists* also conceded to the ideals of scriptural fundamentalists. On the contrary, *reformist traditionalists* do not allow for such an act by a husband as they believe that the religious basis for such an act is highly disputed. *Modernists* also favour reformist traditionalists' stating that such an act is explicitly against the essence of Islamic teachings related to marriage and gender relations. *Mainstream secularists* too prohibit such acts as they consider them illegal and against modern-day laws and human rights. *Radical Secularists* negate the notion of considering a wife as a husband's property and therefore, strictly prohibit it[245].

vii. Status of Minorities

As far as the *radical fundamentalists* are concerned, they do tolerate the status of minorities within a limited circle, that is to say, they do not allow minorities to practice their religion or culture in any way possible. The simple reason given by them is that minorities are inferior to Muslims, and therefore it is in their best interest to convert to avoid discrimination. *Scriptural Fundamentalists* tolerate minorities on a condition that they do not pursue any sort of missionary activities. *Conservative Traditionalists* have a moderate stance, as they not only tolerate minorities in their society but also believe in a decent treatment of such minorities by allowing them to profess and practice their religions/ cultures, as long it is not against Shariah law and morality. *Reformist Traditionalists* also take on the position as the conservative traditionalists, in addition to the involvement of minorities in matters of importance through dialogue. *Modernists* and *Mainstream Secularists*, on the other hand, view minorities' treatment on an equal footing to that of the Muslims. However, as the *radical secularists* believe religion to be a fallacy, therefore they consider religious affiliations as a false ordeal, believe in equality for all[246].

viii. Islamic State

Radical fundamentalists consider that an Islamic state should be universal and supranational in nature. It should regulate all sorts of rules and regulations including prayer practice and attendance, beard length, clothing etc. If any issue is not expressly provided for by the rules, then a religious authority must give some advice on such an issue. *Scriptural fundamentalists* believe that Islamic states are a viable proposal, provided they exist independently. But a supranational Islamic community or 'Ummah' remains an ideal proposition. *Conservative traditionalists* hold the view that an Islamic state is the best place for Muslims to profess and

[244]Benard (2003) 21-22.
[245]Benard (2003) 22-24.
[246]Benard (2003) 20.

practice their religious duties. Alternatively, living and practising Islamic teachings as told by the religious leaders and family in an Islamic community is also a good choice. *Reformist Traditionalists* also deem an Islamic state as the best society for Muslims, along with continuance guidance by the religious experts to the Muslims at large. On the contrary, *modernists* state that Islam was never meant to be a state. It was intended to be a code of conduct for leading life of Muslims. Therefore, in the context of an ever-changing, vibrant community of thinking and questioning rational individuals, the individual is ultimately responsible for his or her behaviour and decisions. *Mainstream secularists* uphold the fact that religion is separate from the state, thus Islam should be a private matter of the individuals. The state, therefore, bears the duty to allow Muslims to practice their religion but every citizen in a state has to follow the state laws and customs as well. *Radical secularists* do not believe in the religion and consider abolishing it claiming it bears a backward force in a society[247].

ix. Public Participation of Women

Radical fundamentalists believe in the maximum differentiation of women from men. For them, women must not be included in any activities of the public realm. *Scriptural fundamentalists* have two further divisions when it comes to women participation. One, the Shia fundamentalists who state that women must play an effective role in socio-political life, provided there remain strict segregation and the highest positions both injustice and government shall be reserved for men alone. Second, the Sunni fundamentalists believe that matters of the government must lie under the realm of men alone. Women can only play role in areas of social concerns. *Conservative traditionalists* claim that women are mainly responsible for taking care of the family. Only when that is done entirely, they can participate and perform an effective role in professional fields and public life. *Reformist traditionalists* hold the same approach as conservative traditionalists, in addition to the fact that they provide women positions of esteemed ranks, including that of the head of the state. *Modernists* hold a slightly different opinion as they believe that both family and community are essential in Islam, therefore, both genders should bear the responsibilities there. All sorts of professions and public life activities must involve the participation of women, without any kind of discrimination. *Mainstream secularists* and *radical secularists* advocate for equal rights and opportunities as a desirable norm for both genders, without any bias[248].

x. Jihad

According to *radical fundamentalists*, there are different levels of jihad, but it is incumbent upon any individual capable of physically taking part in an armed fight to establish a universal and worldwide Islamic order. The classic war, terror and insurgency can take the form of jihad. *Scriptural fundamentalists* believe that the meaning of jihad is different for every individual. For instance, a woman giving birth is one kind of jihad in itself. It is undertaken for one's struggle for individual spiritual betterment. Under certain circumstances, it may include armed struggle like terrorism. *Conservative traditionalists* and *reformist traditionalists* also uphold the same belief as scriptural fundamentalists, provided that the armed struggle or the ‘holy war’ must be waged for the cause of Islam. For *mainstream secularists*, jihad as a 'holy war' is an ancient concept. Today, it strictly refers to spiritual development. Radical secularists are on the other end of the bridge that is they believe waging wars on religious grounds or differences is insane and false[249].

[247]Benard (2003) 11.

[248]Benard (2003) 12.

[249]Benard (2003) 15-17.

xi. Sources

Radical fundamentalists consider the Quran, Sunnah, the rulings of Muslim leaders and the writing of radical authors as sources of meticulously pious Islamic society. *Scriptural fundamentalists* take into account the Quran, Sunnah, Islamic philosophy, science, scholarly interpretation, and charismatic leaders as sources of an Islamic society. *Conservative traditionalists* consider the Quran, Sunnah, local customs and traditions, and the opinions of religious mullahs as sources for an Islamic society. *Reformist traditionalists* take into account a wide range of texts and practices as sources including the Quran, Sunnah, the guidance of scholars, secular philosophers, modern laws and ethical codes, and community consensus. *Modernists* also concede with the same sources as reformist traditionalists, in an attempt to harmonize the true spirit of Islam in the modern-day context. *Mainstream Secularists, on the contrary, consider* continental law, international human rights, and the philosophy of secularism as the sources of society. *Radical secularists* follow the ideology of a particular group or movement as the source for a society[250].

2.3. General Legal Status of Women in Pakistan

Sadly, women have been in a difficult situation, faced with the miserable mindset of their opposite-sex which has influenced the whole of human history. Women were used and abused in every culture to satisfy the desires of men whether they be Greek, Roman, Persian and Arab cultures where the afore-mentioned gender was treated as a means of pleasure, offered to other hands for a negligible sum and buried alive. In addition, it is regrettable to state that women have spent a very unhappy life because they have not been granted basic rights to live with their desire, to speak out against the oppression of their men who have wrought cruelty against them and to cast their vote and contest elections by confining them within the four walls of the house. Also in the view of certain esteemed and revered thinkers who are considered to be the founders of their domains, they made protracted and unremitting attempts to change the universe, offering plenty of political philosophies, such as Plato, Aristotle, Machiavelli, Thomas Hobbs, John Lock and Rousseau, stating that women are incapable of heading any country and becoming heads of state[251].

Therefore, in the Indian male patriarchal culture, women still had no human rights; the freedom to live with their interests, the right to express and the right to vote, and they were considered as animals because of the principle of Sati in which women were stripped of the right to live after their husbands had died. Furthermore, the Pakistani community is still patriarchal and transformed society dominated by male chauvinism where the role of a woman is not remarkable while her counterpart receives all freedoms in all walks of life, neglecting more than 50% of the female gender population. Particularly in rural areas women's lives are very sad, depicting a boring image in which they are forced to bear their husbands' cruel disposition of anachronistic customs and values rendered by the dominant force. They cannot still seek education as they are deemed to be domestic servants and their duties are to care for babies, clean houses and perform all sorts of home-related chores. While Islam gives women equal dignity to men, including all sorts of rights granted to males, yet they spend their lives in Muslim culture without the rights stated in the Holy Quran and Shariah. Notwithstanding giving their freedoms, other societal inequalities reign in the community under which women are abused ferociously handled and violently murdered.

[250] Benard (2003) 15-17.

[251] Scheman, Naomi: Reviewed Work: *Women in Western Political Thought* by Susan Moller Okin. In: The Philosophical Review 91/3 (1982) 466-70.

On the contrary, there has been a continuous movement for women's rights in present-day Pakistan even before it got independence. Educated women were active participants in the hectic political events of the time in East Bengal, Punjab, Sindh and the North-West Frontier Province, and were keenly conscious of their privileges and entitlement. Such women were also active in the women's change movement, in particular, the women's education movement[252]. As Pakistan came into being, it had already educated, politically conscious communities of women who then mobilized themselves to initiate a variety of successful women's movements. When Pakistan's new state came into being, its wealth was under the influence of deeply conservative patriarchal powers. The patriarchal forces dominated the political system, the process building in Pakistan led to women being increasingly marginalized. Women were still national identification markers, but the state's symbolic oppression of women contributed to or was followed by, loss of their political rights. In Pakistan, women have been disqualified, segregated, and restricted to domestic spaces. Female education was abysmally poor and was received entirely within the house's four walls[253].

It should be stressed that Pakistan's founding father, Mohammad Ali Jinnah, believed in gender equality and saw women as equal citizens of Pakistan[254]. He wanted women to play an active role in building a country on an equal footing. He once said: *"No nation can rise to the height of glory unless their women are side by side with them…It is crime against humanity that our. There is no sanction anywhere for the deplorable condition in which our women must live*[255]*. In reality, however, 'Pakistan was made only for the powerful and for the men. It was not made for weak and poor women like me. What are we worth and what is our status here? Nothing at all',* as quoted by Basheeran Bibi, one of the numerous female victims of violence in Pakistan.

Women became a key factor in the anti-colonial war as well as in the Pakistan revolution[256]. The 'Pakistan' revolution opened a new arena for political action for the Muslim women of the subcontinent in the 1940s. Pakistan developed based on the principle of two-nations theory and the association of religious identity with nationality. Although its establishment as an 'Islamic' country meant various things to different parts of society, the state's takeover into a coalition between the patriarchal and obscurantist powers guaranteed that the current political dispensation must impose patriarchy; gender inequities and the rejection of women's freedoms were therefore incorporated into the democratic framework[257].

In the two decades following the creation of Pakistan, the policies discouraged religious orthodoxy and desisted from encouraging the obscurantist forces. Pakistan was declared the

[252]Mumtaz, Khawar/ Shaheed, Farida: Women of Pakistan: Two Steps Forward, One Step Back?.(Lahore: Zed Books, 1987), 38-40.
[253]Jalal, Ayesha: The Convenience of Subservience. In: Kandiyoti, Daniz (Ed.): Women, Islam and the State. (London: Palgrave Macmillan, 1991) 84-86.
[254]Jinnah, Muhammad Ali: Speeches and Statements. (Karachi, 1956) 194.
[255]Bhattacharya, Dr Sanchita: Status of Women in Pakistan. In: Journal of the Research Society of Pakistan 51/1 (2014) 179.
[256]Rouse, Shahnaz: Women's Movement in Pakistan: State, Class and Gender. In: South Asian Bulletin 6/1 (1986) 30-37.
[257]Rouse, Shahnaz J.: Shifting Body Politics: Gender, Nation, State in Pakistan. (New Delhi: Women Unlimited, 2004) 155.

Islamic Republic much later, under the 1956 constitution, and the ulama were with an advisory role in the legislature[258]. Maulana Madudi[259], representing the resurgence of political Islam in Pakistan, argued that voting should be extended to all adult males, but among women, educated among them should have voting rights. In the claims made by the Jama'at-i-Islami, it was clearly stated that public offices that could only be occupied by religious heads of state, and that qualified women were not permitted to take up any public office, we're likely to come into conflict with men[260]. Given the fact that women were very involved in the anti-struggle when it came to their inclusion in the legislature, they were discriminated against[261]. The newly formed state started to build facilities with the involvement of just a handful of people, and the orthodox Muslims were sometimes encouraged to either flee or participate in political action[262]. A major challenge for women came in 1948, during the discussion on the budget session when the first effort was made to protect women's economic rights[263].

Pakistan's culture is no different from any other parochial and male-dominated nation, where the prevailing patriarchal set-up scarcely allows the other half of the human populace a chance to thrive and stand up for their cause. Thus, such a pattern contributes to a community that gives women a derogatory role, Pakistan being the classical example. The country has made the International Politics – Benazir Bhutto the first Executive Director of the Islamic state, and others such as Sherry Rehman, Fehmida Mirza, Hina Rabbani Khar. On the other side, there are instances of Mukhtaran Bibi, Tehmina Durrani and Malala Yusafzai. Such women are not limited to any single socio-economic group or any rural-urban divide. They have endured primarily for social and political causes at the hand of abusive offenders[264].

The women in Pakistan witness a status of gender subordination based on their class and region. The simple reason behind this is the fact of uneven development in the socio-economic sectors and the impact of tribal and feudal systems on their lives[265]. Several religious groups and ulama's who acquired political power during and after the period of Zia-ul-Haq advanced and support women subordination in Pakistan. Initially, the rape victims were not allowed to use DNA evidence in their cases to prove rape against the guilty party in Pakistan. However, over time, the situation has improved in Pakistan with regards to the issues of the like. Now the women are allowed to prove their rape through DNA evidence, which is considered and admitted as conclusive proof in Pakistani courts too. As DNA test provides the courts with adequate means of identifying the accused / perpetrators with an increased degree of expertise, DNA technology helps the courts in reaching a better conclusion whereby the real culprit could be convicted. Therefore, the Supreme Court of Pakistan in Salman Akram Raja vs. Government of Punjab[266] case enunciated new guidelines for the concerned authorities to compulsorily administer DNA tests and preserve DNA evidence in all rape cases in Pakistan.

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[258]Benard (2003) 56.

[259]A recognized an important scholar of Islam and later head of the fundamentalist political party - the Jamat-e-Islami.

[260]Syed, Anwar: Pakistan: Islam, Politics and National Solidarity. (US: Praeger, 1982) 68.

[261]Report of the Pakistan Commission on the Status of Women (Islamabad, 1989) 113.

[262]Khan, Nighat Said: Women in Pakistan: A New Era?. (Change International Report, 1985) 9.

[263]Benard (2003) 55.

[264]Mumtaz / Shaheed (1987) 38-40.

[265]Pal, Mariam S.:Women in Pakistan: Country Briefing Paper. Asian Development Bank, 2000.

[266]Salman Akram Raja vs. Government of Punjab, Constitution Petition No.38, 2nd October 2012, 2013 SCMR 203.

However, with time, the situation has improved in Pakistan with regards to the issues of the like. Now the women are allowed to prove their rape through DNA evidence, which is considered and admitted as conclusive proof in Pakistani courts too. Moreover, there are several examples of women who held esteemed and high positions in the government of Pakistan; leading among them is a twice-elected Prime-Minister Benazir Bhutto[267]. Additionally, the All-Pakistan Ulama Council has recently released fatwas condemning honour killings[268]. Some other improvements also surface as lady traffic wardens are employed in road traffic control measures and an attempt is being made to increase women percentage in the police force as well[269].Despite these improvements, widespread domestic abuse, increased child marriages and rapes remain a bitter truth of the Pakistani society.

2.3.1. Historical Background of Status of Women in Pakistan

Pakistan is a Muslim majority country, founded primarily for the Muslims living in the Indian Sub-continent on August 14th, 1947. Although the division of the Indian sub-continent was indeed based primarily on the religious ground i.e., based on the 'Two-Nation Theory[270]', yet Pakistan continues to struggle through identity crisis amidst evident divisions between the Islamists and secularists. Since the initial debates on the constitution of Pakistan, Islam was considered a key element in the identity of Pakistan. Pakistan was declared an Islamic country by the first constitution of the country in 1956 keeping in view the Objective Resolution of 1949. The preceding constitutions also maintained the central ideology of Islam in the daily affairs of the country. Historically speaking, Muslim reformers like Syed Ahmad Khan advocated for women's right to education, the prohibition of polygamy, and women empowerment by way of education. Jinnah was also known to possess a positive outlook towards women's rights. His sister Fatimah Jinnah became a well-known feminist struggling to alleviate socio-economic discrimination against women and she became a valiant force after independence for women rights. She also organized and established several women's groups and feminist organizations to further her mission of empowering women in the nascent country - Pakistan.

According to Jinnah's reflections, it is clear that the majority of the Muslim women supported the Pakistan movement in the 1940s and this movement was a success partly due to the unyielding support of Muslim women from every corner, be such women a wife, mother, daughter etc. As soon as Pakistan came into being, the Muslim women were given the right to vote in 1947 and this right to vote was later confirmed during the national elections held in 1956 under the then Constitution. Every constitution (1956, 1962 and 1973) in Pakistan provided for an express provision of seat reservation in Parliament for the women to allow them to participate in the political process of the country.

The inclusion of ten separate women in the national and regional legislature was taken up as a big problem in 1953. The proposed Charter for Women's Equality was to be submitted to the Constitutional Assembly. Charter concerns such as parity of rank and opportunities, fair wages, and the promise of freedom for Muslim women under Shariah. While the draft Charter was a significant effort at legislative security for women, it did not appear to obtain women's rights

[267]Tyab, Imtiaz: Pakistani police seeks to recruit more women. *Aljazeera (January 7, 2014).*

[268]*National Assembly of Pakistan:* The Constitution of the Islamic Republic of Pakistan (April 20, *2010).*

[269]O'Connor, Karen: Gender and Women's Leadership: A Reference Handbook. (London: SAGE Publications, 2010) 382.

[270]Cohen, Stephen Philip: The idea of Pakistan. 2nd edition. (USA: Brookings Institution Press, 2006) 25-29.

within the patriarchal political system as a revolutionary dream. The Constitution eventually enacted in 1956 approved the concept of separate female suffrage seats for women on the grounds of specific constituencies for women, thereby granting them equal voting privileges for general seats and reserved seats for women[271]. Women's organizations persisted to struggle for their privileges. An event that became a cause of protest for women's rights organizations in 1955 was the second marriage of Prime Minister Mohammad Ali Boghra, which raised the issue of polygamy to prominence[272]. The protests waged by women compelled the government to nominate a commission set up under the Supreme Court's Chief Justice, Justice Rashid, to review the current laws on polygamy, and to formulate laws on marriage, divorce, maintenance, etc. that would safeguard women's interests[273]. The commission submitted its report in 1956 but was shelved under pressure from the orthodox clergy[274].

Eventually, the suggestions of the Committee were adopted by the military dictatorship of President Ayub Khan and were renamed 'Family Laws Ordinance 1961[275].' Ayub Khan introduced some changes to strengthen the status of women. During his strict and even despotic rule, attempts were introduced to encourage the schooling of women and their inclusion in government jobs and work. Aside from education, women were strongly promoted to take up careers such as media, research, and civil service[276]. Ayub Khan had a rather clear hostility to the conservative powers and kept them accountable for the destruction of the nation. Ayub Khan's Family Ordinance was a significant effort to change family law in Pakistan[277]. Many women in Pakistan were ignorant of their freedoms and were unaware of the benefits and entitlements they had under the constitution. And then, the 1961 Ordinance represented a significant move forward in the fight for women's rights in Pakistan. The women's movement in Pakistan has been influential not just in turning the ordinance into statute, but also in informing and educating women regarding their civil rights. The women's movement in Pakistan was not only instrumental in the transformation of the ordinance into law, but also in educating women about their rights under the law[278].24 The main features of the Family Laws Ordinance 1956 were:

i. Discourage polygamy and control divorce by allowing for specific protocols for both.
ii. The second marriage was made conditional on the first wife's consent and on the approval of an informal council that was appointed locally. Second marriage without approval was subject to incarceration for one year and a penalty up to Rs 5,000.
iii. To seek a divorce, the spouse was forced to give a formal note to the district council president, with a copy specifying particular grounds to his ex-wife.
iv. For the first time a standard marriage contract form was issued, and the registration of all marriages became obligatory.

[271]Bhattacharya (2014) 179.

[272]Minault, Gail: The Extended Family. (Delhi: Chanakya Publications, 1981) 265-267.

[273]Bhattacharya (2014) 179.

[274]Jinnah (1956) 268.

[275]The Muslim Family Laws Ordinance, 1961 (VIII of 1961).

[276]Khan, Sana. Women and State Laws and Policies in Pakistan: The Early Phase, 1947-77. In: Proceedings of the Indian History Congress 74/5 (2013): 726-33. Reference no. 22.

[277]Engineer, Asghar Ali: Islam Gender Justice: Muslim Gender Discrimination. (New Delhi: Gyan Publishing House, 2013) 96.

[278]Rouse (2004) 155.

v. The minimum marriage age for boys has been increased from 14 to 16 years, and from 18 to 21 years.
vi. The ordinance provided for divorce by consent and delegated divorce for women.

While this legislation gave some protection to women, it still had several drawbacks. In addition, the legislation penalized women by forcing them to endure two years of non-support before applying for divorce on the grounds of lack of maintenance. The Family Law Ordinance was supposed to be widely opposed by conservative and oppressive movements, and several of them deemed it 'un-Islamic' and a breach of the rules of Islam. The reactionary forces were particularly shocked by the restrictions on polygamy and the encouragement of monogamous relations. They were often resentful of the limitations on the right to divorce for men. Nevertheless, because they saw the right to divorce as the sole privilege of men, they often opposed the extension or delegation of the right to divorce women. Nevertheless, these rules were not universally enforced and were only marginally successful. In reality, their enforcement has been restricted, and existing practices and beliefs have also discouraged women from making full use of such rules. So far as women's rights are concerned, Ayub Khan's family laws are a milestone in Pakistan, even though his military government mercilessly crushed any dissension and political articulation of national, cultural and linguistic freedoms. In 1971, a transition of policy 1969 put into force an independent and supposedly democratic administration. As a consequence of widespread popular opposition, the change from monarchy to democracy created an atmosphere of excitement and expectations of a new beginning. That was also the moment when there was a beginning for outspoken and self-defining feminists to attract focus with a fresh determination to women's problems. The new government, which tended to pull its decision-makers from the left and democratic sectors of society, reacted predictably to this new ambience[279].

In 1973, the PPP government enacted a new Constitution, which is still in force in the country. This Constitution adopted the policy of gender equality in particular stating that *'there shall be no discrimination based on sex alone'*. It also provides additional protection in matters of marriage, family, mother and child along with a guarantee of *'full participation of women in all spheres of national life'*[280]. The tenure of the PPP government[281] (1970–1977) is considered to be a period of liberal approach towards women and their rights. Women were allowed to work for any or all government services including the civil services, which was formerly barred to them. The PPP government also ensured a seat reservation of about 10% in the National Assembly and 5% in the provincial assemblies, without putting any further limitation on contesting general seats. However, the government faced an economic crisis due to the East Pakistan separation in 1971 and could, therefore, not succeed well with the implementation of all such policies regarding women participation in legislative bodies.[282] Also, several judges upheld the implementation of Shariah laws, which were often misinterpreted and against the express provisions of the Constitution calling for non-discrimination based on sex alone.[283] Woman's problems gained much attention funded by the state in 1975 when Nusrat Bhutto

[279]Benard (2003) 56.

[280]The Constitution of Pakistan, 1973: Articles 25, 27, 32, 34 & 35.

[281]Wolpert, Stanley: Zulfi Bhutto of Pakistan. (Lahore, 1990) 230-233, http://sanipanhwar.com/Zulfi%20Bhutto%20of%20Pakistan%20by%20Stanley%20Wolpert.pdf, last visited 14.08.2020.

[282]Benard (2003) 202-224.

[283]Bettencourt, Alice: Violence against women in Pakistan. (Human Rights Advocacy Clinic: Litigation Report, 2000) 3.

attended the World Conference on Woman and a commission on women's status was established[284].

Even though Pakistan was declared the Islamic Republic, the actual process of Islamization was initiated during the tenure of Zulfiqar Ali Bhutto in 1970 which later on was carried out in full spirit during the tenure of General Zia-ul-Haq in the 1980s. In 1977, Army General Zia-ul-Haq overthrew the elected government of PPP and took charge of the country. The tenure of Zia's government is full of contradictions concerning the status of women rights in Pakistan. On the brighter side, it is said that his regime took several steps to advance women rights by establishing a Women's Division, a Commission on Status of Women and a chapter on women in the Sixth Plan Development (1977-1986) for the very first time. Syeda Abida Hussain was made the chairperson for preparing this chapter with a group of twenty-eight professional women. The main aim envisioned in this Plan was *'to adopt an integrated approach to improve women's status'* [285]. His government also doubled the quota for women's reserved seats in 1985 and appointed twenty women as members of the Majlis-e-Shoora (Federal Advisory Council)[286]. However, the darker side, which is a bitter truth, states that his Islamization process introduced discriminatory laws against women including the Hudood Ordinances[287] and *Qanun-e-Shahadat* Order (Law of Evidence)[288]. He prohibited women participation in sports and promulgated purdah. He also suspended the fundamental rights in entirety provided expressly in the 1973 Constitution, including the right to non-discrimination based on sex. Even though most of the scholars blamed Zia and other leaders for introducing discriminatory measures and laws against women, it is necessary to comprehend the role of constitutional bodies amassed with the obligation of exercising *ijtihad*[289] *(*Islamic legal term meaning "independent reasoning," as opposed to imitation), for instance, the Council of Islamic Ideology (CII), and the Federal Shariat Court (FSC), concerning women rights.

The Council of Islamic Ideology (CII) is a legislative body that is responsible for guiding appropriate government institutions and lawmakers on Islamic matters. The Council was founded in 1962 to act as an Advisory Council of Islamic Ideology and was later renamed in 1973 as the Council of Islamic Ideology (II). There were seven members, all men, including four ulama (Islamic scholars) from East and West Pakistan, when they were first founded in 1962. The CII, in compliance with the 1973 Constitution, is a permanent legislative body consisting of ulamas from various Islamic sects, technocrats and legal experts with eight to twelve members, including at least one woman. The CII has gone through many reforms since its inception, ranging from being governed by secular judges to ulama. In present times, the

[284]Hussain, Neelam: Military Rule, fundamentalism and the Women's Movement in Pakistan. In: Khan, Nighat Said: Up Against the State. (Lahore: ASR, 2004) 29.

[285]Syed (1982) 68.

[286]Benard (2003) 213-224.

[287]Usmani, T.: The Islamization of Laws in Pakistan: The Case of Hudood Ordinances. In: The Muslim World April 96/2 (2006) 287-304.

[288]Muslim, Abdul Ghafur: Islamization of Laws in Pakistan: Problems And Prospects. In: Islamic Studies 26/3 (1987) 265–276.

[289]Note: Ijtihad is considered to be one of the four sources of Islamic law. It is employed in instances where the first two sources of Islam i.e., Quran and Sunnah are unclear or silent. However, Ijtihad demands a comprehensive knowledge of the religion Islam, its texts and legal doctrines, refined legal reasoning, and profound Arabic language skills. It should be carried out using analogical reasoning known as *qiyas*. According to many scholars, its conclusions must not contradict the Quran, and it may not be carried out in situations where agreement (ijma) has been reached.

CII portrays the "Ulama Council[290]" image. The main purpose behind the formation of CII was to initiate ijtihad, hence, the CII maintains its key role in bringing the state laws in conformity with the Islamic laws. The CII's emphasis in the first decade was on the Islamization of Pakistani cultures, such as banning alcohol and gambling and announcing Friday as a public holiday. CII's attention turned to women's issues in the 1980s, and thus the review here has been confined to the CII's work since that time.

One of the most controversial rulings of CII during the times of 1980s included the Ansari bill. This bill recognized the limited participation of women in the political process by allowing only women above 50 years of age to contest for a political office[291]. In the words of Weiss[292], *"the state had attempted to dictate special ideal image of women in Islamic society – chador our char divari, remaining veiled and within the four walls of one's home".* Other proposals from the CII during the Zia administration, in keeping with this restrictive policy, included the introduction of a stringent dress code for both men and women and seclusion of gender in public places, such as a plan to establish a separate women's university. Although CII was to blame for the Islamization of state laws, the Federal Shariat Court (FSC) was also created by the government in 1980 to enforce Sharia law.

Besides all these, Zia's Islamization process as discussed above in length has added to nothing but dismay for the women and their rights. After overthrowing Bhutto's constitutionally elected government in a military coup, Zia took the Presidential office on July 5, 1977. In the words of Anita Weiss: *"In its search for a basis of legitimacy, the government implemented a religiously-based legal code unparalleled in the modern history of South Asia[293]"*. Despite his promise for immediate elections, it was not until 1988 that the country witnessed elections and a new leader. During his tenure, Zia introduced an intensive Islamization program through a series of conservative and repulsive laws that centred upon restricting the rights of women and minorities in the country. When he took office in 1977, Zia declared that all three namely Pakistan, Islam and the military are interlinked. He also attempted to embrace women to his Islamization program by encouraging them to wear a veil and stay home to uphold the ideals of women's honour and the inviolability of her family. The women suffered a great ordeal under Zia's regime due to the Islamization program which scrutinized the role of women in every aspect through the lens of conservative Islamist groups e.g., Jamaat-i-Islami. The issues related to women driving, shopping or attending co-educational institutes were under serious debate among the government representatives and the Islamist groups. These controversies marked a relapse of societal views against women's rights, but the most detrimental of all were the real codified laws enforced against women. On February 10, 1979, Zia passed his first set of Islamic laws comprising of the notorious Ordinance named 'Hudood Ordinance, 1979'. Let's analyse the situation of women under the 1973 Constitution of Pakistan as well as the various Islamic laws passed by Zia during his tenure in office.

[290]Masud, Muhammad Khalid: Role of the Council of Islamic Ideology in the Islamisation of laws in Pakistan. (the University of South Australia, International Centre for Muslim and non-Muslim Understanding, 2015) 5.

[291]Dr Saigol, Rubina: Feminism and the Women's Movement in Pakistan: Actors, Debates and Strategies. (Germany, Friedrich Ebert Stiftung, 2016) 14.

[292]Weiss, Anita M.: Competing Visions of Women's Rights in Pakistan: State, Civil Society & Islamist groups. In: Pande, Aparna: *Routledge Handbook on Contemporary Pakistan* Routledge, 1st Edition. (*UK:* Routledge, 2017) 351-365.

[293]Weiss (2017) 351-365, esp 417.

i. The 1973 Constitution of Pakistan

Making a constitution in Pakistan, on the other hand, proved to be a difficult undertaking. It took several twists and turns, and at each level, imprecise and ambiguous conceptions and terminology concerning the state's Islamic identity added to the confusion. The passage of the Objectives Resolution in 1949 was the first attempt to define the new state's ideological aims and relate them to public policy[294]. The Resolution enshrined the basic ideas on which Pakistan's future constitution would be built, including that Islam is abolished immediately. The first Pakistani constitution was enacted on March 23, 1956, and established Pakistan as the Islamic Republic. Pakistan has been defined as a democratic state built on Islamic social justice ideas. The "Directive Principles of State Policy" specified Islamic requirements, although they were not justiciable. The opposing parties are members of the same group. The 1956 Constitution, on the other hand, was short-lived. It was repealed on October 7, 1958, and replaced in 1962 by a new Constitution[295].

During his tenure between 1977 to 1985, Zia enacted several Ordinances and laws that infringed the rights of women expressly provided in the 1973 Constitution of Pakistan. For instance, Article 34 of the Constitution states, "Steps shall be taken to ensure full participation of women in all spheres of national life" and Article 25 (2) reads as "There shall be no discrimination based on sex alone". However, these provisions got reversed by way of an amendment to Article 270-A of the Constitution, which comprised of a chain of Ordinances enacted aimed at severely limiting and violating women rights including the Hudood Ordinances of 1979 and Qanun-e-Shahadat of 1984. The prior amendment is known as the Eighth Amendment to the 1973 constitution which was passed in 1985 during the government of Muhammad Khan Junejo and it provided Zia's Martial Law Order with a supra-constitutional status. Still, to date, the said Amendment stays unopposed in the Parliament.

By imposing martial law in the country, Zia suspended all fundamental rights provided under the 1973 Constitution, including the right to be free from gender discrimination. He then enacted a set of laws and Ordinances (including the Hudood Ordinance, and the Qanun-e-Shahadat Ordinance) that recognized the legal subjugation of women's status in the country. For the first time in the country's history, the Hudood Ordinance amended the law related to rape and adultery. It also declared fornication as a crime liable for death punishment in the extreme. The Qanun-e-Shahadat Ordinance (Law of Evidence) relegates the legal status of women to subordination and, in certain cases, makes a woman's testimony equivalent to just half the weight of a man's. To regulate punishment for offences related to bodily injuries or harms, Zia introduced Islamic criminal laws such as the *qisas*[296] (Retribution) and *diyat*[297] (Compensation or Blood-Money). Zia also reiterated the ethical constraints he placed on women through a set of informal rules and unwritten laws intended to restrict women's independence, publicity, and participation in public life[298].

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[294] Binder, Leonard: Religion and Politics in Pakistan. (Berkely: University of California Press, 1962) 149.

[295] Ahmad, Mumtaz: The Muslim Family Laws Ordinance of Pakistan. In: International Journal on World Peace 10/3 (1993) 37-46.

[296] Note: Qisas is a Shariah law punishment for the crime of murder, killing, intentional physical injury etc. It is up to the family or victim, himself, to either ask for retribution or waive retribution and seek monetary compensation.

[297] Note: Diyat is the monetary compensation accepted by the victim or his/her family for the offence of murder, killing, or physical injury etc from the accused or his/her family.

[298] Rahman, Farhat Naz: Gender and Access to Justice: A Pakistan Case. (Pakistan: Sir Syed University of Engineering and Technology, 2014) 65.

ii. The Muslim Family Law Ordinance (MFLO) 1961

The Muslim Family Law Ordinance (MFLO) of 1961 was enacted during the regime of Muhammad Ayub Khan and it was deemed to be a piece of positive legislation for women. Child marriages were strictly forbidden and the unilateral right of the husband to divorce his wife was under curtailed under this Ordinance. As Islam gives men the right to contract four marriages, the MFLO also provided the men with the same right but under one condition, that is, he needed to acquire the consent of his former wife/wives. If a man does not seek the permission of his former wife/wives and contract a new marriage, he may face imprisonment and/or a fine. However, the new marriage would remain valid. Section 7 of the MFLO sought to prohibit the practice of unilateral declaration of divorce by the husband and infant provided for a reconciliation period by way of a local council to save the marriage. However, this provision of the MFLO came under serious disagreement with the Islamic laws and Ordinance passed during the tenure of Zia and thus rendered ineffective[299].

In 1962, the original constitution was replaced with a new one. However, before the new Constitution was enacted, the government released the Muslim Family Laws Ordinance (MFLO) in March 1961, which was intended to give effect to the Commission on Marriage and Family Laws' recommendations. The ordinance addressed succession, marriage registration, polygyny, divorce, maintenance, dower, and marital dissolution. The Muslim Family Law Ordinance was Pakistan's first attempt to codify Islamic personal law. The Shariah Act of 1937 had provided the groundwork for such an endeavour, but it could not claim Islamic validity because it was enacted by the British colonial administration. The 1961 statute also marked the beginning of women's rights to be protected in terms of marriage, divorce, custody, and inheritance. This legislation, according to the women's rights organization, is nevertheless a significant step "in boosting the position of women in Pakistan by defending the necessity for women to be free economically, socially, and politically[300]."

The ordinance's greatest significance, however, is that it became a subject of contention between Muslim modernists on the one hand and traditional ulama and fundamentalists on the other. Marriages solemnized under Muslim law were not needed to be registered with state authorities before the introduction of this legislation. All weddings solemnized under Muslim law must now be recorded with the municipal authorities, according to the rule. Marriage registrars were granted permits by local government officials for this purpose. Violations of this clause were punished by up to three months in jail or a fine of up to 1,000 rupees, according to the legislation[301].

The provision on polygamy in the Muslim Family Laws Ordinance was the most essential part. The conventional and orthodox stance has been that Islam permits polygamy and that the restrictions linked to this authorization are moral precepts rather than legal imperatives. The Muslim Family Laws Ordinance did not go as far as to outlaw polygyny, as some other Muslim countries, such as Turkey and Tunisia, had done previously. The ordinance, on the other hand, stated that a man who wishes to have more than one wife must acquire his wife's approval. He was also needed to make his request before an arbitration panel comprised of representatives from both parties and chaired by the chairman of the local council, along with justifications for

[299]Note: Diyat is the monetary compensation accepted by the victim or his/her family for the offence of murder, killing, or physical injury etc from the accused or his/her family.

[300]Mumtaz / Shaheed (1987) 53.

[301]The Muslim Family Ordinance 1961: Article 5.

the second marriage[302].The legislation also established a significant departure with orthodoxy by making the common and much-abused practice of divorce by repudiation, i.e. uttering the word "divorce" three times, unlawful. This had been a big source of fear for women, as they were always insecure in a scenario where males might divorce them instantly by just uttering the phrases *'I divorce thee'* three times. The new rule required a husband to send a written notification to the chairman of the local council, along with a copy to his wife, to secure a divorce. However, the divorce will not take effect until a 90-day waiting period has passed, during which time an arbitration council will be formed to bring the parties back together. The legislation further stipulated that if the woman is pregnant at the time of the divorce notice, the notice shall be rendered useless until the child is delivered[303].

The new rule also posed a challenge to South Asian Muslim society's tradition and customary practice in the areas of dower and maintenance. Previously, maintenance could only be sought through the courts, which included lengthy and expensive criminal proceedings. The law stated that if a husband fails to effectively support his wife, or fails to maintain his many wives fairly, the wife or wives can petition the chairman of the local council, in addition to any other legal remedy available. The arbitral council will next determine the amount of support to be given to the wife or wives, as the case may be[304]. The law further stated that unless the husband and wife agreed differently, the whole sum of dower (Mehr) shall be paid to the woman on demand. The decree, which was the first true test of the state's power to affect change in the traditional realm of the ecclesiastical establishment, was praised as progressive legislation by contemporary educated women and liberal groups but was fiercely opposed by the ultimate of all schools of thought. In actuality, it had minimal impact on Pakistani women's everyday life, but it had significant ramifications for the religious establishment[305].The MFLO, on the other hand, was a test case for President Ayub Khan and his modernist allies in the government, who wanted to "liberate Islam from the debris of wrong superstition and prejudices; to "make it keep pace with the march of time, and to fight against the obscurantist forces in the religious establishment." As a result, the dictatorship utilized the full weight of martial rule to quell any ulama and fundamentalist opposition to the new legislation[306].

iii. The Hudood Ordinance, 1979

Before 1979, the legal system in Pakistan was based on the ideals of Anglo-Saxon jurisprudence derived from colonial history and comprised of the Penal Code, the Criminal Procedure Code and the Law of Evidence Act. These laws, except for the tribal areas where customary law existed, were common to the entire country. In 1979, Zia-ul- Haq's law policy adopted the first set of Islamic laws, the Hudood Ordinances. The aim was to put Pakistan's criminal law system in line with Islamic principles.

The repercussions of the Hudood Ordinance are stark, and courts' interpretations have contributed to the miscarriage of justice severely. According to the Hudood Ordinance, the word 'Adultery' basically applies to adultery, fornication and rape (*Zina-bil-jabr).* However, in instances of adultery, the burden of proving the rape of women lies on the woman herself. In case a woman does not provide enough proof for her innocence to the court, her allegation of rape is deemed as a confession of Adultery, thus incriminating herself. The attempts to foster

[302]The Muslim Family Ordinance 1961: Article 6.
[303]The Muslim Family Ordinance 1961: 41.
[304]The Muslim Family Ordinance 1961: Article 9.
[305]Ahmad (1993) 42.
[306]Ahmad (1993) 43.

Islamization by Zia impacted gravely the criminal justice system of Pakistan. The capacity for abuse of authority by police and prison officers had existed since colonial times, and subsequent periods of martial law had further expanded the powers of law enforcement officials and weakened protections against such abuses. Far from offering stronger security for people with valid grievances, the Islamization process primarily aimed at enhancing the authority of the state over its citizens by causing them, especially the women, to enter into conflict with an already abusive and corrupt system of criminal justice. Moreover, Zia further deteriorated the freedom enjoyed by the civilian courts through the institution of Shariat benches at the High Court level. He also restructured and established the Federal Shariat Court (FSC) in the year 1980 to revise all laws enacted in the country to confirm that none of them was against the teachings of the Quran or Sunnah and additionally to administer appeals in cases of criminal nature, including Hudood cases too.

By rendering adultery offences against the state, cognizable crimes on which the police can take action, the Ordinance provides additional tools to men against women. That was not historically the case, because then adultery was a matter of personal crime committed by the male party to adultery against the husband and extra-marital sex was not considered a criminal offence back then. But now the process has become quite easy for the husband to file a complaint of adultery against his wife, in case she leaves or tries to seek separation from him. Based on that complaint, the wife is arrested and jailed. The women are thus prosecuted without ever going through the due process of justice, considering police corruption and the endless amount of time it takes for such trials to be adjudicated by legal courts. The husband can get bail for her wife in case he wishes to, but then she is absolutely at the mercy of her husband who may revoke the bail anytime he desires. The status of a woman is therefore made worse than that of a slave. Adultery charges against wives who seek separation have now become popular for husbands to submit. Every year, there are hundreds of incidents in which women are prosecuted for adultery on accusations made by husbands. Similarly, where a father does not allow his daughter to marry the person of her own choice, the father files a case of abduction and the married couple is presumed to be in commission of adultery unless they provide proof of lawful marriage contract (Nikkah)[307].

The integration of Hadd and Tazir crimes, as well as Islamic Shariah law, was Zia's final need for properly Islamizing Pakistan. In his paper 'Twenty-Five Years of Hudood Ordinances: A Review[308],' Martin Lau points out that Pakistan was transformed into its current Islamized state through two steps. The first step was to make hadd a legal entity. Hadd transgressions are those for which the Qur'an specifies specific penalties. The Federal Shariat Court was established in 1983 as the second measure. The court has the authority to evaluate laws to see if they are "in conformity with Islamic injunctions." Cases regarding the Hudood Ordinances are also heard by the Federal Shariat Court. The court has the authority to evaluate laws to see if they are "in conformity with Islamic injunctions." Cases regarding the Hudood Ordinances are also heard by the Federal Shariat Court. On February 22nd, 1979, Pakistan's military government proclaimed the country's first move toward implementing Islamic law[309]. The Hudood Ordinance of 1979 prohibits theft, intoxication, adultery, rape (Qazf), and false testimony[310]. Those found guilty of these actions face punishment under Hadd or Tazir. Hadd offences have

[307]Ahmad (1993) 66-67.

[308]Lau (2007) 1294.

[309]Lau (2007) 1294.

[310]Imran, Rahat: Legal Injustices: The Zina Hudood ordinance of Pakistan and its implications for women. In: Journal of International Women's Studies 7/2 (2013) 80.

predetermined penalties, whereas Tazir can be utilized when there isn't enough proof for Hadd but the accused cannot be exonerated. Zina is charged with a crime against the state under the Hudood Ordinance[311]. The introduction of Hadd, Tazir, and Shariat Courts into Pakistan's legal system promoted patriarchy. In a country founded by Jinnah on the principle of equal rights for all inhabitants, Zia's conservative attitude to religion proved harmful to women's rights. Adultery might now result in a woman's flogging. Rapes were frequently misinterpreted as adultery because women were required to present four witnesses to the rape, which was an impossible requirement to meet. Zia also pushed the 'Chadar Aur Chaar Devari' philosophy for women, in which he portrayed women as being 'covered by a blanket or confined to a room,' and nothing more. Another statute, the Law of Evidence, highlighted blatant inequities in the law, such as the testimony of two women equivalent to one male[312].

iv. Zina Ordinance

"A man and a woman are deemed to commit *Zina* if they deliberately have sexual intercourse without being married to one other[313]," according to the Offence of Zina (Enforcement of Hudood) Ordinance of 1979. When liable to be stoned to death in a public place, Muslims were subjected to one hundred whippings in a public location, whereas non-Muslims were subjected to one hundred whippings in a public area[314]. Zina-bil-jabr, which is defined as rape outside of marriage, was also made illegal by the Ordinance[315]. The Protection of Women (Criminal Laws Amendment) Act of 2006 altered this (Act VI of 2006). When Zina and Zina-bil-jabr violations are punishable by tazir, the punishments are 30 whippings and up to ten years in jail, and 30 whippings and up to twenty-five years in prison, respectively[316]. Tazir was likewise removed from the ordinance by the Protection of Women (Criminal Laws Amendment) Act, 2006 (Act VI of 2006). Rape, adultery, and even fornication were all declared crimes against the state under the Zina Ordinance and were punished by death. Although no woman has ever been stoned to death in the name of Islam, the consequences have allowed for the violation of women's rights[317].

The legislation also has various loopholes that might readily be construed in favour of the rape perpetrator. "A person is said to commit Zina-bil-jabr if he or she has sexual intercourse with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely: a) Against the victim's will; b) Without the victim's consent; c) With the victim's consent, when the consent has been obtained by putting the victim in fear of death or of harm; or d) With the victim's permission, if the offender is aware that the victim is not lawfully married to the offender and the consent is provided because the victim believes the offender is someone else to whom the victim is or considers herself or himself to be validly married[318]." Rapists may be exonerated if the Zina-bil-jabr clause was paired with the Law of Evidence. "The testimony of two women is accepted only as one credible source[319]," according to the Law of Evidence, which was approved in 1984. Furthermore, the legislation demands

[311]Imran (2013) 85.

[312]Story of Pakistan: Islamization under General Zia-ul-Haq. Available online at https://storyofpakistan.com/islamization-under-general-zia-ul-haq/.

[313]Government of Pakistan: The Offence of Zina Ordinance: Presidential Order-No. 4 of 1979.

[314]The Offence of Zina Ordinance 1979.

[315]Imran (2013) 87.

[316]The Offence of Zina Ordinance 1979.

[317]The Offence of Zina Ordinance 1979.

[318]The Offence of Zina Ordinance 1979.

[319]Imran (2013) 88.

four Muslim males of high reputation to come forward as witnesses to validate a woman's accusation of rape[320]. The case of Safia Bibi was one of the most well-known Zina Ordinance cases in Pakistan's history. Safia Bibi, a blind 19-year-old domestic helper, was raped by her employer and his son, according to the Los Angeles Times in 1982. Both men were charged, but in an unexpected turn of events, both were acquitted, albeit Safia was sentenced to three years in jail and fifteen lashes for adultery. Following countless protests and petitions, Safia's release was ultimately granted after she served six months in prison[321].

v. The Qanun-e-Shahadat, 1984

According to Section 6 of the Qanun-e-Shahadat Ordinance, it is stated that in all matters embracing also financial matters except offences liable for hadd punishment and *Qisas (retribution)*, the fact in question must be proven by taking into account the evidence of two Muslim adult male witnesses, or in lack of two Muslim adult males by one Muslim adult male and two women. This means that the value of women testimony is worth half that of the men. Moreover, in cases of offences liable for hadd punishment and *Qisas (retribution),* the evidence or testimony of women is completely inadmissible. Once again worsening situation for women and their struggles for gender equality. Nevertheless, the Pakistan Law Commission and women organizations pressurized the government into changing the draft law and that led to a revision of the law. Despite too much pressure, the consequential effect of revision of the law was legalizing the half status of women as a witness under Section 17[322] by expressly stating, *'the competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the injunctions of Islam as laid down in the Holy Quran and Sunnah'*. Moreover, Section 17 limits the right of women to testify only in financial matters by stating further, *'Unless otherwise provided in any law relating to the enforcement of Hudood or any other special law – (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or by one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and (b) in all other matters, the Court may accept, or act on the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant'.* According to this law, as far as attesting financial records is considered, women serving in banks or the finance department of any organization as well as women judges have been made non-persons[323].

In reaction to Zia's controversial Hudood Ordinance, a feminist struggle arose in the 1980s becoming the first real wave of women rights. This feminist struggle gave rise to women associations like the Women's Action Forum (WMA) and these forums condemned the unjust laws contained in the Hudood Ordinance raising awareness among women in Pakistan. As these forums comprised of women from all spheres, they raised their voices against the government in media, through protests on streets, educational campaigns in schools/colleges and formulated famous slogans of *'Men, money, mullahs and military'.*

Naturally, this feminist movement gained the most attraction and appeal during the rule of Female Prime Minister Benazir Bhutto, who served twice as the Prime Minister of Pakistan

[320]Imran (2013) 88.

[321]Khan, Shahid R.: Under Pakistan's Form of Islamic Law, Rape Is a Crime--for the Victims. Los Angeles Times. 25th May 1986. http://articles.latimes.com/1986-05-25/news/mn-7291_1_islamic-law.

[322]Pakistan: The Qanun-e-Shahadat Ordinance (Law of Evidence), 1984.

[323]Ahmad (1993) 67-68.

(1988-1990 and 1993-1996)[324].During her tenure, the NGOs and other focus groups were granted considerable power to urge the government to make amends with regards to the status and rights of women. Glorified and celebrated as a daughter of East Benazir Bhutto was the first Muslim leader to become Prime Minister of Pakistan twice in 1988 and 1993, making a protracted and unflinching attempt to promote women by removing certain conservative and orthodox military acts and laws that hindered women's rights, setting up woman police stations, women's courts and women's Development Banks through which they were able to withdraw cheap loans for the betterment of their condition. Unfortunately, the administrations were unable to complete their tenures and instead the presidents had the authority to disband the legislatures unevenly under Article 58(2)(b) so she may not be able to make pro-women laws to improve the social status of women[325]. Moreover, several women in Pakistan still have to undergo social, religious, economic and political hurdles, which prevent them from exercising their political rights as voters, candidates and election administrators. With the turmoil in Afghanistan in the early 2000s, the Taliban took refuge within the territory of Pakistan. These Taliban implemented strict Shariah codes within the territories they acquired control upon, thus denying women their due rights and freedom guaranteed under the Constitution of Pakistan. This tight control of the Taliban on women affected the existing educational lack in Pakistan, as they did not allow women to attend schools, rolling Pakistan to second place in the highest number of out-of-school children in the world according to the UNESCO report of 2014.

To add to this dismal situation, Prime Minister Nawaz Sharif took office in 1997who came into power gaining strong support from Islamic parties and Mullahs. In the first two terms, the Nawaz government made some attempt to strengthen women by introducing the 15th amendment, but it was largely focused on the Islamization introduced by Zia UL Haq, which was accepted by the National Assembly but rejected by social movements, women's rights NGOs and the opposition, who simply sought to abolish Hudood laws against women. The State has launched a 10-year strategy detailing 16 of the goals laid forth in it for strengthening women's status and a revised "Human Development and Poverty Reduction Strategy"[326] targeted at reducing women's deprivation. All mentioned programs could not run in long since due to short period of governments' terms comprised on half period[327]. Consequently, women found themselves caught in a losing battle against the conservative and religious political rivals[328]. During Nawaz Sharif's rule, the Council of Islamic Ideology (CII) also made a recommendation to make the burqa compulsory which led to an increased toll of honour killings. Soon, the women realized that their struggles for empowerment were not all in vain.

They again received momentum during the regime of an Army General Pervaiz Musharraf, who rallied for women empowerment and encouraged them to participate in media, sports and other socio-political activities. It is hard to claim because Pakistan's historical past has mainly consisted of dictatorial governments enforcing martial laws, which is why democratic standards have not entered society and citizens lack political knowledge. Gen Musharraf enforced the last martial law on 12 October 1999 by overthrowing the second term of Nawaz Sharif's administration, but he took several important measures to motivate women and boost

[324]Alavi, Hamza: Pakistan: Women in a Changing Society. In: Economic and Political Weekly 23/26 (1988) 1328-330.

[325]Pakistan Council for Science and Technology: History of Women Empowerment in Pakistan, 2016. http://www.pcst.org.pk/wst/wst_hwep.php Last visited 13.08.2020.

[326]Mumtaz / Shaheed (1987) 38-40.

[327]Mustafa, Ghulam/Ayaz ul Qasmi, Hafiz: An Analysis of Women Right's in Pakistan: Theory and Practice. In: Journal of Historical Studies 3/1 (2017) 147-159.

[328]Benard (2003) 234.

their social standing when he created the Ministry of Women's Development as an autonomous ministry in 2004. This movement to empower women is still in force, although to a lesser degree than before, along with efforts of WMA, who has successfully been able to get through women-friendly bills, for example, the Criminal Law Amendment Act (2004), the Anti-Sexual Harassment Bill, the Criminal Acid Act, Protection of Women Act, Status of Women Bill and sundry regulations condemning honour killings and other vices faced by women in Pakistani society.

Moreover, President Asif Zardari Government (2008-2013) President Zardari is known to be influential in protecting women and has helped them to get rid of social ills against women, enacting such laws and measures, such as the 18th amendment, deemed a landmark in the history of the country where women's affairs ministry has been handed over to the provinces. The government has also passed the National Commission Act on Human Rights, particularly for women in 2012. Several schemes have also been launched, such as the Benazir Income Support Program under this program; one million women are providing economic assistance and similarly the Women Detention and Distress Fund Act granting unique relief and financial assistance. In addition, twenty-six Benazir Bhutto Shaheed Centers were also established in various districts to provide urgent assistance. During the rule of PPP under President Asif Ali Zardari (2008-2013)has raised the number of women participation in the political forum by appointing women on esteemed positions like the Speaker of Parliament Dr Fehmida Mirza, Foreign Minister Hina Rabbani Khar, Media Advisor Sherry Rehman[329] and others who held prestigious positions within the government administration. Zardari also signed the bill on 'Protection against Harassment of Women at Workplace Bill 2009' that was adopted by the Parliament in 2010[330]. In addition, he also signed two other bills in 2012 aiming at criminalizing the traditional practices of Vani, watta-satta, Swara, marriage to the Quran, acid throwing etc[331].

The new government has recognized that by overlooking 52% of the population of the country comprising of women, cultural, political and social stability cannot be accomplished since they are the major capital of Pakistan. The Government has therefore formed a Convention on the Abolition of All Kinds of Violence Against Women, so that they may engage in any sphere of life. Similarly, the Government has embarked on a Prime Minister's Youth Loan Scheme to support young people in the country in general and women, in particular, to motivate them and then to enhance output levels in all sectors, such that the country's GDP can also be increased. Along with this, several other legislation was introduced to emancipate women and hamper the barbaric actions committed at the regional level by the second gender. As the Punjab Provincial Assembly passed an act offering security for women, allowing them to detain their husbands and keep them out of the house for 48 hours. Therefore, like the Sindh Assembly, the rule against the men who are performing a barbaric act of acid throwing at the faces of their females is insane.

However, like the Nawaz government during its first tenure, the current government of the Pakistan Tehrik-e-Insaf (PTI) party also seems a bit conservative and restrictive. The current Prime Minister – Imran Khan - seems to favour Islamic ideals which might ultimately affect the status of Pakistani women in future. While all the listed laws are enshrined to emancipate, empower and strengthen their position in all walks of life, certain barbaric, outmoded and anachronistic rituals, norms, practices and social evils prevailing in this society. Currently,

[329]Reuters: Sherry Rehman appointed Pakistan's ambassador to the US. DAWN(November 23, 2011).

[330]Rahman, Shamimur: Women's bill sets tough penalties. DAWN (January 30. 2010).

[331]Staff Report: President signs two women's rights bills into law. *Pakistan Today (December 23, 2011)*.

Pakistan's women are split into two groups as urban as well as rural. Urban women's lives are better than rural women as they are more encouraged and not restricted to house walls and engage in any field of life such as engineering, medical, employment, politics, international services and so on. Yet in rural areas, women's lives are very congested, lonely, dirty and wretched for backwardness and illiteracy, women face the evils of anti-woman and gender abuse prevalent in society in the form of Karokari, Vani, Honor killings, forced marriages, child marriages, marriages with Quran, burning brides and acid attacks. According to the 2015/16 annual study by Women Amnesty International, 8,539 incidents of violence against women were reported, of which 1,575 were homicides, 827 rapes, 610 domestic abuse, 705 honour killings and 44 acid attacks[332].

2.3.2. Contemporary status of women in Pakistan

Women's roles in Pakistani culture are diverse[333], but there is agreement that their access to services and opportunities is limited[334]. For Pakistani women, the maternal or paternal role has always been a top concern. Children are expected to respect, venerate, and obey their mothers, according to cultural standards. These principles are fully supported by Islamic doctrine, resulting in well-known sayings and beliefs such as "heaven is beneath the mother's feet." Various studies show that the maternal role is paramount and that ideals associated with fertility control have yet to gain traction in society[335]. The only asset that a woman has is her ability to reproduce[336]. She is convinced that her social reputation and standing are inextricably linked to her ability to produce children[337]. The occupational role is particularly important since it might serve as a substitute for the wife-mother position. However, in Pakistan, women are not expected to have a significant role in the workplace. The majority of women join the workforce due to financial need, and employee engagement, in most situations, detracts rather than enhances reputation. Individual roles include the pursuit of education, work, childbirth, deciding on the number of children to have, deciding on family planning methods to utilize, mobility, and household decisions. Data from the Pakistan Fertility and Family Planning Survey, 1996-97, is used to examine some of these markers of women's status.

Education: The educational attainment of ever-married women by province and location (urban/rural). According to statistics, 54 per cent of ever-married women have no formal education. Twenty-one per cent has had informal or Quranic education, while a quarter has received some formal education. Only 6% of women have completed at least high school. The disparities between urban and rural areas are considerable. Only a quarter of women in big cities are uneducated, compared to over two-thirds of women in rural regions. Women's Employment Women's employment has a significant impact on their financial freedom[338].

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[332]Benard (2003) 152-153.

[333]Shah (1989) 150-166.

[334]United Nations Children's Fund (UNICEF): Situation Analysis of Children and Women in Pakistan. (Islamabad: UNICEF, 1988) 69.

[335]Shah (1986) 2.

[336]Mumtaz / Shaheed (1987) 23.

[337]Manzoor, Khaleda: Focus on Family Welfare Centres Marketing Research. (Islamabad: National Institute of Population Studies, 1991) 30-31.

[338]Hakim, Abdul / Aziz, Azra: Socio-Cultural, Religious, and Political Aspects of the Status of Women in Pakistan. In: The Pakistan Development Review 37/4 (1998) 735.

Employment: Women's employment prospects. In all, 20% of ever-married women are now working for a living. The job situation varies greatly between provinces. There are significant disparities between urban and rural locations, with rural areas having the largest number of working women. Women's engagement in the agricultural industry in rural regions is likely to have been reported as paid work. Women who are now employed make up the majority of the group with the least education. Only 13% of women with up to elementary schooling and the same amount of women with up to intermediate schooling report working for money, compared to 24% of women with no education. In the group with the least education, the proportion rises slightly (19%). The occupation, job status, site of work, and money retention of women who work for a living. Nearly one-third of all working women labour in the production sector (29 per cent). The second most prevalent source of employment is in the service and agriculture industries (26 and 27 per cent respectively). Sixty-four per cent of women work for relatives, and fifteen per cent work for themselves. Nearly two-thirds of all women work outside the house. More than a third (36%) of women say they keep none of the money they earn, while just under 37% keep all or portion of it[339].

Participation in Domestic and Child-Related Decisions: The indications indicate women's engagement and decision-making in home concerns, such as child treatment, family food purchases, and clothing purchases. The great majority of women have a say in these three important areas of household life. However, just a small percentage of the population has the final say in decision-making. With age, one's decision-making capacity grows. Women over the age of 30 are far more prone than younger women to claim responsibility for making final choices. There is also a distinction by province. Punjab and Sindh have significantly more decision-making authority than the NWFP and Balochistan. Women's autonomy appears to be enhanced by both urbanization and education[340].

Mobility of Women: In Pakistan, women are expected to stay at home and care for their homes and children. Women are not culturally obligated to stay at home, but because most places are underdeveloped, there is a perceived lack of personal protection, and their families encourage them not to travel alone outside of their neighbourhood or town. As a result, women's mobility in Pakistan is restricted. Women's mobility was assessed in the PFFPS based on their self-reported capacity to (a) move beyond their neighbourhood or village unattended and (b) get to a hospital unaccompanied. Women's mobility differs depending on their age, province, whether they live in the city or the country, and their level of education. Overall, 18% of women say they have travelled alone outside of their neighbourhood or town. Women in Balochistan are the least mobile, with just 5% of women having travelled alone outside their village or neighbourhood. Older women, urban, and educated are the most capable of travelling alone outside of their surrounding area. Only a quarter of women say they could travel to the hospital alone, but almost three-quarters say they would need to be accompanied[341].

Religion and Family Planning: Pakistan's Muslim population accounts for 97 per cent of the country's overall population. Some Muslims claim that Islam forbids family planning. Fatalistic attitudes toward the number of children are also seen to be religiously motivated, and they oppose family planning. More than half of women claim they have read nothing in the Quran or Hadith in support or opposition to family planning, with 32% saying they have read something unfriendly to family planning. As a result, more than two-thirds of Muslim women

[339]Hakim / Aziz (1998) 735-736.
[340]Hakim / Aziz (1998) 736.
[341]Hakim / Aziz (1998) 736.

have read nothing that is categorically opposed to family planning, while only one-third have read something that is absolutely in favour of it. Similarly, 47% of Muslim women say they've heard a Moulvi Sahib or Pir Sahib criticize family planning. However, just 10% of currently married women have never utilized family planning for religious reasons. In truth, there is no prohibition in Islam against family planning[342].

Communication about Family Planning: According to studies, discussing family planning with one's husband improves the chance of using contraception, but discussing it with friends, neighbours, and relatives is likely to promote acceptance and understanding of family planning. It might also be used to assess the acceptability of family planning on a personal and communal level. Husbands were the most probable people with whom women discussed family planning, according to the survey. The second most popular group was friends and neighbours, followed by other female relatives. In the last year, 45 per cent of presently married women said they had discussed family planning with their spouses. There was 27 per cent who talked about family planning once or twice, and 18 per cent who talked about it three times or more. These data demonstrate an increase in inter-spousal communication since the 1990-91 PDHS when around one-fourth of presently married women said they had talked about family planning with their husbands in the previous year. Age, domicile, province, and education all influence the level of inter-spousal dialogue. As people become older, the amount and frequency of inter-spousal dialogue rise. In senior age groups, however, it begins to decline. Women aged 15-19 years and 45-49 years are the least likely to have discussed family planning with their spouses in the previous year. Urban women are more likely to have inter-spousal conversations. Women in the NWFP are also more likely than women in other provinces to have discussed family planning with their husbands in the previous year. Inter-spousal debate is heavily influenced by education. For example, 69 per cent of presently married women with a high school diploma or above discussed family planning, compared to 40 per cent of those without a high school diploma or higher[343].

Initiation of the Idea of Decision-Making: To understand what influences women to manage their fertility, we need to know who comes up with the notion of family planning and the decision-making process that leads to the adoption of family planning. For presently married respondents. 54 per cent of presently married women used contraception on their initiative at the time of their first usage, whereas 26 per cent used contraception at their husbands' advice. 15% began using contraception as a result of a consensual agreement between husband and wife, whereas 5% did so due to the influence of others. Medical and paramedical personnel are among the "other folks." CPR trends among non-pregnant women who are currently married. Four nationwide polls have been used since the mid-1980s. According to the data, the percentage of presently married non-pregnant women who use contraception increased from 14 to 28 per cent between 1990-91 and 1996-97. The usage of most techniques has grown, showing that women are becoming more open to using family planning methods. Female procedures (especially sterilisation and IUD), as well as male treatments (condom and withdrawal), have become more popular. However, it is still modest when compared to numerous other Asian countries[344].

The Council of Islamic Ideology (CII) has been the subject of criticism recently, especially since 2006, from all parts of Pakistani society and abroad. This was partly attributed to the

[342]Hakim / Aziz (1998) 736-737.
[343]Hakim / Aziz (1998) 737.
[344]Hakim / Aziz (1998) 737-738.

Council's findings on women's rights issues. In 2006, CII ruled the Women's Protection Bill *un-Islamic* as it shifted the scope of rape (*Zina)* from Huddod laws to Pakistan Penal Code (PPC) which meant the punishment for the offence of rape would be dealt under *Taazir* punishments (under the statute law) instead of Hadd punishments (under Hudood law)[345]. Moreover, now all punishable offences related to rape, for instance, forced rape (Zina bil-Jabr) and adultery/consensual rape under the Women Protection Bill are prosecuted in civilian courts instead of Islamic courts.

The background in Pakistan at that time is essential to look at. General Pervez Musharraf held the office of the President at that time and he upheld the notion of 'enlightened moderation' into the Pakistani society. During his regime, a woman named - Mukhtara Mai – was gang-raped which brought Musharraf and his government under enormous hassle from all over the country and foreign civil society organizations. Due to this heightened pressure, Musharraf turned to the CII for seeking help in reviewing the Hudood Ordinance, to which the CII responded with a lengthy report consisting of 190 pages in the year 2006. In the long report, the CII distinguished between the two kinds of rapes namely forced rape and consensual rape suggesting that the current case involves no requirement for four witnesses to testify about the incident[346]. After this incident, a disagreement occurred among Musharraf's allies in the government. The Islamists warned Musharraf of their resignations in case his government attempted to bring in any new changes to the 'divine ordained laws' of the Hudood Ordinance. Therefore, he had to strike a compromise with them and for that purpose, a new Act named the Protection of Women Act, without the need to abolish the already enforced Hudood Ordinance. Under this new Act, matters about rape were dealt with under the jurisdiction of the Pakistan Penal Code (a continental law).

DNA research was ruled insufficient by CII in 2013 as key evidence for rape allegations, re-affirming the requirement of four male witnesses to show that the accused had been rape charges[347]. The Council then made no difference whatsoever between Zina-bil-Jabr and Zina-bil-Raza. Many criticized CII for laying the burden on the victim of rape to bring four male witnesses, along with the suggestion to the Council to consider including DNA evidence in special cases, for instance where the victim is killed or where eye-witnesses cannot be presented[348]. A former member of the CII was said to state that in the instance of Zina, the Quran specifies the obligation of four male witnesses to secure the institution of marriage in the event of a married woman being convicted, but Muslim jurists have acknowledged this stipulation for all cases[349].

In 2014, a new provocative recommendation was forwarded by the CII where it proposed that a Muslim woman should not object to the second, third or fourth marriage of her spouse. The Council recommended that the government amend the laws in place to allow a man to marry without his or her wife's permission. Owing to some other provocative statements, the Council has gained a lot of local and foreign scrutiny since 2016. Firstly, the CII deemed the National

[345]Dr Saigol (2016) 28.

[346]Quaraishi, Asifa: Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective. In: Michigan Journal of International Law 18/2 (1997) 289-295.

[347]Khan, Sattar: Is it time o reform Pakistan's Council of Islamic Ideology?. (Germany: Deutsche Welle, 17-05-2016). Available online at http://www.dw.com/en/is-it-time-to-reform-pakistans-council-of-islamic-ideology/a-19262444. Last visited 21-01-2021.

[348]Hussain, Mushtaq/Mushtaq, Ammara: Islamic law: Backing up forensic DNA evidence. In: *Nature* 503/7476 (2013) 342-342.

[349]Masud (2015) 5.

Assembly's bill to ban child marriages to be *un-Islamic*. This is because the Council has already approved the marriage of girls as young as nine in 2014, based on the condition that if there exist clear signs of maturity or puberty. In its decision, the Council blocked any attempt to prosecute young girl marriages of 8 years of age[350]. Secondly, without the permission of a husband to dissolve a marriage, CII ruled *un-Islamic* the court practice of issuing khula (the right of a wife to seek divorce). Thirdly, the Council rejected the Protection of Women against Violence enacted by the Punjab government. These controversial policies have generated criticism from civil society and politicians.

There has been a frenzied discussion in the National Assembly on CII, and some legislators have also accused the Council of growing abuse against women. By stressing the anti-women prejudice of CII, a leading politician, Aitzaz Ahsan, reflected his frustration. He said the Council should be abolished because the government was spending 100 million Pakistani Rupees in its budget for nothing. The Council then forwarded its project to devise a model women's security bill as a proposal for all stakeholders, primarily Punjab and Khyber Pakhtunkhwa (KPK), after opposing the Punjab government's Protection of Women against Violence Bill in February 2016. Before continuing on its women's protection bill, the Government of KPK asked CII for advice on this issue. The result was a catastrophe as it caused another uproar over the many recommendations of the Council, such as the model women's protection bill authorizing husbands to beat their wives 'lightly'[351].

Furthermore, there exist several negative societal outlooks that cause hurdles in the way of women empowerment in Pakistan. These negative social outlooks attitudes include the scourge of dowry, pressure on women to leave work or business after marriage by spouse and family, monopoly of men on making decisions related to family matters, the custom of preference for the opinion of men over women in matters related to domestic issues, non-recognition of women's dignity, non-payment of women's decided or promised wedding gifts known as *"Haq-mahr"* while contracting marriage, restrictions on women from filing cases against men in court in cases of disputes, harassment at workplaces, honour killings, punishment to women even in cases of rape etc. The evaluation of the origin of the problems shown here reveals the effect of the non-practice of Islamic laws in the household. A study of Islamic teachings on marriage laws show that they never encourage individuals to obtain dowry as gifts through coercion from women at the time of marriage. Rather it allows the parents and family members of the bride to send some gifts to help new partners launch an independent life after marriage, according to their wishes. The laws demand a man to settle and pay his wife for Haq mahr. Sadly, dowry and Haqmahr concerns reflect the ignorance of male individuals to obey Islam's teachings in Pakistan. The existing situation illustrates male superiority in married life in a manner that ignores the right of women to take part in decision-making about themselves and their family matters. In family life, this means the superiority of men over women. It also highlights women's issues with their disincentive to embrace a career and work and use their skills. They are abused at work as well as prevented from playing a dual role in domestic life by the mindset of their relatives. For working mothers, this makes life more complicated. This calls on the government and other welfare institutions to be vigilant to monitor harmful social outlooks and to help women by monitoring the enforcement of welfare laws[352].

[350] Quaraishi (1997) 289-295.

[351] Khan, Raza: 'Lightly beating' wife permissible, says CII's proposed women protection bill. (Pakistan: *Dawn* News, 26-05-2016). Available online at https://www.dawn.com/news/1260803. Last visited 20-01.2021.

[352] Rukshanda, N.: Problems of women: A global view. In: Journal of Gender Studies 15/3 (2005) 13-23.

Besides the CII and certain negative outlooks, a variety of initiatives to empower women have been initiated by the government of Pakistan. Nevertheless, many girls and women in Pakistan have issues with the men in society. Some surveys questioned women about the government's role in providing them with empowerment and respected status in Pakistan, to which they responded with positive feedback in the favor of government's actions. The surveys suggested that women have access to educational facilities, the right to share land, resources for various skills development, the provision of leadership services, basic health facilities, the right to engage in non-political campaigns, equal status in-laws as men, opportunities for high potential employment like men, and a constructive position for the media to the benefit of women rights. This illustrates that Pakistan's government is eager to motivate and promote women to enjoy a respectful place in society. This also looks, on the other hand, at the fact that the government is supporting women and aims to commit women's contributions to improving the society in Pakistan[353].

Let's observe a few optimistic social behaviours that carry happy signs for women in the present context in the society of Pakistan. The family enthusiastically accepts the birth of a girl infant. Women are proudly entitled to pursue higher education. They are encouraged to engage in out-of-home excursion services, have freedom of expression on family matters, have permission to cast votes in elections, feel protected at work, and have the right to choose a spouse for marriage. This also examined the dominance of Islamic ideals in the lives of women in Pakistan, as well as the recognition of success in dealing with modern values to face the demands of this era[354].

2.3.3. Status of Women under Shariah Law

To determine women's status, Syed[355] and Sathar et al.[356] employed traditional metrics of education and employment. Only by looking at Pakistani women's life as their whole, including their cultural values in the family, society, and nation, as well as their demographic and economic positions, can we have a historical understanding of their current function and status. Furthermore, it is critical to comprehend religious and legal prescriptions and norms pertaining to women's standing[357]. Women's limits can be classified into two groups. The first group includes legal limits and inequities drawn from the Quran (Muslims' sacred book), Hadith (Prophet Muhammad's sayings), Sunnah (Prophet Muhammad's deeds), and customary Shariah rules (laws based on the Quran, Hadith and Sunnah derived by Muslim jurists). Inherited inequity, marriage, divorce, child custody, and the capacity to act as a legal witness are among them. The second set of prohibitions relates to the imposition of purdah (women's seclusion and concealing from males) or the isolation of women. Women's engagement in educational, economic, and social activities is hampered by both forms of constraints. Additional limitations based on local conventions rather than religious sanctions exist in many regions. All parts of life are governed by Islam. Because the family is thought to be at the heart of the Islamic social

[353]Chaudhary, A.R./Chani, M.I./Pervaiz, Z.: An analysis of different approaches to women empowerment: A case study of Pakistan. In: World Applied Sciences Journal 16/7 (2012) 971-980.

[354]Akhter, Nasreen/Akbar, Rafaqat Ali: Critical Analysis of Life of Pakistani Women: Views of Educated Women. In: Journal of Elementary Education 26/1 (2016)111-121.

[355]Syed, Sabiha Hassan: Female Status and Fertility in Pakistan. In: The Pakistan Development Review 17/4 (1978) 408-430.

[356]Sathar, Zeba A./Akhtar, Fifa: Evaluation of Fertility Decline in Karachi. In: The Pakistan Development Review 27/4 (1988) 659-668.

[357]Shah, Nasra M. (ed.): Pakistan Women: A socio-economic and Demographic Profile. (Islamabad: Pakistan Institute of Development Economics, 1986) 2.

system, its rules are quite clear on the role of women in society. Originally, the goal of these rules was to better the status of women, because, before Islam, women in Arabia had almost legal standing under tribal law. Various Islamic teachings improved the situation; nonetheless, later Islamic teachings were understood in the context of existing traditions and practices of a specific culture, emphasizing women's principal role in the household, within which they had both rights and responsibilities[358].

Many individuals in Pakistan, particularly those who are members of Maulana Maududi's political organization, the Jamaat-e-Islami (Islamic Party), or sympathetic to its goals, are influenced by the theological beliefs of Maulana Maududi, a religious scholar and ulema[359]. Maulana Maududi thinks that man is the active partner in nature's system, while the woman is the passive partner, and that man is superior because he possesses innate attributes of domination, power, and authority[360].

Hussain[361], a Pakistani writer (and former judge of the Pakistani High Court), has authored a lengthy essay on the role of women in Islam, exploring several social and economic factors. According to Hussain[362], religious experts' downgrading of women's standing demonstrates a double standard for modesty and chastity, one for men and one for women. By commanding men and women to guard their private parts and drop their gaze, the Quran established a uniform norm for both men and women. The attainment of the objective of keeping chastity was expected of both sexes. The ulema, on the other hand, dismissed the woman's capacity to protect her virginity and seclusion from male society. A woman was deemed the example of chastity as a result of the ulema's segregationist mentality[363]. This is what the ulema of today infer from the secluded women. Qutb, an Egyptian religious scholar, likewise believes that treating them as equals and accepting their absolute equality as human beings entitled them to equal rights. Equal human dignity, economic freedom, and the right to a good social life are all guaranteed in Islam. She has the right to an education and even to remain at home[364]. In reality, according to religious experts Fazlur Rahman, Islamic faith women are intended to be equal partners with men in the Middle Ages, and now it's time to check Maloney's incorrect citation[365]. There are no religious restrictions on education or employment.

In Pakistan, however, Islamic views on women's rights to education, property, and approval were not institutionalized nor widely accepted[366]. Any effort to meddle with or amend Muslim religious regulations concerning family affairs can put the government in a bad light, at least in South Africa. For example, in 1985, an Indian Supreme Court decision sparked outrage. The Supreme Court upheld the lower court's decision to award Shahbano, a divorced Muslim woman, a maintenance allowance from her husband, and dismissed the husband's appeal against the award of maintenance under section 125 of the 1973 Code of Criminal Procedure, which deals with the maintenance of wives, children, and parents. The ruling party (Congress-

[358]Callaway, Barbara / Creevey, Lucy: Women and State in Islamic West Africa. In: Charlton et.al. (eds): Women, the State, and Development. (New York: State University of New York, 1989) 86.
[359]Callaway / Creevey (1989) 24.
[360]Maududi, S. Abu A'La: Purdah and Status of Women in Islam. (Lahore: Islamic Publications, 1987) 134.
[361]See Hussain, Aftab: Status of Women in Islam. (Lahore: Law Publishing Company, 1987).
[362]Supra Hussain (1987) 11.
[363]Hussain (1987) 11.
[364]Qutb, Muhammad: Islam the Misunderstood Religion. (Lahore: Islamic Publications, 1980) 99.
[365]Maloney, Clarence: The People of South Africa. (New York: Holt, Rinehart and Winston, 1974) 389.
[366]Callaway / Creevey (1989) 21.

I) had backed the judgment despite Muslim fundamentalists' demands, and as a result, Congress-I lost certain by-elections as a significant proportion of Muslim votes turned against it. When an independent Muslim member of parliament later submitted a bill in parliament to safeguard Muslim personal law, the ruling party flipped its previous attitude and backed the measure to attract Muslim support[367]. Religious extremists' attitudes have influenced women's status in Pakistan. However, the ideas of Pakistan's founder, Muhammad Ali Jinnah, are substantially different, as seen by the following excerpt from his speech: *"It is a crime against humanity that our women are shut up within the four walls of their houses as prisoners. There is no sanction anywhere for the deplorable conditions in which our women have to live. You should take your women with you as comrades in every sphere of life[368]".*

Jinnah campaigned for equal participation of men and women in social and national life[369]. Following Pakistan's independence, politicians saw the ulema as "irritants," illiterate, and narrow-minded. In 1951 and 1953, the ulema met in Lahore and approved resolutions outlining the ideas of an Islamic state, which they demanded should be integrated into Pakistan's constitution. The chairman of Jammat-e-Islami, Maulana Maududi, called for voting rights to be granted to all adult males and only educated ladies. He argued that women should not be permitted to hold public office if they were likely to come into conflict with men. Only pious and erudite men were permitted to assume major governmental positions, including that of the head of state. He proposed a special assembly of women to advise legislatures on women's problems. While it is true that the political leadership in Pakistan's early years (1947-58) treated the views of orthodox Muslims with contempt and scorn, it is also true that steps to appease them were also done. For example, under the 1956 constitution, Pakistan was designated the Islamic Republic, and ulema was given an advising role in the legislature. However, the Constituent Assembly overlooked the majority of their demands about the functioning of the Islamic Republic, such as prohibiting women from contesting or participating in elections[370]. President Ayub Khan's tenure (1958-69) was notable because it marked a turning point for Islamic proponents. Ayub Khan questioned the ulema's archaic worldview, seeing them as divisive and backward forces in society. The Family Laws Ordinance of 1961 was enacted by him. This legislation mandates marriage registration, which reduces fraud and protects vulnerable women from exploitation[371]. Polygamy was severely restricted under this law, and a husband could not marry a second time without his present wife's agreement. The Bhutto government (1972-77) drafted the 1973 constitution, which provided women with increased rights. The following are relevant clauses from the 1973 constitution:

- Article 25: (1) All citizens are equal before the law and are entitled to the equal protection of the law. (2) There shall be no discrimination based on sex alone. (3) Nothing in this article shall prevent the state from making any special provision for the protection of women and children.
- Article 27: No citizen otherwise qualified for appointment service of Pakistan shall be discriminated against in respect of such appointment on the ground only of race, religion, caste, residence or place of birth.

[367]Pathak, Zakia/Rajan, Rajeswari Sunder: Shahbano. In: Signs 14/3 (1989) 558.

[368]Mumtaz, Khawar/Shaheed, Farida: Women of Pakistan: Two Steps Forward, One Step Back. (Lahore: Vanguard, 1987) 7.

[369]Qayyum, Abdul: Jinnah and Islam. In: McDonough (ed.), Sheila: Muhammad Ali Jinnah – Maker of Modern Pakistan. (Lexington/Massachusetts: D.C., Health and Company, 1970) 15.

[370]Mumtaz / Shaheed (1987) 9.

[371]Chaudhry, M. Iqbal: Pakistani Society: A Sociological Perspective. (Lahore: Aziz Publishers, 1980) 152.

- Article 34: Steps shall be taken to ensure full participation in all spheres of national life.
- Article 35: The state shall protect marriage, the family, and the child.
- Article 37: Clause (e): The state shall make provision for just and humane conditions of work, ensuring that children and are not employed in vocations unsuited to their age or maternity benefits for women in employment[372].

Nonetheless, certain institutional changes are crucial in recognizing women's disadvantages. Before this, women were not a concern, and development plans did not prioritize women as a group in need of particular assistance[373]. However, in 1979, the cabinet Secretariat formed the Women's Division to conduct particular programs to fulfil the country's unique needs. The government's emphasis on women's status recognition was given to the issue in the Sixth Plan 1983-88, and this division has now been awarded the status of notable change. The strategy emphasized the equality of opportunity in the areas of education, employment, mortality, and fertility. It argued that this was a must for total national growth and that no one should be "half-free and half-chained[374]'." During the 1990s, there was a little improvement in women's engagement in education and employment as planning tools.

When we analyze the pre-Islamic and post-Islamic socio-cultural and political status of women, we can see a steady rise in their role. Islam as a faith presented women with elevated dignity and resources to develop them as a significant part of society. Women in Arabia in periods of poverty, before Islam (Jahiliyah)[375] were subjugated either to their families or their spouses. At that time, when war was ongoing, women were also taken as captives. They were usually regarded as bondmaids by the enemy and held in contempt. Although they were kindly treated by their captors, yet they were always embarrassed and stripped of their men and homeland. Women had little control or influence over matters pertaining to their well-being and were exempt from any significant involvement in their respective social and political relations. One of the social reasons for such an attitude was that there were often inter-tribal blood feuds in pre-Islamic times, demanding that male members defend their tribes. Men were therefore much more in demand than women. In such an anarchic age, Islam has, in theory, introduced the concept of freedom and justice for women in the harsh desert of Arabia.

With one move, Islam removed the stereotype of a woman that she was the everlasting seducer and tempter of a man and that she should be honest and sinless to her man/husband. Islam presents women with fair rights and has an individual identity that cannot be subjugated. The Holy Quran has disclosed humanity's roots and presented men and women as compatible elements of a society worthy of sustaining the human race's life together. The book (Holy Quran) addresses both men and women in the same manner i.e. *Annas, AlInsan, Al Bashar and Al Momin*. Islam provides women with status or position, financing, political rights, etc. Nonetheless, the Qiwwama of husbands over their spouses is one of these examples. A husband is Qawwam that is to claim he respects his wife's needs. The Quran's mention is made that the man has to support his wife and family behind the granting of Qiwwama right to husbands over their wives[376].

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[372]Constitution of the Islamic Republic of Pakistan, 1973.

[373]Shah, Nasra M.: Female Status in Pakistan: Where Are We Now? In: Mahadevan (ed.), K.: Women and Population Dynamic: Perspectives from Asia Countries. (New Dehli: Sage Publications, 1989) 150-166.

[374]Shah (1989) 161.

[375]Sulaimani, Faryal Abbas Abdullah: The Changing Position of Women in Arabia under Islam During the Early Seventh Century. (Thesis: University of Salford, 1986) 5- 6.

[376]The Holy Quran: Surah An-Nisa 4, Verse 34.

Most notably, Islam not only grants women social freedoms, but also equal civil privileges. She will purchase her own money and land, market and make a living. In Islam, the woman is constitutionally equal and is autonomous of her family, partner, or brother's responsibilities. Furthermore, Islam has given women the freedom to inherit both moving and immovable property. After the death of male family members (father, husband and brother), She still bears the right to inherit the land[377]. Women earn compensation for raising children as well as their living expenses from their husbands even in the case of divorce[378]. Sadly, this dimension of equality has been substituted over some time by gender segregation and injustice, thus degrading to the extreme level of violence in Pakistan. The proliferation of customary rules became more apparent as Islam spread far and large. The very nature of Islam has also been corrupted, which is clear in Pakistan. Throughout the absence of freedom for women, abuse was the 'law of the nation.'

While Pakistan is an Islamic state, it derives its definition from customs and cultural norms in terms of women's rights. The existence of a parallel justice system such as Jirga and Panchayat is generally apathetic to women and their grievances and therefore the existence of both legal and religious safeguards and measures does not permeate the structure of society. Even the uncertainty factor prohibits women from claiming their freedoms. Such bodies administer or enforce penalties on those who claim their human rights against the specified tribal or group norms. Such tribal justice system is recognized in different places by Constitutional Law (including FATA and PATA), but it is also unlawfully in Pakistan. Throughout these places, regular judicial tribunals do not have authority over a Jirga decision and there are instances where human rights covered by constitutional law are infringed. The Jirgas function against women's rights and actions are often focused on stark bias and bigotry towards women centred on their cultural and religious stereotyping of women's position[379].

How and why did the role of women decrease in Islamic society? In medieval cultural practice, the solution can lie, as most early jurists come from the urban Arab community and culture of the 7th century. The Arab customary laws were a component of the Shariah, unfortunately, most Muslims believe that even these customary laws too are divine and binding because of a lack of proper knowledge and understanding, and hence Quranic injunctions on gender justice have been diluted. And secondly, the fabrication of *ahadith* also caused discrimination. The Quranic injunctions in favour of women were not appropriate in a patriarchal community, as they questioned the supremacy of men and considered women equal to men[380].

Therefore, it may be assumed that the issue is partly cultural and partly religious. Unfortunately, Islamic zealots seek to excuse the prevailing cultural and social misdeeds on the grounds of Islam. Sadly, at the individual level, women themselves are still not informed of the privileges enshrined in Islam. Islam finds all men and women fairly divine and gives equitable civil rights. Both genders have common and similar roles to do, such as prayer, ceremonies, fasting, etc. According to Islam, moral supremacy is focused exclusively on modesty and not on a gender basis[381]. Women who have a career or employment outside their

[377]The Holy Quran: Surah An-Nisa 4, Verses 7, 11.

[378]Farooqi, Hafiz Abdullah: Emancipation of Women of Islam. In: The Pakistan Review 13/5 (1956) 21.

[379]Bhattacharya (2014) 183-184.

[380]Bhattacharya (2014) 182.

[381]The Holy Quran: Surah An-Noor 24, Verses 30, 31.

home are not restricted by Islam[382]. But in fact, women are more acquainted with the concocted version, as proclaimed with a certain bent of mind by religious leaders. This passive personality is triggered by a serious case of denial or could be respected engrained in their psyche by family and surroundings. This docility is certainly evident in Pakistan as females try to reconcile with abuse and within them, there is a clear sense of remorse.

As far as women's rights are concerned, while Shariah provides such basic privileges for women, it does not equate them with men. Therefore, oppression dependent on religion is a component of Shariah. Many Muslim nations, following Shariah rules like Pakistan, position women in a lower rank by enforcing gender discrimination, confining them to their houses, forcing them to wear the hijab and refusing them the right to hold high public office. In reality, the practice of Shariah does not look favourably upon the jobs of women. Also, a woman is generally entitled to inherit only half the share of a man of the same degree of relationship to the deceased in Pakistan and several Muslim countries following Shariah law. A man is allowed to marry up to four women at once, whereas women can only have one partner. Whereas the husband may divorce his wife at his choice, a woman may request a judicial divorce before a male judge without justification for doing so and is expected to provide clear grounds for divorce. A parent, partner, sibling, uncle or even son can have jurisdiction over a woman whose right to fair care is subject to the authority of that individual. For all commercial transactions, the Qur'an specifically requires two male witnesses, or one male and two female witnesses. The evidence of two women equals that of one man, in addition to the fact that the compensation for murdering a woman unlawfully is also half that for killing a man[383].
In Islam, the status of women's testimony is highly disputed, ranging from a complete rejection in particular legal areas to a conditional acceptance in a discriminating manner (half the worth, etc), to a complete acceptance without any bias towards gender. The Islamic law defines testimony (*shahada*) as an attestation concerning a right of a second party against a third party. It co-exists with other forms of evidence such as the oath, acknowledgement and circumstantial evidence, to prove a case. A testimony should comprise of certain knowledge of the questioned event, and it cannot be based on mere speculation[384].

The testimony of women varies in accordance with the issues and circumstances of the case in question. In the case of a witness for financial matters/documents, the Quran requires two men or one man and two women. The second chapter of the Holy Quran, Surah Al-Baqarah, Verse 282 provides the basis for the above-mentioned rule that two women are the equivalent of one man in providing testimony in financial situations as a witness.[385]

'O you who believe! When you contract a debt for a fixed period, write it down. Let a scribe write it down in justice between you. Let not the scribe refuse to write as Allah has taught him, so let him write. Let him (the debtor) who incurs the liability dictate, and he must fear Allah, his Lord, and diminish not anything of what he owes. But if the debtor is of poor understanding, or weak, or is unable himself to dictate, then let his guardian dictate injustice. And get two

[382]Hakim, Abdul/Aziz, Azra: Socio-cultural, Religious, and Political Aspects of the Status of Women in Pakistan. In: The Pakistan Development Review 37/4 (1998) 727-46.

[383]Nanda, Ved P. Islam and International Human Rights Law: Selected Aspects. In: Proceedings of the Annual Meeting (American Society of International Law) 87/3 (1993): 327-31.

[384]Hallaq, Wael B.: Sharī'a: Theory, Practice, Transformations. (Cambridge: Cambridge University Press, 2009) 347.

[385]Fadel, Mohammad: Two Women, One Man: Knowledge, Power and Gender in Medieval Sunni Legal Thought. In: International Journal of Middle East Studies. 29/2 (1997)185–204.

witnesses out of your men. And if there are not two men (available), then a man and two women, such as you agree for witnesses, so that if one of them (two women) errs, the other can remind her.'
This saying of the Quran has also been interpreted by several Muslim scholars to imply testimony of two women being equal to a single man's. The tafsir Ibn Kathir states that Allah requires that two women take the place of one man as a witness, because of the woman's shortcomings, as the Prophet described.[386] Ibn al-Qayyim also comments on the afore-mentioned verse as follows:

'There is no doubt that the reason for a plurality of women in the Quranic verse is only in recording testimony. However, when a woman is intelligent and remembers and is trustworthy in her religion, then the purpose of testimony is attained through her statement just as it is in her transmissions in religious contexts.'[387]

In addition to the restriction declared in financial matters, a large number of classical Muslim scholars claim for prejudice against women testimonies in matters of criminal cases too. A twelfth-century Maliki jurist – Averroes stated that jurists of his time disputed with regard the status of women in matters of hudud and criminal punishments for serious crimes. He stated further that some of the jurists believed that the testimony of a woman was entirely unacceptable in these matters besides the fact that they testify together with male witnesses. However, he stated that a school of thought referred to as Zahiris believed in the testimony of two or more women testifying together with a male witness, and considered it acceptable even in cases regarding financial transactions described above.[388] One of the most influential Islamic scholars - Ghamidi rejected further extending the implementation of the Quranic verse (mentioned above) to incidental events, claiming that the specific verse was limited to the particular topic of financial or contractual witnesses. In contrast, however, some hadiths confirm the acceptance of only one female testimony in the instances of one murder and the assassination of the third Caliph of the Islamic state - Hazrat Usman. Respectively, the acceptance of these testimonies led to the death penalty for the murderer and the initiation of a campaign against the state.

Apart from the financial matters, Muslim scholars also differ on the status of women's testimony in other issues and whether the interpretation of verse 282 for financial transactions shall be applied to other cases as well or not. This is particularly true in matters relating to bodily affairs such as divorce, marriage, freedom of a slave, and restitution of conjugal rights. According to Averroes, the Imam of the Hanafi school of thought believed in the acceptance of women testimony in such matters. In contrast, the Imam of Maliki school of thought believed in the non-acceptance of women testimony in such matters. For certain cases, however, Muslim scholars agree on the acceptance of women testimony alone where the men have no prior knowledge of circumstances of bodily affairs involving the physical handicaps of women or the crying of a baby at birth etc. Ibn Qudamah, in his famous compendium on Islamic jurisprudence *al-Mughnī,* stated that in matters of nursing, childbirth, menstruation, chastity, and physical defects, a male witness is not accepted entirely while a single female witness is[389].

[386]Kathir, Ibn: Tafsir Ibn Kathir. (Surah Al Baqarah: Part II).

[387]Khan, Nazir / Alkiek, Tesneem / Chowdhury, Safiah: Women in Islamic Law: Examining Five Prevalent Myths. In: Yaqeen Institute for Islamic Research, 2019.

[388]Rushd, Ibn: Bidayatu'l-Mujtahid. Edition 1st. (Beirut: Daru'l-Ma'rifah, 1997) 311.

[389]Benard (2003) 202-224.

In these situations, the testimony of a woman becomes equal to that of a man's and her testimony can also invalidate a man's testimony where he accuses his wife of un-chastity.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[390] has only been accepted by a limited number of Islamic nations, even with significant reservations. To clarify, reservations usually indicate that the State does not find itself bound by the terms of those clauses "unless they clash with Shariah law centred on Holy Qur'an and Sunnah." Indeed, as regards Article 2 of the Convention, which obliges parties to take substantive steps to counter prejudice, reservations indicate that the State is unable to cooperate with the content or substance of the Convention. Likewise, the ratifying Muslim states have reserved Article 16 of the Convention, which obliges the parties to 'take all necessary steps to eradicate discrimination against women in all matters relating to marriage and family relations,' and mentions each marital and family right separately, allowing the parties to give women equality in those relationships, including marriage. Such objections evoke Shariah limitations on the freedom of the wife to divorce by rendering it dependent on a judge's decision, while in the husband's situation there is no such limitation.

2.3.4. Status of Women under Constitutional and other Statutory laws

The status of women in Pakistan is a complicated phenomenon due to a multi-cultural ethnicity. Women's condition in Pakistan is lamentable owing to the non-implementation of the pro-women legislation. These barricades offer a blank field for abuse, injustice, racial discrimination, and oppression towards women that has become this society's fundamental principle and strong conviction. Many consequences from qualitative and quantitative data research clearly illustrate the importance of various aspects and enormous obstructions in the path of women's security and protection laws. These as the intrinsic obstacles, including the prevailing and mischievous conduct of men toward women, the acknowledgement of the reality that women are in the hands of men, and the superiority and prestige gained by men and counter to this societal arrogance and disrespect towards women. Simultaneously extrinsic problems such as societal norms on the treatment of women, impotence of mass media, hegemony in the social climate, systemic bigotry of law enforcement agencies, the heritage of socio-political values, illiteracy, legal illiteracy, fear of notoriety among women, incapacity of the justice system, denial of justice, renunciation of judicial changes, the cynical position of the police and stewardship[391].

Concerning the status of women, Pakistan has made continuous efforts towards introducing laws relating to the protection and security of women since 1947. There was minor legal peculiarity between the men's and women's privileges they possessed at the time of independence[392]. According to sections 8 to 28 of the Constitution of Pakistan, the basic rights of all the people in Pakistan are complied with in all respects without prejudice, ethnic diversity and gender. On the other hand, there were struggles made to stop the continuous practice of violence against women through the enactment of numerous laws e.g. Muslim Personal Law

[390]Weiss, A. M.: Interpreting Islam and Women's Rights: Implementing CEDAW in Pakistan. In: International Sociology 18/3 (2003) 587.

[391]Moosvi, Shireen: Status of Women: India and Pakistan. In: UNESCO History of Civilization of Central Asia 6/1 (2005) 1850-1990.

[392]Muneer, Sania: Pro-women Laws in Pakistan: Challenges towards Implementation, 2018: 86-101. https://www.researchgate.net/publication/324039364 last visited 13.08.2020.

of *Shariah*, Muslim Family Law Ordinance, Hudood Ordinance, Women Protection Bill, Sexual Harassment Bill, Prevention of Anti- Women Practices Bill, Acid Control and Acid Crime Prevention Bill, Child Marriages Act.

In addition, Pakistan has been a partner to numerous foreign and regional conventions for the security and equitable rights of women. Pakistan is a signatory to the International Population and Development Conference (ICPD), the Beijing Action Plan and the United Nations)[393] Pakistan acceded to the Convention named 'Elimination of All Forms of Discrimination Against Women (CEDAW) in 1996, issuing a declaration on the Convention and making a reservation on Article 29. Pakistan has also committed itself to "pursue by all appropriate means and without delay a policy of eliminating discrimination against women". It is therefore obliged to remove "any distinction, exclusion or restriction made based on sex which has the purpose of impairing or nullifying the recognition, enjoyment or exercise by women based on equality between men and women, of human rights and fundamental freedoms.[394]"

Unfortunately, all these pro-women laws grant and protect women rights theoretically, but not practically. These legislations are nothing more than a piece of paper. To add to dismay, the State's radicalization has deprived the country of the environment necessary for the actual implementation of these different laws and, in turn, for the protection of the female population. Most of such laws remain on paper, while the regulatory machinery of the country is, on the one side, restricted to coping with a deluge of extremism and enveloping violence, yet, on the other, oblivious to the plight of women in a culture that is parochial yet profoundly dedicated to a theological and political agenda that opposes and tries to remove women from the mainstream[395].

Many Islamic fundamentalists are against any change regarding women's rights that can undermine male domination with regards to family and society. Their goals are to set up a special curriculum to train girls for their role as housewives, to restrict their access to political life, remove them from the legal profession, and impose a rigid dress code. Despite these inequalities between men and women, for many of these women freedom of expression and equality do not seem meaningful goals to obtain. The majority of them see the Western culture as a danger for their native culture, bringing with it the disintegration of families and social breakdown due to this mullah mind-set[396].

A thorough examination of the realistic implications of implementing the rights of women under Shariah law in Pakistani society indicates that the rules on several accounts are severely breached, in modern times. There are people who, consciously or unknowingly, deviate from the teachings and guidelines of Islam in this regard. Pakistan is the Islamic Republic; any rule and regulation in the country are focused on Islamic law. Around the same period, moreover, there are rituals and practices against Islamic rules that are widely observed. Cultural traditions

[393]National Commission on the Status of Women Islamabad: Institutional Strengthening of NCSW Support to Implementation of GRAPs: Study to Assess Implementation Status of Women Protection Act, 2006: 11. http://www.ncsw.gov.pk/previewpublication/4 last visited 13.08.2020.

[394]Brightman, Sara: Rights, Women, and the State of Pakistan. In: Contemporary Justice Review, 18/3 (2015) 334-351.

[395]Mumtaz / Shaheed (1987) 38-40.

[396]Offen, Karen: Women in the Western World. In: Journal of Women's History 7/2 (1995) 145-151.

in Pakistan do not require women to enjoy their civil and religious freedoms, guaranteed by law and supported by Islam[397].

However, over time, women have been provided with legal rights/safeguards in Pakistan in the form of the Constitution and Legal instruments. A legal right has been defined in Black's Law Dictionary 2 as: "A right created or recognized by law". Following are the different categories of legal rights for women in Pakistan:

i. Rights provided to women under Constitutional law.
ii. Rights provided to women under Criminal Law.
iii. Rights provided to women under Continental law.
iv. Rights provided to women under Family Law.

i. Rights provided to women under Constitutional law

The Constitution of the Islamic Republic of Pakistan guarantees fundamental rights to every citizen without discrimination based on gender. The Foundation of the Constitution of Pakistan 1973 is embedded in Islam, a religion that has recognized all human rights inclusive of women rights 1400 years ago. According to Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as "The Constitution") all citizens are equal in the eyes of law and there must not be any discrimination based on sex. In the urban areas of Pakistan, women are participating in every field of life and working for the social and economic development of society. At the same time, the condition of women in rural areas is deplorable amidst heinous anti-woman practices like forced marriages, rape, vigilante justice, acid attacks, mutilations, honour killings, sawara, karo-kare and vani etc[398]. The Constitution has guaranteed twenty-one fundamental rights, which are as follows:

a) ***Rights of life and liberty***
b) ***Rights to Equality*** (irrespective of gender, race, religion, caste, residence)
c) ***Rights to Freedom:*** Freedom of movement (Art.15); Freedom of assembly (Art.16); Freedom of association. (Art. 17); Freedom of trade, profession, etc (Art.18); Freedom of speech (Art. 19); Freedom of religion (Art.20) "freedom of religion applies to minorities as well as various sects of religion.", Protection against taxation on basis of religion(Art.21); and Protection of religious and educational institutions(Art.22).
d) ***Right to Education:*** (Art.25-A).
e) ***Rights to Property:*** Freedom to acquire property (Art.23); and Protection of property rights (Art.24)
f) ***Rights to Culture:*** Preservation of language, script, and culture etc (Art. 28)
g) Social Rights: Freedom from slavery (Art.11); and Freedom from forced Labor (Art.11)
h) ***Right to Constitutional Remedies to Protect Fundamental Rights:*** Under Article 199 of the Constitution, every citizen of Pakistan can invoke the writ jurisdiction of the high court and seek remedy against infringement of fundamental rights guaranteed thereunder.

[397]Mumtaz / Shaheed (1987) 38-40.
[398]Shaikh, Dr Abdul Razak: Women's status in Pakistan. Pakistan: DAILY TIMES (March 8, 2019).

ii. Rights provided to women under Criminal Law

Women have been provided rights in criminal matters by way of various Statutes namely:

a) ***Pakistan Penal Code (PPC) 1860:*** Sections 310, 310(A),332, 336(A)(B), 354,354(A),365(B), 366(A)(B), 367,371(A)(B),375,376,493,496(A)(B)(C), a new chapter about *'Offences against Women'* Sections 498(A)(B)(C), 509, and a Bill on *Domestic Violence*, according to which victim can file a case before the Court of law which would be decided as early as possible.
b) ***Criminal Procedure Code (Cr.P.C) 1898:*** Sections52, 497,167, 203(A)(B)(C).
c) ***Offences of Qazaf (Enforcement of Hadd) Ordinance, 1979:*** Sections7,14.
d) ***Rights of Women Prisoners:*** Women prisoners enjoy the same rights as are provided to men prisoners. According to Cr.PC and Jail Manual women have every sort of protection in jail. In the same way, they can pursue their cases, file appeals before a competent Court of law and they also have the right of remission during their imprisonment on different occasions.

iii. Rights provided to women under Continental law

Women have also been provided with civil rights through several Statutes, for instance:

a) ***Code of Civil Procedure, 1908:*** Section 56 provides that a woman cannot be sent behind bars in the execution of a decree and financial matters.
b) ***Factories Act, 1934.***
c) ***Married Women Property Act 1874:*** This enactment protects the rights of a married woman concerning her property (moveable or immovable), earnings and wages.
d) ***Mines Maternity Benefit Act 1941.***
e) ***The Maternity Benefit Ordinance, 1958.***

iv. Rights provided to women under Family Law

Women also possess rights under various family law Statutes or Acts, e.g.:

a) ***The Dissolution of Muslim Marriage Act, 1939:*** Section 2.
b) ***Muslim Family Laws Ordinance, 1961:*** Sections 5, 6, 7, 8, 9 and 10.
c) ***The West Pakistan Family Courts Act, 1964:*** Section 5, schedule 1 part 1 which provides rights to women in the following matters comes under the jurisdiction of Family Courts; dissolution of marriage (including *Khula*), dower, maintenance, custody of children (visitation rights of parents in case of separation of parents), guardianship, recovery of dowry articles, and personal property and belongings of a wife.
d) ***The Guardians and Wards Act, 1890:*** In case of separation between the spouses, the mother has the legal right to keep the custody of her son till the age of 7 years while her daughter shall remain in her custody till marriage. However, in this rule, the paramount consideration in respect of the custody of the child is the minor's welfare. But in any case, all the day to day expenditures of the minor, whatsoever, like feeding, clothing, lodging, education and health etc, shall be borne by the father. If the father fails to fulfil this liability the minor may seek the help of the Court and the Court may fix the quantum of maintenance allowance keeping in view the standard of life of both the families and coercive measures may also be used to recover the allowance from

father. Provided that where the minor has not attained the age of seven years in the case of male or the age of 16 years in the case of female, the Court shall, on the first date of hearing pass interim order for the custody of minor to the mother and visitation rights of the father.

e) ***Child Marriage Restraint Act, 1929:*** Marriage of girls during childhood is prohibited. The parents and the *nikkahkhwan* both are liable to be punished with imprisonment and fine if they are involved in arranging the marriage of a girl who is under sixteen years. The minimum marriage age was extended to 18 years through an amendment in a family law amendment.

f) ***Dowry and Bridal Gifts (Restriction) Act, 1976:*** Sections 3, 6, and 9.

2.4. Case-Study

In contemporary legal scholarship, the protection of women's rights in Muslim societies is a subject of scholastic debate. In Pakistan, the debate is even more hectic, notably in the context of a constitutionally mandated Islamization process. After Pakistan emerged on the map of the world, this process was initiated and accelerated by Gen. Zia's military rule (1977-1988). Deterioration in the rights and status of women is considered to be one of the important implications of this process. One of the perceptions commonly prevalent about women in Pakistan is that they do not enjoy equal legal protection. This perception is not entirely without strength[399].

The position of women in Pakistan is generally based upon the socio-economic background from which they come. Wealthier and middle-class families tend to have more empowered women, while low-income families are generally considered more patriarchal. This can be considered a bit of a generalization, but it usually holds up[400].

Looking at the participation rate of women in the labour force as of 2014, it stands at 25 per cent. That means about three-quarters of women don't work in Pakistan. Pakistan has come a long way, with just 13 per cent of Pakistani women employed in 1990; this is a rise of 12 per cent over 24 years. By contrast, about 35 per cent of Indian women and 17 per cent of Iranian women are part of the workforce.[401]

However, there are signs of progress being made. The laws on child marriage, abortion, men’s second or subsequent marriages, First Women's Bank, women’s seats in parliament, and the new bill on women’s security from violence while at work were all well-intentioned measures to improve Pakistani women's position. Similarly, it cannot be expected from a highly educated, middle-class woman from Karachi or Islamabad to choose her husband, probably do a job, and inherit property to have the same level of intense feeling of deprivation as a poor, rural Pakistani woman. This particular aspect of Pakistani society cannot be simply ignored. Taking some famous examples of affluent Pakistani women who have been able to gain a great deal:

[399]Cheema (2013) 620-621.

[400]Malik, Linda: Social and Cultural Determinants of the Gender Gap in Higher Education in the Islamic World. In: Journal of Asian and African Studies 30/3 (1995) 146.

[401]Agboatwalla, Mubina: Women's Development in Pakistan: Issues and Challenges. In: Community Development Journal 35/2 (2000) 181-85.

i. *Benazir Bhutto;* She grew up in one of the country's richest households, studied at Harvard and Oxford Universities, and twice became the Prime Minister.

ii. *Fehmida Mirza;* grew up in an influential Sindhi political family and became the first speaker of Pakistan's National Assembly.

iii. *Abida Hussain;* is a daughter of one of Punjab's largest landowners, went to school in Geneva and studied art history in Florence and later became Pakistan's ambassador to the U.S.

iv. *Hina Rabbani Khar*; She is a daughter of a powerful parliamentarian and niece of a former governor, she went on to become Pakistan's Foreign Minister (the first woman).

v. *Sharmeen Obaid-Chinoy;* She is born into a wealthy Lahore family, studied at Smith College and Stanford University, won an Oscar, is currently Pakistan's leading film-maker, etc.

It is not to suggest that the above-stated women are not qualified and have not tried tirelessly to accomplish anything. What I mean is because they come from a family with a rich background, it allowed them to reach their potential. Most people, though, have little chance to realize their ability. There is but a long way to go for ordinary women in contrast.

Moreover, the Supreme Court of Pakistan has recently played an incredibly positive role in improving the status and security of women's rights. In the next sub-section (4.2. Case-Study), it is argued by analyzing some of the judgments of the Supreme Court of Pakistan that the Pakistani judiciary has been a precursor to women's rights, although its domain has largely been confined to the constitutional framework. The proactive position and stance of the Supreme Court would have been salutary had it been moved into the ignored areas of the legal status of women in Islamic law e. g. evidence, inheritance, hudood laws, and supported the conflicting parties in resolving them. It should, therefore, gradually engage with these areas because it is expected that an institution like this will foster the debate in the right direction. Nevertheless, it recognizes that its revolutionary position is restricted by the powers vested on it by the Constitution.

Notwithstanding, the Constitution of Pakistan, 1973 provides for the freedom of women in its different Articles. For instance, Article 3 specifies that the State is dedicated to the abolition of all kinds of oppression. Article 25(1) ensures that ‘all citizens are equal under the law and entitled to equal protection under the law.’ Article 25(2) further states that ‘there shall be no discrimination on the grounds of sex alone.’ Article 27 prohibits discrimination on the grounds of gender, race, religion or caste for government work. Article 34 specifies that ‘action shall be taken to ensure the complete involvement of women in all fields of national life.’ Article 38(a) mandates the State to ‘ensure the well-being of people, regardless of age, caste, religion or ethnicity, by raising their standard of living.’

The above provisions provide adequate constitutional guarantees for the protection of women's rights in Pakistan. Having found such detailed provisions for the elimination of discrimination in the Constitution, it may be assumed that the courts have not fully protected women's rights; otherwise little would have been achieved in this respect. The task of the courts, headed by the Supreme Court, has traditionally been to make it simpler for women to enjoy the freedoms

enshrined in the Constitution. This is amply illustrated by the judgments of the Supreme Court in the following sub-section[402].

In the previous sub-section, women status and rights have been discussed in detail along with a brief historical overview. In this section, the primary focus is on the court practice concerning women's rights in matters of contractual nature, keeping in view the Shariah and Anglo-Saxon law system. The aim is to reflect the working and interconnected nature of both the legal systems in the context of women in Pakistan.

Protecting the rights of women in Muslim societies is a subject of scholastic debate within contemporary legal scholarship. In Pakistan, the debate is even more hectic, especially in the sense of a constitutionally mandated Islamization process. After Pakistan emerged on the world map, this process was initiated and accelerated by Gen. Zia's military rule (1977–88). The degradation of women's rights and status is perceived to be one of the significant consequences of this process. One of the misconceptions widely prevalent about women in Pakistan is that they do not enjoy equal legal protection. The aforementioned provisions in sub-section 2.3 provide adequate constitutional guarantees for the protection of women's rights in Pakistan. Besides such express provisions for the elimination of discrimination in the Constitution, it can be seen that the courts have not fully protected the rights of women in Pakistan. There is still more work and effort needed to accomplish the goal of equal status and rights for the women in the country.

Nevertheless, the Supreme Court of Pakistan has been continuously striving to bring the inequality gap concerning their women status and rights to a minimum, so that the women become entitled to enjoy their rights as sanctioned by the law of the land i.e. the Constitution. For that purpose, some of the cases and/or judgments of the Supreme Court are provided to highlight its progressive role in the promotion of women's contractual rights in a mixed legal system, comprising of Shariah and Anglo-Saxon legal system[403]. In the following cases, it can be seen that the Supreme Court was fairly consistent in supporting and securing women's rights within the constitutional framework. It has appeared to follow a progressive interpretation of Islamic law by applying *istihsan* or juristic discretion to serve *maslah or problem/issue.* In short, all the efforts of the apex court highlight its commitment to uplift women's status largely through the constitutional parameters, as shall be evidenced from the cases/judgments cited below.

In Shirn Munir[404] case, there was a controversy related to discrimination based on sex in the admission or enrollment of female students in educational institutions. The context of the case was that some educational institutions set quotas for both males and females to deprive female students of securing admission who otherwise were entitled to it. The Supreme Court held that no discrimination based on gender could be allowed except on the grounds of reasonable and intelligible classification. Coeducation is permitted and the settings of gender-based admission quotas are directly contrary to the requirements of Article 25(2) unless they are justified as a protective measure for women and children under Article 25(3). The Constitution assumes that women and children need protection rather than males, and as long as the same constitutional assumption continues, the court cannot reverse it by giving males protection at the cost of women and children.

[402]Cheema (2013) 620, 625.

[403]Cheema (2013) 616.

[404]Shrin Munir and others V. Government of Punjab and Another, PLD 1990 SC 295.

Hafiz Abdul Waheed[405] is one of the most celebrated cases concerning women's rights in Pakistan. In this case, the dispute resolves over an adult girl's right to marry once and for all on her own free will and without a *wali* or guardian's consent. The Supreme Court held that the marriage was not illegal because of the presumed lack of consent of a *wali*. The court relied specifically on several Federal Shariah Court judgments that an adult *sui juris* Muslim girl can contract a valid *nikah* or contract on her own.

In Rafique Bibi[406] case, the issue of delay in registering an FIR for alleged manipulation of income records depriving a woman of her due inheritance share of immovable property was brought before the Supreme Court. The Court observed that it had always stressed the protection of women's rights related to land property in particular. Women had the right to petition for their civil rights in the courts, and if such a case had been brought before courts, it would have to be dealt with in compliance with the law; relief could not be refused based on technical purposes alone.

In another case, Fazal Jan[407] addressed the rights of illiterate *pardanashen* (veiling) women in property matters. The Supreme Court noted that the petitioner was not expected to conduct a complicated case herself, so it was in the interests of justice that a competent and experienced continental lawyer should assist her. Such assistance would be considered in accordance with its fundamental rights, as provided for in Article 25(3).

The competence of a woman to be Pakistan's prime minister was disputed in the *Inquilabi* Labor Party and a statement was sought that a woman could not be head of an Islamic state, minister or member of the Provincial or National Assembly as it is against the spirit of the Constitution and the Quran and Sunnah. The court held that it is clear that the Constitution itself envisages "Muslim" as meaning a "person" that could not be restricted to men by any means.[408] Thus, the court concluded that there is no constitutional bar for a woman to assume public-nature responsibilities under discussion in the case.

In Khurshid Bibi[409] (1967), the right of a wife to get separation from her husband on the grounds of khula was put before the Supreme Court. The fundamental issue involved in the case was whether a wife can obtain khula without the consent of her husband. The court ruled the controversy in favour of the wife by noting that such a divorce is not based on her husband's consent. The court decided upon the ideology of khula and observed that it is meant to encourage women in contrast to the right of talaq vested in the husband. Thus, if trouble occurs from a woman's side, a husband is granted the power to divorce her, and when harm is sustained from the side of a husband, she is granted the privilege to get khula.

The issue of the mother's right to hizanet (custody) of her child of tender age was addressed in the Supreme Court in Rahimullah[410] (1974). This was held that the woman in dispute had not

[405]Hafiz Abdul Waheed V. Asma Jehangir, PLD 2004 SC 219.

[406]Rafique Bibi V. Sayed Waliuddin, 2004, 1 SCC 287.

[407]Mst. Fazal Jan V. Roshan Din and 2 others, PLD *1992* SC 811.

[408]Cheema (2013) 619.

[409]Mst. Khurshid Bibi V. Muhammad Amin, PLD 1967 SC 97.

[410]Sabreen, Dr Mudasra: Law on the Custody of Children in Pakistan: Past, Present and Future. In: LUMS Law Journal 4/4: 72-95. https://sahsol.lums.edu.pk/law-journal/law-custody-children-pakistan-past-present-and-future last visited 14.08.2020.

forfeited her right of custody on the basis that she had taken her two boys from their usual place of residence. In any case, it was not beyond the meaning of Section 25 of the Guardian and Wards Act that they were put under the care of the appellant/father when they were of tender age to secure their health. This judgment benefits mothers to keep their small children in custody.

The Supreme Court in Ghulam Ali (1990) addressed the privilege of Muslim women to inherit in compliance with the injunctions of Islam. The court acknowledged that Islam has visualized several forms in which money circulates. It noted that almost all commentators on the Islamic culture believe that strict implementation of inheritance laws is a significantly agreed tool for the redistribution of property. It would be against public policy to give any credence to the claim of "relaying a woman's inheritance rights" as contended in the present case by the petitioner. The court thus ruled that women should not be stripped of their inheritance privileges and that the representations of their so-called relinquishments could not necessarily be believed to be true without their free will being created. In another case settled earlier than the one mentioned above, in the Federation of Pakistan (1983), the Supreme Court ruled a non-Islamic tradition of relinquishing women's inheritance privileges in favour of their male relatives.

The Supreme Court decided in the favor of Noor Jehan (famous Female Singer of Pakistan) by giving her a fair share of her right from his father's property in 2016, which was long contested by his brothers. Although the decision came long after death, it paved the way for the acknowledgement of women rights in Pakistan.[411] The case was decided by a two-member bench, comprised of Justice Ejaz Afzal Khan and Justice Qazi Faez Isa. In the ruling, they observed, “A sister, to claim her rightful inheritance, was compelled to go to court and suffered long years of agony. However, before she could get what was rightfully hers, she too departed from this world. A quarter of a century has elapsed since the death of Haji Sahraney (the deceased father). Such a state of affairs, to say the least, is most unfortunate.”[412]

Where the infant is illegitimate, custody goes to the woman regardless of the religion of the parents. According to both Islamic and Pakistani law, an illegitimate child belongs only to his mother, and his father has no right to claim custody. In Roshni Desai v Jahanzeb Niazi[413] , the court awarded the mother the custody of an illegitimate boy. The child's father was a Muslim, while his mother was a Hindu. They were staying in Canada, and they had a son without marriage. The mother demanded custody of the minor when the father brought his son to Pakistan. The High Court of Lahore ruled that such an arrangement was not accepted under Islamic law and the child has been declared illegitimate. The court observed that the father has no association with his illegitimate child in Islamic law and Pakistani law and that an illegitimate child belongs to his mother. The court granted the mother custody of the minor and ruled that only maternal relations are eligible to claim custody of an illegitimate infant in case of absence or disqualification of the mother. The father bears no claim as to the custody based on the fact that the mother was a non-Muslim.

Moreover, Section 5 of the Dowry and Bridal Gift Restriction Act 1976 states, “All the property given as dowry or bridal gifts and all property given to the bride as a present shall vest absolutely in the bride, and her interest in the property however derived shall hereafter not be

[411]Iqbal, Nasir: SC gives the deceased woman a rightful share in inheritance. Pakistan DAWN, 2016.
[412]Iqbal (2016).
[413]Roshni Desai V. Jahanzeb Niazi, 2011 PLD 423.

restrictive, conditional or limited." Therefore, a gift or benefit was in essence a reward from one person to another according to Muhammad Ashraf v. Farzana Kousar case in 2016.[414] In the said case, it was stated that such a gift or benefit will become irrevocable when the materials of a 'gift' have been completed. Thus, the donor would no longer bear any claim of return for such gifts from the donee in case of transfer of possession of such gifted property.

In addition, according to the Punjab Commission on the Status of Women show that an unprecedented 746 honour killings, 24 stove burnings, 18 cases of divorce marriages, almost 1000 confirmed cases of abduction, 730 cases of gang violence, 31 cases of sexual assault and 305 cases of physical abuse were reported in 2017 alone. However, most of these cases or incidents go unreported and all of these reports go unchallenged.[415]

The above case laws show that the supreme judiciary has been fairly clear in upholding and preserving women's interests within the legislative system. It has appeared to pursue a progressive interpretation of Islamic law by applying *istihsan* to serve *maslahah.* The above case survey shows that the involvement of the superior judiciary was primarily governed by the constitutional requirements, as we do not see the same degree of engagement in a variety of other controversial areas of women's rights, e. g. evidence, inheritance, and hudood laws etc. In the following chapter (Chapter 4), I will present detailed explanations on the issues of evidence, inheritance, and hudood laws to pursue the courts to expound such issues in length by applying their judicial ijtihad in the changing socio-political environment of Pakistan.

2.5. Summary

The whole chapter can be summarized through a brief overview of its contents. In the beginning, the chapter expounds on Shariah law that has been in existence long before the times of the Islamic states in the 18th and 19th centuries, along with some other cultural norms. Traditionally, Shariah law was construed by independent muftis (commonly referred to as jurists), based on the teachings of Islam and various legal sources. However, at present, these Shariah laws have been replaced by European Statutes or Codes in majority Muslim countries, while retaining the classical rules of Shariah under the realm of family laws. It then reflects on the legal system of Pakistan which is composed of a combination of Shariah and Anglo-Saxon law. When Pakistan got independence in 1947, English laws remained in force until a new constitution was chalked-out. The founder and father of Pakistan - Muhammad Ali Jinnah – envisaged a legal system for Pakistan in complete compliance or consonance with the teachings of Islam, which could not come true during his life. But his vision was long carried on and bore a lasting impact on the lawmakers in Pakistan in later times. The regime of General Zia-ul-Haq bears witness to Jinnah's vision, as Shariah law was incorporated into the Constitution of Pakistan, paving way for the Islamization process in the country.

Furthermore, the chapter then seeks to address the general and contractual status of women in Pakistan, who usually experience gender subordination based on their class and region. The simple reason behind this is the fact of uneven development in the socio-economic sectors and the impact of tribal and feudal systems on their lives. Several religious groups and ulamas who acquired political power during and after the period of Zia-ul-Haq advanced and support women subordination in Pakistan. They even do not allow the rape victims to use DNA evidence in their cases to prove the guilty party. However, with time, the situation has improved

[414]Muhammad Ashraf V. Farzana Kousar, 2016 CLC 1473.

[415]Rashid, Tahmina: Crimes against women in Pakistan, Policy Forum, 2019. https://www.policyforum.net/crimes-against-women-in-pakistan/ last visited 07.08.2020.

in Pakistan with regards to the issues of the like. Now the women are allowed to prove their rape through DNA evidence, which is considered and admitted as conclusive proof in Pakistani courts too. Moreover, there are several examples of women who held esteemed and high positions in the government of Pakistan; leading among them is a twice-elected Prime Minister Benazir Bhutto.

The role and status of women in Muslim societies have been affected by the contradictory interpretations of the Holy Quran throughout the years. This must be borne in mind that all these interpretations of the versions of the Holy Quran are made by male scholars which impact women and their status. As women in Muslim societies have always been kept away from seeking education, their capability to read and raise their voice against any of the interpretations impacting their lives seems greatly retarded. Her only source of knowledge and information was her father, husband or any other male member of the family. The differences of rights of men and women in Muslim societies arise out of sexual, biological, and social realities, rather than on a scientific basis.

Since its inception, Islam was (presently as well) entirely male-dominated providing in-depth legislation favouring men over women in matters of dealing with marriage, divorce, property rights, inheritance etc. This legislation forms the core of family laws included in the Shariah law, which are considered to be one of the sensitive issues across Islamic countries in the modern era. As every society is posed with the issue of either lesser or greater adaptations, all Muslim countries have the same issue to deal with. Some of them propose the substitution of the old Shariah laws with a new, yet modern law code. While others seek interpretations of state law in such a way as to conform to the Shariah law-making Qiyas such an essential source of legal discretion. According to detailed teachings of Islam, it is clear, however, that Islam gives men superiority over women in matters of personal nature. Let's discuss these teachings in-depth under the following sub-headings and contractual rights of women in matters related to marriage, divorce, property, inheritance etc. In the end, the chapter chalks out the legal safeguards provided to the women in Pakistan over the times in the form of Constitution and Legal instruments which include: rights provided to women under Constitutional law; rights provided to women under Criminal Law; rights provided to women under Continental law; and rights provided to women under Family Law.

In a nutshell, it can be said that Pakistan has come into being with the pre-text of Islam, and it is quite disheartening to see that religious and Quranic values are often ignored and twisted, particularly as regards the role of women. Incidentally, in Pakistani society, the social evils that Prophet Muhammad fought against for the whole of his life are deeply rooted and the so-called guardians of the faith take them as a normal routine of 'punishing' and ostracizing the women. The modern culture of defending abuse and oppression in the name of Islam must be discouraged. In Pakistan’s background, religion has not been able to eradicate centuries-old un-Islamic and even barbaric social evils and this has been a cause of critical concern. The mal-practices of illiterates or Jahiliyyah are currently ongoing in Pakistan. Worse still, religious clerics and preachers are sanctifying and propagating ‘customary laws’ in the name of Islam. Additionally, mass ignorance and the element of fear also causes brutality against women, as female are wrongly told from childhood to "not question the scriptures". They are conditioned to be ignorant not only about legal rights but, also about the ‘true principles of Islam’.

Women's rights are human rights that can be secured only if the Pakistani society is free from gender-based violence and addresses women's position as women are not only mothers,

daughters, sisters and wives, but also human beings. In the light of the above discussion about women's status in Pakistan, improved legislation seems to be an important tool in bringing the status of women in the context of social, economic and political aspects. For that purpose, it can be seen that the Supreme Court of Pakistan has been continuously supporting and securing women's rights within the constitutional framework by following a progressive interpretation of Shariah law. However, besides this progressive attitude of the courts of Pakistan towards the status and rights of women, there is still much work left to do in this regard. There is a dire need to find a common core between the rulings/laws of both the legal systems to find solutions to the existing laws of inequality and subordination of women in Pakistan.

Hence, it is important to organize regular training and awareness programs periodically to make women aware of their rights and empower them to exercise only just demands. In addition, the present laws need to be revised and modified. More specifically, in a dogmatic society in Pakistan, proper law enforcement is very critical to providing women with a safe and secure environment to prosper themselves. And there is a need to establish a National and District level women's legal assistance centre. Moreover, while discussing women's status in Pakistan, it becomes evident that Pakistan is tossing between the traditional Shariah law and the modern Anglo-Saxon law system. This modern legal system has been forced on Pakistan much like every other post-colonial country, but the culture has not fully changed from the inside. Therefore, the constant tussle between the two is taking its toll on the female population, resulting in women oppression. To sum up, Pakistan needs to address the issue of women's status with acumen by reducing the existing gulf between theory and practice regarding the empowerment of women. The government of Pakistan must bridge this gap by taking proficient steps to empower the women who have become a sign of oppression and disparity not only domestically but also internationally. It should provide the women with opportunities to compete with men on an equal platform, to acquire parallel status as that of the women in other developed countries.

Chapter 3: Comparison of Theoretical Legal Techniques (TLTs) of Contract Law between EU and Pakistan

Abstract

This Chapter contributes towards the significance of adopting comparative contract law methodology between the European and Pakistani Contract law. The aim is to provide a comparative analysis of basic theoretical legal techniques between both the civil and Anglo-Saxon legal systems to find solutions to the lacunas existing in the Pakistani contract law, since its formulation in 1872. In the beginning, the paper opens up with the prime focus on elaborating the need to formulate a single, unified European Contract Law besides the differing domestic contract laws of the Member States to ease the market economy. The Chapter then chalks out some of the basic theoretical legal techniques existing in both the legal systems in detail, including the definition of contract, consideration, breach of contract and remedies, privity of contract, duty to perform and good faith etc. Furthermore, these existing theoretical legal techniques are then compared in such a manner as to find solutions for the existing problems in Pakistani contract law. This is done by suggesting the method of import or incorporation of EU contract law interpretation to the same theoretical legal techniques. It is considered to be the need of time, as Pakistani contract law has never been updated or amended since its enforcement. In the end, the paper revisits the essence of the research by comprehensively summarizing the aforementioned areas.

Keywords: *European Union; Unified Contract Law; Theoretical Legal techniques; Comparative Analysis; European V. Pakistani Contract Law.*

3.1. The Idea of Unified European Contract Law

In the famous words of *Tony Weir*, contract law is deemed to be a productive law in contrast with the tort law which is considered to be more of a protective law. Taking into account the entire basis of contract law, it can be seen that the basic principles are the same in both the Civil and Anglo-Saxon law legal systems while bearing in mind the existence of opposing and diverse ideological beliefs behind the technical rules in operation between both legal systems. It is a century after entering into force the German Civil Code (BGB) that efforts have been made regarding the future of contract law. In the wake of an ever-growing trend towards integration in Europe (EU), it is believed that economic integration would lead towards a unified, codified private law system. Although the debate for integration in Europe barely involves a limited circle of comparative lawyers, yet the study on European Commission's (referred to as 'Commission', hereinafter) 'Action Plan for a Coherent Contract Law' has to be assessed to witness the progress of the debate on common European Civil Code (ECC). Even though the Commission stresses the depressing effect on business and trade between the EU Member States due to differing legal systems or domestic private law rules, the academics emphasize a broader agenda. For them by enforcing a unified European civil code based on common legal concepts, a *jus commune* of Europe would be revived by way of legislation originating directly from Brussels, this time.

A consequent effect of this emerging EU cooperation can be seen in the enforcement of the *Principles of European Contract Law* (PECL)[416] and the UNDRIOT *Principles for International Commercial Contracts*[417], 2004. To date, the PECL is regarded as the most compact attempt towards extracting shared principles from both the civil-Anglo-Saxon legal systems, to formulate a common core. However, at this point, it is sufficient to state that the German Civil Code (BGB) already in force since 1896 would be regarded as the major source for European contract law. It is assumed that making the logic behind the BGB more clearly despite the language restrictions, would bring mutual borrowing between both the legal systems more convenient, resulting in much needed and desirable organic convergence. The reason behind employing the BGB is the fact that all its rules have been practically applied and tested. There exist certain rules in the BGB that need to be refined on a case-by-case basis to eliminate the court's dissatisfaction with their abstract provisions of the code. For that purpose, a considerable number of such abstract rules have been revised adding to the richness of the subject and ultimately leading towards the goal of finding common core principles for the formulation of a common European Civil Code[418].

Besides, any attempts to contribute towards a common framework for the European Civil Code will have to deal with and include the following core aims, for instance, justice, freedom, human rights protection, economic welfare, solidarity, and social responsibility. In addition, some other particular aims may well be added especially promotion of the internal market,

[416]Ole, Lando/Hugh, Beale: Principles of European Contract Law – Parts I and II. (The Hague/London/Boston: Kluwer International, 2000) XXVII.

[417]UNIDROIT Principles of International Commercial Contracts. (Rome: International Institute for the Unification of Private Law, 2004).

[418]Markesinis, Basil/ Unberath, Hannes / Johnston, Angus C.: The German Law of Contract: A Comparative Treatise. Second Edition, (Oxford: Hart Publishing, 2006) 2-16.

preservation of cultural and linguistic plurality, rationality, legal certainty, predictability, efficiency etc[419].

It was in 2001 when the European Commission circulated the idea of converging contract law in entire Europe. This idea raised concerns and debates regarding the merits of such convergence on a wide range of academics and politicians in Europe[420]. These wide-ranging debates have accrued significant insights along with considerable confusion. For instance, the project of harmonizing various domestic private laws into one whole raises concerns of legitimacy, state sovereignty and efficacy of such convergence. Despite these concerns, debates on whether and how to mitigate the differences among the Member States has been of significant value in both academic and policy circles, for over a decade now. These debates moved to an advanced level by way of the consultation document of the Commission named 'Communication on European Contract Law'[421], which gave way to the establishment of a Draft Common Frame of Reference (DCFR). The DCFR was put in an application to pave way for drafting up a *political* Common Frame of Reference (CFR), that in reality was called the 'Action Plan on A More Coherent European Contract Law' by the Commission in 2003.

But before we move on to the detailed discussion on CFR, a brief overview of the DCFR is necessary to understand the objective behind its formulation. It is comprised of mainly a threefold purpose. Firstly, to enhance the coherence of contract law legislation in the EU, commonly called after as the *acquis*. Secondly, to provide a guideline for the Member States in shaping their contract law accordingly. Thirdly, serve as the basis for a non-sector specific 'Optional Instrument'[422]. Still, to date, it was felt that the said Optional Instrument will form the basis for the implementation of a Common European Sales Law (CESL), where parties to the contract would be free to opt into through choice of law clause[423]. Nevertheless, this proposal was withdrawn[424] and replaced by two proposals for directives. One covered the digital content supply, and the other covered the sales of goods online. Combined, these directives will as the Commission states, *'... fully harmonise in a targeted way the key mandatory rights and obligations of the parties to a contract for the supply of digital content and the online sales of goods'*[425]. By DCFR, the Commission believed to bring greater convergence regarding the private law convergence in Europe. Thus, emphasizing the general principles of private law, especially the law of contract, without focusing the specific laws like the consumer laws[426].

[419]Bar, Christian/Clive, Eric M.: Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Volume 3. (München: European Law Publishers, 2008) 13.

[420]Saprai, Prince: The convergence of contract law in Europe and the problem of legitimacy: A Anglo-Saxon lawyer's perspective. In: ERCL 12/2 (2016) 96–135.

[421]The European Commission: Communication from the Commission to the Council and the European Parliament on European Contract Law. (COM, 2001) 398.

[422]The European Commission (COM, 2003) 68.

[423]The European Commission: Proposal for a Regulation on a Common European Sales Law. (COM, 2011) 635.

[424]The European Commission: Work Programme 2015: A New Start. (COM, 2014) 910. Annex 2 & 12.

[425]The European Commission: Digital Contracts for Europe - Unleashing the Potential for E-commerce. (COM, 2015) 633.

[426]Hesselink, M.W.: European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice? In: European Review of Private Law 15/3 (2007) 323/ 344.

Furthermore, the DCFR comprises a compact text, well contained with all essential details for those who are charged with deciding whether or to what end or by what means there will be a CFR. The DCFR should not be considered as a draft for the Common Frame of Reference. Instead, the DCFR will continue to have its independent significance and value despite the fact of whether CFR would become a reality or not. It is part of the academic text which lays down the results of diverse research projects conducted in Europe and therefore, it calls for evaluation based on that perspective. Such scholarly evaluations will then form part of the final published edition. It is believed that DCFR will advance knowledge in the field of private law within the various jurisdictions of the EU, to provide an insight into the existence of similarities among various domestic laws. This will further act as a stimulus for future development and a move towards a regional manifestation of a common European private law legacy. In this sense, the DCFR differs from the CFR. That is, the function of DCFR is not only to provide insight into the existence of similarities among the domestic privacy laws but it also demonstrates a certain number of cases where differing domestic private laws give rise to differing answers towards a common issue.

The team assigned with the task of drafting the DCFR did hope that their draft would be a source of inspiration to draw insights for suitable solutions for questions of private law for the academic world around. Soon after the publication of the PECL, also contained within the DCFR in a revised form, the PECL received increased attention from higher courts in the EU, and several official bodies delegated with the power to modernize the relevant domestic contract law. The Commission formulated these Principles of European Contract Law under the leadership of Professor Lando[427], therefore, these PECL are often called the 'Lando Principles'. The PECL are contained in a series of articles that are accompanied by a comprehensive commentary helping the reader understand easily. Not only this, but the articles also contain notes which help in explaining the relation of each article with different domestic laws, along with references to the sources (primary/secondary) in each domestic system[428]. Lando and his group were assigned with the task to formulate a statement of the principles (PECL) in such a way that it contains and underlie the domestic private law of all Member States in the EU. Based on this projection, it is assumed that the same would be true in the context of the DCFR with slight ramifications for reform projects within as well as outside of the EU. In case, the content of the draft CFR is convincing enough for a proposed CFR, it will lead directly to the goal of harmonization of private law in Europe.

Nevertheless, it is intended that the DCFR should be implemented and interpreted in such a way that it remains true with the spirit and objectives of the laws of both the Member States and EU, in particular with the objectives of laying the basis for freedom, justice, security, an internal market that is open to the free and fair competition along with the free movement of goods, persons, services among the Member States. In addition, maintaining the EU's cultural and linguistic plurality shall also be regarded and taken under consideration. Conclusively, it can be said that the DCFR upholds not only the coverage of PECL but it goes way further, as it covers a series of model rules, rights and obligations regarding 'specific contracts'.

[427] Rowan, S.: Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance. (Oxford: Oxford University Press, 2012) 117–118.
[428] Rowan (2012) 117-118.

3.1.1. Whether convergence should happen?

The literature and debates on the topic of one European Civil Code are considered hugely significant, regardless of the manner and methods of bringing into reality such convergence. The Commission's consultation paper and the creation of the DCFR have led to wide-ranging debates about whether contract law should converge in Europe or not. Although the idea of convergence can become reality either through some binding legal instrument or by the use of an optional instrument that provides with choice of law clause[429], yet it leads towards potential conceptual confusion. Based on this confusion, whether convergence should happen or not? According to Saprai[430], there exist three significant issues that arise in the wake of such a question.

i. Pluralism and state sovereignty

Firstly, one of the most important issues is the concern over state sovereignty whenever convergence is sought after[431]. The basic reason for that is said to be state freedom because the essence of state sovereignty lies in a states' ability to take free and independent decisions about matters of concern for its state. In this context, state sovereignty refers to the freedom of a state as to the values and interpretation of her contract law[432]. This freedom matters since it reflects a states' national character or identity while choosing such rules and principles of contract law[433]. This can be verified by the Study Group on Social Justice in European Private Law's statement, *'any system of contract law expresses a set of values, which strives to be coherent, and which is regarded as fundamental to the political morality of each country'.* Facing this backdrop, the program of EU's harmonization of private law may well be considered as inconsistent and illegitimate intrusion with the diverse political and legal traditions of individual Member states.

ii. Legitimacy

Secondly, the question of legitimacy also looms over the contract law convergence question in Europe and an increased emphasis has been put on the problem of constitutional legitimacy. By constitutional legitimacy, it refers to the *consent* of a Member State in instances of signing and ratifying certain European Union treaties by giving away her sovereign rights in the command of the EU. This concept of legitimacy or consent often remains attached to the former - state sovereignty issue and therefore, reflects the Commission's justification of its legitimacy by stating the fact that consent is the basic building block of its foundation. However, attaching too much significance to the idea of *consent* also stands completely unwarranted, which is based on two reasons: 1) the reason that while signing such treaties, the Member States gave

[429]Green, R. Sefton: Sense and Sensibilities: The DCFR and the Preservation of Cultural and Linguistic Plurality. In: European Review of Contract Law 4/3 (2008) 281 & 289.

[430]Saprai, Prince (2016) 96–135.

[431]Collins, H.: European Private Law and the Cultural Identity of States. In: European Review of Private Law 3/2 (1995) 353.

[432]Tasioulas, J.: Human Rights, Legitimacy, and International Law. In: The American Journal of Jurisprudence 58/1 (2013) 21–22.

[433]Study Group on Social Justice in European Private Law: Social Justice in European Contract Law: a Manifesto. In: European Law Journal 10/6 (2004) 653-654.

their consent for any prospects of contract law convergence in Europe seems completely questionable, and 2) yet more significant is the fact that the Commission cannot justify the legitimacy of its program of harmonization even if the Member States did consent to the harmonization of general contract law process. This is due to the reason that consent is regarded neither essential, nor a pre-requisite condition to establish the legitimacy of international law[434].

iii. Efficacy

The word efficacy, here, refers to the complexity of maintaining consistent and coherent interpretation of the DCFR throughout the twenty-eight separate jurisdictions of the EU. This definition finds its parallel in the literature related to the issue of the efficacy of one European Civil Code and raises potential obstacles in the process of harmonization of private law in the EU. Most of the issues are related to the English text of DCFR and its accurate translation into the twenty-three different official languages of the EU. Not only this, the issue that the DCFR uses *'an astonishing number of vague and ambiguous terms…'*[435] and badly written provisions[436] also raise concerns. All these issues related to the efficacy makes the task of drafting a coherent DCFR an uphill task.

3.1.2. A European Civil Code and the Various Study Groups at Work

[437]Professor Von Bar, head of the *Study Group on European Civil Code* (SGECC), stated that the mission of his group is nothing but to formulate a unified European civil code, beginning with the law of obligations. Now whether this was contemplated by the Commission to formulate a unified EU contract law or not, it is yet to be seen as the views differ. For some people, this is exactly the case and much obvious based on two prime arguments. Firstly, the existence of different legal systems in the EU causes inconveniences and obstacles concerning trade in the internal market. To overcome this, we can look into the already achieved technical harmonization for uniform voltages used in electrical appliances. The same practice can be applied in the case of EU Member States laws. Secondly, the differing legal systems of Member States raise concerns about the sovereignty of domestic contract laws that the EU seeks to avoid. For that purpose, some people believe that a unified European Civil Code would help serve the past purpose of these civil codes in bringing about political integration in the EU. Therefore, the calls for unified EU Civil or Contract law have been made for years. Even Professor Lando also envisaged in the late '70s for the call stating that his Principles of European Contract Law (PECL)[438] may well become the basis of such a Code[439]. To make that a reality, the European Parliament passed a resolution in 1989, asking for initiation of

[434]Buchanan, A.: The Legitimacy of International Law. In: Besson, S./ Tasioulas J: The Philosophy of International Law. (Oxford: Oxford University Press, 2010) 79/95.

[435]Green (2008) 281, 289. Also Stefan Vogenauer's evidence to European Union Committee on European Contract Law.

[436]Papp, F. Wagner-von: European Contract Law: Are No Oral Modification Clauses Not Worth the Paper They Are Written On? In: Current Legal Problems 63/1 (2010) 511-581.

[437]Beale, Hugh: The Development of European Private Law and the European Commission's Action Plan on Contract Law. In: Juridica international law review 10/1 (2005) 4-16.

[438]Ole (2000) XXVII.

[439]Ole (2000) xi and introduction xxiv.

preparatory work for drafting a unified European Civil Code[440] making vivid contemplation for the foundation of a single market.

There exist many arguments for and against the creation of a European Civil Code. One of the influential supports can be found within the Lando group, in itself. Even within the Lando group, the team members suggest the notion of a unified European contract law code replacing the domestic contract laws of the Member States or by way of issuing a directive calling the Member States to make amendments to their laws. Apart from the intricacy of witnessing any legal basis for such a European Civil Code in any of the existing EU treaties, in particular with the European Court of Justice's decision in the *'Tobacco Advertising'* case[441], several Commission members believed that the actual essence of European principles rests in less ambitious goals. In addition, besides the European Parliament's resolution, there seems to be no real sign of any European Commission documents certifying unification or harmonization.

Are there any other groups working for harmonization? If yes, then what have they achieved so far? It is not possible to point out all of them, but some of them can be accounted for along with their research work so far. Besides the SGECC, several other groups are researching on restating common principles of European private law. The research work of these groups will no doubt resemble each other, having a similar format i.e. statements of principles in the form of articles. A few such groups include:

- The *Academy of European Private Lawyers*. This group has already formulated a code of general contract law[442];
- The *EC Group on Tort and Insurance Law*[443]; and
- A team working on insurance contracts, chaired by Professor Heiss.

Apart from these groups, there exist some other groups that approach a slightly different line. The European Research Group on Existing EC Private Law (*Acquis* Group)[444] works particularly with the principles and policies of the existing *acquis communautaire*[445]. Three other groups approach the question of harmonizing the EU private law with a diverse aspect: 1) The Common Core of European Private Law (or *Trento*) Project views at the ways to resolve typical cases existing in different domestic systems[446]; 2) The Leuven Centre for a Anglo-Saxon law of Europe is involved in bringing up the Casebooks related to the Anglo-Saxon law of Europe in the form of series. This series aims to address the common principles existing within the various domestic laws and is already found in the *acquis* [447]; and 3) The Society of European Contract Law is a kind of group that organizes conferences on the general theme of European contract law and then publishes the papers of the presenters in their conference

[440]See Resolution of 26 May 1989 (OJ C 158/401 of 1989).

[441]Weatherill, S.: The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality. In: Journal of Consumer Policy 24 (2001) 339–399.

[442]The draft proposal for a body of general European contract law was published in Gandolfi, G.: Code Européen des Contracts – Avant-projet. (Giuffré, Milan 2001).

[443]See http://www.ectil.org/.

[444]See https://ouclf.law.ox.ac.uk/category/authors/european-research-group-on-existing-ec-private-law-acquis-group/.

[445]See https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:acquis.

[446]Gerber, David J.: The Common Core of European Private Law: The Project and Its Books. In: The American Journal of Comparative Law 52/4 (2004) 995-1001.

[447]Gerven, W. van / Lever, J./Larouche, P.: Tort Law. (Oxford: Hart Publishing, 2000) 934-935.

books[448]. These papers are not restricted to their approach; instead, they take on an interdisciplinary approach involving economic analysis of law. Additionally, several well-established institutions of comparative law have shown keen interest in harmonizing European contract law, to mention in particular the Association Henri Capitant[449] and Société de Législation Comparée. Furthermore, new groups have also been established recently, of particular note being the Research Group on the Economic Assessment of Contract Law Rules, and the Study Group on Social Justice in European Law[450].

3.1.3. The European Commission: Perspective on European Contract Law

The position of the European Commission on the questions of unification, harmonization, and drafting the general principles of European contract law has varied over time. Initially, it was the European Commission that provided financial support for the research work on European Contract Law, but later the Commission withdrew it. Now, the Commission seems to be taking ken interest in the financial aid again. The change in approach can be reflected in the green paper, 'Communication from the Commission to the Council and the European Parliament' published in 2001 elaborating these principles of European contract law[451]. This green paper brought two issues into light:

1. The paper called for substantial evidence as to the issue of differences of legal systems leading to trade barriers in a unified single market, and
2. It laid down four options for future initiatives for the Commission,[452] which included;
   a. *No European Commission action;*
   b. *Promote the development of common contract law principles leading to greater domestic law convergence;*
   c. *Improve the quality of legislation already in place; and*
   d. *Adopt new comprehensive legislation at the European Commission level.*

In reality, all the above options were proposed keeping in mind that they were not alternatives for one another. A combination of two or more options was allowed to be adopted, e.g. options *b* and *c* could both be combined to deal with the harmonization process. In addition, the last option *d* consists of several other sub-options based on the provision of choice of instrument clause by the green paper. To view the range of all the options provided, it can be seen that they range from one extreme to another. One extreme involves a regulation or directive that would either impose a single European contract law upon all the Member States or provide a certain degree of leniency to the Member States in adapting their laws under the said directive. The other extreme includes a recommendation that would not be binding and provide the States with free choice to follow the code as much as it desired.

Furthermore, the communication accrued multiple and variable reactions. Regarding the proposed options, few were in favour of option *a*, leaving the affairs of trade and businesses to the market. On the contrary, the majority consents with option *c* calling for an improvement in the standard of the *acquis*. Many others also favoured option *b* demanding the restatement

[448]Grundmann, S./ Stuyck, J.: An Academic Green Paper on European Contract Law. (Online: Kluwer, 2002) xxiv & 432.
[449]See https://www.henricapitant.org/.
[450]Social Justice in European Contract Law: A Manifesto. In: European Law Journal 6/10 (2004) 653–674.
[451]The European Commission (COM, 2001) 398.
[452]The European Commission (COM, 2001) Para 4.

alternative. Although they recognized the significance and value of the convergence of contract law in one single code, some considered the move towards greater convergence of domestic laws, not an end itself. They believed that diversity is essential because it allows the parties to have different preferences and free will to choose the law it desires to regulate the contract. Certainly, it can be seen that option *d* received significant attention that ranged from enthusiastic supporters to staunch opponents like the UK government.

So what would be the future now? As witnessed from the above, it was evident that no consensus among the EU organs existed about the future of unified EU contract law. However, the EU Council of Ministers proposed a low-key document emphasizing the improvement of the *acquis communautaire* and its coherence. The Council also advised the Commission to look into the issues of functional barriers in the internal market due to the differences in non-contractual liability and property law of the Member States. For that purpose, the Commission organized research on such issues. Conversely, the Parliament in Europe reacted by demanding an explanatory action plan[453], setting forth ambitious deadlines. Whereas the Economic and Social Committee stated that it would view the European contract law as a regulation[454], which must not replace domestic laws, in any way. Rather, the regulation would set forth rules that the parties would be free to choose in governing their contract despite their domestic law. This is particularly of interest to the Economic and Social Committee, as it would carry consumer protection measures, valuable both for the consumers and SMEs.

3.1.4. The Commissions' Action Plan

The European Commission finally substantiated its *Action Plan on a More Coherent European Contract Law*[455] in 2003. The proposed Action Plan requested comments on three anticipated measures:

i. About escalating the consistency and coherence of the *acquis*;
ii. About promoting the expansion of wide-ranging EU standard terms of the contract; and
iii. About examining the need for a measure not limited to particular sectors, for example, an 'optional instrument'.

Moreover, the Commission published another paper in 2004, titled '*European Contract Law and the Revision of the Acquis: The Way Forward*'[456] that develops in length its plans under each heading.

3.1.5. The Common Frame of Reference (CFR)

According to the options already proposed, the Commission is trying to combine option *c* with option *b* in an attempt to develop an improved common frame of reference (CFR), which the Commission can then employ or use as a tool in both drafting new legislation and creating a review of the existing *acquis*[457]. This attempt seems like a pretty sensible reaction to issues that

[453]The European Commission (COM, 2001) 398.

[454]Beale (2005) 4-16.

[455]The European Commission (COM, 2003) 68.

[456]The European Commission: Communication from the Commission to the Council and the European Parliament on European Contract Law. (COM, 2004) 651.

[457]The Action Plan (COM, 2003) Para 72.

were suggested earlier or established in the process of consultation. However, the Commission's Action Plan appears unclear on certain intriguing questions relating to the CFR. For instance, what will the CFR look like? What will it cover? And how will it be produced? Regarding the first question, the *Action Plan* provided broad hints that the CFR would not only contain a set of definitions, but also a statement of rules[458]. This was confirmed by the *Way Forward* paper, which states:

"*The structure envisaged for the CFR (an example of a possible structure is provided in Annex I) is that it would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles may be required. Secondly, those fundamental principles would be supported by definitions of key concepts. Thirdly, these principles and definitions would be completed by model rules, forming the bulk of the CFR. Annexe I to The Way Forward, in which the Commission sets out a possible structure for the CFR, envisages three separate chapters — for principles, definitions, and model rules, respectively"*[459].

In terms of the second question relating to the form, the CFR is predicted to be similar to the PECL articles that lay down basic concepts and the way they intermingle in the form of rules. It is also believed that the CFR, like its draft CFR (DCFR), would not only contain the rules but also a comprehensive commentary expounding the interrelationship and interpretation of those rules by providing examples. These commentaries could then be used as helpful sources in understanding the mechanism of the rules and thus, are employed widely in restatements at both domestic and international levels, for instance as with the case of the UNIDROIT Principles of International Commercial Contracts[460]. Even the benefits of these commentaries are gaining strong ground in the UK Parliament, in particular with its legislation, in the shape of 'Explanatory Notes' that would accompany the legislative bills. Moreover, in terms of the content of the CFR, the model rules envisaged by the Annex to *The Way Forward* find their parallel in the PECL rules. This means that the general principles of contract law would form the core of the CFR, including the rules administering specific contracts. Undeniably, under such circumstances, the need for a CFR is felt strongly where the core is based on general principles because those general principles give way to greater divergences in concept and terminology.

As to the third question relating to how the CFR is to be produced, the Commission's *Action Plan* pointed at the continuing research process stating its intention that it would not start the research process from scratches again. Instead, it intended to augment research projects only in areas where the existing research leaves a gap. Thus, it gives the impression that the Commission intends to rely chiefly on the research work of the already existing Study groups, mentioned above. But a glance at the *Way Forward* paper suggests that it does not intend to solely depend on the product of academic research. The participation of stakeholders and other interested parties is also of the essence. By 'stakeholders and other interested parties, the paper includes the industry, retail business, legal practitioners, and consumers[461]. Thus, the paper made it clear that a network of expert stakeholders would be established by the Commission to participate with the academic researchers along with the opportunity to attend regular workshops which would 'enable stakeholders to identify practical issues to be taken into

[458]The Action Plan (COM, 2003) Para 62–63.
[459]The Way Forward (COM, 2004) Para 3.1.3, 11.
[460]The European Commission (COM, 2004) 651.
[461]The Action Plan (COM, 2003) Para 65.

account and give feedback'[462]. In addition, groups of experts from the Member States will also be at work. The *Action Plan* also called for research funds that would be made available to these research groups by way of the Sixth Framework Program, and this is indeed happening.

Another important question comes to mind while discussing the future of the CFR. Once the 'draft CFR' is prepared and submitted by the Joint Network on European Private Law (JNEPL) to the Commission, what will happen next? According to the Commission, it plans on producing CFR based on that DCFR proposed by the researchers. But how would this be achieved? The question is still in the wait to be answered, even after the *Way Forward* paper. However, the *Way Forward* states that 'the European Parliament, the Council, and the Member States will be invited to examine the researcher's final report and the Commission's evaluation. Consultation of Member States could be continued through the same working group of national experts which will track the preparatory work'[463]. This gives the impression that the CFR will be produced by involving a political process within the Member States and the EU organs. Additionally, the paper also explains that a period of six-month consultation would be held with the stakeholders after the said political process, meaning thereby that the stakeholders would appear on the research input scene through workshops, only after the submission of the draft CFR to the Commission and at the end of the period of six-month consultation.

3.1.6. Goals and Contents of CFR

The CFR is required to be different in its purpose from its precursor – the PECL. The purpose of the CFR may either be to use as a 'toolbox' laying the basis for an optional instrument or as a call by modern-day legislators in their surge to update their contract law, similar to the way the Lando group already suggested. The aim of employing the CFR as a toolbox appears to be twofold. Firstly, it should lay down the common principles of the present-day continental laws of all the Member States. The results or ends achieved by the laws of most States are found to be similar. But there exists the problem of translating the different concepts and terminologies among them. The problem here is not about finding solutions as to what European legislation should be, instead, an agreed language for translating such concepts or terminologies should be provided to ensure that the enforced legislation achieves what is required in each system. But it must also be borne in mind that the existing differences should not be hidden in the CFR, and they must come up with some kind of a majority rule. For instance, the provision of Notes in the CFR should explicitly reflect upon a given rule, if such rule does *not* symbolize laws of specific Member States, to account for the differences existing within different legal systems while drafting the unified EU legislation. Equally, the variation in the application of principles like good faith should be well researched and elaborated expressly to ensure a proper model of EU legislation.

Furthermore, the CFR must reflect the 'best' domestic approach to common issues agreed upon by the researchers and stakeholders to achieve the best outcome, based on a mutually consented policy that employing such an approach is superior to others. For the sake of accounting the CFR as a toolbox, the researchers and stakeholders must agree on a policy approach that resembles the modern trend or majority opinion. But this should not mean that other policy approaches for handling the same issues be suppressed or left out. Such policy approaches should be made evident clearly in the Notes of the CFR, alongside the commentary evaluation section. Not to forget, the purpose of the CFR as a toolbox must not be to introduce new laws

[462]The Way Forward (COM, 2004) Para. 3.1.2, 10.
[463]The Way Forward (COM, 2004) Para. 3.2.3, 12.

but to aware the legislators with choices and/or options existing in the different legal systems to find a common answer to legal issues.

Moreover, the participation of stakeholders in the process of formulating the CFR does not change the purpose behind the CFR. It is a fact that these stakeholders or interested parties may show an inclination towards certain political objectives like the lawyers may draw attention towards outcomes they assume are in the best interest of their clients. To flush out this draw-back, it is significant to involve stakeholders from all sectors to ensure that the policies and social justice are upheld. One thing more important is the fact that the researchers and those responsible for the drafting of the CFR must determine the existing policy issues and provide arguments for both sides. If not done so, it would reflect both an academic failure and neglect of decision-making powers.

Besides, one of the constant worries that cast trouble on the proposed approval of the CFR plan is the clause of political consultation. During the stage of political consultation, attempts can be made to choose a particular policy above others or rule out certain policies entirely by amending the terms of the CFR. This may lead to ruining of a quite fine draft in the last minutes by political interferences. Now such kind of nonsense cannot be tolerated that involves phrases that did sound perfect at the time of proposition but uncertain or devoid of any legal effect later on. Therefore, it should be very clear at this stage that any political interference is unnecessary while drafting the CFR as a toolbox. Otherwise, it will be a ‘draughtsman’s handbook’ for the legislators, who would accrue maximum control over the process of drafting any new or revised version for the sake of the CFR.

3.1.7. The Optional Instrument

In case the CFR was to be employed as an optional instrument, the outcome of that would have been different. According to the Commission's option *c* regarding the need for an optional instrument to be used as the CFR in the future, it directly hints at the basis of an optional instrument, Some commentators on the Commission documents of 2001 proposed, during informal discussions, that it is not possible that all Member States would consent to the idea of a single EU Civil Code. Therefore, it is worthwhile to introduce a new treaty to be signed and ratified by the Member States to adopt it as an optional code, and to this States may adhere if they so desire. To put it in another way, it can be referred to as an instance of the adoption of a common currency in the EU. But this is not what the Commission, Action Plan or Way Forward envisions. Instead, they intend to introduce a set of contract law rules that the States may choose to regulate their contract, besides the fact that the CISG provides the States with the optional instrument clause. If such intention is made true by way of a treaty, then the entire domestic contract law should be replaced by those set of rules. However, some states have raised concerns regarding the total replacement of contract laws stating that such laws seem to be incomplete and insufficient in several ways. For example, the problem of what happens if one party to the contract is in one country and the other party in some other country. Anyways, such concerns have been of little importance in comparison with the CISG that tackles such issues with a high degree of reasonability.

In addition, an optional instrument draws a lot of other relevant questions. Firstly, whether an optional instrument should be imposed on the Member States as a must opt-in option or instances where it must be applied in situations if the States do not opt-out? Interestingly, the answer to the first question is directly linked to the second question, that is, should it be applied only to cross-border transactions within the EU or to national transactions as well? Considering

these questions, it can be said that they cannot be answered with ease. An instant reaction to these questions could be to allow the States to opt-in the optional instrument for national transactions too by making a positive choice, instead of becoming bound by it later on unless the State opt-out. These questions also give rise to another question-begging the need for such an optional instrument at all. The government of the UK does not favour the need for an optional instrument at all based on the threat to the national system.

Presumably, one of the strongest arguments advanced in a surge for an opt-in optional instrument is that if the Member State desires to employ such instrument, on what grounds it could be stopped. Those who oppose the creation of a unified EU Civil Code bring in defence the reason of preservation of freedom which can exactly match the argument forwarded by the supporters of such a Code. Once the optional instrument is enforced in any State, it is based on such States own sweet will thus preserving the right of freedom to choose the suitable law for its State[464].

In the end, it can be said that the Commissions' consultation paper of 2001 put in process the greater convergence of the general principles of contract law in Europe which consequently led to the creation of the draft CFR, embodying ambitious goals. In the words of Vogenauer, *'The DCFR, as published in 2007, is much more than a toolbox for a revision of the acquis, and it even goes beyond a potential European Contract Law Instrument. It is meant to be a blueprint of a European Civil Code in the area of patrimonial law'*[465]. In the political arena, there seems to be no appetite for such a unified EU Civil Code, and the situation remains uncertain as to the future harmonization initiatives concerning that[466]. Nevertheless, clarifying the issues related to pluralism, sovereignty, legitimacy and efficacy may lead to a better debate on the harmonization of EU Continental law, specifically contract law.

However, in general, the Commission's Action Plan and *The Way Forward* are to be welcomed. Besides the opt-out optional instrument, these instruments do not present any threat to the domestic contract laws. The CFR and the new improvements made in the *acquis* would make it easier to adopt the EU legislation into domestic laws. The opt-in optional instrument seems to be a very convincing option for the States to acquiesce to the replacement of domestic laws with the optional instrument, as there exists no objection to that from the States. Keep in mind that any such conclusions find their basis in the fact the CFR and any other optional instrument are well executed, allowing for proper freedom of choice to the States. Nonetheless, it would be premature to suggest that these harmonization measures form part of a coherent overall plan leading straight to a comprehensive codification.

3.2. Comparing the Theoretical Legal Techniques (TLT) in detail between Pakistan and some specific EU-Members

There exist several distinctions between the continental European (EU) legal system and the Anglo-Saxon legal system *(referring hereinafter to Pakistani legal system)*. However, it would be hard to make any attempt at giving preference to these differences based on their significance. In this paper, the primary focus would be on the differences of key theoretical legal techniques between the contract law of the EU (especially Germany and France, as a

[464]Social Justice in European Contract Law: A Manifesto (2004) 653–674.

[465]House of Lords/European Union Committee: European contract law: the Draft Common Frame of Reference. (London: The Stationery Office, 2009)12.

[466]Papp (2010) 512-513.

reference) and Pakistan. While comparing the contract law of these different legal systems, it is witnessed that there exist treasure trove examples for distinction.[467] For instance, in the contract law of Pakistan, the concept of consideration is a must condition for the enforceability of a valid contract, that is something of value must be exchanged or bargained. Whereas the French contract law does not recognize consideration as a must condition. Initially, under the French Civil Code (FCC), a valid contract needed to bear *'lawful cause'*[468] as an essential condition, which has been replaced by the requirement of a *'lawful, certain content'* under the new reform introduced to the FCC in 2016.[469]

Before proceeding to the analysis of the core areas of divergence between Pakistani and EU contract law, some points must be made and clarified with caution.[470] Firstly, the EU contract law reflects the famous maxim known as '*pacta sunt servanda*' which gives the understanding that contract is regarded as both a legal as well as a moral obligation.[471] This obligation of moral sanctity of a contract demands the parties to abide by their contractual duties, which complements the role of the state in the EU contract law. Secondly, the differences arising between the civil and Anglo-Saxon legal systems regarding contractual law techniques are based on the distinctions of historical backgrounds and market demands. Thirdly, there exist potential complex and diverse traditions within civil and Anglo-Saxon law which account for their distinction.[472]

Nevertheless, all these afore-stated points must be regarded as approximations rather than an exact representation prevailing in any civil or Anglo-Saxon law jurisdiction. Lastly, there is a prevalent consensus relating to the mitigation of differences between the common and continental law regimes, as they both now seem to gradually converge with time.[473] This argument is with special regard to contract law because it is that area of law that makes cross-fertilization and Anglo-Saxon law borrowings of civilian institutions most noticeable.[474] Nonetheless, the existence of relative differences in the civil and Anglo-Saxon legal systems continue to marvel the scholars and lawyers dealing with the comparative law[475], as they form the basis of comparative law studies.[476] Therefore, in the discussion that follows, I will aim at addressing the key differences in the theoretical legal techniques persisting in each legal system – the continental legal system in EU through the example of Germany and France, and the Anglo-Saxon legal system in Pakistan – to provide insight into the different usage and applicability of same terminologies under different legal systems.

[467]Pejovic (2001) 817-841.
[468]Moor, A. De: Contract and Agreement in English and French Law. In: Oxford Journal of Legal Studies 6/2 (1986) 275, 281–282.
[469]See French Civil Code: Articles 1105–1106. Available online at: https://www.trans-lex.org/601101/_/french-civil-code-2016/.
[470]Pargendler, M.: The Role of the State in Contract Law: The Common-Continental law Divide. In: Yale Journal of International Law 43/1 (2018) 143-190.
[471]Hyland, R.: Pacta Sunt Servanda: A Meditation. In: Virginia Journal of International Law 34/2 (1994) 405, 406.
[472]DiMatteo, L./ Hogg, M.: Comparative Contract Law: British and American Perspectives (Oxford: Oxford University Press, 2016) 2-5.
[473]Spamann, H.: Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law. In: BYU Law Review 2009/6 (2009) 1813-1815.
[474]Nicholas, B.: The French Law of Contract (Oxford: Clarendon Press,1992) 120-126.
[475]Moss, G.C.: Boilerplate Clauses, International Commercial Contracts and the Applicable Law Cambridge (Cambridge: University Press, 2011) 181-82.
[476]Whitman, J.Q.: The Two Western Cultures of Privacy: Dignity Versus Liberty. In: Yale Law Journal 113/6 (2004) 1153, 1163.

3.2.1. Theories and Definitions of Contract

The definition of a contract is found to be different in both legal systems. The continental legal system in the EU defines 'contract' as an agreement among several people, comprising of a collective declaration of intent anticipated at regulating their rights and duties. This definition finds its parallel in many other civil codes justifying the notion of consent or understanding. In spirit, any legal act expresses the principle of will or autonomy, which comprises the fact that the will of the people is taken into consideration while formulating the law. The 'will' is regarded as independent and autonomous, and therefore, it bears the power to give rise to such legal acts that conform to the individual will.

According to the new article 1104 introduced in the FCC through reform in 2016, it is stated that all contracts must be discussed, settled and implemented in good faith and any failure to conform with such duty can not only prompt the disbursement of damages but also lead to the termination of such a contract. In addition, another article 1112(1) has been added to the FCC that states expressly that in case a party is aware of certain facts that are of essential value to the contract, such party shall inform the other party if such other party is legally unaware of such facts[477]. In this context, however, it should be acknowledged indeed that it would be useful to examine in more depth the status of women in private law issues in relation to the soi-disant *"égalité civile"* as manifested in the natural law way of codification of French continental law.[478]

The slogan of the French Revolution, "Liberté, égalité, fraternité," encapsulated the key concepts represented in revolutionary law (which is still the motto of France). While the literal meaning of liberté, egalité, and fraternité is self-explanatory, the motto came to be seen as a catch-all for the French people's basic rights and freedoms (and, yes, most especially men). It was a direct jab at the monarchy and clergy: all men are created equal in God's eyes, and no one shall be denied the privileges granted to others. It still symbolizes the fight against injustice, division, and misuse of power now as it did during the French Revolution. Since the words "liberté, egalité, fraternité" were formed, France has become significantly more varied, and equality has seen possibly the most significant transformation in meaning. This is due to the fact that inequity exists in so many domains. For many individuals, economic inequality, geographical inequality, racial inequality, and religious inequality all fall under the banner of "egalité." This shift in connotation corresponds to the evolution of France's history. Colonialism, the two World Wars, and the growth of extremist organizations, many of which are founded in some manner in cultural or religious identity, have all influenced how liberté, egalité, and fraternité are interpreted and used.[479] The developments were sparked by the fervent yearning for liberty and equality espoused by 18th-century philosophers. The values of liberty and equality had a profound impact on family relationships. Marriage was only a legal act; divorce was allowed; paternal authority was restricted; and parental approval was not necessary for children above the age of 21. The wife was considered equal to her husband in a

[477]Hameau, P.: Bus/ J.P./ Gdanski, M.: Reform of the French Civil Code on contract law and the general regime and proof of obligations, Global publication, 2016. https://www.nortonrosefulbright.com/en/knowledge/publications/2a563f12/reform-of-the-french-civil-code-on-contract-law-and-the-general-regime-and-proof-of-obligations.

[478]Note: A deeper examination of the ABGB-system, at chapter level, reveals a Roman law system modified on a natural law and rational basis. This fact does not seem to be decisive with respect to the key issues of the thesis (Supervisor's reply to Prof. Janos remark).

[479]LibertiesEU: Liberté, Égalité, Fraternité: The Meaning and History of France's National Motto, 2021. Available online at https://www.liberties.eu/en/stories/liberte-egalite-fraternite/43532. Last accessed on 13.04.2022.

short experiment with "family courts" that were allowed to override paternal judgments. In terms of succession, all children were granted equal shares, and the testator's authority to dispose of property by will was limited to prevent inequities from being reestablished by this means.[480]

On the other hand, in Pakistan according to the Anglo-Saxon legal system, the definition of a contract is quite different based on a general utilitarian concept. This utilitarian perspective is a characteristic of the Anglo-Saxon legal system and thus leads to the flourishing of the concept that the real value of a contract is embedded in its economic consequence. In a free-market society, there exists individual economic freedom which is exercised by way of a contract only to maximize individual as well as social efficacy. As a result, the existence of an agreement is not sufficient to make a contract; other conditions are also required, including the accomplishment of the effects, realized in the form of a traditional exchange. Therefore, the contract is regarded as a legal mechanism created solely for economic purposes. Based on this analysis, the concept of will/autonomy found in the continental legal system is not considered valuable in the Anglo-Saxon legal system since the enforcement of the contract matters more than its formation. The will/autonomy of the contractual parties surpasses insignificance by the effects and pragmatic purposes sought after by a contract.[481]

3.2.2. Consideration

According to the contract law of Pakistan, a contract bears no binding legal effect unless it is supported by 'consideration', which essentially means that a contract must be supported by something of value, such as the promise of a party to provide goods or services, or a promise to pay for goods or services.[482] Speaking of consideration recalls the fact that consideration is not only about an exchange, but it requires some reciprocal link between the things that are exchanged. According to this fact, the claimant does not have to prove the receiving of any kinds of benefits from the other party unless the promise or performance of such other party induces genuine proof for the return consideration. That is, the concept of consideration is given and acknowledged in the contract as an inducement or motive for the promise made between the parties. This idea of a reciprocal link between the things exchanged was enunciated by Justice Oliver W. Holmes Jr. in the 19th century, and since then this concept has been fortified in the US Anglo-Saxon law system.[483] For instance, if a party enters a gratuitous contract, such party would then be legally bound to perform his part of the obligation, but without anything in return. A gratuitous contract is held void under the Anglo-Saxon law-based contract law of Pakistan, as it lacks consideration because nothing is exchanged or given in return. The concept of consideration is regarded as a sign of seriousness, and it forms the basis of a binding contract in Pakistan contract law. This heightened significance provided to the concept of consideration is based on two common-law aspects: 1) It is a *must* condition for a valid contract under Anglo-Saxon law as opposed to continental law, and 2) It is regarded as a sole product of judicial decisions and acumen developed as a result of untiring efforts of English Anglo-Saxon law judges, as opposed to the strict enforcement of Statutes, rules and regulations etc. There seldom arises any case where the absence of consideration in a contract

[480]LibertiesEU (2021).
[481]Cabulea, O-B.: Voluntary Sources of Obligations: Comparative Perspective: Anglo-Saxon law and Continental law Systems. In: Annales Universitatis Apulensis Series Jurisprudentia 21/9 (2018) 9-26.
[482]See Indian Contract Act, 1872: Sec. 2(d).
[483]Oliver Wendell Holmes, Jr.: The Anglo-Saxon law (US: Dover Publications, 1991) 293-294.

forms the basis of litigation, due to the simple reason that it is considered being routinely satisfied in the commercial transactions.[484]

Besides its significance, the concept of consideration differs from the concept of *'lawful, certain content'* founded in the FCC, 2016.[485] Before the reform in FCC, there were four pre-requisites for a valid contract namely the consent, capacity, subject matter, and lawful cause (causa).[486] This concept originated in the Roman texts but was principally established in the Canon Law. The notion of *cause* does not exist in other European nations and is considered abstract and challenging to interpret. However, according to the French legal scholars' cause has been further divided into a subjective and objective cause. The subjective cause determines the intentions of the party undertaking performance and is particular to that party only, while objective *cause* denotes the abstract and indefinable consideration existing for contracts of the uniform type. For instance, regarding a purchase contract, the objective *cause* for the buyer will be manifested in the attainment of title, and in the case of the seller, it would be the price to be paid. In contrast, contracts with similar contractual nature have subjective causes that vary from one to another. So, for example, the location of a home may be a subjective factor for one buyer, while its general condition or size may be a factor for another buyer. The Supreme court (*Cour de Cassation)* has utilized subjective cause to re-establish the balance of duties obligatory upon parties to a contract on several occasions in France. There have been objections and issues raised by legal practitioners and scholars about this subjective view on the cause. To increase legal clarity in contractual matters, the reform removes the notion of cause and substitutes it with rules that are less abstract yet have a comparable outcome. Article 1128 of the FCC, which takes effect on October 1, 2016, replaces the idea of "lawful cause in the obligation" with the requirement of a "lawful, certain content."

3.2.3. Contracts for the Benefit of Third Parties and the Doctrine of Privity of Contract

The doctrine of privity of contract is alien to the EU continental law. Therefore, parties to the contract may agree to confer their rights and duties in a contract to a third party. According to the German Civil Code (GCC)[487], "A contract may stipulate performance for the benefit of a third party so that the third party acquires the right direction to demand performance.[488] The right, of course, cannot be forced upon the third party; if the third party rejects the right acquired under the contract, the right is deemed not to have been acquired[489]."

A new Article 1216 was added to the French civil code in 2016, allowing a contracting party to assign its position as a party to a contract with the prior approval of its co-contracting party. This assignment of contract would greatly simplify how contractual transfer occurs under French law. Such consent can be given in advance, for example, in the contract between the future assignor and the assigned party, in which case the assignment becomes effective concerning the assigned party when the contract between the assignor and the assignee is notified to the assigned party or when the assigned party acknowledges it. The assignment must be completed in writing, or else it will be considered null and invalid. The assignment of the contract frees the assignor from duties emerging after the assignment if the assigned party

[484]Dawson, J.P.: The Oracles of the Law. Revised Edition (California: Greenwood Press, 1978) 390-93.
[485]Cabulea (2018) 9-26.
[486]Calleros, C. R.: Law School Exams: Preparing and Writing to Win. (US: Aspen Publishers, 2007) 36-41.
[487]See Sec. 328: Bürgerliches Gesetzbuch [German Civil Code], Bundesgesetzblatt (Federal Law Gazette), no. 4/2013.
[488]French Civil Code: Art.1121.
[489]German Civil Code: Sec. 333.

explicitly agrees; otherwise, the assignor remains equally and severally responsible for the contract's execution. Any security interests previously provided by the assignor remain in force if the assignor is not discharged by the assigned party. Other than that, security interests provided by third parties are only valid if they agree to them. If the assignor is released, any mutual and several co-obligors are still responsible after the assignor's part of the obligations is deducted.

The obligor of the receivables no longer needs to be served by the bailiff (huissier de justice); under revised article 1324 of the FCC, mere notification to or acknowledgement by the obligor is sufficient, and even this is not required if the obligor has provided advance permission to such assignment. A receivables' assignment must be done in writing or it would be null and held invalid. The new article 1327 of the FCC expressly permits the assignment of debts (cession de dettes) as long as the creditor consents or acknowledges it, including by granting advance consent. The original obligor is relieved of its duty if the creditor agrees; otherwise, it is mutually and severally responsible for the payment of the debt. Security interests provided by third parties only survive if the original debtor is not freed of its obligation; otherwise, security interests granted by third parties only survive with the consent of the people who gave them. After the assignor's part of the obligation has been deducted, any other jointly and severally responsible co-obligors are still liable[490].

Whereas this concept of alienation of contractual rights and duties to third parties, is non-existent in Pakistani contract law based on Anglo-Saxon law, as it does not acknowledge any benefits to the third party. According to this doctrine, the rights and duties of third parties are curtailed and only parties to the contract can enforce their rights or duties entered upon during the contract formation, that is 'only a person who is a party to a contract can sue on it[491]'. There are many cases in which the concept of privity of contract is upheld by the apex court in Pakistan. In a famous case – *Fazal Dad (deceased) through L.R & Others v. Adnan Ali*[492], the court upheld the doctrine of privity and rejected the argument of a third party over the contract. The Court held that only contracting parties can take benefits arising under the contract.

However, several Pakistani contract law sections also uphold the exceptional circumstances where third party rights and obligations are dealt with e.g. Section 41 (if a contracting party has received obligation from the third party then that contracting party cannot enforce his claim against the other contracting party), Section 126 (third party rights in case of guarantee contract), and Section 136 (describes the situation where a contract to give time to principal debtor is made by the creditor with a third person, and not with the principal debtor).[493] However, the concept of privity of contract is not so well recognized in Pakistani contract law due to the increased emphasis on the concept of consideration, upon which the rights of both the contracting as well as the third party depend. This concept of consideration provides the third party with the right to enforce its right over a contract.[494]

[490]French Civil Code: Art. 1105–1106.

[491]See Dunlop Pneumatic Tyre Co v Selfridge & Co. case: 1915 AC 847, 853.

[492]Akbar, Muhammad Kamran: Legal Value of Third Party Right over a Valid Contract. In: Journal of Applied Environmental and Biological Sciences 7/7 (2017) 177 (fn. 11).

[493]Akbar (2017) 176-177.

[494]See Fatema Khatoon and Another v. Nur Miah and others: PLD 1967 Dacca 152.

3.2.4. Duty to Perform and Good Faith

Generally, any contract concluded by the parties must be performed under the stipulated time or in a reasonable period. In the case of the EU continental legal system, if the performance is delayed, the claimant (the creditor) can sue the defaulter (the debtor) by putting up a notice of default. For instance, the GCC[495] states that 'if after his obligation is due, the debtor does not perform after a warning from the creditor, he is in default because of the warning.' The basic aim behind the issuance of such notice is to warn the defaulter of his delayed performance and to fulfil his obligation within a reasonable period i.e., the grace period provided in the notice. In the said notice, the claimant gives a statement in which he makes it clear to the defaulter that his performance would not be accepted after the expiry of the grace period. But if the defaulter does not pay heed to the notice, then it would justify the claimants' claim for recovery of the damages.[496] Whereas, in Pakistani contract law, there is no prerequisite of notice of default and the general rule is that performance is deemed due without any notice of default.[497] The contract law of Pakistan sticks to the Anglo-Saxon law principle of the performance of a contract within a reasonable time. According to the Sale of Goods Act 1979[498], 'where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time'.

Moreover, the concept of duty of faith is also helpful in understanding the divide between the EU and Pakistani contract law. Two of the renowned scholars – Reinhard Zimmermann and Simon Whittaker – have chalked out an entire volume for functional inquiry to investigate the scope of this concept in the EU, where there seems to appear a 'rather clear-cut continental law/Anglo-Saxon law divide[499]'. Whilst this concept of duty of good faith is employed for multiple functions in the contract law, however, my main concern would be to expound on the technical difference of this concept within both the legal systems with special regard to its role in establishing the meaning as well as the scope of contract *performance*. The main issue is whether and to what extent good faith functions as a basis for implied contractual duties of cooperation and collaboration besides those provided expressly in the contract.[500]

According to the old Section 306 of the GCC, contracts were void if they could not be performed at the time they were signed. For example, according to an older Section 307 of GCC: *"A party who knows or should have known that a contract cannot be performed must compensate the other party for any harm they have suffered by relying on its legal validity"*. Previously, responsibility for the earlier inability of performance was confined to the negative interest, or reliance interest, under Section 307. As part of the German Act to Modernize the Law of Obligations, the rules on the initial impossibility of performance in old Sections 306 and 307 were repealed and were replaced by new Section 311a (1) and 311a (2). The new Section 311a (1) states that the initial impossibility of performance does not affect the validity

[495]Oliver Wendell Holmes (1991) 293-294.

[496]Schlesinger, R.B et al.: Comparative Law (New York: Foundation Press, 1998) 493.

[497]Treitel, G.H.: The Law of Contract (London: Sweet&Maxwell, 1995) 743.

[498]Sales of Goods Act, 1979: Sec. 29 (3).

[499]Zimmermann, R./ Whittaker, S.: Good Faith in European Contract Law (Cambridge: Cambridge University Press, 2000) 15.

[500]Kennedy, D.: Form and Substance in Private Law Adjudication. In: Harvard Law Review 89/8 (1976) 1685-1778.

of the contract, and 311a (2) states that a creditor is permitted by Section 284 to seek compensation for non-performance or repayment for expenditures. The contrast between old sections 306, 307, and the new section 311a is even more pronounced if one distinguishes between the consequences of initial impossibility concerning the duty to perform and the consequences of initial impossibility concerning the duty to compensate damages resulting from non-performance. For example, under old section 306 (1), the claim for performance was excluded because the contract was void; under new section 311a (1), the claim for performance is excluded because performance is impossible. Indeed, the new section 275 (1) of the GCC states that "a claim for performance cannot be asserted in as much as the debtor or anyone else cannot perform." The impediment's occurrence time turns out to be inconsequential, irrelevant. However, when it comes to the responsibility to reimburse for damages, the provisions in old section 307 and new section 311a (2) produce quite different results: Section 307 required the debtor to compensate for the negative interest by recreating the condition that would have occurred if no contract had ever been entered into, while according to new section 311a, it is now required that the debtor compensate for the positive interest, to restore what would have happened if the contract was fulfilled correctly[501].

According to German Act to Modernize Obligation Law of 26 November 2001, the third feature of impossibility is the separation between objective and subjective impossibilities of performance. Nobody, even the debtor, can perform; subjective impossibility relates to the debtor – even while the debtor cannot perform, other people can. As a matter of ancient law, there was a distinction between first and subsequent ineligibility. According to section 306 of the GCC, a legal transaction whose object was impossible for everyone was held to be invalid. But a legal transaction whose object was impossible for the debtor was considered valid. A second barrier to performance was also considered in the old section 275, establishing the distinction between two forms of impossibility: the effects of eventual objective impossibility were described: section 1 described the effect of subsequent objective impossibility; section 2 extended this effect to subsequent subjective impossibility, stating that "the creditor's incapacity to perform after the formation of the obligation was equal to the subsequent impossibility of performance." In each scenario, the debtor was released from his or her obligation to fulfil. The new law abolishes the distinctions in old sections 306 and 275, equating initial impossibility with subsequent impossibility, as well as subjective impossibility with an objective impossibility: the impediment to performance extinguishes the creditor's right, whether it occurs before or after the conclusion of the transaction. While the GCC now recognises the relationship between subjective and objective impossibility[502].

Currently, there are no provisions in the FCC that address the well-known and important principle of defence against non-performance, which has been fashioned by an extensive body of case law. No-performance defence is defined as follows in new Article 1219: *"A party may refuse to perform his obligation, even where it is enforceable, if the other party does not perform his own and if this non-performance is sufficiently serious."* Only "sufficiently significant" non-performance can invoke this argument, which prevents the abuse and bad faith use of this defence to punish small non-performances. New Article 1219 is nothing more than an updated case law that has been in place for some time. A new notion, however, is introduced by the legislation, one that had not previously been established by French courts. New Article

[501]Oliveira, N.M.P.: The German Act to Modernize the Law of Obligations as a Model for the Europeanization of Contract Law? The New Rules Regarding Impossibility of Performance from the Perspective of a Portuguese Lawyer. In: Electronic Journal of comparative law 11/4 (2007) 6.
[502]Oliveira (2007) 8-9.

1220 is introduced, which states: "*A party may suspend the performance of his obligation as soon as it becomes evident that his contracting partner will not perform his obligation when it becomes due and that the consequences of this non-performance are sufficiently serious for him. Notice of this suspension must be given as quickly as possible*." As a result, a creditor of an obligation will have the option of suspending the execution of his or her duties as a preventative step before his or her contractual partner is found to be in default. This new approach imposes a sort of pressure on a contractual partner to fulfil his or her obligations. It is, however, more controlled than a simple defence to non-performance since, in addition to a "sufficiently significant" violation, the decision to suspend the performance of the duty must be communicated to the opposing party as soon as feasible[503].

In a broader sense, the notion of good faith is a more widespread place in the EU continental legal systems. However, the application of the duty of good faith varies across different jurisdictions of the Member States of the EU. For example, in Germany the concept of duty of good faith functions as a 'judicial oak that overshadows the contractual relationship of private parties[504]'. This high esteem for the ideal of good faith has paved the way for other EU countries to follow it with the same spirit as France and outside the EU like Brazil.[505] Similarly, this ideal is found in existence in Anglo-Saxon law countries as well including the US, UK and Pakistan. The Pakistani contract law incorporates the duty of good faith in sales contracts under its Sales of Goods Act, 1979. At the same time, the American Uniform Commercial Code (UCC) also provides for the duty of good faith in the performance and implementation of every contract.[506] Nevertheless, the UCC applies this duty of good faith in contracts with much less fervour than do other civilian countries do.

3.2.5. Force Majeure / Frustration of contract

The concept of *force majeure* originated from Roman law and was later adopted in the EU and other continental legal systems. It means any unforeseen and unexpected happening or event that is outside the contracting parties' control making the performance of the contract impossible. Consequently, it excludes the liability of the party from the non-performance of the contract. In a well-known case*, J. Lauritzen AS v Wijsmuller BV* (The Super Servant Two), Bingham L. J. laid down five propositions that chalk out the basic framework of the concept of frustration:

- the doctrine of frustration has evolved to mitigate the rigour of the Anglo-Saxon law's insistence on the literal performance of absolute promises;
- frustration operates to kill the contract and discharge the parties from further liability under it;
- frustration brings a contract to an end forthwith, without more and automatically;
- the essence of frustration is that it should not be due to the act or election of the party seeking to rely on it and it must be some outside event or extraneous change of situation;
- a frustrating event must take place without blame or fault on the side of the party seeking to rely on it.[507]

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[503] Avocats, S.: Reform of French contract law to take effect on October 1, 2016: Important changes that caught our attention, 2016. https://www.soulier-avocats.com/en/reform-of-french-contract-law-to-take-effect-on-october-1-2016-important-changes-that-caught-our-attention/.

[504] Ebke, W.F./ Steinhauer, Bettina M.: The Doctrine of Good Faith in German Contract Law. In: Beatson, Jack/ Friedmann, Daniel: Good Faith and Fault in Contract Law (Oxford: Oxford Scholarship Online, 2012) 171.

[505] Treitel, G.H.: The Law of Contract. (London, Sweet&Maxwell, 1995) 743.

[506] Uniform Commercial Code UCC, 2001: Sec. 1-103.

[507] See J. Lauritzen A.S. v. Wijsmüller B.V. case: [1990] 1 Lloyd's L.Rep. 1.

The contract suffers from frustration eventually when it is established that the circumstances have become incapable of performance of a contract without the fault of either party, thus, terminated.[508] The court has to decide whether frustration is justified or not. For that purpose, the court seeks to analyze the data based on the terms and conditions of the contract read in consonance with the then-existing circumstances, and the circumstances that happened later on.

There exist several examples of frustrating events that render the contract subject to termination, namely the subsequent changes in the law, supervening illegality, an outbreak of war and restrictions, statutory enforcement etc.[509] Moreover, other events like a legal impossibility[510] physical impossibility (death, incapacity, destruction of subject matter, delay and hardship)[511] and the impossibility of purpose[512] (the very basis on which the contract is formed as established in *Krell Vs Henry*[513] case). The reason why it is termed as 'frustration' is that it refers to a later or subsequent impossibility of non-performance, to distinguish it from a prior mistake of the parties or initial impossibility at the time of contract formation.[514] When dealing with frustration, the courts adopt a multi-dimensional approach concerning *'the terms of the contract, its context, parties' knowledge, expectations, assumptions, risks, the time of contract, and the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances[515]'*. The courts view frustration as a last resort that they employ rarely with caution[516]; in short, the traditional principles of freedom and sanctity of contract still hold firm.[517]

The concepts and regulations governing ethical, moral, and practical impossibility are described in section 275 of the new GCC legislation, whereas the principles and rules governing the foundation of the legal transaction are established in section 313. After the First World War, the notion of a *clausula rebus sic stantibus*, which had been expressly rejected by 19th-century lawmakers, became an established legal institution in German law to deal with its repercussions, particularly the catastrophic impacts of hyperinflation.[518] If both parties misunderstand the facts of the deal, they can modify the contract under 313 (2) GCC. The disadvantaged party does not need to initiate renegotiations as a first step, although an offended party may request a contract adjustment without first negotiating[519]. Section 313 GCC (1) stipulates that the party requesting adjustment must request a particular change of the contract,

[508]See Davis Contractors Ltd. v. Fareham Urban District Council case: [1956] A.C. 696.

[509]Murray, R.: Contract Law – The Fundamentals (London: Sweet&Maxwell, 2011) 299- 304.

[510]Halson, R.: Contract Law (London: Pearson Higher Education, 2013) 423-425.

[511]Koffman, L./ Macdonald, E.: The Law of Contract (Oxford: Oxford University Press, 2010) 514-522.

[512]Smith, S.A.: Aliyah's Introduction to the Law of Contract (London: Clarendon Press, 2005) 184.

[513]Chen-Wishart, M.: Contract Law (Oxford: Oxford University Press, 2010) 318.

[514]Duxbury, R.: Contract Law (London: Sweet&Maxwell, 2011) 241.

[515]Mckendrick, E.: Contract Law (London: Palgrave Macmillan, 2011) 256.

[516]Mulcahy, L.: Contract Law in Perspective (London-New York: Routledge-Cavendish, 2008) 127.

[517]Brownsword, R.: Smith & Thomas: A Casebook on Contract (London: Sweet&Maxwell, 2009) 701.

[518]Schlechtriem, P.: The German Act to Modernize the Law of Obligations in the Context of Common Principles and Structures of the Law of Obligations in Europe, Oxford University Comparative Law Forum, 2002. https://ouclf.law.ox.ac.uk/the-german-act-to-modernize-the-law-of-obligations-in-the-context-of-common-principles-and-structures-of-the-law-of-obligations-in-europe/.

[519]Schlechtriem (2002): It is submitted that demand for negotiations should be a prerequisite based on the good faith requirement in § 242 BGB before an adjustment claim can be raised in court.

which the court might either allow or refuse and 313 (3) GCC envisages termination of the contract as a last resort in certain situations. By adding the new rules on the abnormal difficulty in 275 (1) and (2), and by removing the old rules on initial and subjective impossibility, the German Modernization of Obligations Act of 26 November 2001 amended GCC provisions regarding the impossibility of performance. When it came to instances of extraordinary difficulty, there were no legislative norms under old German law. Sections 306 or 275 of the GCC should be used if the barrier to performance could not be overcome: where old section 275 pertained to situations of future absolute impossibility, while old section 306 applied to cases of initial absolute impossible. If, on the other hand, impossibility was relative, and the performance obstacle could still be overcome, the case could not be decided using those principles. Enneccerus and Lehmann proposed that the principle of good faith in section 242 be linked to the rules in sections 275 and 306: if the impediment to performance upsets the contractual relationship's equilibrium, making performance unreasonably burdensome for the debtor, the rules for absolute impossibility should apply to relative impossibility. There should be a limit on how much the creditor may ask for from the debtor. Judges could not resolve specific cases based on such imprecise, confusing, and vague standards proposed by Enneccerus and Lehmann. If the impossibility was absolute, judges should follow the standards in 306 and 275; if it was merely relative, judges should determine the issue based on the good faith concept in 242. However, the German Civil Code 242 states: *"The debtor is bound to affect performance according to the requirements of good faith, considering common usage"*.[520]

Section 275 of the German Obligations Act was modified. Absolute impossibility is discussed in part 1, relative impossibility is discussed in sections 2 and 3. In section 2, the debtor may refuse to perform in circumstances of practical impossibility if performing would demand expenditures "that are disproportional to the creditor's interest in the performance". According to Section 3, the debtor is barred from fulfilling because of an ethical or moral responsibility that is greater than the legal one. So long as performance is to be done in person, the debtor has the right not to perform if the creditor's interest in performance is outweighed by any impediments[521]. Relative impossibility includes ethical, moral, and practical impossibility.

Changes in circumstances that could not have been foreseen before signing a contract can result in a contractual party who had not accepted such risk requesting a renegotiation of the contract with its counterparty, as per new FCC Article 1195. Renegotiation requires that the asking party fulfil its responsibilities during the process. They can also agree to terminate the contract on the date and under the terms set by them. They can also agree to ask the judge for a modification of their contract if their counterparty refuses to renegotiate or renegotiation fails. As long as the parties cannot reach an agreement within a fair time frame, the court may amend or cancel the contract. It is expected that parties to contracts governed by French law will now add wording declaring that the risk of "hardship" is taken; the Loan Market Association, for example, has suggested such an approach to loan agreements. New article 1218 defines force majeure as the occurrence of an event beyond the obligor's control, which could not have been reasonably foreseen at the time of contract entry, the effects of which cannot be avoided by

[520] See the translation of § 242 in Markesinis, B.S./ Dannemann, G./ Lorenz, W./ The German Law of Obligations Vol. I: The Law of Contracts and Restitution: A Comparative Introduction (Oxford-New York: Clarendon Press, 2001) 412-414.

[521] Schlechtriem (2002): Note that there is a slight difference between CISG and BGB: the particular purpose is decisive under BGB even if the buyer did not or could not reasonably rely on the sellers capacity. The deviation from the Anglo-Saxon law based restriction in Art. 35 (2) b) CISG was necessitated by the Consumer Sales Directive, where this restriction was dropped on account of motions by the consumer protection wing of the European Parliament.

appropriate measures, and which prevents the obligor from performing its obligation. If the consequences are only transitory, the execution of the duty is halted until the ensuing delay warrants contract termination. If the consequences are irreversible, the contract instantly ends and the parties are released from their duties (without damages being due). The acknowledgement of this concept intends to fight severe contractual imbalances that emerge during contract performance and is compatible with the Ordinance's goal of contractual fairness. Three requirements must be met to establish unpredictability: An "unforeseeable" change in economic circumstances that makes contract performance "overly onerous" for a party that did not agree to incur such risk. This is a purely auxiliary provision, not a statement of public policy. The parties may opt to suffer the consequences of any such events that might disrupt the contract's scheme by agreeing in advance to exclude the implementation of this new Article 1195. Furthermore, the request for renegotiation does not free the party from fulfilling its duties throughout the renegotiation process or, if discussions fail, until the Judge rules on the following request for modification. Force majeure is not defined in the FCC's current edition. It was evolved through a series of rulings handed down by the Court of Cassation, some of which were incongruous with each other. According to new Article 1218 of the legislation, force majeure is defined as follows: "*In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.*" Due to the unreasonableness and irresistibility criteria outlined in case law, this formulation reflects the concept that has been evolved through time[522].

Initially, the Pakistani contract law based on Anglo-Saxon law principles did not allow for the impossibility of performance of a contract based on this concept, as it pursued strict liability. That is, if any such event did occur during the performance of a contract, the parties were obliged to state such exemption from liability expressly while entering the contract. It was later in the 19th century that the Pakistani contract law acknowledged the concept of frustration of contract – a similar concept to that of force majeure – based on the supervening impossibility of performance. In the aftermath of these impossible events, the Anglo-Saxon law established the legal terms of 'frustration' and 'hardship'. According to this concept, if a party fails to perform his duty due to the supervening impossible events that do not involve his fault, then such contract is terminated, without making any party liable for damages.[523] Furthermore, to resolve the conundrum of the economic and financial crisis, the contracting parties are encouraged to principally facilitate suitable provisions i.e. 'hardship clauses' during the formation of their contract. In the absence thereof, there must be a possibility for the parties to either terminate or modify their contract by the provision of an 'intervening clause' for the court.

3.2.6. Breach of Contract and Remedies

Generally speaking, breach of contract accrues a similar kind of liability in both the German and French continental law systems and Pakistani Anglo-Saxon law systems. However, there lie significant differences as to awarding of damages in both the legal systems. One of the basic differences is the requirement of fault to recover damages by establishing a breach of contract under German and French continental law systems. While Pakistani Anglo-Saxon law system does not establish any requirement of fault to prove breach of contract to recover damages. The Pakistani Anglo-Saxon law system relies on the principle that contract law is founded upon a

[522]Hameau (2016).

[523]Moor (1986) 275, 281–282.

law of *strict liability*, which accompanies remedies irrespective of any requirement of fault[524]'. According to the Restatement (Second) of the Law of Contracts, "When the performance of a duty under a contract is due, any non-performance is a breach[525]". On the contrary, German and French continental law systems operate on the basic requirement of fault to justify the claims regarding the recovery of damages, which shall only be awarded if a contract is breached at least negligence.[526] An evidence to this can be cited in the German Civil Code which states that "the debtor is responsible for deliberate acts and negligence[527]" and "the debtor is not in default as long as the performance does not take place because of a circumstance for which he is not responsible[528]". Therefore, it is clarified that a party is only responsible for paying the damages to the other party when he is at fault either intentionally or negligently. But if such breach occurs due to unforeseen events or force majeure, then such party would not be liable to pay damages.[529] However, according to the new law, the concept of a breach of an obligation is broad, regardless of whether the obligation is created by contract or arises under the law (such as in the case of negotiorum gestio) or under the newly introduced pre-contractual duties of care to protect the prospective partner's real and personal rights and interests under sections 311 (2), 241 (2)[530]. Unless party autonomy is restricted by legal norms that prohibit certain terms – in particular standard terms – or that impose certain terms on the contracting parties on an exception basis, the content of the obligation is determined by the law and, in the case of contractual obligations, by agreement between the contracting parties.

A regulation establishing "implied" terms of quality supplements the parties' agreement as if it were "accurately written out"[531]. An obligation is violated whenever a party deviates from the content of the duty. A similar concept can be found in the Principles of International Contract Law as promulgated by UNIDROIT[532], in the European Principles of Contract Law (hereinafter: PECL)[533], as well as in the UN-Convention on International Sales of Goods, where the concept of non-performance is referred to as "breach of contract" (CISG).

There are several remedies available to the obligee in the event of a breach, some of which may be dependent on additional conditions, and if the obligee is also under a duty towards the obligor, he or she may have the right to delay their performance[534]. They include:

[524]Farnsworth, E.A.: Contracts (Boston: Little, Brown, 1982) 843.

[525]American Restatement 2nd of the Law of Contracts, Trans-Lex Law Research, https://www.trans-lex.org/450300/ /American-restatement-2nd-of-the-law-of-contracts/ (9 January 2020).

[526]Mehren, A.V./ Gordley, J.: The Continental law System (Boston, Little, Brown and Company, 1977) 1106.

[527]See German Civil Code: Sec. 276.

[528]See German Civil Code: Sec. 285.

[529]Horn, N./ Kötz, H./ Leser, H.G.: German Private and Commercial Law (Oxford: Clarendon Press, 1982) 112.

[530]Schlechtriem, Peter/ Schmidt-Kessel, Martin: Schuldrecht Allgemeiner Teil. Fourth Edition. (Mohr Siebeck Online, 2000) 12.

[531]See L.J. Brett, Randall v. Newson: (1878) 2 Q.B. 102.

[532]International Institute for the Unification of Private Law: Principles of International Commercial Contracts, Rome 1994.

[533]The two-tier system followed a model to be found in the old version of Section 852 of the BGB regarding tort claims, but also in the EC-Directive on Products Liability and the – not yet published -Part 3 of the Principles of European Contract Law, prepared by the Commission on European Contract Law, Parts I and II ed. by Ole Lando and Hugh Beale, Kluwer Law International 2000.

[534]See German Civil Code: Sec. 321.

1. a claim for specific performance (section 241), which in case of non-conformity is aimed at curing the non-performance, (e.g. sections 437, 439 for sales and sections 634, 635 for construction contracts);
2. termination of the contract which is effective *ab initio*, i.e. retroactively *(Rücktritt,* notably under section 323 for synallagmatic contracts); in case of recurring obligations, this is replaced by a termination which is effective only for the future *(Kündigung,* in particular under section 314);
3. a claim for damages (section 280);
4. in case of hardship created by circumstances that have either changed or which had been erroneously assumed at the time of contracting, a claim for adjustment of the contract may lie under section 313 for the aggrieved party. If this is not feasible, termination may be granted in this situation as a remedy of last resort;
5. in certain types of contracts, the aggrieved obligee may also exercise a right of a price reduction or of self-help, the latter with the consequence that the necessary cost can be charged to the party in breach and a corresponding advance be claimed (see section 637 for construction contracts).

Several remedies for contractual non-performance have been added to the FCC in its updated version.

1. Non-performance of contractual obligations by a performing party (exception d'inexécution), not only when the other party is already non-performing, but also when it's manifestly clear that the other party will not perform on a contractually required date and if such non-performance has sufficiently serious implications for that otherwise performing party.
2. Following formal notice of non-performance (mise en demeure), specific performance (exécution forcée) may be ordered, provided that the non-performing party has been served with formal notice to perform (mise en demeure). In addition, the obligee has the right to execute or cause to be completed the duty within a reasonable time and at a reasonable cost, or to destroy everything done in breach of the obligation upon receipt of prior authorization from the court.
3. The obligee may seek the obligor to repay any money paid by the obligee for this purpose, or the obligee may file an application in court asking the obligor to advance to the obligee the funds required for such performance or destruction. Why Accept poor performance and seek a corresponding price decrease following a mise en demeure, which is a significant change from prior practice, in which particular performance was rarely tolerated.
4. A mise en demeure allows the contract to be terminated. An irrevocable clause in a contract must define those obligations whose non-performance will cause the contract to be terminated. A contract without a résolutoire provision allows the obligee to terminate the contract by simple notification, albeit at its own risk, in the event of a sufficiently significant non-performance. As a result, the obligee is always entitled to ask the court to terminate the contract; in such cases, the judge may either acknowledge or order that the contract be terminated or order the non-performing party to perform either immediately or within a specified time, or simply order payment of damages.
5. Furthermore, damages can always be sought following a mise en demeure, either alone or in combination with the other remedies[535].

[535]Cabulea (2018) 9-26.

3.3. Finding *Solutions* to the existing issues related to Theoretical Legal Techniques (TLT) in Pakistan through TLTs in some specific EU-Members

Nowadays, teaching law in a comparative methodology has gained importance worldwide, especially in Europe. Many lawyers and professors are found quite fluent with comparative law thus acknowledging the fact that awareness of both common and continental law is now much more a commonplace phenomenon in the EU. The reason for this commonplace phenomenon is the reality that law has become transnational now. But unfortunately for Asia, especially Pakistan, the field of comparative law is still an exceptional one due to the reason that law is still regarded as a domestic discipline. If the law colleges in Pakistan have provided comparative law studies, the results would have been different today. The limited aspect of teaching comparative laws of only the UK and USA have led to a complete indifference with the world's largest legal system i.e., the continental legal system. Through the example of the adoption of the CISG by the EU countries, Asian countries can be compelled into teaching comparative law approach in their teaching institutes; to understand the compromise reached between common and civil legal traditions, and to increase awareness of laws outside the realm of Asia. The awareness in the field of comparative law provides the lawyers with a better solution to the problem, who can then guide his/her clients in the best of their interests. Such kinds of lawyers are sought after by firms all around the world who are well versed with the laws of different legal systems and know-how to apply the best outcome to the benefit of their firm.[536]

Moreover, it is evident that 'the differences that once seemed significant between the civil and the Anglo-Saxon law are becoming blurred or hazy[537]' and both the legal systems are found to be synchronized with regards to; sources of law, procedure, drafting techniques and judicial views.[538] This harmonizing or synchronization has promoted the surge for common ground or solutions to common problems existing in differing legal systems. One factor leading to the harmonization is the fact that the Anglo-Saxon law countries, especially Pakistan, have begun relying on the codified laws by compelling the legislation to make reforms since the 19th century. Likewise, the continental law nations, including France, bears un-codified public law which seems quite bizarre within its highly rational continental legal system and thus, calls for a codification of the public law.[539] Another factor is the enhanced judicial acknowledgement of the fact that it is the judges that lend a hand in the making of laws, instead of abiding strictly with the precedents alone. This increased judicial acumen has also influenced the judges in France who have shifted their trend of following the strict code provisions to the enforcement of precedents to help both the courts and lawyers.[540]

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[536]Bell, G.F.: Harmonisation of Contract Law in Asia - Harmonising Regionally or Adopting Global Harmonisations - The Example of the CISG. In: Singapore Journal of Legal Studies 2005/2 (2005) 369-370.

[537]Merryman, J.H.: The Continental law Tradition (US: Stanford University Press, 1985) 28.

[538]Windeyer, W.J.V.: Lectures on Legal History (Australia: Law Book Company, 1957) 47.

[539]Pringsheim, F.: The Inner Relationship between English and Roman law. In: Cambridge Law Journal 5/3 (1933-1935) 347, 350.

[540]Bell (2005) 362-372.

Although there are several claims made in pursuance of harmonization of both legal systems, yet there are certain Anglo-Saxon law features that remain indifferent from peripheral changes still to date, for example, basic structure, the role of legislation and precedent, its mode of reasoning and its underlying assumptions. Some scholars argue that the proponents of harmonization possess a limited understanding of the legal rules and concepts of both systems.[541] According to Legrand, 'these two legal traditions reflect two modes of experiencing the world which simply cannot be reconciled. While they may have similar rules, concepts and outcomes, this is peripheral: the key features of the Anglo-Saxon law prevent intermingling on a deeper level'. Besides the support for harmonization of common and continental legal systems, there exist vivid differences between both systems with regards to their contract law. The subchapter '*Comparing the Legal Techniques in detail between Pakistan and EU or some specific EU countries'* provides ample proof for the existential differences between the theoretical legal techniques in the contract law of both the systems. These differences in the theoretical legal techniques can thus be used to find out solutions to existing problems in the Pakistani Anglo-Saxon law-based country, where answers to certain legal techniques are found to be absurd and inefficient. The solutions provided by the contract law in Pakistan do contain inconsistencies and demand up to date techniques to resolve matters. Therefore, a unified contract law of the EU or examples of the international treaties or conventions like the CISG or PECL or DCFR can be of help. The solutions existing under the EU contract law can be employed or incorporated into the Pakistani contract law through an amendment process, which is considered to be a need of the time, as the legislature has never heeded towards the need to keep the contract law up to date. After a thorough examination of the differences and solutions provided for the theoretical legal techniques of both Pakistan and the EU contract law, the contractual problems of Pakistan can be resolved by employing the EU contract law concepts and solutions into the Pakistani contract law, and even vice versa may be true. Let us see the outcome of this legal transplant or incorporation in detail below.

3.3.1. Theories and Definitions of Contract

As explained, the meaning of a contract is different in both the continental and Anglo-Saxon legal systems. The EU, especially French contract law emphasizes the free will of the contracting party and urges the contracting parties to discuss, settle and implement the contract in good faith, otherwise such a contract shall be terminated resulting in payment of damages. The ideas of freedom, negotiation and good faith also exist in the Anglo-Saxon based Pakistani contract law, but this freedom is not related to the free will of the parties, instead, it is linked with the freedom of forming a contract alone. The notion of the free will of the parties is set aside focusing more on maintaining the economic aspect of a contract. Thus, justifying the consent based on objective theory, where only the external will of the parties in the making a contract is taken into consideration while ignoring their internal will. The heightened utilitarian aspect of contract under Pakistani contract law can be reduced to a lesser level by emphasizing the need to give privilege to the free will of the parties. To ensure that contract is made keeping in mind the autonomy and free consent of the parties, which is otherwise abandoned in an unconventional manner stretching beyond the basic concept of the contract i.e. the *promise*. It is provided expressly in the Second Restatement of Contracts[542] stating, 'the contract is a *promise* or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty'. Here again, the significance is given to the promise or set of promises, despite the free will. For making Pakistani contract law fairer and more promising, the concept of parties' autonomy must be introduced in the contract law.

[541] Pringsheim (1933-1935) 252.

[542] American Restatement 2nd of the Law of Contracts.

Moreover, it is a cultural framework a certain community is set in, which determines what they believe to be binding. The agreement between the parties serves as a cornerstone of any contract, as said before. Consequently, a few general remarks are going to connect to this general concept of an agreement and a contract, in order to alleviate the work of this thesis. Let's highlight certain aspects and pinpoint information which might facilitate this aim. By using parallel terms 'Roman' and 'Pandectist', the scope of the thesis enlarges. The reason for this is the difference in the goal of these two giants: the Romans were striving for justice first and foremost. However, within this framework and behind every single case, the inherent justice stood in the centre.[543]

The Pandectist scholars of the 18th and 19th century aimed at building up a system, whereas this system did not necessarily exist in real life (or at least not in the form as they imagined it). Despite this, through sheer abstraction, they had managed to make up a black box of legal rules primarily stemming from and based on Roman law, i.e. Emperor Justinian's Roman law. Suffice it to refer to the monumental work by Savigny, "System des heutigen römischen Rechts" where he sets out to define Pandektenrecht. With this regard, among other elements, he reaches back to Justinian's codification, but he is positively reluctant to go beyond that. The German scholar, Christian Wolff (1679—1754) defined the system as truths connected to one another (veritates inter se connexae). One of the indisputable doyens of Pandectistic, Theodor Mommsen (1817—1903) went even further with the statement: "Das System ist seine eigene Wahrheit". These two bottom-line approaches clearly highlight an idea of imagining a system; an attitude borrowed from the field of natural sciences. The Romans, by comparison, failed to make a quest for a bigger picture (even if they perceived one).[544]

As for the concepts, when the BGB was drafted, the cornerstone notion was "Rechtsgeschäft", which was deemed as a declaration of will by both parties aiming to achieve particular legal consequences. The Roman approach also knew a similar concept; that of "*negotium*". This term consists of two morphemes: "*nec*" and "*otium*". The latter refers to free time or leisure time, while the first one, "*nec*" was used to imply negation ("*nec pro non*"). Thus, "*negotium*" denotes a period in which they used to carry out business, as it is no free time or leisure time (*nec* + *otium*). Additionally, it is clear from the primary ancient sources that the Romans used it mainly as a common, everyday term, which developed additional legal meaning, whereas the German "Rechtsgeschäft" is purely a legal notion meant to serve exclusively legal purposes. To stay with the Romans, first the notion of "*pactum*" bears significance. The deep and direct connection to contemporary English is obvious and undisputable. That is a further reason to linger with the original Roman concept behind them; to see the gradual changes that occurred during the centuries. The term "*pactum*" derived from the noun "*pax*", that is peace, as Ulpian again leads "*pactum*" eventually back to "*pax*" (cf. Ulp. D. 2, 14, 1, 1 [4 ad ed.]: *Pactum autem a pactione dicitur (inde etiam pacis nomen appellatum est*). Thus, the reference to peace in connection with "*pactum*" is also clear to have an implication of easing, alleviating a tense situation.[545]

"*Consensus*" and "*contractus*" are again two terms, which also exist in modern languages, but their sense is somewhat altered. "*Consensus*" is linked with the English term "consent"; but

[543]Note: Remarks of Dr. Prof. Janos Erdody has been added as part of his suggestions acting as one of the Opposition Examiner for my Preliminary Debate held on the 28th March, 2022.

[544] Note: Remarks of Dr. Prof. Janos Erdody has been added as part of his suggestions acting as one of the Opposition Examiner for my Preliminary Debate held on the 28th March, 2022.

[545] Note: Remarks of Dr. Prof. Janos Erdody has been added as part of his suggestions acting as one of the Opposition Examiner for my Preliminary Debate held on the 28th March, 2022.

whereas English "consent" implies one person's agreeing to something (of a unilateral character), the Latin "*consensus*" contains the prefix "*con-*" which signifies "together, with others". Therefore, the Latin term designates mutual agreements, and sometimes even mutual sympathy for the other party's situation. As for the origins of "*contractus*" there are two approaches. According to the one, it is derived from "*contra*" and "*agere*". This implies activities carried out together, while these activities affect one another, respectively. The other one sees "*contractus*" as a derivative of the verb "*contraho*", which is regarded as a contraction of "*con*" (with) and "*traho*" (pull). With any etymology the bilateral character and mutual consent as foundation stones are apparent. Based on Roman law traditions, this "agreement element" resulted in the French Civil Code claiming expressly: Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites (Code Civil Art. 1134).[546]

There is one more term, "*conventio*", which is again a common and widespread term in modern continental law as well. When we are to discover its ancient origins, reference should be made to Ulpian again, who explains the prevalent use of the verb "*convenire*" as the root for the noun. He asserts that the verb means that certain people gather, congregate at a particular place, thus reaching a common standpoint, even if they originally had various and different intentions (cf. Ulp. D. 2, 14, 1, 3 [4 ed.]: "*[...] nam sicuti convenire dicuntur qui ex diversis locis in unum locum colliguntur et veniunt, ita et qui ex diversis animi motibus in unum consentiunt, id est in unam sententiam decurrunt*"). For a first glimpse, it may seem far-fetched, yet not unlikely, that the classical jurist describes the psychological process of deliberation and agreement. Ulp. D. eod. 1, 3 (4 ad ed.)

"*Conventionis verbum generale est ad omnia pertinens, de quibus negotii contrahendi transigendique causa consentiunt qui inter se agunt: [...] adeo autem conventionis nomen generale est, ut eleganter dicat Pedius nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re sive verbis fiat.*"[547]

In Ulpian's text the general term is "*conventio*", regarding which he strongly insists that there is no contract, no obligation without "*conventio*". As this excerpt makes part of the famous and widely known definition of "*ius*" ("*[...] ut elegenater Celsus definit ius est ars boni et aequi [...]*"), the reference to *conventio* is positively a practical example of how this *ars boni et aequi* was meant to work. The importance of *conventio* in the Roman thought resides in the fact that within the scope of contracts in general, the so-called nominate contracts are characterised by the subsistence of a *causa*, a legally accepted reason for the *conventio*. If this *causa* was present, it rendered the contract legally disputable. In other words, in this only case was it possible to bring an *actio* against the other party. *Consensus* in the sense of agreement as the exclusive element in forming a contract is a modern achievement (cf. with this regard the ideas of the Dutch humanist Hugo Grotius [1583 — 1645]), or Samuel Pufendorf [1632 — 1694], Christian

[546]At this point it should be noted that a reference is also made by the author herself to Aristotle's idea of contract, based mainly on Aristotle's Rhetorics. Additionally, another text could be taken into account here, which is all the more interesting because it clearly underpins what the author is willing to express with this regard. Arist. Eth. Nic. 1131a: "[...] τῶν γὰρ συναλλαγμάτων τὰ μὲν ἑκούσιά ἐστι τὰ δ᾽ ἀκούσια, ἑκούσια μὲν τὰ τοιάδε οἷον πρᾶσις ὠνὴ δανεισμὸς ἐγγύη χρῆσις παρακαταθήκη μίσθωσις [...]" — "[...] the two classes of private transactions, those which are voluntary and those which are involuntary. Examples of voluntary transactions are selling, buying, lending at interest, pledging, lending without interest, depositing, letting for hire; these transactions being termed voluntary because they are voluntarily entered upon". Cf. H. RACKHAM (translator): *Aristotle in 23 Volumes*. Vol. 19. London, William Heinemann Ltd, 1934. The terms 'voluntary' and 'involuntary' refer to the existence or the lack of a mutual consent of the parties, respectively.

[547] Note: Remarks of Dr. Prof. Janos Erdody has been added as part of his suggestions acting as one of the Opposition Examiner for my Preliminary Debate held on the 28th March, 2022.

Thomasius [1655 — 1728] and Christian Wolff [1679 — 1754] of German origins, as well as French Jean Domat [1625 — 1696] and Robert Joseph Pothier [1699 — 1772]). All these scholars play a paramount role in the development of continental continental law as the precursors of German BGB, or French Code Civil. Besides many other topics, their discussion was about whether an agreement is the result of a declaration and its acceptance, or rather an agreement is a common declaration of will by both parties targeting at the object of the agreement. In the first case, it is the parties' will which stand in the centre, whereas in the second case it is the object, which is in the focus; consequently, two declarations are necessary, respectively (Pufendorf). In the background of conventio, Christian Wolff saw a unilateral promise of both parties directed to the very same object.[548]

However, an agreement as a fundamental element is present in any contract because it is based on mutual promises. Both parties promise to provide a service specified by the parties themselves. These mutual promises make the parties bound, as the Institutes of Justinian puts it eloquently *"obligatio est iuris vinculum"*. Generally speaking, the parties are considered to be bound to one another, though in reality they are bound to their own promises. I fulfil the obligation not because the other party could expect me to do so, but because I gave my word to do so. To prove this, any keyword reference to *obligationes naturales* is enough.[549] A natural obligation means that debt and responsibility to fulfill the debt are separated. In other words, I owe, but I am not responsible for it. It follows that the debt cannot be claimed from me, although I owe it, i.e. if I voluntarily discharge the debt, it cannot be claimed back from me in the form of unjust enrichment (undue payment).[550]

The notion of the sanctity of contracts, pacta sunt servenda, is one of the few laws for the organization of society that has such a deep moral and theological significance. This notion was refined in a notable fashion in ancient times in the East by the Chaldeans, Egyptians, and Chinese. The national gods of each party were involved in the creation of the deal, according to these persons. The gods were, in a sense, the pact's guarantors, and they threatened to interfere against the party that broke the deal. As a result, the process of creating a contract became entwined with serious religious formulae, and a contract cult arose. The notion of pacta sunt servenda has a theological basis for Muslims: "Muslims must abide by their requirements." In several places, the Quran expresses this plainly. The Mediterranean peoples had a similar interest in controlled commerce, which was added to the religious purpose. The Romans' legal sense realized that a well-regulated trade could only exist if contracts were honored. Contracts were then, like before, regarded to be under Divine protection. But, at the time, their psychological foundation was, above all, the need for a legal framework to govern international contractual ties. The sanctity of contracts was greatly influenced by Christianity. Its basic idea demanded that one's word be kept, as it is clearly expressed in the Gospel according to St. Matthew, in particular, where it is said, at Chapter 5, Verses 33 to 3, at the end: "But let your communication be, Yea,yea: Nay, nay: for whatever is more than these cometh of evil."[551]

[548] Note: Remarks of Dr. Prof. Janos Erdody has been added as part of his suggestions acting as one of the Opposition Examiner for my Preliminary Debate held on the 28th March, 2022.

[549]Note: Remarks of Dr. Prof. Janos Erdody has been added as part of his suggestions acting as one of the Opposition Examiner for my Preliminary Debate held on the 28th March, 2022.

[550]Notes: Added remarks of my Supervisor - Dr. Prof. Jozsef Benke, in response to the suggestions made by the opposition examiner – Prof. Erdody.

[551]Wehberg, Hans: Pacta Sunt Servanda. In: The American Journal of International Law 53/4 (1959) 775–86, esp. 775.

The term 'aqd' was used in the Qur'an's Surah al-Ma'idah meaning contract.[552] The definition of the phrase has been debated among Islamic jurists. The view of Imam Raghib al-Isfahani appears to be the most persuasive of them all. 'Aqd,' he claims, encompasses all types of contracts, which he categorizes as follows: To begin, make a covenant with Allah to trust in Him and to follow His precepts in the manner of His prophet. Second, the pledge, promise, or commitment that one makes to oneself. Last but not least, a contract between two people, groups, parties, or governments. As a result, Muslim people, companies, and states are compelled to fulfill all types of contracts, as the Qur'an demands in the following words: "O those who believe, fulfill the contracts." Allah, the Creator of the Universe, has given this instruction as a must. The first verse of Surah Ma'idah, which was revealed at the end of Prophet Muhammad's life, is this (peace be upon him). "Surah Ma'idah is from what has been revealed towards the end of the revelation of the Qur'an," the Prophet is claimed to have remarked regarding this Surah (and hence about the above verse). So, whatever has been made legal there will remain legal forever, and whatever has been made illegal there will remain illegal forever." This signifies that treaty obligations, which are rendered obligatory (fard) in this Surah of the Qur'an, must be fulfilled. This instruction is so significant that the entire Surah is referred to as Surah al-aqud (Chapter of Promises). Its significance may also be shown in the fact that when the Holy Prophet appointed Sayyidna 'Amru ibn Hazm as Governor of Yemen, he included this verse at the top of the edict. Fulfilling a treaty is thus a fundamental religious responsibility for any Islamic government or state. In the subject of Siyar, Muhammad places a significant focus on the notion of pacta.[553]

After accepting Islam's monotheistic creed and becoming a Muslim, it is his responsibility to keep all kinds of pledges. It is unworthy of him to abandon them. Doing so, on the other hand, is a symptom of hypocrisy. "The signs of a hypocrite are three: anytime he talks, he lies; whenever he makes a promise, he invariably breaches it; and if you trust him, he shows to be dishonest," the Prophet said. "And do not make your oaths a deception to take advantage of one another," Allah says, urging believers to avoid this devious attitude. Otherwise, they may lose their faith (Iman) and become hypocrites: "or else your strong foot will slip" (on the path of truth). "Surely the hypocrites be hurled into the lowest depths of hell, and you shall find none to assist them." Second, Allah has commanded Muslims to do justice and be kind to others while also avoiding indecency, wickedness, and transgression (of the limits set by Him). According to Qur'an interpretations, justice and goodness are defined as follows: "Justice means that one should give the right of the other person in full and take what comes to him, neither less nor more; then, should someone hurt you, you hurt him only as much as he did, no more.[554]" And being nice involves giving the other person more than he deserves and ignoring your own right to the point where you accept it even if it turns out to be less than due. Similarly, rather of exacting equal revenge on someone who harms you physically or verbally, you should forgive him and, in reality, return the evil done to him with what is beneficial for him. Thus, the demand to perform justice appears as Fard and Wajib (obligatory and required as duty), but the instruction to be good seems as a voluntary (Nafl) deed motivated by a well-intentioned desire to do more in the path of what is good. Among other things, doing justice entails maintaining commitments. And it is a transgression to break them. As a result, breaking pledges or commitments after they have been made is a significant offense in Shariah, and it is punishable in the Hereafter. According to the Prophet, on the Day of Resurrection, a flag will be put on the back of the pledgebreaker, which will be the cause of his or her shame there.

[552]The Holy Quran: Surah 5, Verse 1.
[553]Zahid, Anwar: Pacta Sunt Servanda: Islamic Perception. In: Journal of East Asia and International Law 3/2 (2010) 377.
[554]Zahid (2010) 378.

Furthermore, Allah must punish such a wrongdoing in this life as well. According to the prophet, there is no sin save injustice (transgression), for which there is swift reprisal and punishment. Allah, on the other hand, will assist the victim of injustice. Acting against anything that has been sworn by someone is likewise a big offense. And fulfill Allah's Covenant when you promise, and do not breach oaths after you have seriously sworn them, while you have made Allah a witness over you, declares Allah in the Qur'an. Allah, without a doubt, is aware of all you do.[555]

The pacta doctrine is of divine origin in the Islamic legal system, according to the explanation above. It is a holy habit (Sunnah) of the Prophet and an obligatory mandate of Allah (peace be upon him). It is an integral aspect of the Muslim faith (Iman). Allaah has instructed them to keep their pledges in order to maintain their faith and to do justice to others. Otherwise, both this world and the next will be punished. As a result, believers must follow all agreements, including international treaties, unless they are in violation of Shariah law. By actually following on Allah's instruction, the Prophet has given the finest example of honoring commitments. He upheld treaties with foreign countries despite strategic drawbacks, humiliation, and dangers to his society (Ummah). Despite his and the Muslim community's undeniable strength and authority following the conquest of Makkaah, he kept his treaties until the agreed-upon time limit had passed. He showed charity to the Quraysh, who had broken the Hudaibiyah pact, and promised them relief for the'sacred months' (four months in length). He could have immediately slain them, exiled them from Makkaah, or taken other retaliatory steps, but he chose not to. He pardoned them and offered them time to adjust to Muslim life, failing which they may leave outside of the Arabian Peninsula. He did not forcibly convert them to Islam. He allowed them to make their own decisions. He maintained the door open for them to adopt Islam. And it wasn't out of self-interest; rather, it was out of concern for their salvation in the hereafter. And it was the main reason he came as mankind's final Prophet. As a result, the pacta doctrine is regarded by Muslims as a holy principle of faith, religion, and law. The idea came from Allah, and the Prophet put it into practice in real life, establishing an example for Muslims and the rest of the world. This principle's goal is to please Allah by honoring both pledges made to Him to follow Him and promises/agreements/treaties made with mankind. This goal goes much beyond what the West considers to be the commonplace goal of social good. As a result of implementing Allah's word, Islam wants societal harmony and stability. In that situation, Allah's pleasure is the goal, adhering to the concept of pacta is a method to achieving that goal, and peace and security in this life are a result of striving toward that goal.[556]

The idea of contract sanctity is a necessary requirement of any social community's existence. The international community's life is founded not just on state-to-state connections, but also, to a growing extent, on state-to-state and state-to-foreign corporate or individual relationships. Without the idea of pacta sunt servenda, no economic interactions between two parties may exist. So far, it has never been challenged in practice.[557]

3.3.2. Consideration

As stated in the Principles of European Contract Law (PECL), 1995, “A contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form. The

[555]Zahid (2010) 378-379.
[556]Zahid (2010) 384-385.
[557]Wehberg (1959) 775–86, esp. 775.

contract may be proved by any means, including witnesses."[558] This notion of contractual freedom as to the form of a contract is commonplace in the EU contract law in contrast with Pakistani contract law, where this requirement is a rare incident. However, recently the trends have changed and slight shifts towards less strict requirements as to the form of contracts are in operation, including the ones related to the sales contracts. Article 2:101of the PECL states that the freedom of contract as to its form reduces the strict requirement of a specific form of a contract in such a manner that a contract is deemed valid and effective if the parties intend to remain legally bound after reaching an agreement without any further requirements.[559] Thus, it can be inferred that a valid contract can be made between the parties without the need of any specific form as required under the Pakistani contract law i.e. the necessity of consideration for a valid contract[560], and under the French contract law i.e. the requirement of lawful, certain content[561] for a valid contract. With the changing needs of the market economies, both the system needs to incorporate the PECL notion of contractual freedom to form a contract to make way for the easier conclusion of contracts.

Moreover, the strict requirement of consideration in the Pakistani contract law has been under debate as it is no more considered consecrated. This stringent requirement gave rise to problems that hindered the contract formation, which would otherwise be considered as valid agreements. For that purpose, a comparative analysis of consideration and cause has been undertaken above. From that comparison, both reflect different ideas as consideration cannot be equated as the cause behind a legally binding contract and therefore, both may result in differing solutions for a given problem at times. However, at other times, consideration can be replaced with the French concept of lawful, certain content to help find a suitable solution for problems arising under Pakistani contract law that provides a relatively liberal interpretation demonstrating the respect that the French Contract law holds for the independence and free will of the parties along with the principle of morality.[562] Furthermore, over time, the compulsory requirement of consideration for a valid contract in the Pakistani contract was steadily softened. The prior requirement of consideration as a must condition in a valid contract has been mitigated over time, providing that the consideration is deemed to be fulfilled in cases where a promisor aims at gaining some benefit or avoiding any loss. At present, the requirement of consideration is regarded as a mere proof of the intent of the parties to stay legally bound by their contract, consideration has lost its essential value in both the commercial as well as written contracts.[563]

3.3.3. Privity of Contract

The concept of privity of contract was originally established under the Anglo-Saxon law regime as it centres more on the core issue determining the party suited to file for damages, instead of determining the rights of parties under a contract. However, this concept has raised concerns and issues over the last few decades causing inconvenience to the market practice. Resultantly, many Anglo-Saxon law countries have adopted legislation acknowledging the rights and benefits of third parties. On 11 November 1999, the Contracts (Rights of Third

[558]See Art. 2(101): Lando, O., Principles of European Contract Law – PECL, Tras-Lex Law Research, https://www.trans-lex.org/400200/_/pecl/ (23 April 2021).
[559]Lando, O./ Beale, H. (eds.): Principles of European Contract Law, Part I and II Combined and Revised (The Hague: Kluwer Law International, 2000) 561.
[560]See American Restatement 2nd of the Law of Contracts: Sec.17, 71, 79.
[561]See French Civil Code: Article 1128 / Supra 176: Chapter 2.
[562]Nicholas (1992) 118.
[563]See Rann v. Hughes case: (1778) 7 TR 350.

Parties) Act received the Royal Assent thus removing the doctrine of privity.[564] This Act aimed at introducing contracts for the benefit of third parties into the Anglo-Saxon law. Over time, the rigidity in this stringent concept of privity of contract diminished. This led the courts in Pakistan to give rights to a third party so that the contracting party may protect themselves from any unnecessary litigation. A deeper analysis of several case laws made it even clearer that besides the increased recognition of the concept of privity of contract, efforts were in process for the protection of third party's rights. These efforts towards recognition of the rights of the third parties were imported from the German and French contract laws. The courts in Pakistan and other Anglo-Saxon law countries have already intentionally acknowledged the rights and benefits of the third party under certain exceptional circumstances. Both the precedents and Statutes favoured the idea of conferring the rights to a third party in instances where its interest is directly involved. This recently enhanced acknowledgement of the rights of third parties by the Pakistani contract law spares the courts from numerous unnecessary litigations on a day-to-day basis.

3.3.4. Duty to Perform and Good faith

As aforementioned, the performance of a contract must be done within the stipulated time or within a reasonable time. The issue however arises with the Pakistani contract law when the performance is deemed to be done within a reasonable time. The court has to declare the reasonability of performance in case a party fails to do so. In such matters, instead of seeking the court's help, it is worthwhile to endorse the idea of the German contract law, that states the parties are bound to perform the contract within the stipulated time or otherwise they face a 'notice of default' which provides a grace period in which performance must be done. The inclusion of the concept of 'notice of default' within the Pakistani contract law can help clarify the period of performance, resulting in better achievement of contractual goals. Moreover, the idea of importing the duty of good faith from the German and French contract law into the Pakistani contract law is open to debate. The application of the duty of good faith varies across different jurisdictions of the Member States of the EU, for example in Germany the concept of duty of good faith functions as a 'judicial oak that overshadows the contractual relationship of private parties[565]'. This high esteem for the ideal of good faith has paved the way for other EU countries to follow it with the same spirit as France and outside the EU like Brazil. As Pakistan follows the English law, it can be detected that historically Anglo-Saxon law was more antagonistic to the ideal of good faith in contracts i.e., 'adamantly refusing to recognize any such duty of good faith whatsoever[566]'. England was a rare Anglo-Saxon law jurisdiction found in the EU before the Brexit. Therefore, it was not difficult to understand the import of this concept into the English legal system.[567] However, there was reluctance in the complete adoption of this in England earlier, but recent decisions passed by the English courts suggest that it is becoming friendlier to the concept and application of the duty of good faith in contract

[564]Dean, M.: Removing a Blot on the Landscape – The Reform of the Doctrine of Privity. In: Journal of Business Law 4/1 (2000) 143-152.

[565]Ebke, W.F./ Steinhauer, Bettina M.: The Doctrine of Good Faith in German Contract Law. In: Beatson, Jack/ Friedmann, Daniel: Good Faith and Fault in Contract Law (Oxford: Oxford Scholarship Online, 2012) 171.

[566]Farnsworth, E.A.: A Anglo-Saxon lawyer's View of His Civilian Colleagues. In: Louisiana Law Review 57/1 (1996) 235.

[567]The Unfair Terms in Consumer Contracts Regulations, 1994 (The Unfair Terms in Consumer Contracts Regulations, 1994, no. OJ No. L95, 21.4.93): 29.

law.[568] The same idea of good faith is applied in Pakistani contract law by the courts by providing the parties with such terms which they would have not otherwise foreseen.[569]

3.3.5. Force Majeure / Frustration of contract

The courts in Pakistan do not possess the authority to either alter or modify the contract under changing circumstances as provided to the courts in Germany and France. Unlike the contract law of Germany and France, the Anglo-Saxon law based Pakistani contract law also bears no clear or definite meaning of the term 'force majeure'. Therefore, when the parties conclude a contract in Pakistan, they must specify such events that account for force majeure in the contract excluding their accountability for non-performance. This leads to extensive and lengthy force majeure clauses in the Pakistani contracts, as the parties aim to include all such force majeure events in the contract as possible. In the event of force majeure, the contract between the parties is regulated according to the already stipulated force majeure clauses in the contract or otherwise, the issue is settled by the court that either modifies or terminate the contract, as it deems fit.

While, the German and French contract law applies a different connotation to the concept of force majeure, which is only applicable in situations of the substantial impossibility of contractual performance. In that sense, both the German and French contract law concept of *force majeure* is different from that of the Pakistani contract law concept of *frustration*. In addition, both the German and French contract laws do not recognize a long list of force majeure events, and thus the contracts in these regimes are comparatively less extensive than the Pakistani contracts. Where there is a substantial change in the economic conditions, the German contract law applies the doctrine of changed circumstances i.e., *clausula rebus sic stantibus*[570] since the First World War. It means that the German contract law functions independently of any party agreement in cases of force majeure, thereby protecting the parties from any loss even if there is no force majeure clause in the contract. As the German and French contract laws are based on the idea of fault for determining liability, the force majeure events would lead to exemption from performance to the party in question. Whereas the Pakistani contract law does not recognize the concept of fault for liability, therefore the whole contract would be terminated without excusing any party for non-performance.[571]

To find a resolution to the instances of *frustration* under Pakistani contract law, the doctrine of *force majeure* from the German or French contract law can be employed. This incorporation can help the parties in Pakistan to conclude contracts entailing less lengthy details for force majeure clauses, along with the facilitation of such clauses through courts in case the parties forgot to mention them at the time of concluding the contract. Moreover, if the Pakistani contract law replaces its concept of frustration with that of force majeure, it would save the parties from facing termination of the whole contract in such events. Resulting in the exoneration of liability of the party required to perform the contract and if the parties so desire, they may continue the same contract once the events of force majeure are removed.

The replacement of the frustration clause by the force majeure clause in the Pakistani contract law bears multiple benefits. Firstly, this clause entails the idea of suspension of the contract for

[568] See Yam Seng Pte Ltd. v. International Trade Corporation case, 2013: EWHC (QB) 111.

[569] Easterbrook, F.H./ Fischel, D.R.: Contract and Fiduciary Duty. In: The Journal of Law & Economics 36/1 (1993) 425.

[570] Schlechtriem (2002).

[571] Mulcahy (2008) 127.

a limited period on the happening of a force majeure event.[572] Secondly, it provides the parties with the opportunity to flee from the restrictive view of the concept of frustration. Thirdly, it possesses remedial flexibility i.e. the parties to the contract are provided with the opportunity to decide what would happen in cases of force majeure events.[573] Similarly, the incorporation of hardship clauses[574] in the contracts at the time of conclusion also gives parties the advantage to continue their contractual relationship based on different terms and conditions, which the traditional Pakistani contract law (specifically Anglo-Saxon law) does not allow, as the courts in Pakistan possess no authority to alter the contracts with the changing circumstances.[575] Moreover, the intervener clause also reflects much similarity to the hardship clause with the exception that it authorizes a third party e.g. an arbitrator to decide the matter between parties to the dispute. The decision of the arbitrator is considered final and authoritative; in case the parties fail to come up with a mutually agreed solution.[576]

3.3.6. Breach of Contract and Remedies

The stringent concept of strict liability in the Pakistani contract law for the breach of contract has recently been mitigated. This alleviation has been witnessed in the instances of unforeseeable circumstances at the time of the formation of a contract and due to the German and French contract law ideals of the requirement of fault for liability. The German Civil Code states that "the debtor is responsible for deliberate acts and negligence[577]" and that "the debtor is not in default as long as the performance does not take place because of a circumstance for which he is not responsible[578]". This condition of fault to justify liability for breach of contract seems to be reasonable and should be incorporated in the Pakistani contract law to minimize strict liability and promote a rational basis for enforcing liability clauses. Moreover, the difference between liquidated damages and penalties in the Pakistani contract law also creates confusion and interpretation issues. Whilst the liquidated damages signify genuine estimation of the harm suffered by a party, the penalties stand for the extravagant and excessive amount in contrast with the loss that could have happened by the contract breach.[579] In consequence thereof, the courts are reluctant in enforcing penalties and allow liquidated damages as a suitable remedy to the affected party from the breach. According to some Anglo-Saxon law experts, the contract law notion of compensation is not ideal in the economic sector. As a result, the parties are advised to define the number of damages under the heading "liquidated damages" during the contract creation process. However, to ensure that such clauses are fair, courts examine the liquidated damages in light of actual or projected harms that occurred, as well as the degree of difficulty in proving them.[580] If nothing of substance is uncovered during the liquidated damages determination, the court declares that such a clause is void. The Pakistani contract law can also employ either German or French contract law methodology in handling the issue of breach of contract. The EU law, especially the French law, uses the term

[572]Mulcahy (2008) 133.

[573]Cartwright, J.: Contract Law – An Introduction to the English Law of Contract for the Continental lawyer (Oxford: Hart Publishing, 2013) 260.

[574]Mulcahy (2008) 136.

[575]Mckendrick, E.: Contract Law, Text, Cases and Materials (Oxford: Oxford University Press, 2012) 402.

[576]Papp, T.: Frustration and Hardship in Contract Law from Comparative Perspective. In: Acta Juridica et Politica 77/33 (2014) 421-430.

[577]See German Civil Code: Sec. 276.

[578]See German Civil Code: Sec. 285.

[579]Beale, H.: Chitty on Contracts (London: Sweet & Maxwell, 1983) 958.

[580]See Uniform Commercial Code UCC, 2001: Sec. 2-718.

'*clause penale*[581]' which specifies the amount of money that the creditor secures from the debtor in case he fails to perform his part of the contract. This amount should be per the estimated loss endured by the aggrieved party[582], and can be mitigated by the court under such circumstances as it deems fit or where such amount stands in sheer contrast with the notion of good faith.[583]

To make matters more complicated, enforcement of remedies is dependent on the state's involvement. In various legal systems, the state plays a distinct role. As long as the State is not involved, contracts cannot be enforced in that state. Since there are no remedies for violation of contract, the state's role would be limited. As for the enforceability of contracts and remedies for their breach in states with either common or continental law regimes, the state plays a separate though potentially important part. To provide efficient contractual remedies, continental law regimes like the EU limit government interference. While in Anglo-Saxon legal systems like Pakistan, government participation is stronger, resulting in a reduced role for the state in providing effective contractual remedies for individuals.[584] This practice of continental legal systems can also be imported to the Pakistani Anglo-Saxon legal system to ease the smooth and free working of legislation.

3.4. Summary

In the end, let's review in brief the two major issues covered in this chapter: harmonizing the contract law across the entire EU into one single, uniform civil code, and bringing solutions to the existing practical problems of theoretical legal techniques in Pakistan through the lens of EU contract law. On the issue of harmonization of the EU Civil Code, several scholars and practitioners are of a progressive opinion, investigating the many possible ways to bring harmonization among different legal systems of the EU. The mission of exploring these existing means to unify the continental law of the EU into one single code is pain-taking and complicated. The task of undertaking comparative research of the contract law in the various Member States demands a comprehensive analysis of not only two States but more than two. Due to a simple reason, the law of any country develops into a system, which if amended improperly leads to the ruining of such a system. An explicit example of such a task has been the UNIDROIT instrument - Principles of International Commercial Contracts[585]. To bring into reality these UNIDROIT Principles, it took almost twenty years i.e. from 1971 to 1994, but they are still considered to be academic recommendations. This is because the Member States are not ready to amend their national laws per these UNIDROIT Principles or with the fact that the laws of some other Member State are superior to theirs. The supporters of the harmonization struggle have faced relative successes, for instance in efforts to harmonize the EU law by way of a few directives namely the directives related to consumer protection and company law etc. Even though these directives permit a certain degree of leniency in the mode of their application, yet the actual move towards harmonization of the Member States' laws have been made. An Association Agreement was signed in 1995 among Latvia (including other central and eastern European countries) and the EU. In accordance with that agreement, Latvia and those countries had a fundamental duty to it bring into conformity their domestic laws according to the EU Directives.

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[581] Schlesinger (1998) 493.

[582] Benjamin, P.: Penalties, Liquidated Damages and Penal Clauses in Commercial Contracts: A Comparative Study of English and Continental Law. In: The International and Comparative Law Quarterly 9/4 (1960) 600.

[583] Zimmermann (2000) 15.

[584] Oliver Wendell Holmes (1991) 143-190.

[585] International Institute for the Unification of Private Law: UNIDROIT - Principles of International Commercial Contracts, 1994.

Concerning the second issue, it can be said that while studying or analyzing the law in a comparative aspect, there may arise situations in which the same legal term gives rise to multiple meanings or several different legal terms result in the same legal effect. Such situations may lead to confusion for the law practitioners or their clients. The reason for this confusion is the fact when either a continental lawyer faces Anglo-Saxon law issues or vice versa. Although certain problems find similar solutions in both the legal systems, yet it cannot be denied that both systems differ from each other in their legal structure, classification, fundamental concepts, or terminology etc. All these differences cannot be addressed in any single piece of research work or even books[586] of comparative law. Moreover, any attempt to give superiority based on their significance to these differences between both the legal systems would be an uphill task. Hence, this chapter offers a coordinated account of differences among the various theoretical legal techniques between the contract law of the common and continental legal systems e.g. definition of contract, consideration, the doctrine of privity of contract, duty to perform and good-faith, frustration of contract/force majeure, breach of contract and remedies. While reflecting upon these differences, it becomes clear that these conceptual differences give rise to a similar pattern in certain situations. In other situations, the differences can be employed or imported into the legal systems of one another to find a better solution to the existing issues.

To be specific, the examination of two systems of contract law - Pakistan and the EU - reveals several differences based on the fact that the two different legal systems possess different histories and traditions. Yet the significance of these differences depends, most likely, on their potential to pave way for solutions to the existing problems. Sometimes these differences are not so obvious to the Pakistani or the EU lawyer. They may be shocked when they realize that their legal systems do not provide the same meaning for certain fundamental terms like the definition of a contract, as aforementioned. However, the existence of these differences paves the way for finding common solutions or common ground for harmonizing the laws among different legal jurisdictions. Such efforts account valuable for many reasons. Firstly, such efforts provide a platform for the lawyers and academics to understand the difference in legal language through debates or consultation to remove any confusion or misunderstandings. Secondly, these efforts bring the lawyers and academia into contact with new ways of dealing with a common issue and finding a common solution to that issue. Thirdly and finally, these efforts point towards the ultimate goal of convergence of these two differ these two different legal systems in certain aspects[587].

[586] See, for example, Zweigert, K./Kotz, H.: Introduction to Comparative Law. Third Edition. (Oxford: Clarendon Press, 1998).

[587] Treitel (1995) 743.

Chapter 4: Comparison of Contractual Rights of Women between Europe and Pakistan regarding Gender Equality Issues

Abstract

This chapter emphasizes the comparative analysis of the legal status of women between the Pakistani Shariah based Anglo-Saxon legal system and the European Continental legal system. In the beginning, the chapter provides a brief outlook into the basic themes of the previous chapters, along with an insight into the primary research questions to be discussed in the current chapter. Gradually, the chapter builds into a detailed account of the historical as well as the recent situation of women's status in the England and EU. Through this elaboration, the chapter then seeks to compare the reasons and outcomes for choosing a comparative methodology for the legal status of women, especially in Pakistan and the EU. Moving on, the chapter concentrates on elaborating the contractual rights of women in Pakistan through the lens of the prevailing Shariah law system and EU under the Continental legal system accompanied with relevant case-laws. This elaboration is provided to make a comprehensive comparative analysis of available rights and legal statutes of women in both Pakistan and the EU. This comparative approach helps in finding solutions to the existing gender inequalities in Pakistan by adopting the methodology adopted by the laws and regulations in the EU. In the end, the chapter concludes with comprehensive essence of the entire topic in addition to calls for reforms and several governmental initiatives to foster the status of women in Pakistan.

Keywords: *Comparative Law; Pakistan v. EU; Status of Women; Women Contractual Rights; Reforms and Initiatives.*

Introduction

Before we begin to explore the contents of chapter 4 in detail, it seems wise to take a quick review of the previous chapters, written so far. Chapter 1 of my thesis develops into the significance of comparing contract law as a means to address gender equality issues between Pakistan and Europe along with the reasons for such comparison. Chapter 2 provides a detailed account of Shariah legal system operating in Pakistan with an in-depth overview of the general legal status of women in Pakistan. Chapter 3 deals with two main issues: 1) issues related to the emerging concept of harmonization of EU private law especially a uniform EU Contract law to ease the understanding of core contractual concepts in EU, and 2) issues related to the varying interpretation of the contract law concepts related to the theoretical legal techniques in EU and Pakistan and comparing them to find out a common core or solutions for such issues. Chapter 4 seems to be an honest attempt at combining all the relevant research in the forgoing chapters and concentrating it to focus on issues of gender equality in terms of contractual rights in Pakistan. The basic questions to be answered in the current Chapter include the following:

i. *Why choose comparative methodology concerning the status of women between Pakistan (Anglo-Saxon law mixed Shariah legal system) and EU (Continental legal system)?*
ii. *Why compare Contractual law based Theoretical Legal Techniques (TLT) or Contractual rights of women between Pakistan and EU?*
iii. *Are there any case studies involved while making the said comparison?*
iv. *What is the outcome of the above-said comparisons?*

Part 1: Why choose comparative methodology concerning gender equality issues between European Continental legal systems and Pakistan as Anglo-Saxon mixed Shariah legal system?

The existence of inequality between the status of men and women in Pakistan and the EU leads toward the main reason for comparing two different legal systems. The comparison is aimed at bringing harmony between the unequal status of both genders in Pakistan by looking up to the example of the EU and taking measures to incorporate better levels of equality between the two genders. This can only be made practical after a thorough analysis of the status of women in Pakistan (explained in detail in Chapter 2 of the thesis) and the EU, both in past as well as present context.

The unequal status of women governed under Shariah law is believed to be due to the prevalence of religion and patriarchal norms, just like Pakistan. Although many other explanations support the argument for the unequal status of women in Pakistan, my focus will be on the existence and persistence of religion and patriarchal norms in the country. One group of scholars believe that religious norms are the main reasons behind the prevalence of the unequal status of women in most Islamic countries, including Pakistan. The traditional interpretations of Shariah law assign traditional roles and duties for men and women along with a different way of treating both the genders[588]. For instance, Shariah law provides limited rights

[588]Donno, Daniela/Russett, Bruce: Islam, Authoritarianism, and Female Empowerment: What Are the Linkages?. In: World Politics 56/4 (2004) 582-607.

to women concerning the capacity of renouncing their marriage, inheritance, child custody, and even freedom of movement. Not only this, it is believed that religious laws and norms also pose restriction on women participation in the political process, and therefore, clearly excludes women from taking any role in political offices. Some scholars posit that these religious norms are known to be powerful barriers in the advancement of women rights due to the increased levels of religiosity in most the Islamic countries[589]. According to the research carried out by Ronald Inglehart and Pippa Norris, it is affirmed that there is a link between the Islamic culture and existing discriminatory behaviour between both genders in terms of education, political participation, economic activities etc[590].

Some other scholars base their arguments on the phenomenon of religious institutionalization as the core of gender inequality in Islamic countries, including Pakistan. That is, the high levels of organization and incorporation of religion into the political structures are to blame for the inequalities between men and women. Whereas researchers like Mala Htun and Laurel Weldon posit that the reason for gender inequality in Islamic countries is due to the relationship of that country/state with the religion, instead of the aforementioned religious norms[591]. In countries like Pakistan, the state religion is Islam and by recognizing such a relationship, Pakistan established several institutions based on religious ideologies such as courts, ministries, or educational institutes. By doing so, the country is faced with high levels of religiosity in a society of such nature that religion become the cornerstone of the country's power, identity, and legitimacy[592]. It is believed that recognizing religion as a state religion, levels the ground for an elevated resistance towards the rights of women, with special regard to the areas of family law where religious principles decree women rights. The situation worsened for the women in terms of reforms to their rights as the state-religion relationship hurls barriers in the way[593]. Moreover, by providing religion with state recognition, the religious elites/leaders are motivated to participate in the political process to hold onto their influence and resources[594]. Scholars also believe that this state-religion relationship gives supplementary validity to religious interpretations and/or elites, posing difficulty in makings any sort of changes to the religious laws[595]. Lastly, since any reforms to the rights of women contest the status of religion in politics, the identities of the State and its people are deemed threatened by their expansion and thus, denied.

The second group of scholars believe that the prevalence of gender inequality in most Islamic countries like Pakistan is due to the rising or continuity of patriarchal norms[596] and culture in the society. Although there might be differences in opinion, it is mostly contended that the

[589]Alexander, Amy C./Welzel, Christian: Islam and Patriarchy: How Robust is Muslim Support for Patriarchal Values?. In: International Review of Sociology 21/2 (2011) 249-276.

[590]Norris, Pippa/Inglehart, Ronald: Sacred and Secular: Religion and Politics Worldwide (Cambridge: Cambridge University Press, 2004) 116-19, 137-38.

[591]Htun, Mala/Weldon, Laurel: Religious Power, the State, Women's Rights, and Family Law. In: Politics & Gender 11/3 (2015) 451-77.

[592]Htun, Mala N./ Weldon, S. Laurel: State Power, Religion, and Women's Rights: A Comparative Analysis of Family Law. In: Indiana Journal of Global Legal Studies 18/1 (2011) 145-65.

[593]Iannaccone, Laurence R.: The Consequences of Religious Market Structure: Adam Smith and the Economics of Religion. In: Rationality and Society 3/2 (1991) 156-177.

[594]Iannaccone (1991) 161-62.

[595]Stark, Rodney/ Iannaccone, Laurence R.: A Supply-Side Reinterpretation of the 'Secularization' of Europe. In: Journal for the Scientific Study of Religion 33/3 (1994) 233-34.

[596]Sharabi, Hisham: Neopatriarchy: A Theory of Distorted Change in Arab Society. (New York: Oxford University Press, 1988) 207.

policy of the state regarding women rights is closely interlinked with the economic and political aims of the state. Scholars from this group believe that the reason for the prevalence of these patriarchal norms at the state level is grounded in the state-building ventures during the post-colonial times through which the new elites or leaders cultivate power and legitimacy. The weak states were inclined towards making alliances with powerful tribes after seeking independence from the colonial masters. Consequently, they received benefits from such patriarchal associations and networks[597]. On the contrary, the states who chose not to form any patriarchal alliances proved to be better in terms of women rights as they delegated the function of regulating and enforcing women rights to the civil authorities which inclined towards restricting the authority of kinship associations and networks by way of codifying the patriarchal norms into state laws. In recent times, the leaders often trade women rights policy for political security to please and gain the support of their opponents – the Islamists. Women rights are always placed at the core of debates revolving around state religion and state identity to serve the interests of state leaders and Islamists. They are, therefore, portrayed as *repositories of religious, national, and cultural identity*. As a result, the scholars contend that any reforms in women rights are receded due to the increase in the persistence of patriarchal norms and the conventional interpretations of Shariah law. Although the arguments based on religious norms and cultural aspects vary in their nature, yet they seldom predict similar outcomes. Concerning family law, for instance, both predict that women rights will be demarcated in Islamic countries e.g. Pakistan.

4.1. Historical background of women rights in England and the Continent

In the Middle Ages, the English Church and society viewed women as frail, irrational and susceptible to temptation, which had to be continually held in check. This was expressed in the tale of Adam and Eve in the Christian society in England, where Eve succumbed under the temptations of Satan and steered Adam to eat the forbidden fruit. It was St. Paul's conviction that the agony of childbirth was retribution for this deed that led to the banishment of humanity from the Garden of Eden. The inferiority of women is obvious even from many of the medieval writings, such as the writings of Jacques de Vitry (1200 AD theologian) who stressed female submission to their husbands and expressed women as frail, unstable, dishonest and stubborn. By being naive in her sexuality, being married to a husband and finally becoming a mother, the church has encouraged the Virgin Mary as a role model for women to imitate. That was also the key objective for women across Medieval Europe, both culturally and religiously. In medieval England, rape was often seen as an offence against the father or husband and as a breach of their safeguard and responsibility of the women in the household they care for. In the Middle Ages, women's status was often alluded to by their relationships with men, such as 'His daughter' or "So and so's wife." Despite all this, the Church also stressed the importance of intimacy and joint counselling within marriage and discouraged any sort of divorce so the wife would have someone to look after her. Given all this, the Church always stressed the value of love and shared guidance in marriage, banning divorce of all sorts, for the woman to have someone to provide for her[598]. The property that a woman possessed at the time of marriage became the estate of her husband, according to English Anglo-Saxon law, which evolved from the 12th century onwards in England. Eventually, English courts abolished the sale of property by a husband without his wife's permission, but he also maintained the right to administer it and obtain the income it produced.

[597] Charrad, Mounira: States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco (Berkeley: University of California Press, 2001); 17-27.

[598] Ward, Jennifer: Women in England in the Middle Ages. (New York: *Hambledon Continuum*, 2006) 3-4.

However, the scholars had differed over the issue of whether women are human beings or not, ever since the fifteenth century in Europe. This issue got its resolve in the late eighteenth century owing mostly to the upheavals caused by the French Revolution. In a legal society, the status of men and women came to be determined by their socio-political ranks instead of gender, thus giving rise to an unequal legal system. There also existed certain exclusionary laws for women, in general, that gave in to the centuries-old subjection and dispossession of their rights at the hands of men. In accordance with the Roman Law along with the ancient French law, the majority of Southern Europe prohibits the legal competence of women to enter into binding contracts in commercial transactions or from appearing before a court or tribunal. This meant that women had no authority acting as security or loan in commercial matters. Likewise, they were also restricted from acting as witnesses in prosecutions. French married women remained subject to limitations on their legal capabilities which eventually got lifted in 1965[599].

Similarly, the case of German law also resembled that of the French or Roman law. German law was in force from Central Europe to Scandinavia and it fostered the legal establishment of gender guidance or tutelage also known as the '*munt'* or '*cura sexus*'[600]. In all legal matters, especially court issues, all women were required by the law to be represented by male legal counsel. It impliedly meant that in the instance of lack of a male counsel, the women were unable to either contract or appear before the court because the customary law restricted their legal competence by stating women possess no indispensable intellectual aptitudes and were playful and untrustworthy. The German law acknowledged different forms of treatment for women except the ones working in any business, trade or a widow[601]. The excluded class of women was not justified as any favour to the women, rather it developed over time as a practice or custom.

In Europe as a whole, women were subordinate to men in legal standing during the Middle Ages. Women were restricted in medieval Europe from going to court and compelled to leave all legitimate business matters to their spouses. Women were deemed to be the property of men in the legal system, so any danger or harm to them was the responsibility of their male representatives or guardians. In a way that would meet the needs of the family as a whole, medieval marriages among the elites were arranged. Before a marriage took place, a woman legally ought to agree and the Church allowed this consent to be conveyed in the present tense and not in the future tense. Marriage could still take place anywhere, though there would have to be a minimum age of 12 for girls while 14 for boys. Women's legal position in Europe was based on their marital status, while marriage itself was the largest factor in reducing the autonomy of women. Not only did tradition, statute and practice reduce the rights and liberties of women, but it prohibited single or widowed women from taking elected office under the justification that they could marry one day[602].

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[599]Smith, Bonnie G: The Oxford Encyclopedia of Women in World History. *(*London: Oxford University Press, 2008) 428-429.

[600]Sabean, David Warren. Allianzen und Listen, Die Geschlechtsvormundschaft im 18. und 19. Jahrhundert. In: Gerhard, Ute ed: Frauen in der Geschichte des Rechts. Von der Frühen Neuzeit bis zur Gegenwart. (Munich: Beck, 1997) 460-479.

[601]Dilcher, Gerhard: Die Ordnung der Ungleichheit. Haus, Stand und Geschlecht. In: Gerhard, Ute ed.: Frauen in der Geschichte des Rechts: Von der Frühen Neuzeit bis zur Gegenwart. (Munich: Beck, 1997) 55-72.

[602]Jewell, Helen M.: Women in Late Medieval and Reformation Europe. (New York: Palgrave Macmillan, 2007) 123-124.

Until now, women's rights have been abused globally in the name of religion. Fortunately, the more severe abuses are not widespread in Europe, but they, too, are on the rise, especially in some immigrant societies and communities that have fallen prey to religious extremism, some that affect such fundamental human rights as the right to life, bodily dignity, freedom of movement and choice of spouse. The disturbing spike in the cases related to 'honour killings' (for instance murders, attempted murders and harassment of girls and women who refuse to conform with such religious and/or cultural standards by members of their families and communities) and forced marriages, as well as the refusal to abolish the violent ritual of female genital mutilation, are some examples of such incidents[603].

The key exploitations of women's rights that can be traced to religion in the member states of the Council of Europe, however, are more nuanced and derive from the fact that gender equality is not genuinely endorsed by the dominant monotheistic religions in Europe. In other words, while women and men can be equal before God, they are intended on earth to serve specific and different tasks. The Catholic Church has thus historically stressed, as has the Orthodox Church, the role of wife, mother, and housewife for women. These religiously motivated gender assumptions have conferred a feeling of dominance on men over the years and have thus contributed to unequal treatment of women. To keep women within the bounds of their prescribed legal status, men have repeatedly committed acts of violence against women. This personal authoritarianism of men was legitimized from the eighteenth century onwards by the need to shield women from fraud and guarantee their rights, considering their 'inexperience' and lack of judgment concerning complicated legal transactions[604]. These claims eventually came into doubt with the French Revolution and the *Declaration of the Rights of Man and Citizen*. Thus, even though this was not expressly specified, all subsequent legal codes presumed 'the principle' of 'equal treatment' for single women. It was entirely in answer to an inconsistency that unmarried women were put on equal footing with men.

Thus, private law, and family law, in particular, is the main and definitive basis for recognizing the gendered order in modern patriarchal cultures seeking to be governed by liberal ideals. While the scheme of private law, which structured industrial society by promising liberty and property, has its roots in the fiction of the equality of all parties involved, including the special status of married women. Until the mid-twentieth century, the resulting enclave of "non-egalitarian law" would regulate the existence of the latter. Let's examine the rights of women under the various civil codes enacted in different regions at different times.

i. The French Code Civil, 1804

The French *Code civil* of 1804, commonly referred to as the Napoleonic Civil Code (*Code Civil)*, is considered *a masterpiece of liberal legislative art* making it a nationally significant legal instrument in France since that time. This initial *Code civil*, with its basic liberal values guaranteeing independence and property, proposed a legal structure suited for the introduction of a market system founded on property ownership by fundamentally abolishing the privileges and ecclesiastical competence in continental law. In the aftermath of Napoleon's conquests, the *Code civil* was triumphantly developed across Europe, leaving its mark on the legal systems of several European countries, especially the countries in Southern Europe.

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[603]Council of Europe: Parliamentary Assembly: Documents: Working Papers 2005 Ordinary Session (Fourth part), 3-7 October 2005, 245.

[604]Göttingen, Dietrich/Gerhard, Ute: Gleichheit ohne Angleichung, Frauen im Recht. (München, Beck, 1990) 150-151.

However, the *Code civil's* triumph faced with a downside: the humiliating role of women in French conjugal and marital law, which can be viewed as a patriarchal response to the revolution's wide-ranging demands for rights to independence and equality, as well as to the requests of women for equality. The legal reforms in place in France during the short period between 1789 and 1804 (specifically 1795) codified some freedoms and equality laws that applied to women and young girls, overturning the gender order and the current social structure. These comprised of the enactment of civil marriage, which revoked the control of the Catholic Church over conjugal and family relations, as well as other steps seeking equality for women, such as the majority age for marriage, which at 21 years of age brought freedom from a parental authority instead of 25 and equal treatment in the instances of adultery[605]. By the declaration of September 1792, the adoption of the right to divorce was celebrated as an act of emancipation because it allowed, among other purposes, divorce by mutual consent. The June 4, 1793 declaration introduced equality in the field of inheritance between the sons and daughters, as well as between the legal and natural children, thus revolutionizing the family law. Nevertheless, through the second decree of November 2, 1793, the freedom of natural children was again taken away and strictly restricted to those children who had been freely accepted by their families. Consequently, the dream of bringing total equality in conjugal relationships receded. It started in the autumn of 1793 when women clubs were outlawed and Olympe de Gouges, Madame Roland, Queen Marie-Antoinette and several other women were exposed to revolutionary terror.

According to the Article 213[606] of the *Code civil*, which was in force till 1938, it is stated: "*The husband owes protection to his wife, the wife obedience to her husband"*. In all respects, the wife was thus put under marital authority; she was not an individual legal entity. For any legal action in any issue, whether it be for the reason of running her household or undertaking autonomous commercial enterprise, she had to seek her husband's permission. She was not allowed to appear before the court or sign any papers[607]. She could own land, but she could not purchase or dispose of property or profit from the revenue accrued from her occupation. Moreover, she was not allowed to dispose of her land without prior approval from her husband even in instances of co-habitation[608]. Indeed, marital jurisdiction applied as much to the person of the wife as to her land, and this situation could not be changed by contract by contract[609]. Only women involved in public merchandise were allowed to enter into contracts without the consent of their husband[610]. The grounds for seeking a divorce for the women were also unfair and unequal. The husband's adultery was not considered as a valid ground for divorce unless he committed adultery in the couple's marital home[611]. By comparison, if he found her cheating, the deceived husband might procure a divorce for any act of adultery and even execute his unfaithful wife with impunity[612].

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[605]Gerhard, Ute: Legal Particularism and the Complexity of Women's Rights in Nineteenth-Century Germany. In: Steinmetz Willibald: Private Law and Social Inequality in the Industrial Age. Comparing Legal Cultures in Britain, France, Germany and the United States. (Oxford: Oxford University Press, 2000)137-155.

[606]For French Code Civil, 1804 please visit this link https://www.trans-lex.org/601100.

[607]French Code Civil: Articles 214-226.

[608]French Code Civil: Article 217.

[609]French Code Civil: Article 1388.

[610]French Code Civil: Article 220.

[611]French Code Civil: Articles 229-233.

[612]See the Penal Code of France: Articles 324 and 336. Available online at https://www.napoleon-series.org/research/government/france/penalcode/c_penalcode.html (Last visited: 26-01-2021).

By referring to the republican system of Jean-Jacques Rousseau, Jean-Étienne Portalis[613] justified at length the grounds for the subjection of women to the Republican regime. In particular, Portalis believed that it is not our inequality but our inherent temperament that subjugates women to tighter duties for their good and the protection of society. The strength of a republican regime is the men as father or husband. For its part, parental authority was considered exclusive, unhampered and especially unforgiving as it said, *"Disobedience is sacrilege[614]."* That is, the father owned the right to reprimand and even get his child jailed[615]. In a republic, domestic power is centralized to firmly restrict political and civil authority. The absence of rights for single mothers and their children in French continental law was unprecedented in all of the legal systems of the time. The underlying characteristic of this inequality lies in the fact that it was forbidden for pregnant women and their children to sue for maintenance or living allowance or to take the biological father of the child to court for maintenance claims. The mother had no rights and did not profit from any public assistance. In France, however, a scheme of discreet childbirth was developed to discourage abortions and infanticides, along with sanatoriums to accept abandoned children and baby hatches in which foundlings could be deposited secretly. Until the mid-nineteenth century, these initiatives were officially authorized and tolerated as a matter of population policy and, after 1870, for patriotic reasons. For the part of the feminist movement, it still needed a long fight to amend, although not repeal, Art. 338 in 1912. The ban on obtaining approval of paternity was only entirely repealed in 1972 in addition to the enjoyment of complete legal equality by natural children in France in the years 2003 and 2005[616].

ii. The Prussian Code, 1794

The Prussian Code (referred to as the German Allgemeines Landrecht-ALR) was surprisingly good for women and their rights. Fears that the Code would make *'Prussia a true paradise for women'* quickly took hold of the critics. Nevertheless, the man is defined as 'the head of the conjugal community in this code, notwithstanding the mentioned equality of the sexes[617]. He is the one who makes decisions for the family in matters related to the place of residence, name, and condition, and oversees the usufruct over common properties[618]. The wife, however, can partially enter into contracts and has a domestic mandate, otherwise referred to as the 'power of keys.' Should her husband be incapacitated, she is also an independent legal person. In addition, when it has been contractually reserved for her, she can dispose of her property[619].

Like the *Civil code* of France, the ALR has defined marriage as a civil contract that rejects the concept of marriage as a sacrament in canon law and thus excludes ecclesiastical jurisdiction. That is the reason that the right to divorce was quite liberal in Prussia. It authorized divorce based on the 'temperamental incompatibility' of one of the spouses[620], in addition to the usual

[613]Note: He is known to be the *founding father* of the Family Law *Code Civil.*

[614]French Code Civil: Article 371.

[615]French Code Civil: Articles 375, 377.

[616]Lefaucheur, Nadine: 2013. Unwed Mothers and Family Law in nineteenth-century France: the issues of paternity suits and anonymous delivery. In: Meder, Stephan and Duncker, Arne (eds.): Family Law in Early Women's Rights Debates. (Cologne/Weimar/Vienna: Böhlau, 2013) 90-104.

[617]The General Law Code for the Prussian States, 1794: Section 24 I.1. Available online at https://ghdi.ghi-dc.org/sub_document.cfm?document_id=3550. (Last visited 26-01-2021).

[618]The General Law Code for the Prussian States, 1794: Section 184 sq. II.1.

[619]The General Law Code for the Prussian States, 1794: Sections 205, 208 II.1.

[620]The General Law Code for the Prussian States, 1794: Section 668 sq.II.1.

grounds such as adultery, premeditated abandonment, refusal of marital obligations etc. However, if this Code is considered to be favourably inclined towards women, it is primarily because provides broad rights to unmarried mothers and their children with respect not only to the father but also to the acknowledged father's parents (i.e., the grandparents). Unmarried mothers were therefore given a housing allowance and diaper payments. In addition, she was entitled to benefits equal to that of a divorced wife who had settled her case if the mother had been offered marriage[621].

The aforementioned laws sparked scandal from the beginning and were judged by the conservatives and ecclesiastics in Prussia as sloppy and frivolous. According to them, the family is thought to be the pillar of bourgeois society, and it comes under jeopardy through illegal, extra-marital relations. Furthermore, after the failed revolution attempt in 1848, the laws related to unmarried women were drastically altered and amended by the Prussian State Council, insinuating directly to the provisions of the French Code. Around the same time, in the dominant-legal doctrine, the property rights of married women were revoked and replaced by presumptions to their disadvantage.

iii. The General Civil Code of the Austrian Empire (ABGB), 1811

The General Civil Code of the Austrian Empire (ABGB) of 1811 was an outcome of the enlightened absolutism that aimed to amalgamate the multiplicity of legal sources in the Habsburg territories, a multiethnic state that stretched from Hungary to Galicia and Northern Italy, drawn up under the reigns of Empress Maria Theresa and her predecessors, Joseph II and Leopold II. The idea of equal human rights was therefore meant to surpass the immoral values embedded in the culture of feudal laws. The Austrian Civil Code gave women a certain degree of equality compared with other major civil codifications[622]. Under the ABGB, married as well as single women were allowed to appear before the court and enter into contracts. Nevertheless, few exceptions also came to take the form of laws over the course of the nineteenth century. The man was regarded as the 'head of the household' under Austrian rule as well, but he lacked marital jurisdiction over his wife. It was his duty to lead the household, which meant that a married woman had to face opposition from her husband in terms of representation in her commercial activities or property matters. In the ABGB, like every other code, legitimate domination on the person of the wife eventually became the prevailing view, justified by referring to the inherent separation of the sexes.

Despite the division of land, established by statute, and thus the right to property given to women[623], the belief steadily and innately cultivated that married women had, through a way of a mutual arrangement, passed the management of their property to their spouses. A generous educational sort of patriarchy came to be founded in this manner. Unlike its French and German predecessors, the ABGB left the Catholic priest or Protestant pastor's jurisdiction for the administration of marriages. Catholics tended to be barred from divorce[624], although non-Catholic Christians and Jews could seek divorce[625]. These steps allowed the church to continue to control matrimonial law, that is, to create barriers to conjugal marriage, to decree exceptions to the prohibition on divorce and to sanction ‘bed and board’ separation. However, the Austrian

[621]The General Law Code for the Prussian States, 1794: Sections 1028-1029, 1049 II.1 and 592 sq. II.2.
[622]The General Law Code for the Prussian States, 1794: Section 91sq.
[623]The General Law Code for the Prussian States, 1794: Section 1237-1238.
[624]The General Law Code for the Prussian States, 1794: Section 111.
[625]The General Law Code for the Prussian States, 1794: Sections 115, 123.

Code did not prohibit this continuation of Catholic canon law from being exceptionally well-disposed towards illegitimate children and their mothers[626]. It also offered sufficient protection and schooling for mothers and infants, although they were still exempt from parental inheritance and recognition.

iv. The Scandinavian legal context

The Nordic countries are viewed by history and comparative law as a distinctly legal framework characterized by pragmatic conceptions and concrete, functional reforms. Legislative collaboration in the Nordic countries allowed corporate and contract law to be consolidated in the late nineteenth century but family law proved to be challenging. As elsewhere, it was only in the mid-nineteenth century that the legal tutelage between married and single women was repealed in Nordic countries. Regarding single women, it got repealed in Denmark in the year 1857, in Norway and Sweden in the year 1863, and in Finland in the year 1864. However, regarding the married women, it was a different case. Married women were relatively early awarded ownership to property and the equal rights of inheritance in Nordic countries. In Norway and Denmark, these privileges were acquired in the years 1849 and 1899, respectively. In Sweden, it happened in two phases: 1) In the first phase, the married women were allowed to dispose of any land expressly allotted to them during the marriage contract, and in the second phase, this applied by extension to the land obtained by their own personal or professional practice. The untimely achievement of the right to vote in Finland (1906) and Sweden (1919) unquestionably augmented the process of equality for women in the Family law regime.

v. English law

The women status in the English Anglo-Saxon law of the 19th century is in sharp contrast to the former legal institutions in England, with their parliamentary constitution, the doctrine of separation of powers and the fundamental protection of property rights. The unmarried woman was deemed as an autonomous legal entity in English medieval law; however, she lost legal capacity over marriage. Marriage was thus associated with a *'civil death'* for women until the 19th century as identified by William Blackstone in his famous maxim: *'By marriage, the husband and wife are one person, and the husband is that person*[627]*.'* Thus, English husbands had a right over their wives' persons, their transactions, and their land meaning that wives lost their legal entities. Furthermore, the father alone had all sorts of parental control. Except for Jews and Quakers, marriage was strictly allowed under the jurisdiction of the Church of England, with divorce granted by the English Parliament[628] based on the complaint filed by an aggrieved person/party. Neither England nor the independent colonies that proclaimed independence in 1776 had a uniform code, or thus a common form of family law. Since the late Middle Ages, the law has been established based on compilations of legal cases and court rulings which have been interpreted by royal jurisprudence and based on case law. For instance, the field of land/property rights in the early 19th century. Relevant statutes such as the Dower

[626]The General Law Code for the Prussian States, 1794: Sections 161-171.

[627]Blackstone, William: Commentaries on the Laws of England. (Oxford: Clarendon Press, 1765-1769) 442.

[628]Probert, Rebecca: Family Law Reform and the Women's Movement in England and Wales. In: Stephan Meder and Christoph-Eric MECKE (ed.): Family Law in Early Women's Rights Debates. Western Europe and the United States in the 19th and early 20th centuries. *(*Cologne/Weimar/Wien: Böhlau, 2013) 170-193.

Acts and the Divorce Matrimonial Causes Act of 1857 have given women property rights or allowed divorce on particular grounds[629].

The pronounced absence of protections for married women, in contrast with European codifications, in a century marked by industrialization and growing commerce, gradually called for clarification, especially in the United States, which sought independence in the name of liberty from England. The growth of the feminist revolution in England and the advent of the right to vote for women reinforced by the famous parliamentarian - John Stuart Mill – paved the way for the enactment of numerous *"Married Women's Property Acts"* in the 1870s. Primarily, these laws granted only married women access to the inherited property but did not allow them equality in matters of the court. However, according to the doctrine of possessive individualism, their legal emancipation concerning inherited property created more desirable circumstances for women in general, as liberal theory associated individual rights with the right to dispose of one's property. Although women gained the freedom to vote in England: for single women over 30 years of age in 1919 and for single women over 21years of age in 1928, only in the late 1960s were married women given legal equality under family law.

4.2. Present Situation of Women's Rights and Status in England and the Continent

Rights, as a term and ideology, acquired growing socio-political political and philosophical significance in Europe starting in the late 18th century and during the 19th century. Movements that sought freedom of worship, the eradication of slavery, women's rights, rights for land, and the universal right to vote[630] emerged. The topic of women's rights became central to national discussions in both France and Britain in the late 18th century. At the beginning of the 20th century[631], the right to vote (suffrage) became the main cause of the British women's revolution, originally becoming one of many women rights' movements. At the time, the right to vote was limited within British territories to affluent landowners. As property law and marital law granted men ownership rights over marriage or succession before the 19th century, this arrangement indirectly excluded women. While male suffrage widened over the century, in the 1830s women were expressly forbidden to vote nationally and locally. The right to vote was steadily expanded in many countries during the 19th century, and women continued to fight for their right to vote. New Zealand became the first country to grant women the right to vote at the national level in 1893. In the early 20th century, several Nordic countries granted women the right to vote, such as Finland in 1906, Norway in 1913, Denmark & Iceland in 1915. Many other nations also followed the leas after the First World War including the Netherlands in 1917, Austria, Azerbaijan, Canada, Czechoslovakia, Georgia, Poland & Sweden in 1918, Germany & Luxembourg in 1919, Turkey in 1934, and the United States in 1920.

The European women, seeking democratic freedoms and the right to engage in democracy, had already begun to struggle against the legal incompetence of married women and mothers, as well as the restrictions of marriages of convenience, during this era. This observation also relates to the European and American feminist movements at the international level that organized themselves into alliances in the late nineteenth century: by organizing giant rallies and inventing new ways of civil disobedience, they campaigned for the right to vote and

[629]Blackstone (1765-1769) 173.

[630]Tomory, Peter: The Life and Art of Henry Fuseli. (New York: Praeger Publishers, 1972) 217.

[631]Brody, Miriam/Wollstonecraft, Mary: Sexuality and women's rights (1759–1797). In: Spender, Dale (ed.): Feminist theorists: Three centuries of key women thinkers. (New York: Pantheon Books, 1983) 40–59.

increased civil rights, particularly those within the family[632]. After World War II, French women, the first to claim civil rights for women, only gained legal equality with men in public law and private law in terms of suffrage and family law domain. In comparison to other European legal codes, the Napoleonic Code Civil of 1804, which was to become a blueprint for modern legislation as Europe's first liberal and bourgeois legal code, stands out for its especially strict and misogynist clauses in the field of family law[633].

Yet faith/religion continues to play a major role in the lives of many European women. Certainly, in one way or another, the majority of women are influenced by the mindset of various religions towards them either they believe or not, directly or by their conservative impact on the culture or country. This effect is rarely local, that is, in the name of religion, women's rights are frequently restricted or abused. The right to freedom and dignity in all walks of life is given to all women residing in the Member States of the Council of Europe (hereafter referred to as the *EU Council*). It is not necessary to recognize freedom of faith as a justification for defending violations of women's rights. It is the responsibility of the *EU Council* to protect women from abuses of their rights in the name of faith and to encourage and fully enforce gender equality. No religious or cultural relativism in women's human rights must be recognized by governments. Therefore, the Parliamentary Assembly of the *EU Council* has to initiate imperative safeguards to defend all women residing within the EU from all sorts of abuses of their rights in the name of religion. For that purpose, the Parliamentary Assembly of the *EU Council* has enforced the following measures:

- Establishing and enforcing concrete and efficient measures to address any abuses of women's right to life, bodily dignity, freedom of movement and free choice of spouse, including honour killings, forced marriages and female genital mutilation, wherever and by whom they are perpetrated, whatever their reason, and irrespective of the victim's nominal consent;
- Refusal to accept and cease to enforce international family codes and personal status laws based on religious values that violate women's rights on their land and, where possible, renegotiate bilateral treaties;
- Respond to violations of women's human rights in the name of religious or cultural relativism anywhere, including in international fora like the United Nations, the IPU and others;
- Guarantee the distinction between the Church and the State which is important to ensure that women are not subject to religious policy and rules (e.g. in the area of family, divorce, and abortion law);
- Ensure that freedom of worship and reverence for culture and heritage is not recognized as an excuse to justify violations of women's rights, even where underage girls are required to conform with religious codes (including dress codes), when their freedom of expression is limited or when their family or group access to abortion is forbidden;
- Where religious instruction is allowed in schools, ensure that this training is consistent with the values of gender equality;

[632]Gerhard, Ute: Women's Rights in Continental law in Europe (nineteenth century). In: Clio Women, Gender, History 43/1 (2016) 250-273.

[633]Offen, Karen: Les femmes, la citoyenneté et le droit de vote en France 1789-199. In: Cohen, Yolande/Thébaud Françoise(ed.): Féminismes et identités nationales. Les processus d'intégration des femmes au politique. (Lyon: Centre Jacques Cartier, 1998) 47-70.

- Take a stance against any religious doctrine that is anti-democratic or dismissive of human rights, particularly women's rights, and refuse to allow such doctrines to affect political decision-making; and
- Vigorously promote respect for women's rights, freedom and dignity in all aspects of life by participating in dialogue with members of various faiths and striving for complete equality between women and men in society[634].

Furthermore, the European Commission (EC) is tasked with the responsibility of ensuring gender equality in Europe through implementing the policy of "Strategic engagement for gender equality 2016-2019". This policy basically put emphasis on five key areas: enhancing the female participation in the labour market and providing economic parity with men; diminishing gaps in pay, remunerations and pensions and thus reducing poverty; encouraging parity in decision-making with men; fighting violence against women and securing and supporting the victims; and fostering equality of gender and rights of women, globally[635].

4.3. Comparison of Status of Women in Pakistan and Europe

Pakistani legal system is a combination of both the English Anglo-Saxon and Shariah law. It, therefore, grants rights to women based on both the prevailing legal systems. However, sometimes these conflicting legal systems result in controversy over the rights of women. Shariah law makes a point by enforcing all the rights provided to women in the Islamic teachings including matters of personal nature or legal issues for example marriage, divorce, inheritance, property ownership, legal capacity, etc. Whereas, the state law provides general rights and safeguards to women based on the Anglo-Saxon legal system, which is in turn reviewed by the Federal Shariat Court to ensure such laws conform to the Islamic teachings. In other words, women rights are still regulated under the influence of Shariah law and administered as such. Therefore, the women in Pakistan still lag behind the women in Europe and UK, which mark a deep impact on their journey towards empowerment. The distinction of women rights based on two different legal systems gives rise to either a confused or extremist woman in a society i.e. she is either very Islamic or modern.[636]

Not only this, in thesis Chapter 2 and previous sub-section (4.2), we have seen the historical background of women in Pakistani and EU legal systems. The study reveals that besides sharing a common history, the women in the EU and UK have advanced not only in a theoretical sense but also in a practical way. The women struggle towards equality and empowerment is much more progressive there as compared to Pakistan. Women bear a better degree of equality with men in every aspect be it socio-economic, cultural or legal aspect. Therefore, these differences call for the comparison of women and their rights in different legal systems to find a common core or solution to the existing gap in women rights existing in Pakistan, today.

The status and role of women based on the pretext of religion and patriarchal culture in Pakistan are not considered in compliance with the modern-day ideals of gender equality and equal

[634]Council of Europe: Parliamentary Assembly: Women and Religion in Europe (16 September 2005) 9-10. Available online at https://www.refworld.org/docid/43a97a9c6.html. Last visited 09-01-2021.

[635]European Commission: Questions and Answers: What is the EU doing for women's rights and gender equality?. (Memo Brussels, 6 Mar 2018). Also, available online at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_1602. (Last visited 10-01-2021).

[636]Hassan, Amna: The Shariah Law in Pakistani Legal System and General Legal Status of Women in Pakistan. In: DIKE 1/14 (2020) 190-210.

opportunities for women around the EU or across the globe. It is primarily because through such presumption only conventional roles of women and men in society are reinforced and it takes away opportunities for women to take on duties typically reserved for the opposite sex, that is, the women are compelled to take on their traditional duties of taking care of their family, children, and house while men do the rest, for instance working outside or taking positions of power in politics or business. Therefore, countries, where religion plays an influential role, tend to bear fewer numbers of women participating in labour as well as politics. For example, the provinces of Sindh, Balochistan, and Khyber Pakhtun Khawn (KPK) in Pakistan and some countries in the EU, with Spain being a notable exception[637].

The religious laws are not expressly implemented on the women in Europe in the same way as they are applied in some other countries including Pakistan, Iran, Afghanistan, Saudi Arabia, Jordan, Sudan, and the West to differing degrees. Nevertheless, there are a lot of migrant women who indirectly agonize from their implementation, since some EU countries like France have entered into bilateral treaties with a certain religious country e.g. Morocco thus recognizing and settling questions of women through the personal status laws of Morocco. For example, a Moroccan woman can be arbitrarily repudiated by her spouse or deprived of the guardianship of their children aged over seven in France based on the Moroccan personal status law. There are, of course, very serious infringements of women's rights and, while it means renegotiating whole amicable treaties, France and other countries that have signed those treaties should be urged to avoid the misconceived regard for personal laws of other countries that violate women's rights.

The Islamic dress code for women, i.e. the headscarf, is, in reality, the most common and noticeable issue in Europe. In certain nations, there is a vigorous discussion about whether the headscarf is merely a sign of modesty that demands the same reverence as the symbols of the piety of other religions (be it the Sikh turban or the Jewish kippa), or whether it is rather a symbol of women's obedience and subjection. Because it is always hard to decide if wearing a headscarf is forced or self-imposed by choice, especially in the case of young girls, the debate becomes more complicated. The headscarf has been dealt with differently by various European countries. France has recently introduced a law banning the wearing of all ostentatious religious items including the headscarf in schools, while Turkey bans the wearing of headscarves in state institutions such as universities or the civil service. On the contrary, Great Britain allows the wearing of all types of headscarves or veils, anywhere in the country[638].

4.3.1. Reasons for Comparison

According to the United Nations Development Programme (UNDP) report[639], women are seen as dependent on men and responsible for managing all household affairs on the presumption of conservative religious laws, cultural norms, and clichéd gender roles which consequently causes negative impacts on their lives e.g., Pakistan. The preference of a son is prevalent in the country while women still face caste-based intersectional discrimination in addition to gender-based discrimination. Moreover, there are no equal rights of inheritance and nationality laws for men and women. In connection with marriage, the religious and customary discriminatory

[637] See, for example, in the EU there are a few countries that have a low rate of women participation in the labour market comprising of Bulgaria (56.34%), Croatia (52.61%), Romania (61.82%), Moldova (61.83%), Russia (59.1%), Ukraine (62.75%). These figures are provided by UNIFEM in 2004 for the year 2000.

[638] Offen (1998) 47-70.

[639] UNDP: Human Development Report 2016: Human Development for Everyone, 2016. Available online at http://hdr.undp.org/en/content/human-development-report-2016. Last visited on 10-01-2021.

laws remain widely enforced, leading one in two girls to marry in the country before 18 years of age. While the legal minimum marriage age for women in the country is specified at 18 years, religious statutes and customary laws that are in force allow parents to consent to the marriage of their daughters even below the stipulated age. The traditions and customs take priority over the personal consent of the women, thus, leading most of their parents or relatives in charge of planning their weddings[640]. In comparison, married women's rights continue to be limited. In Pakistan, the rules surrounding the right to divorce are discriminatory. Failure to offer federal assistance to single women exacerbates insecurity. Even if a woman leaves an abusive marriage, there is no arrangement of a government accommodation or unemployment assistance for a woman to help her financially. In Pakistan, the longer-term housing for women in the poor often limits the residence of single women, allowing the subsequent widow or vulnerable women. Long-term women's shelters across Pakistan often exclude the residence of single women allowing widowed, unmarried or destitute women with children[641].

Let's review the primary reasons for the comparison of the condition and status of women in Pakistan with that of EU women. Firstly, the increased level of poverty among women in Pakistan calls for comparison with other women residing in the EU or elsewhere, who enjoy much better conditions. In Pakistan, women suffer from poverty due to insufficient resources at the disposal of the government to enforce reforms for uplifting the status of its women. Moreover, the issues related to national security usually override other issues in parliamentary sessions such as gender equality and policy of non-discrimination between opposite sexes. Therefore, the Government of Pakistan seems to be so overwhelmed with security issues that it almost ignores the fact that the provision of equality for both genders is part of the solution for existing problems. In addition, the lacks of funds for women impact the ability of women organizations in their attempt to secure women rights through the legislative procedure.

Secondly, the discriminatory traditions, cultural and religious norms are also another reason for comparison. Historically witnessed, the women in the EU also faced discrimination based on cultural or religious practices but with time, the situation moved towards betterment. Now the women in the EU are in far better positions than the women in Pakistan, who are still standing at a loss for a long time. In patriarchal cultures and societies like Pakistan, opposition to change or reform is especially high. Sometimes considered fundamental to the socio-cultural and religious values of the society where they are adept, laws related to social and cultural rights, containing abortion rights for women, are the most challenging to amend. These ancient laws can also date back several hundred years preserved and implemented by the religious and customary institutions to maintain the status quo established by them. They do so in an attempt to remain in authority or possession of their power which they acquired over a long time, through subjugating the women in the land.

Thirdly, issues of harassment and violence against women in politics develop into another cause for comparing the same situation with that of the EU women. In Pakistan, women fear constantly violence in the political arena. They are made the target of hate speech and character assassination, boosting violence against them in public to discourage them to participate in politics. Although women in the EU also face some degree of violence in politics, still the

[640]Centre for Reproductive Rights: A Pivotal Movement: 2014 Annual Report. Available online at https://www.reproductiverights.org/sites/default/files/documents/CRR-2014-Annual-Report.pdf. Last visited on 12-12-2020.

[641]Social Welfare Department: Mother & Children Homes (Dar-ul-Falah). Government of Pakistan. Available online at https://swd.punjab.gov.pk/mother_and_children_homes. Last visited on 23-11-2020.

women in Pakistan are the most affected. Therefore, there is a dire need to reform laws for the amicable and secure political environment for women parliamentarians, who constantly suffer from psychological and corporeal violence in attempts to threaten or marginalise them.

Fourthly, the problem of a high rate of illiteracy in Pakistan also accounts for comparison. In the EU, the literacy rate for adults was around 99.13 % in the year 2016, which is consistently increasing since then at an annual rate of 0.05%. However, in Pakistan, the total literacy rate was around 59 per cent % in the year 2017, with less than 47 per cent of women being literate and more than 71 per cent of men[642]. This huge gap in literacy rate between men and women in Pakistan clearly explains the discriminatory behaviour against women in the country.

Fifthly, the women do not have a fair chance at the administration of justice in Pakistan, both in access to legal aid as well as court judgments. This also forms the basis for comparison with women in the EU where they have been provided by the law with just legal rights and the opportunity to fair-trial before the court. Unfortunately, the provision of a fair trial is missing in practice concerning women in Pakistan and therefore they lack any just means to legal aids as lawyers are very expensive to afford, except for certain non-government organizations. Simply put, the justice system practised in Pakistan is mainly gender justice, that is, it implies that men are favoured over women. The statute or laws themselves are patriarchal in some ways by favouring the privileged men over the subordination of women. The biases in the representation of women in trials as claimants, accused and as lawyers have been exposed by studies into legal and judicial processes; in the appointment of judges and the methods used in courts[643]. The fact of the justice system is such that the final punishment is always excluded from the actual sentence. Rahima, for example, struggled for a four-year trial in Karachi Central Jail: when she was eventually sentenced, her punishment was four months in prison. In light of this, access to justice raises a multitude of risks for women in Pakistan.

4.3.2. Outcomes / Initiatives for Improvement

Based on the comparison reasons, it seems worthwhile to chalk out the initiates to be taken to improve the status of women in Pakistan, and other under-developed countries. To that end, we can look into the example of the EU who is engaged in promoting equality between genders not only in the EU but also in countries outside the EU, like Pakistan. Acting as a global force, the EU advocates equity between the sexes and the empowerment of women in all its activities across the world. For that purpose, it works meticulously with partner countries, the United Nations, international organizations and non-governmental actors, especially women's organizations and gender equality advocates. Furthermore, the EU and the United Nations (UN) commenced an ambitious Spotlight Initiative to eradicate all sorts of abuses against women in 2017. It contributed EUR 500 million for the said Initiative and reinvigorated other members to join as well. Comprehensive programs to eradicate all types of abuses against women for instance sexual and gender-based harassment and discriminatory practices; trafficking and economic (labour) exploitation; femicide; and domestic and family violence would be enforced within the next several years. Key areas for action would comprise reforming regulatory structures, legislation and organizations, prevention initiatives, access to

[642]Roser, Max/Ortiz-Ospina, Esteban: Literacy, 2016. Available online at https://ourworldindata.org/literacy. Last visited on 11-12-2020.

[643]Dr Rahman, Farhat Naz/Dr Memon, Kiran Sami: Gender and Access to Justice: Pakistan Case. (Online: Researchgate, 2014) 64.
https://www.researchgate.net/publication/261810408_Gender_and_access_to_Justice_A_Pakistan_Case.

resources and enhancing data collection in Africa, Latin America, Asia, the Pacific and the Caribbean.

The action of the EU is focused on a global commitment to combating gender inequality. The EU is enthusiastically engaged in multilateral meetings with other member countries to unceasingly foster the implementation of the gender equality agenda, especially at the annual sessions of the United Nations Commission on the Status of Women (CSW) and the sessions of the United Nations Human Rights Council as the main policy-making platform. The EU also promotes the adoption of the Convention on the Elimination Abolition of all Forms of Violence against Women (CEDAW) and the Beijing Declaration and Forum for Action, as well as the International Conference on Population and Development's Programme of Action (ICDP). The following significant programs were implemented in 2017 concerning betterment in the status of women around the world by the EU and other institutions.

- The joint venture of the EU and UN referred to as the *Spotlight Initiative*, funded with €500 million from the EU, aimed at reducing all kinds of abuses directed against women.
- The European Commission (EC) has been playing a key role in drawing up a G7 Roadmap for a Gender-Responsive Economic Environment, formally approved by G7 representatives at the May 2017 Taormina Meeting in close collaboration with the European External Action Service (EEAS). It was the first ministerial conference of the G7 devoted to the issue of gender equality. The Roadmap reflects on institutional policies that come under the authority of central governments and which are expected to have the biggest effect on the provision of gender equality.
- In optimizing momentum towards the Sustainable Development Goals (SDGs), which are part of the 2030 Sustainable Development Agenda, the EU plays an important role. To this end, Eurostat has released a legal instrument entitled *'Sustainable development in the European Union – 2017 monitoring report on progress towards the SDGs in an EU context'*. The instrument marks the beginning of periodic analysis by Eurostat of progress made towards the SDGs in the EU; especially regarding the SDG 5.
- The EC itself is dedicated to the humanitarian situation to avoid gender-based abuse. On 21 June 2017, the EU took over the leadership of the global initiative *'Call to Action on Protection from Gender-based Violence in Emergencies'* from Sweden. Gender-based abuse is also common in humanitarian crises. The call for action brings together almost 70 humanitarian organizations with one mission: to identify and resolve gender-based violence as life-threatening at the very outset of a crisis. The EU is working on the following four goals during its leadership until the end of 2018: (1) Increasing support for the need to avoid and respond to gender-based abuse. (2) Increasing emphasis on combating gender-based abuse in crises, (3) Bringing the Call to Action for the sector where it will have the most effect, and (4) Adopting the 2016-2020 Call to Action Roadmap, by implementing commitments.
- The EC has also engaged closely with women in the Western Balkans digital sector and aims to create an ICT Women & Girls network to serve as role models to enable women and girls to get more involved in the ICT sector. The digital development plan also proposes tangible steps to enable women and girls to meet the global development objective of gender equality by leveraging digital technologies. The EC also pursues this approach through public activities, such as the organizing of one of the main

sessions on women and ICT in the developed world at the 2018 European Development Days[644].

In addition to the initiatives taken by the EU and other institutions, the Civil Society Organisations (CSOs) have also been actively involved in the process of uplifting the status of women around the world, especially in Pakistan. When engaging with formal institutions, CSOs fighting for women's rights may be obligated or prefer to exercise self-censorship. The reasoning behind such a balancing act is to advance particular causes where CSOs see the opportunity to change ongoing conditions rather than to focus on problems where improvement is not thought feasible and where working networks with local authorities could be jeopardized.

Moreover, the need for educated women is also crucial for the advancement of women in Pakistan. In this sense, a representative of UN Women cited the Ghanaian proverb, *'if you educate a child, you educate a person, but if you educate a girl, you educate an entire community*[645]*.'* It is also essential, beyond education, to interact with people at all levels of decision-making. Community-based groups should increase awareness of the issues of gender equality and offer alternatives to improve the lives of women. But the participation of members of established organizations in reform efforts is still necessary if they are to progress. The advocacy of the inclusion of women in religious and customary institutions is particularly significant. Women are more likely to act differently as they become involved in decision-making systems and may form the agendas of organisations. The experts consulted therefore proposed that capacity building and funding be made a priority to facilitate women's political participation in the local government and the municipal councils[646].

Part 2: Comparing Contract Law TLTs between Pakistan and the EU regarding Gender Equality Issues

4.4.Rights of Women concerning Contractual Issues under Shariah Law

The role and status of women in Muslim societies have been affected by the contradictory interpretations of the Holy Quran throughout the years. This must be borne in mind that all these interpretations of the versions of the Holy Quran are made by male scholars which impact women and their status. As women in Muslim societies have always been kept away from seeking education, their capability to read and raise their voice against any of the interpretations impacting their lives seems greatly retarded. Her only source of knowledge and information was her father, husband or any other male member of the family. The differences of rights of men and women in Muslim societies arise out of sexual, biological, and social realities, rather than on a scientific basis.

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[644]Mr Dalton, Paul/Ms. Devrim, Deniz/Mr. Blomeyer, Roland/Ms. Mut-Tracy, Senni: In-Depth Analysis: Discriminatory Laws Undermining Women's Rights. (Belgium, The European Parliament's online database, "Think tank", 2020) 68-71.

[645]Suen, Serena: The Education of Women as a Tool in Development: Challenging the African Maxim. In: Hydra 1/2 (2013) 61.

[646]European Commission: Evaluation of the EU's external action support in the area of gender equality and women's and girls' empowerment 2010-2018. (Final Report, 2020) 5-14. https://ec.europa.eu/international-partnerships/system/files/gender-evaluation-2020-final-report-volume-3_en.pdf.

The Holy Quran itself acknowledges the superiority of men over women and women over men in certain aspects with due regard to the natural facts. Concerning the superior position of men over women, the Quran states that men provide financial or economical support to women. According to this argument, there seems to be no superiority of men over women based on natural facts, as it is an entirely economical factor that is not an inherent thing. However, the Quran still accords slight superiority to men over women in both domestic as well as political domains. As per the domestic sphere, final power or authority shall be vested in one sex or the other, probably men as per the Quranic interpretation. Likewise, in the political domain, the final say shall also rest with the men based on their comparative freedom from several natural boundaries, which consumes substantial female time and energy, enabling the men to devote greater attention towards political issues and matters[647]. Similarly, after going through the interpretation (Tafseer) of the Quran by Mr Siddique, a woman can rightly assume that the assurance provided in the Holy Quran between both the sexes is not accurate. According to his Tafseer, it is stated that although both sexes are equal there are certain domestic, economic and political aspects where men lead women with a slight degree of superiority in with regards to sexual, biological, physical and mental acumen.

Here comes the question of superiority of women over men, for instance, what matters ensure women a degree of superiority over men? By looking into the history of Islam and its conquests leading to the spread of Islam to countries besides Arabia, it is witnessed that Persian Empire (now known as Iran) was a living example of women supremacy. When the Muslims conquered Persian Empire, they observed that the women in Persia enjoyed greater rights and supremacy over men. She had the right to own property, advocate for her rights, seek justice through court and rule the country. As it is well known, the Muslim society and culture were opposite to that of the Persian Empire.

Since its inception, Islam was (presently as well) entirely male-dominated providing in-depth legislation favouring men over women in matters of dealing with marriage, divorce, property rights, inheritance etc. This legislation forms the core of family laws included in the Shariah law, which are considered to be one of the sensitive issues across Islamic countries in the modern era. As every society is posed with the issue of either lesser or greater adaptations, all Muslim countries have the same issue to deal with. Some of them propose the substitution of the old Shariah laws with a new, yet modern law code. While others seek interpretations of state law in such a way to conform to the Shariah law-making Qiyas such an essential source of legal discretion[648]. According to detailed teachings of Islam, it is clear, however, that Islam gives men superiority over women in matters of personal nature. Let's discuss these teachings in-depth under the following sub-headings and contractual rights of women in matters related to marriage, divorce, property, inheritance etc.

The criterions set out in the international treaties must be incorporated into national constitutions and then integrated into domestic legislation to make strides towards gender equality and effectively encourage women in their everyday lives. Disparities based on gender exist concerning matters of marriage, decision-making in family, wealth, divorce, parentage and inheritance, with overt and unforeseen consequences for women's autonomy thus affecting

[647]Siddiqui, M. Mazheruddin: Women in Islam. (Pakistan: The Institute of Islamic Culture, 1952) 23, 24.
[648]Waddy, Charris: Women in Muslim history. (London: Longman ELT, 1980) 30-31.

rights, responsibilities and social roles of both the genders. This discrepancy restricts the efficacy of constitutional amendments intended to eradicate inequality based on gender and suggests that there is a need for more attempts to abolish laws that hold women and men in unequal roles. The prejudiced personal status law also bears negative consequences for the autonomy of women, economic security, social positions and self-esteem. To foster the empowerment of women, both through economic inclusion and in their personal life, legislative reform on family laws is required.[649] Let us take an in-depth insight into the contract rights of women in Pakistan below. These contractual rights are so-called based on their derivation from the notions of equality[650] and contractual freedom granted to all citizens of Pakistan under the Contract Act, 1872.[651] Although these concepts belong to the branch of personal or family law, yet they contain elements of contract law in the sense of matrimonial or maintenance agreements, property or inheritance contracts etc. For the purpose of my thesis, I would like to draw attention to this unique concept of contractual freedom or right regarding the existing family law concepts (e.g. martial rights, divorce, maintenance etc).

4.4.1. Marital Rights

Marriage holds a dominant position in the Muslim religion. It is a foundation, from a theological point of view, contributing to the establishment of a family, which is perceived to be the basis of Islamic society. However, it acts as a *contract* in a civil context that denotes (defines the meaning of contract) the validity of sexual relations and the inception of conjugal life for children's procreation. In the traditions of the Muslim religion, this foundation has a significant role and retains its conservative Islamic existence[652]. In the presence of witnesses, the marriage (Nikah) is conducted before the imam or the Mufti himself: two men or one man and two women. However, for administrative purposes, all religious marriages must be declared to the public registry and registered with it upon the issuance by the Mufti Office of the relevant certificate. In addition, the marriage contract also contains provisions for the Islamic dower (i.e., the *consideration* of a contract known as the *Mahr*). The aggregate value of a typical Mahr may be fairly high, ensuring its importance for the women in issue, that is, through the Islamic dower, the women seek certain proprietary benefits as well as a protection against the liberty of men to divorce (i.e., breach of marriage contract) the women any time he so desires.

Marriage law contains values that uphold and promote gender equity, such as equality between partners, joint decision making of conjugal life, reciprocal responsibility of maintenance, etc. The married couple officially denounces the implementation of those values by recourse to a religious union or marriage. As a result, this sustains the survival of the patriarchal system of Islamic families, whereby the ancillary role of the household caretaker, the children or even the larger family is delegated to women[653]. As compensation, Muslim law regulations encourage women to request full support from their husbands, including food, clothes and accommodation. There have been disputes about the practice of some Islamic traditions,

[649]OECD: Women's Economic Empowerment in Selected MENA Countries: The Impact of Legal Frameworks in Algeria, Egypt, Jordan, Libya, Morocco and Tunisia. Competitiveness and Private Sector Development. (Paris: OECD Publishing, 2017) 78.

[650]Constitution of the Islamic Republic of Pakistan, 1973: Art. 25.

[651]Indian Contract Act, 1872: Section 14.

[652]Fyzee, Asaf A.A.: Outlines of Muhammadan Law. 4th edition. (Oxford: Oxford University Press, 1974) 90-91.

[653]Kofinis, Stergios: The Status of Muslim Minority Women in Greece: Second Class European Citizens?. In: Schiek, Dagmar/Lawson, Anna (eds): European Union Non-Discrimination Law and Intersectionality. (UK: Ashgate, 2010) 125-140, 135.

comprising of proxy marriages and marriages of minors, and there has been concern that, in particular, the rights of young Muslim women are not being secured. In both cases, the National Commission on Human Rights has expressed its concerns as to the conformity of these traditions or customs with the national public order and the responsibilities of the State under international conventions on human rights (e.g., the CEDAW). It also underlines that marriages could be instigated against their will in such practices, involving the lack of personal and immediate consent of women (forced marriages). Finally, in 2002, after the intervention of the central administration, the long-lasting tradition of proxy marriages ended[654]. Marriages of minors, however, are still standard practice[655]. Given that people who have reached puberty are considered to have the ability to marry under Islamic law and that puberty can be achieved at a young age, it is not forbidden to marry minors[656]. However, contracting a minor into marriage is subject to court authorization in some Muslim states[657].

Islam indeed provides women with rights relating to marital issues, yet certain cultural practices incur heavy impact upon offer and acceptance procedure past the Islamic prerequisites and in several instances incur results in sheer derogation to the Islamic practices[658]. Historians claim that the status of women before the advent of Islam was no less than that of animals. That being said, these historians allege that the women in the pre-Islamic era enjoyed no legal protection, having no rights. Men were allowed to marry as many women as they wanted (a practice known as polygamy), could divorce women with ease and buried female infanticide. But with the advent of Islam, the Holy Prophet (PBUH) brought Islamic reform that aimed to bring potential changes in these immoral activities of the Arab pagans and their customs.

The Prophet (PBUH) brought reforms in the laws and customs relating to the family matters such as marriage, divorce, property, inheritance etc. According to his teachings of Islamic reforms, marriage is comprised of three main considerate aspects: legal aspect, social aspect, and religious aspect. Based on the legal aspect of marriage, it is considered as a contract in three senses: requires offer and acceptance of both parties; contains provisions for the breach; and allows for revision or modification of provisions acceptable to both parties. Although it is just considered as a contract in Islam, yet the general assumption makes it into a sacred covenant[659]. Anyways, in Islam, a wife possesses the rights as an heir and widow entitled to dower after the demise of his husband. She also has the right to retain the property of her deceased husband, only at such time when she becomes capable of collecting her dower / Mehr. But as the majority opinion of Islamic scholars favours the concept of Mehr being non-inheritable (because it is not a lien), a wife's rights to the property of her husband remain questionable and controversial.

In Muhammad Tariq Mahmood v, SHO[660] case, a couple entered into a marriage contract without the approval of the father of the bride. According to that, the bride's father filed a First

[654]Papadopoulou, Triantafyllia Lina: Trapped in History: Greek Muslim Women under the Sacred Islamic Law. In: Annuaire International des Droits de l'homme 5/1 (2010) 397-418, 56.

[655]Kotzampasi, Athina: Gender Equality and Private Autonomy in Family Affairs. (Online: Sakkoulas, 2011) 184-85.

[656]OECD (2017) 78.

[657]OECD (2017) 47-49.

[658]Mohammad, Imani Jaafar/Lehmann, Charlie: Women's Rights in Islam Regarding Marriage and Divorce. In: Journal of Law and Practice 4/3(2011) 1, 2.

[659]Nicholson, R.A.: A literary history of the Arabs. (Cambridge: Cambridge University Press,1969) 38.

[660]Muhammad Tariq Mahmood v SHO: Lahore: Millat Park, 1997 PCrLJ 758 (Lah).

Information Report (FIR) against the couple under Hudood Ordinance accusing them of adultery. In response to the FIR, the couple approached the Lahore High Court (LHC) to set aside the FIR as void. The couple's lawyer argued that in accordance with Shariah law, marriage is considered a civil contract. Therefore, based on that, both husband and wife being entered into a valid marriage contract as adult legal persons (*sui juris)* of competent and sound mind, which means that the consent of the wife's father was not a valid requirement once the couple agrees on marriage out of their free wills. Based on the arguments of the couple's lawyer, the LHC set aside the FIR and absolved a couple of adultery charges levelled by the bride's father.

Moreover, there are some other kinds of marriages in Islam that forms the basis of cruel practices of discrimination against women and favouring men alone. One such kind is nikah halala (commonly referred to as *tahleel marriage*)[661] and the other is contract marriage (also known as *Mut'ah marriage*). The former kind of marriage takes place when a woman, who has earlier been divorced by her husband and wants to re-marry him. For that purpose, she has to first marry some other Muslim man, get that marriage consummated and seek divorce from him, to re-marry her former husband[662]. Although this kind of marriage has been declared haram (forbidden) by the hadith of the Prophet (PBUH)[663], yet it was in practice during the earlier periods of Islam and a small Muslim minority also practices it today[664].
The latter kind of marriage takes place when a man wishes to marry a woman based on a contract, with mutual consent, for a specified time and such marriage the amount of Mehr is specified and agreed upon in advance[665]. When the time stipulated in the contract lapses, the marriage stands void and such woman gets divorced. This practice is still considered valid by the small Muslim minority sect – Shiite Sect. According to them, mut'ah marriage comprises of certain preconditions: the women shall not be married; she should be a chaste and pious Muslim or belong to People of the Book (Ahl Al-Kitab); she must seek her guardian's approval in case she has never been married before; and if she has no guardian, then she must be non-virgin according to Islam to do so independently. When the contract expires, the marriage dissolves and the woman has to undergo a period of abstinence (four months, ten days, also known as *iddah*) from further marriage or sexual intercourse. The purpose of iddah is to provide sufficient time to ascertain the paternity of the child if the woman gets pregnant during the period of contract marriage[666].

The Shiites support for the contract marriages is based on the teachings of the Holy Quran, hadith of the Prophet, history, cultural and moral grounds[667]. According to them, the verses of the Holy Quran take superiority over any other sources of Islamic laws, thus justifying their

[661] Ali, Shaheen Sardar/Griffiths, Anne: From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads. (UK: Routledge, 2016) Chapter 5.
[662] Singh, Vatsala: What does Quran say about Nikah Halala? Will banning it help?. (The Quint: Bloomberg LP, 2018).https://www.the quint.com/voices/women/so-what-does-the-quran-say-about-nikah-halala-triple-talaq-polygamy. Last visited 23-04-2020.
[663] Ahmad, Yusuf Al-Hajj: The Book of Nikkah: Encyclopedia of Islamic Law. (Darussalam Publishers: Volume II) 23-25.
[664] Ahmad, Athar: The women who sleep with a stranger to save their marriage. BBC News (May 5, 2017).
[665] J. Esposito: The Oxford Dictionary of Islam. (Oxford: Oxford University Press, 2003) 221.
[666] Mohammad / Lehmann (2011) 8.
[667] Rohde, Achim: (2014). State-Society Relations in Ba'thist Iraq: Facing Dictatorship. (UK: Routledge, 2014) 171.

practice of mut'ah marriages through the Holy Quran in ***Surah An-Nisa, verse 24*** (also known as the *verse of Mut'ah).*

"And also prohibited to you are all married women except those your right hands possess. This is the decree of Allah upon you. And lawful to you are all others beyond these, provided that you seek them in marriage with gifts from your property, desiring chastity, not unlawful sexual intercourse. So for whatever you enjoy of marriage from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. Indeed, Allah is ever Knowing and Wise."

Guardianship by men over women and their involvement in decisions about a woman marriage, as well as polygyny and early marriages, stunt women's autonomy and freedom to choose how and with whom to live their lives. These conditions affect their capacity to shape their destinies, economic and otherwise, free from coercion.

4.4.2. Divorce Rights

As Islam considers marriage a contract between two parties, therefore, it attaches high repute and respect to it. Although divorce carries no immoral connotation, yet it is strongly discouraged in Islam as it demolishes the existing family setup. The abhorrence towards the practice of divorce is clear from the numerous sayings of the Holy Prophet himself, for instance *'the most repugnant thing made lawful in the sight of God is divorce'*, or *'marry but do not divorce, because God does not like men and women who relish variety in sexual pleasure'*.Despite its dislike, divorce takes place and it can be carried out in three ways: by the death of either of the spouse; by the act of parties; and through judicial procedure. Firstly, when either of them, i.e. the husband or wife dies, the marriage stands dissolved lawfully. But the consequences of re-marrying after the death of a spouse vary for both men and women. In case a wife dies, the husband is at free will to remarry immediately, but conversely speaking, a wife cannot do so, as she has to observe 'iddah' before remarrying another man. In case the wife was found pregnant at the time of her husband's death, she must wait till the delivery of the child before remarrying".

Secondly, divorce can also take place by the act of the parties. That means the husband can divorce his wife by pronouncing the word 'talaq' thrice and the marriage stands dissolved. The word talaq indicates the supreme authority of a husband that he possesses over his wife to annul their marriage at any time he so desires, without seeking his wife's approval, or presence at the time of pronouncing talaq. The divorce is immediately in effect once the word 'talaq' is used in the right connotation with absolute clarity and un-ambiguity[668].

However, this concept of triple talaq which means that the divorce is valid as soon as the husband pronounces the word 'talaq' thrice, does not find its parallel from the teachings of the Holy Quran, as interpreted by the Sunni School of thought. In this regard, the practice and ideology of the Muslim minority Shiite Sect are deemed to be in accordance with the true interpretation of the verses of the Holy Quran from both Surah Talaq and Surah Al-Baqra.

[668]Wilson, Roland Knyvet Sir: Anglo-Muhammadan Law. (Pakistan: Law Publishing Company, 1930) 61.

Therefore, to comprehend the teachings of Islam regarding divorce, it would be very useful to comprehend their meaning in depth by looking at some of the verses of the Quran below:

- Divorce may be pronounced twice; then the wife may either be kept back in fairness or allowed to separate in fairness[669].
- And the divorced women (after the pronouncement of the divorce) must wait for three monthly courses...and their husbands are fully entitled to take them back (as their wives) during this waiting period if they desire reconciliation[670].
- Then, if the husband divorces his wife (for the third time), she shall not remain lawful for him after this divorce, unless she marries another husband...[671]
- When you marry the believing women and then divorce them before you have touched them, they do not have to fulfil a waiting period, the completion of which you may demand of them[672].
- And if those of you who die, leave wives behind, the women should abstain (from marriage) for four months and ten days[673].

The laws relating to divorce mentioned in the above verses prescribe the following rules:

i. A man (husband) can utter the word 'talaq' thrice upon his wife.
ii. If a husband utters talaq once or twice, he still bears the right to keep his wife back within the prescribed waiting period, and if after the expiry of such waiting period both of them want to re-marry, they can do so and there lies no condition of Nikah-halalah (Tahleel marriage) for that. But in case the husband utters talaq thrice upon her wife, he loses any legal right on his wife and has to undergo nikah halalah to re-marry her.
iii. The concept of a waiting period exists for a woman who undergoes menstruation and with whom the marriage has been consummated. Therefore, when her husband dies, she is required to pass three monthly menstruation courses.
iv. There exists no waiting period for a woman who has never consummated her marriage or who became a divorcee even before getting touched, therefore, she can re-marry whenever she wants.
v. The waiting period of a widow is said to be four months and ten days[674].

Thirdly, a divorce can also take place through the judicial process whereby a wife seeks the court help to dissolve her marriage either by talaq-itafwid (delegated divorce) or through court decree. Talaq-itafwid or delegated divorce is a judicial process where the wife is given the right or power to divorce by her husband, either as a condition at the time of marriage or sometime after the marriage through mutual consent. The provision is based on certain pre-requisites if a wife needs to call out for this kind of divorce. There are two primary pre-requisites for the exercise: 1) the delegated right to divorce must be based on some reasonable grounds, and 2) it must not be unconditional or absolute. In contrast to the husband, the wife is under mandatory obligation to present evidence in her appeal for divorce and her appeal must be adjudged based on the parameters of reasonable grounds and public policy. Thus, this haphazard opportunity

[669]The Holy Quran: Surah Al-Baqarah, Verse 229.
[670]The Holy Quran: Surah Al-Baqarah, Verse 228.
[671]The Holy Quran: Surah Al-Baqarah, Verse 230.
[672]The Holy Quran: Surah Al-Ahzab, Verse 49.
[673]The Holy Quran: Surah Al-Baqarah, Verse 234.
[674]Maududi, Abul A'ala: Syed Abu-Ala' Maududi's: Introductions to the Qur'an. (Amazon, 2012). Chapter 65.

of delegated divorce provides women with just a nominal way of acquiring freedom from their unsatisfactory marital life. This deliberate display of inequality laying the onus of proof on women showing evidence of a breach, and proving such breach liable for her claim of separation or divorce is known as the 'the most potent weapon in the hands of a Muslim wife'[675].

Another way for a woman to seek a divorce is through a court decree, which often requires her to waive the entire or part of her Mehr (dower). In other cases, she may also be compelled to seek her freedom only by giving a bribe in the form of money to her husband to free her from the marital bond. In addition, if a court finds out that the woman asking for divorce reserves no valid grounds and her claim is merely based upon being the victim of anarchic sexual intercourse; the court may demand her to give more than just her dower[676]. In deciding the validity or reasonableness of grounds for divorce, the court is guided by the teachings of Islam which recognize the following list of grounds as reasonable for seeking divorce: option of puberty; husband's refusal to provide economic sustenance; change of religion; impotence; infectious diseases etc.

Besides, divorce may also take place by mutual consent of both parties, that is if the husband and wife mutually agree that their marriage is no more workable, and it is dissolved, then each of them has to return their consideration, given at the time of contracting marriage. Once the parties return those considerations, the marriage stands dissolved. Moreover, Islam also provides another method of divorce i.e. through the process of annulment or abrogation (referred to as faskh) of a marriage. For that purpose, both the parties have to appear before an arbitrator/judge to get their marriage annulled. The reason behind this kind of separation or divorce lies in the Holy Qur'an, Surah Nisa, verse thirty-five which states:

'*And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted with all things.'*

According to this verse, if the parties wish to separate, they may call upon an arbitrator who shall hear the claims of both the parties and decide accordingly. But if, however, the husband withdraws from his previous claim while the trial is ongoing, the wife shall not be entitled to freedom and dissolution of marriage. But in recent years the courts have shown their inclination to take into consideration the time a wife spends with her husband as economically valuable in deciding on the return of dower in cases of divorce as well *as khul*[677]. The wife can file for *Khula,* which is a *fault-based divorce,* in Pakistan but she has to convince the court that she has suffered prejudices and the proceedings can be lengthy, complex, tiring and expensive. The wife will generally receive the portion of her dowry that was not paid to her when the couple married after the termination of the marriage. The amount is determined by the judge, based on the length of the marriage and the financial resources of the husband. It may be paid in one payment or multiple payments per month.

[675]OECD (2017) 151, 152.
[676]Siddiqui (1952) 77-79.
[677]Abdul Rashid v. Shahida Parveen: 2013 YLR 2016 (Pesh).

The right of the wife to dissolve a wedding on grounds of Khula was conditional on the consent of her husband, before the Pakistani Lahore High Court (LHC) decision in *Balqis Fatima v Najam-úl-Ikram*[678]. This demand made khula's method practically inefficient and prisoner of the will of a spouse. In the case of Balquis Fatima, the LHC has exonerated women from this obligation to obtain the khula and to phase out the value of husbands' permission so far. In 1967, in *Khurshid Bibi v Baboo Muhammad Amin*[679] this principle was upheld by the Supreme Court. The Federal Shariat Court in *Saleem Ahmad v Government of Pakistan*[680] also endorsed this principle.

The financial and social consequences of a divorce are often severe for women in Pakistan and other Islamic countries. Divorce might inflict severe financial drawbacks on women, especially those who do not have personal wealth, due to the division of property. If these properties are registered in the name of her spouse, even after a long married life, and even if she contributed to their acquisition either directly, for instance through reimbursing a loan, or indirectly by her job in the household, the wife has no claim to the assets gained during the marriage, including the family home. The discretionary regime for collective properties in Tunisia aims to "ensure that spouses have joint ownership of any property or group of properties specifically intended for the use of the family." When the divorce takes place, the property obtained after a wedding date shall be divided between partners. The *khul* is believed to have increased women's bargaining power in the marital home, granting them negotiation opportunities with their husbands. In the face of a potential end of their marriage, women found paid jobs, allowing them to be autonomous in the event of divorce[681] .

4.4.3. Custodial Rights

According to the teachings of Islam, a mother enjoys a high status in the society, and this has been proved by the oft-repeated hadith of the Prophet (PBUH) himself stating *'paradise lies at the feet of mothers."*[682]A mother experiences an intimate, close and most informal relationship with her children. She is responsible for providing her children with all kinds of supports in their lives, including emotional, social or even financial. But all the praises for a mother becomes non-existent from the moment her marriage falls apart, either due to divorce or due to natural cause (death of her husband). In any of the cases, the rights of a mother for her children's custody become exceptionally limited.

For instance, in case a woman is divorced at a time when her son and daughter are of two and seven years of age, respectively, then her right to her children's custody no longer remains according to Islamic law. The children will automatically be given in the custody of her husband and she would not be allowed to visit them again. As Islamic law is patriarchal, it does not consider the mother a natural guardian of the children. The father or in case he dies, his executor becomes the legal guardian of the children. The mother only enjoys limited custody of her children that is up to the age of two years for the son and seven years for the daughter. These limited and biased custodial rights to the women again give rise to the inequality existing

[678]Balqis Fatima v. Najam-ul-Ikram: PLD 1959 Lah 566.

[679]Khurshid Bibi v. Muhammad Amin: PLD 1967 SC 97.

[680]Saleem Ahmad and others v. Government of Pakistan: PLD 2014 FSC 43.

[681]Hassani-Nezhad, L./Sjögren, A.: Unilateral Divorce for Women and Labor Supply in the Middle East and North Africa: The Effect of Khul Reform. In: Feminist Economics 20/4 (2014)113-137.

[682]Nasai, Sunan An-: Hadith 20. In: The Book of Jihad: Chapter 6.

between both sexes in Islam. However, this practice or Islamic laws relating to the custodial rights of children find no proof from the verses of the Holy Quran. Therefore, it is assumed that these practices must have evolved as a result of the Sunnah of the Prophet (PBUH), Muslim culture, fatwas of the ulamas or religious scholars.

Islamic scholars (ulama) take pride in pronouncing the equality of both sexes in Islam. Yet *actions speak louder than words* in the matters of marriage, divorce and child custody. In all these matters, men are given greater rights and power as compared to women. Islam recognizes marriage as a civil contract, to which both the contracting parties agree with their own free will and therefore, are at freedom to dissolve such a contract any time they so desire, without feeling the guilt of committing some moral wrong. Even after that, a wife's free will in all these matters is gravely influenced by two important factors. Firstly, in case a woman is divorced, the husband keeps the right to their children's custody. Here one may ask how much freedom a woman enjoys in seeking a divorce from her husband, knowing the fact that she would have no longer the right to her children's custody and permission to visit them ever again. She is only allowed to leave with her clothes and some personal belongings. Apart from the fact that the wife has her Mehr (dower) expressly provided while contracting marriage; she is habitually compelled to waive her right to that Mehr instead of her husband's approval to seek divorce.

Secondly, in the case of divorce, a woman is faced with the struggle of economic survival along with the pleasure of looking after her children. That is, after divorce a woman losses both a companion and the source of income or livelihood. Because she has not worked before (mostly in Muslim societies), therefore, she lacks the necessary skills to obtain employment opportunities. Thus, to sustain herself and the children under her custody till they reach age, she has only two options to survive i.e. either as a beggar or a prostitute. Since these two options are not acceptable for most women, they opt for remarriage. But as soon as she chooses to re-marry, she loses her children's custodial rights then and there, that is, even sooner than the time allowed by Islamic law. In these circumstances, one can again question the degree of freedom provided to a woman in comparison to a man, who has no consequences to deal with after getting a divorce and is at free will to remarry again, knowing that the children would come into his permanent custody given the due time under Islamic law[683]. Moreover, a divorcee woman is seen with abhorrence in society and it seems like an uphill task for a divorcee woman to remarry, unlike a divorcee man. Here again, even though Islam allows women to remarry, yet the society or culture would not make it an easy path for women and prioritize their interpretations of Islamic teachings instead.

Concerning the second marriage of a mother in the case of a custody dispute, the LHC held in *Amar Ilahi v Rashida Akhtar*[684] that a mother does not fully forfeit the right to custody of her child by marrying a stranger; she loses just her *preferential* right but maintains an ordinary right. The appellant's counsel argued that the petitioner excluded herself from the custody of the minor by remarrying an individual who was not connected to him. However, the Court applies the following statement concerning all the arguments of the appellant stating *"the rights of all the women before mentioned are not made void by marriage with strangers."*

[683]Honarvar, Nayer: Behind the Veil: Women's Rights in Islamic Societies. In: Journal of Law and Religion 6/2 (1988) 355–387.
[684]Amar Ilahi v. Mst. Rashida Akhtar: PLD 1955 Lah 412.

4.4.4. Maintenance Rights

Women in marriage and divorce obtain financial protection which is not foreign to Islamic values. There has been a unanimous agreement among the Muslim scholars and jurists regarding the right of women to maintenance (i.e., remedy for the breach of marriage contract). However, there is a divergence of opinion on continuing this right after the marriage ends, but a large number of Islamic law experts says that it is open to women[685]. Several Muslim countries provide maintenance protection to women post-divorce by way of the Islamic principle of *Mata'* meaning post-divorce maintenance, which is seldom referred to as "gratification", "obligatory gift", "alimony" or "suitable gift"[686]. It applies to the preservation of the partner for life or before she remarries, partly or once. For times after iddat, it is assumed to be the right of a woman to obtain property from her husband at the time of divorce.

The concept of *Mata'a* has originally been derived from the Holy Quran itself stating, *"for divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous[687]."* According to various interpretations of this particular verse suggest that divorced women must be provided with something. The amount of maintenance may be decided by the legislators in such a manner that it conforms with the doctrines of "justice" and "rationality" by considering the marriage duration, facts and circumstances of the case, and husband's financial condition in mind[688].

Since 1956, the definition of mata' has been debated in Pakistan. The Commission on Muslim Marriage and Family Laws observed that *"a large number of middle-aged women divorced without rhyme or reason should not be thrown on the street without a roof over their heads and without any means of supporting themselves and their children,"* and suggested that *"such discretion be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children[689]."* The Law and Justice Commission of Pakistan forwarded draft legislation between 1993 and 2009 twice to allow for obligatory maintenance by divorcing husbands after the waiting period i.e. *iddat*. Moreover, the CII also proposed the enforcement of new legislation related to *mata'*[690] in 2008, but the Pakistani legislature did not take up the matter seriously and even now it is at a stand-still.

In *Khalid Bashir v Shamas-un-Nisa[691]*, the LHC addressed the duty of the father to provide maintenance for his children and in the case of a working mother, can he be discharged his liability. The Court stated with a vivid ruling that it is imperative for the father to provide maintenance for his child and his obligation can not be relieved exclusively on the ground that the mother is the earning hand. In this case, neither the applicant is thought to be feeble nor incompetent of earning his own money, therefore, he cannot be allowed to waive his

[685]Women Living Under Muslim Laws- Dossier 22: Post Divorce Maintenance for Muslim Women and the Islamist Discourse- http://www.wluml.org/node/334.

[686]Masud, Muhammad Khalid: The Award of Mata'a in the Early Muslim Courts. In: Masud, Muhammad Khalid/ Peters, Rudolph/Powers, David S. (eds): Dispensing Justice in Islam: Qadis and Their Judgments. (Boston: Brill, 2012) 349-381, esp. 355.

[687]The Holy Quran: Surah Al-Baqarah, Verse 2 (241).

[688]Viqar, Fauzia: Thematic Report on the Issue of Financial Protection Upon Divorce: Muslim Women's Rights under Family Laws in Pakistan- Article 16 for Consideration by CEDAW Committee in its 75th session 15th-28th February 2020. (Pakistan: Rah Center for Management and Development, 2020) 3.

[689]The Holy Quran: Surah Al-Baqarah, Verse 2 (241).

[690]The Holy Quran: Surah Al-Baqarah, Verse 2 (241).

[691]Khalid Bashir v Shamas-un-Nisa: 2015 MLD 11 (Lah).

responsibility solely on the basis that the child's mother is a homoeopathic practitioner and proficient earning source.

4.4.5. Employment Rights

According to Islamic law, women are allowed to work but this is usually under certain circumstances and very strict conditions. In many Islamic countries, job opportunities for women and men are not the same. They are not given equal opportunities because women are highly restricted from public life. A woman is not supposed to work alone with a man because according to the Quran they might be tempted. A woman is not supposed to do any job that will expose her honour of adulthood; in fact, she is required to be modest. Islam generally recommends that women stay at home and take care of the home. When Vanessa Maher carried out her fieldwork on Women and Property in Morocco in 1974, she pointed out that women do not work because their participation in the 'public sphere is considered immoral. This alone prohibits these women from doing anything that will make them acquire property. Also, the man according to Islam is obliged to uphold his duty of maintaining the woman. The husband is responsible for maintaining his entire family, not the other way round even when the wife has the means, so this also discourages Muslim women from working[692].

4.4.6. Property Rights

Since its inception, Islam has treated both men and women as distinct entities. Even after marriage, both sexes do not enjoy equal shares of each other's material possessions. That is, each of them maintains absolute control over his/her personal or real property. This notion of property ownership in the Anglo-Saxon law of England during the 19th century was quite different to that of the Islamic ideology. The English law considered both the husband and wife as a single entity or unit led by the husband, who possessed absolute control over his wife's properties and was in a position to deprive her of her property rights as the law did not consider her as an autonomous legal entity[693].

Islam is notable for the unfair representation of women in common thinking. There is frequent reference to the restricted women rights to freedom of divorce, child custody, and other aspects of family law, as well as the prevalence of low levels of women's political participation, education, and work engagement. However, it is less cherished that Shariah law provides better protection to women in certain ways than other religious practices. Of special interest, Islamic law's prevalent and historical meanings afford autonomous property rights to women[694]. Unlike other aspects of Islamic law, in terms of purchasing, vending, appropriating, or loaning (i.e., matters pertaining to the doctrine of privity), jurists do not distinguish between the sexes as well as the different categories of properties like the land, real estate, or money etc[695]. Since the seventh century, women in Islam have enjoyed an individual legal personality and distinct

[692]Mazumdar, Shampa/Mazumdar, Sanjoy. Rethinking Public and Private Space: Religion and Women in Muslim Society. In: Journal of Architectural and Planning Research18/4 (2001) 302–324.

[693]Daniels, Ronald J.: The Legacy of Empire: The Anglo-Saxon law Inheritance and Commitments to Legality in Former British Colonies. In: The American Journal of Comparative Law 59/1 (2011) 111–178.

[694]An-Na'im, Abdullahi Ahmed: Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives. In: Harvard Human Rights Journal 3/1 (1990) 13-53.

[695]Tucker, Judith E.: Women, Family, and Gender in Islamic Law. (Cambridge: Cambridge University Press, 2008) 135-37.

property rights irrespective of their marital status. The prevalent legal opinions state that both the sexes are bestowed with equal rights to receive, control and dispose of land, quoting portions of the Holy Quran, which read *"if you perceive in them right judgment, deliver to them their property*[696]*"*.

As stated previously, the matrilineal system of kinship held a woman as the head of her family and awarded her many rights, including the right to own property. In contrast, the patrilineal system of kinship considered women as nothing more than animals principally used for breeding and labour on the farm. The Prophet Mohammed chose the patrilineal system as the basis for his new religion upon which he implemented his Islamic reform. However, he did maintain the women's rights to buy and sell a property and to establish a business without any male relative's consent, direction, or involvement. For instance, the Holy Prophet's first wife Hazrat Khadijeh was a rich and respected woman among the Quraish tribe, who owned and operated her own import and export business. In the course of her business, she had to maintain contact with the men and employed a large number of men in her business, including the Prophet himself[697].

The right of women to own property is also recognized by the Holy Quran. This recognition is expounded by the Quran itself where it mentions some women holding esteemed positions in the times of the Holy Prophet and led them, afterwards, to acquire property. Generally, the Shariah law is clear about the rights of women concerning the holding, using and disposing of property, but these laws become intricate when explained through Tafseer of scholars from various schools of thought in Islam. In addition, Shariah law also recognizes the fact that a woman must be given what she earns and which can be transferred to her husband when she desires with her own free will. Because Islam requires women to remain a reserve, the right to property ownership seems contested as such a right can only be acquired when women are released from the bonds of restrictions and allowed to manage their property themselves, without the need of any male relative.

Bridal gifts agreed before, during or after marriage have become the exclusive property of the bride and are not refundable under the Dowry and Bridal Gifts (Restriction) Act of 1976, whether marriage exists or ends in divorce. Whenever a woman or wife files a suit for the retrieval of bridal gifts, the courts usually upholds the claims forwarded by her. The duty of the husband to care for his wife and children regardless of the couple's financial situation is another aspect that reinforces women's right to marital property. In deciding the wife's share of the property and her claim on any properties made during the union, the husband's position must be taken into account. Pakistan must also implement legislation to secure the interests of women in marriage and move for parallel regulations to guarantee women's economic rights in the event of divorce. This may be in the form of land, gifts, or money for the work performed by women during marriage sustenance[698].

Moreover, the financial security of women after a divorce is related to their share in marital property which may be owed by the contribution of women in cash or otherwise in connection

[696]The Holy Quran: Surah An-Nisa, Verse 6.

[697]Mazumdar, Shampa/Mazumdar, Sanjoy. Rethinking Public and Private Space: Religion and Women in Muslim Society. In: Journal of Architectural and Planning Research 18/4 (2001) 302–324.

[698]The Holy Quran: Surah Al-Baqarah, Verse 2 (241).

with physical or intellectual labour. There is no legal mechanism in Pakistan for documenting or deciding the contribution of an individual, in-kind or otherwise, to the acquisition of matrimonial property during the marriage subsistence period. For the restitution of her personal property and possessions, a wife may even bring a claim in the Family Courts. As to the matter of what constitutes a woman's individual property, the courts have usually understood that the property purchased, obtained or rendered after marriage by a woman, whether of her wealth or through the resources of her spouse, is to be included in the concept of an individual property. Family courts are allowed to pass a temporary injunction to retain and secure any property in question, the protection of which is deemed necessary for the fulfilment of the decree. The petition for the restitution of property can be brought by a woman during the course of a marriage or divorce[699].

4.4.7. Inheritance Rights

Since Islam follows a patriarchal linage, the man is considered as the head of a family and thus possesses the right to property ownership. Inheritance is one form of property ownership and Islam gives immense favours to men concerning inheritance[700].The law of inheritance is quite extensive and provides every single detail with depth in Islam. The religious scholars frequently refer to the saying of the Prophet with regards to the significance of inheritance laws, *'Learn the laws of inheritance, and teach them to the people; for they are one half of useful knowledge'*[701].

The law of inheritance (i.e., contracts based on privity of contract or for the benefit of third parties) in Islam consists of two distinct elements: the pre-Islamic customs of Arabia; and the Islamic reforms introduced by the Prophet. In a broader sense, the law of inheritance requires three things: certain individuals are given a specific share, according to the guidelines in the Quran; the residue is given to the agnatic heirs, and bequests are limited to one-third of the estate. A comparative review of the pre-Islamic and the Islamic principles of inheritance laws show that the Quran corrected the inequalities and economic injustices which existed in pre-Islamic Arabia concerning the distribution of wealth. A summary of the two principles is as follows[702]:

i. Pre-Islamic Law of Inheritance based on the customs of Arabia:
    a. The nearest male agnate or agnates succeeded;
    b. Females and cognates were excluded;
    c. Descendants were preferred to ascendants and ascendants to collaterals; and
    d. Where the agnates were equally distant, the estate was divided per capita.

ii. The Islamic Law of Inheritance:
    a. The spouse was made an heir;
    b. Females and cognate gained the right to inherit;

[699]Muslim Family Law Ordinance 1961: Section 21-A.

[700] UKEssays: Ownership of Property in Islamic Law, 2018.https://www.ukessays.com/essays/anthropology/property-ownership.php. Last visited 20-04-2020.

[701]Hurairah, Abu: Sunan Ibn Majah. In: Ibn Majah: Sunan Ibn Majah. The Chapters on Shares of Inheritance, Hadith No. 2719.

[702]Murphy, Papa: Inheritance Laws in an Islamic Society: Islamic Cultures Are Distinct in Everyway. (US: iUniverse, 2012)177.

c. Parents and ascendants were given the right to inherit even when there were male descendants;
d. As a rule, a female was given one half the share of a male; and
e. Rule of exclusion: In Islam, every individual, including an unborn child yet alive, is given the right to inherit. However, there are certain categories of individuals who are barred or excluded from the list of inheritance. This exclusionary rule is applied in circumstances involving differences in religion, homicide, slavery, and legitimacy[703]. An individual may be excluded in one of two ways: imperfect and perfect. An imperfect exclusion is a change of position or status in the line of succession, e.g., a female by herself is Quranic heir, but if she has a brother then she is excluded as the Quranic heir and admitted as an agnatic heir. The perfect exclusion is based on some legal cause and excludes people who, under normal circumstances, are eligible to inherit. Some of the more important situations under which the perfect exclusionary rule is applied include: a non-Muslim cannot inherit from a Muslim; a person who causes the death of another, whether it be intentionally or unintentionally, cannot inherit from the estate of the deceased; a slave cannot inherit from a free man. This was an ancient law no longer existent in modern-day Muslim societies; an illegitimate child can only inherit from the mother's estate and not the father's. This is one exception where the natural relationship determines the right to inherit. Islam does not recognize illegitimacy altered into legitimacy through the process of legislation. In some Muslim societies, the old customs still exist, and females face exclusion and their share of inheritance is calculated into that of the male heirs and it's an example of imperfect exclusion[704].

Although women possess the right to inherit a certain amount of share in the property of their deceased family member, yet their share is mostly half as opposed to the share of men in the family. For instance, a daughter bears the right to inherit from her deceased father's property, but the share is half of what the son inherits. To put it in another way the inheritance process is like two shares for the son and one for the daughter. The reason behind this unfair provision for inheritance is based on the presumption that the women (daughter in this case) have no duty to look after the responsibilities and management of the family as the men (sons in this case).

This unfair distribution of inheritance can be witnessed in *Muqadar v. Mst. Roshah*[705] case, which involves the allocation of the property of a dead man – named Rajab. He left behind his widow, a daughter and relatives. The dispute revolved around the issue of shares of inheritance for each party, to which the court responded with a ruling stating that shares of each party shall be decided in consonance with the injunctions of Shariah law. The widow was held to be entitled to 1/8 and the daughter to 1/2 which would become 3/24 and 12/24 respectively. While the residue, i.e. 9/24, would go to the relatives.

[703]Murphy (2012) 177.
[704]Russel, Alexander David: Muslim Law: An Historical Introduction to the Law of Inheritance. (UK: Routledge, 2013) 227.
[705]Muqadar v. Mst. Roshah: 2008 CLC-Peshawar-High-Court 43 (2007).

In addition, some women suffer from an entire denial of their right to inheritance in several conservative Muslim countries keeping in view these unfair Shariah law provisions and customary practices of such countries. This is due to the underlying reason that women offer no help in looking after the family; therefore, they shall not be given any share in the inheritance property. Not only this, Northern Nigeria is a living example of the stated fact, where Islam is practised and yet most of the law courts prohibit women from acquiring any right to inherit the property. In most cases, the process of inheritance is carried out in theory only and not in practice. That means the women are merely informed that they possess the right over a certain part of the property which in almost the majority of cases is not at all given to them. The right to property ownership has always been considered as a man's business, as women are deemed weak and entirely dependent on men who are in constant need of the men to manage the property and issues relating to such[706].

In 1995, Annelies Moors[707]explained the fact that women under Islamic law possess inheritance rights which are usually more restricted than the rights of men. The preference is generally given to men which is quite clear through the laws of inheritance in Islam. To prove this, she refers to the share of widows and daughters, who inherit far lesser share than any male member of the family. In case, a woman's husband dies, it becomes very difficult for her to inherit exclusive rights to her husband's property. This is done to retain such a widow from getting re-married and taking the entire property out of the deceased husbands' family. It is deemed better to keep her under the protection of the male members of the deceased husband's family so that the property stays within his family (basically the men). Islam entitles the wife to one-eighth share of the property of her husband, in case she has children with her deceased husband and to one-fourth share, in case she is childless when her husband dies, while daughters are entitled to half the share in comparison to their brother's share. Moreover, in case a father has only one daughter as his children, only half of his property will go to her daughter as inheritance and the rest would be given to his male relatives in the family. While this is not true in the case of an only son, as he gets the entire property of his deceased father reflecting the biased teaching of Islam against women. The logic behind the difference in the shares of a widow is that the property she inherits with children would go to her children, significantly the boys and the share is usually lesser and often refused due to the fear that she might get re-married. In the case of a childless widow, she is generally given nothing in property ownership.

The regulation enables female heirs to escape pressure from relatives to renounce their inheritance rights and gives them time to evaluate their options before making a decision. Such a procedure could ensure women greater access to financial assets. While this practice may prove positive, it must be noted that to ensure that land remains in the father's family, especially in rural regions, women are sometimes excluded from their inheritance because they are not named as potential heirs. Land may also be divided among male heirs before the father dies, as it is possible to make living bequests and donations. Women are then put under pressure not to claim their share. Bequests and donations can also be used positively to ensure that wives, daughters and sisters receive a higher share of assets than foreseen in the legal provisions on inheritance. A woman's access to inheritance and receipt of equal share has a significant impact on her financial security. With a limited inheritance, women can end up without sufficient

[706]Murphy (2012) 177.

[707]Moors, Annelies: Women Property and Islam: Palestinian Experience 1920-1990. Cambridge Middle East Studies (Cambridge: Cambridge University Press, 1995) 286.

assets or resources to support themselves. For example, if a wife has no personal assets, she may find herself destitute and deprived of the marital home unless she has minor children in her care.

4.5. Rights of Women concerning Contractual Issues under Continental Law in Europe

In continental law matters, the European Union (EU) plays a minimal role. Each independent member state has its laws on separation, divorce, spousal and childcare, custody and guardianship, and other matters. The EU's function is primarily to ensure that decisions taken in one country can be enforced in another. It also plays a part in helping to decide which government has the authority to hear a specific case. Indeed, the EU does not have laws regulating, for example, those that are entitled to custody or access, but it does have rules attempting to ensure that custody and access orders placed in one country can be placed in another country. The United Kingdom is no more considered an EU member and is assumed as a third party as of January 31st, 2020[708]. During the negotiated adjustment period i.e. until December 31st, 2020, however, British residents and their families have the same right to live, work, obtain benefits and access to EU healthcare as they did before.

While Continental Law remains the competence of individual EU countries, if there are cross-border repercussions, the EU can pass legislation on family law. For certain cases, a special legislative process is in place: all EU countries must consent (unanimously) and it is appropriate to consult the European Parliament. Today, living, working or learning in another country in the EU is simpler than ever before. There are more and more households and couples made up of individuals from various EU countries in a world where people are constantly mobile. Let's review the contractual rights of EU women under Continental Law in detail below to make a comparative analysis with the contractual rights of women under Shariah law in Pakistan ahead.

4.5.1. Marital Rights

In most European countries in the 21st century, ensuring equality for men and women is an extraordinary priority. That development began especially early in Sweden. Through the introduction of the contemporary the Marriage Code of 1920, a historical milestone was accomplished in 1920[709]. The chain of command in marriage formally ended through this Code in such a way that the married women were liberated from the legal supervision of their husbands. Equality was a central principle articulated in the preparatory work of this Code stating, *'Without any constitutionally defined right for one to rule on the other or alone in joint family affairs, the partners shall, as far as possible, be put side by side as equally free and separate individuals[710].'* In accordance with this philosophy, both the spouses were regarded as equals in all aspects of the law, which meant that the partners were entitled to the same standard of living during the marriage and could contract in or out of the marriage based on their free-will. They were absolved of any legal supervision or guardianship to contract

[708]European Council: Press release: Signature of the EU-UK agreement, 30 December 2020. Available online at https://www.consilium.europa.eu/en/press/press-releases/2020/12/30/press-release-signature-of-the-eu-uk-agreement-30-december-2020/. Last visited 25-12-2021.

[709]This Code replaced its predecessor the 1734 Code.

[710]Scherpe, Jens M.: European Family Law Volume III: Family Law in an EU Perspective. (UK/USA: Edward Elgar Publishing, 2016) 5.

marriage after 18 years of age in most of the EU countries. Moreover, the married women acquired the right to manage their property by themselves and the right to serve as their children's legal guardians. A fresh matrimonial property regime came into a force known as the *'deferred property regime'*[711], under which each spouse bore a latent privilege for half the marital property's gross net worth but the claim was only to be made after the marriage got dissolved. The term deferred property regime is quite vast comprising of both pre-marriage property and property obtained after the marriage. In instances of dissolution of marriage, this new property regime gives the monetarily weak spouse an equitable share of the income of the monetarily strong spouse. This means that it helped raise the status of married women in cases of divorce in the 1920s and 1930s when such women could barely make money for themselves. The revolutionary laws in the field of equality for men and women in the EU include the Swedish Marriage Code of 1920, along with the corresponding Acts in Norway and Denmark.

In most European countries in the twenty-first century, achieving gender equality is a top goal. This trend began in Sweden at a relatively early stage. The enactment of the new Marriage Code in 1920 was a watershed moment in history. The marital hierarchy was legally dissolved by the Marriage Code of 1920, which liberated married women from their husbands' legal guardianship. 'The spouses should, as far as practicable, be put side by side, as equally free and independent individuals, without any legally recognized right for one to decide over the other or alone in joint family concerns,' said the 1920 Code's preliminary work[712]. In accordance with this philosophy, husband and wife were recognized as two equals in all legal matters. Married women gained the right to administer their property and act as legal guardians for their children as a result of this[713].

The postponed community of property rule was implemented as a new marital property regime. Each spouse was given a latent claim for half of the entire net worth of the marital property, but the claim could only be realized if the marriage was dissolved. The postponed community of property law, which is still in effect in Sweden, is broad in scope, encompassing both properties acquired before and after the marriage. It guarantees that if the marriage terminates, the financially weaker party will get an equal portion of the wealth of the financially stronger party. In the 1920s and 1930s, when most women were still housewives with no source of income, the regime may be said to have improved their position in the event of divorce. Spouses have the right to the same level of living during their marriage. The Marriage Code of 1920 reflected a fresh perspective on divorce[714]. The overall notion was that it was no longer seen desirable to discourage couples from divorcing by enforcing harsh divorce laws and requiring couples to attend mandatory religious mediation. In other words, divorce went from being viewed as a consequence or punishment for failing in marriage to being viewed as a cure when a marriage had irreversibly broken down[715]. When both spouses agreed, divorce was granted after a one-year term of formal separation on the grounds of lengthy and persistent conflict. The couples' word was enough to prove that the disagreement had persisted after the official separation[716].

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[711]Marriage Code of 1920: Chapter 5.

[712]Scherpe (2016) 5.

[713]Marriage Code of 1920: Chapter 5.

[714]Note: The new rules on divorce had already been introduced in 1915, through a separate enactment which was then transferred into the 1920 Code.

[715]Antokolskaia, M.: The Search for a Common Core of Divorce Law: State Intervention v. Sposes' Autonomy. In: Casals, M. Martin/Ribot (eds), J.: The Role of Self-determination in the Modernisation of Family Law in Europe. (Girona: Documenta Universitaria, 2006) 34.

[716]Scherpe (2016) 80.

In the Marriage Code of 1920, a so-called divorce catalogue was adopted, which provided seven alternative reasons for divorce in the case of unilateral divorce petitions. Divorce was available if one of the spouses: (1) had remarried in violation of the law (bigamy); (2) had sexual intercourse or fornication with someone other than the spouse; (3) had infected the other spouse with venereal disease; (4) had attempted to take the other spouse's life, or had committed aggravated assault on the other spouse or the children; (5) had been convicted for certain felonies; (6) abused alcohol; or (7) was mentally ill The changing attitude toward divorce, as well as the huge 'divorce catalogue,' may create the impression that divorce was popular in Sweden throughout the 1920s. This, however, was not the case. In the 1920s and 1930s, divorce was still uncommon, though there was a minor uptick. In 1925, 1,748 divorce decisions were issued, and in 1935, 2,718 divorce decrees were issued. The number of weddings completed climbed from 37,419 in 1925 to 51,306 in 1935 over this time. Furthermore, the population of Sweden rose little. As a result, most marriages in the 1920s and 1930s were still considered permanent. How did the Marriage Code, with its new perspective on divorce, fare in society? In truth, the Marriage Code of 1920, women's independence, and the emphasis on equality had little direct influence on the daily life of the Swedish people. In the 1920s, just 4% of all married women in Sweden worked for a living[717].

In most homes in the 1920s and 1930s, the 'traditional' allocation of tasks between husband and wife was still in effect. This meant that wives were in control of the home and children, while husbands worked outside the home and were responsible for generating a living for the family. In other words, in Sweden at the time, equality was essentially a theoretical matter. The 1920 Marriage Code was not intended to disrupt gender norms within the family. In reality, it was assumed that a conventional distribution of tasks, in which the woman was responsible for the home and children while the husband was the earner, would best suit the family's interests[718]. Spousal maintenance was usually granted in the uncommon occurrence of divorce. This was significant because forcing a divorced woman to work out outside the home was seen as demeaning[719]. The ideological significance of the Marriage Code of 1920, however, should not be overlooked. Women gained the majority and legal power as a result of the Marriage Code of 1920, which emphasized that varied contributions during the marriage – domestic work and profitable employment – were valued equally. The 1920Marriage Code may be considered as laying the legal and ideological groundwork for the subsequent legal evolution in the late 1960s and 1970s when the idea of equality gained traction in society and affected people's family behaviour.

- ***Marriage Regulations in Germany***

Among other EU countries, Germany was the first to introduce robust laws that gave full legal capacity and administrative rights to married women regarding their property rights by way of a legal enactment in 1953[720]. A new policy on the marital property came into effect in Germany in 1958, namely the community of accrued gains, enacted by the German Equality Law of 1958, thus substituting the former regime based on the doctrine of property separation. In general, there is no way to compare the different marital property regimes. However, in contrast to its predecessor, the new regime comprised of clauses specifying that the work of a womans'

[717]Scherpe (2016) 5. Note: In 1940, this figure was 9%, and in 1960 it was 23%.
[718]Scherpe (2016) 7.
[719]The Swedish Law Commission Report, 1913: at 448.
[720]The German Constitution, 1949: Article 117.

household was identical to that of the husband's earning work, more specifically that the household work was also a contribution[721]. Furthermore, by dividing the property acquired during the marriage equally between the spouses, this new property regime fostered greater equality between the spouses on the dissolution of their marriage. This suggests that all sorts of contributions for the welfare of the family are taken into consideration in a marriage such as household work and paid employment. From this perspective, it can be seen that the spouse who carries out household chores is rewarded with a fair share for his/her services upon the dissolution of marriage in Germany.

As previously indicated, the Swedish Marriage Code of 1920 had a similar section emphasizing the significance of both family duties and successful employment. It should be emphasized, however, that until 1976, domestic work was entirely entrusted to the woman, according to the German Civil Code's language[722]. Housework was not specifically assigned to the woman in the Swedish Marriage Code of 1920; it was simply declared that it was as vital as a productive job[723]. However, as previously stated, a conventional division of tasks applied in Sweden as well, thus the distinction was largely linguistic and symbolic at the time. Similarly, in the Netherlands, married women's inability was removed in the 1950s, namely in 1957. Women were given the authority to administer their property as well as their spouses' 'community property' as a result of this legislative amendment. Nonetheless, until 1970[724], a clause in the Dutch Civil Code stated that the husband was the head of the union. In principle, the community of property law, which is still the default in The Netherlands, includes all assets acquired before or during the marriage, as a gift, or via inheritance[725].

- ***Marriage Regulations in France***

Employing the 1985 Reform Act[726] in France, husband and wife were given full equitable rights of representation in matters relating to their shared land or property. As early as 1965, a systematic reform was carried out in France relating to the property matters between the spouses. This new reform aimed at introducing an inclusion in the acquisitions regime for both spouses. However, it could not achieve its primary purpose of ensuring parity between the spouses as the husband continued to be the *'head of the community'* with exclusive authority to control the matrimonial property. Nevertheless, through the Reform Act of 1985, the dominant status of the husband was eliminated and the legislation gave husband and woman equal rights in disposing of their personal and joint estate[727]. In general, the establishment of parity between husband and wife remains the core political aim in many European countries during the 20th and 21st centuries.

The Reform Act of 1985 in France gave husband and wife complete equal rights of participation in things touching their joint property[728]. Before this, in 1965, France implemented a significant reform of the spouses' property relations, adopting the participation

[721]Boele-Woelk, K./Braat, B/Curry-Sumner, I. (eds): European Family Law in Action Volume IV-Property Relations. (Cambridge: Intersentia, 2009a) 62.
[722]The German Constitution, 1949: Article 117.
[723]The Marriage Code, 1920: Chapter 5, Section 2.
[724]Boele-Woelk / Braat / Curry-Sumner (2009a) 67, Question 2.
[725]Boele-Woelk / Braat / Curry-Sumner (2009a) 312, Question 20.
[726]Boele-Woelk / Braat / Curry-Sumner (2009a) 60.
[727]Boele-Woelk / Braat / Curry-Sumner (2009a) 62.
[728]Boele-Woelk / Braat / Curry-Sumner (2009a) 60, Question 2.

in acquisitions system. However, this change did not attempt to create equality between spouses, and the husband remained the 'head of the community,' with sole control over marital property administration. The husband's superior status was eliminated by the Reform Act of 1985, and husband and wife were placed on an equal footing in the law, with equal rights to dispose of their personal property and communal assets[729].

4.5.2. Divorce

In Europe, there is a high trend of marriages terminating in divorces. As a fact, more people choose to opt for a live-in relationship or abide by a civil marriage, which means a marriage governed by Continental Law rather than religious law. However, several divorcees would want to get married again, but due to religious constraints, they cannot. For example, the rights to divorce and remarry are strictly reserved for the husband under Islamic/Shariah law. Therefore, in the EU people favour civil marriages that offer divorce by filing a divorce petition before a civil judge whose decision dissolves their marriage. In addition to the dissolution of marriage, the judge possesses the authority to decide on issues related to the couples' children, shared property regimes, common assets, maintenance of children and/or spouse. Special laws exist within the EU for couples who live in different countries in the EU, which regulate divorce announced in one EU country to be acknowledged in another EU country.

New family law enactments have been adopted in most of the EU jurisdictions, which have constrained the degree of official involvement in the private affairs of spouses. A modern outlook for divorce was reflected in the Marriage Code of 1920. The general principle was that it was no longer anticipated to discourage men and women from divorce by enforcing rigid guidelines on divorce and obligatory church mediation. Conversely, the meaning of divorce shifted from being used as a remedy against a failed marriage in cases where the union of the spouses was irretrievably broken down[730]. Once the husband and wife gave their consent to separate, divorce was accessible subsequently based on long and continuous conflict after a period of separation of about one year. The consent of both the spouses is considered enough proof to state the fact that even after their one year of legal separation, conflict persisted[731]. However, in the case of seeking an autonomous or unilateral divorce, the Marriage Code of 1920 provided both husband and wife with seven different grounds, including where either of them: (1) contracts a second marriage (bigamy); (2) enters into an extra-marital relationship with somebody else; (3) infects his/her spouse with a deadly disease; (4) attempts to murder or assault the other spouse or their children; (5) commits several felonies/crimes; (6) gets alcohol addict; or (7) becomes mentally ill[732].

Basically, since the 1960s and 1970 in the EU, the main aim was to enhance the independence of both the spouses in terms of marital relations, thus making marriage a private matter between spouses. By so doing, it allowed the spouses to seek divorce from each other based on mutual consent or the irrevocable breakdown of their marriage. The idea of thwarting divorce regulations have been put aside by several national legislators, promoting the significance of individual autonomy. In the EU, divorce based on fault is gradually becoming extinct in the

[729]Boele-Woelk / Braat / Curry-Sumner (2009a) 60, Question 2.

[730]The Marriage Code, 1920: Chapter 5, Section 2.

[731]Sörgjerd, Caroline: Marriage in a European Perspective. In: Scherpe, Jens M.: European Family Law Volume III. (UK/USA: Edward Elgar Publishing, 2016) 6-7.

[732]Boele-Woelk, K./Braat, B/Curry-Sumner, I. (eds): European Family Law in Action Volume I-Grounds for Divorce. (Belgium: Intersentia, 2009b) 80.

21st century; however, there are certain EU countries such as France, Germany and Netherlands where it is still considered as a valid ground for divorce to a limited extent[733].

- ***Divorce Regulations in Germany and Netherland***

Divorce based on mutual consent is not recognised by either German or Dutch law as an independent (direct) basis for divorce. Rather, irrevocable dissolution/breakdown of marriage is the primary basis for divorce in both of these jurisdictions[734]. Divorce focused on the irrevocable dissolution of marriage was adopted in the Netherlands as the primary justification for divorce in 1971[735]. The consent of the spouses that the union has forever broken down is adequate as proof in this regard and the judge should not perform any further investigation[736]. 'Hardship- clauses' may be used in German legislation to illustrate the dissolution of marriage. A separation period shall be required before the divorce, for joint divorce applications about one year and unilateral applications about three year period. When the partners file for divorce together, the assumption is that the union has permanently broken down[737]. According to German law, the demonstration of a lawyer is obligatory and, in Dutch law, a divorce presentation must be signed and forwarded by an attorney general. Special forms comprising of the pertinent queries and data are available on the district courts' pages, and can be filled out and sent in by either or both partners. Divorce is an administrative process where the parties are not obligated to appear before a judge or an authority[738].

- ***Divorce Regulations in France***

In France, for example, divorce on grounds of mutual consent was adopted into statutory law in 1975, among other factors. Liberalizing divorce was a key aim of the reform. There were limits, though. A simple condition for seeking divorce on the grounds of mutual consent was that the union had lasted six months before the divorce filing and that an arrangement on all subsidiary matters could be presented by the spouses. The spouses had to testify before the judge twice; first to clarify the specifics of their arrangement on subsidiary matters, and second to finalize it[739]. A divorce based on mutual consent was enabled by the French Divorce Act of 2004, which came into effect on 1 January 2005. As a result, short-lived marriages may also be broken on the grounds of mutual consent and no separating time is necessary[740]. Another innovation is that couples have to testify in front of the judge only once. However, they do have to procure contracts of agreements covering all subsidiary matters to seek divorce on the grounds of mutual consent[741]. Another aspect that slows divorce in France is that a counsel must replace the spouses, for they cannot apply for a divorce together by themselves alone.

Besides mutual consent, the French Divorce Act of 2004 provides three other grounds for divorce: (1) recognition of the concept of marital dissolution (when the spouses decide to

[733]De Cruz, Peter: Family Law, Sex and Society: A Comparative Study of Family Law. (UK: Routledge, 2010) 66-67.
[734]Sörgjerd (2016) 6-7.
[735]Sörgjerd (2016) 44.
[736]Boele-Woelk / Braat / Curry-Sumner (2009b) 89, Question 4.
[737]Boele-Woelk / Braat / Curry-Sumner (2009b) 80, Question 4.
[738]Boele-Woelk / Braat / Curry-Sumner (2009b) 154, Question 9.
[739]Sörgjerd (2016) 313.
[740]Antokolskaia (2006) 18.
[741]Sörgjerd (2016) 6-7.

divorce but disagree on subsidiary issues); (2) breakdown of private life; and (3) fault-based divorce. Divorce on the ground of marital dissolution can only be granted after a two-year split-up of the spouses, without any further investigations. It turned out to be a lot more liberal ground in comparison to the prior Act of 1975, which recommended six years of split-up. In French Law, divorce on the grounds of mutual consent is still a good alternative, and divorce proceedings on any other separate ground maybe eventually converted by the spouses into a mutual consent process[742]. This suggests that it is usually considered better if both the spouses agree to divorce and, with limited interference from the authorities[743], seek settlements on subsidiary matters on their own.

In France, for example, mutual consent divorce was established in statute law in 1975 as one of numerous grounds for divorce. Divorce liberalization was one of the reform's key goals[744]. There were, however, certain limitations. A primary requirement for getting a divorce by mutual consent was that the marriage had lasted at least six months previous to the filing of the divorce petition and that the spouses could exhibit an agreement on all ancillary issues[745]. The spouses had to go before the judge twice: first to discuss the contents of their contract about ancillary concerns and again to finalize it[746]. The French Divorce Act of 2004, which went into effect on January 1, 2005, made divorce by mutual consent easier. As a result, short-term marriages can be dissolved by mutual consent with no need for a time of separation[747]. Another unique feature is that the spouses only have to appear before the court once. They must, however, provide a contract with agreements for all ancillary concerns to get a divorce based on mutual consent[748]. Another issue that causes divorce to be delayed in France is the requirement that both spouses be represented by a lawyer. They are unable to petition for divorce on their own. Apart from mutual consent, the French Divorce Act of 2004 specifies three additional grounds for separate: (1) recognition of the principle of marital breakdown (where the couple decides to divorce but disagrees on ancillary matters), (2) breakdown of communal life, and (3) fault. After a two-year separation of the couple, a divorce based on the dissolution of the marriage can be granted without any additional inquiry. This is a departure from the 1975 Act, which mandated a six-year separation period[749]. In Sweden, the same concept applies; if the spouses had lived apart for two years previous to the divorce filing, there is no need for a second reconsideration period[750]. According to French law, divorce by mutual consent is always a possibility, and divorce procedures started on another basis can be altered later by the couple to one based on their mutual consent. This shows that it is often seen as best if both spouses consent to the divorce and achieve independent agreements on ancillary issues with minimum interference from the court or authorities.

[742]Sörgjerd (2016) 6-7.

[743]Boele-Woelk / Braat / Curry-Sumner (2009b) 58-63, esp. 58-60.

[744]Butruille-Cardew, C.: The 2004 French Divorce Law and International Prospects. In: International Family Law Journal (2006) 144.

[745]Boele-Woelk / Braat / Curry-Sumner (2009b) 313, Question 29.

[746]Boele-Woelk / Braat / Curry-Sumner (2009b) 313, Question 29.

[747]Sörgjerd (2016) 6-7.

[748]Sörgjerd (2016) 6-7.

[749]Sörgjerd (2016) 6-7.

[750]The Swedish Marriage Code, 1987: Chapter 5, Section 4.

4.5.3. Custodial Rights

While the spouses remain married, they possess joint custody over their children in the EU. But, if the spouses separate or get divorced, they have to decide on the custody of their children for future endeavours. In terms of custodial rights, husband and wife have an equal share, that is, they have the right to agree on any terms they decide besides any religious or state laws. They can either agree that both of them shall possess the custody where their children may live with both of them alternatively or only one of them possesses the right to custody and the other possesses visiting rights. The spouse getting the custody rights has to provide for their children's education and general well-being while the other spouse must provide the maintenance for the subsistence of his/her children. Although it is the parents who bear the custodial rights over their children, yet these rights might be entrusted to a child institution.

The custodial rights are decided between the husband and wife through mutual agreement. In the instance of the spouse's failure, a lawyer or an arbitrator might be of help. For that purpose, the spouses have to seek the court for a decision regarding their custodial rights over their children. Once the matter is in court, the judge has to assign appropriate custodial rights to each spouse. If the spouses belong to different countries within the EU, then the EU laws decide which court is liable for dealing with such a case. The key goal is to prohibit all couples from approaching the court in their own country and to prevent two rulings from being given in the same situation. The place where the child lives habitually is regarded as the place for court jurisdiction.

In Leonov v. Russia[751] case, a father -Mr. Leonov- filed a petition in the court for the custody of his child. In the petition, he claimed the existence of a judicial presumption that a child is best placed with his/her mother and that his (the father) rights under the Constitution had been abused by the domestic courts. In response to his petition, the Court ruled that there had been no breach of Article 8 (the right to respect for private and family life) and, no infringement of Article 14 (prohibition of discrimination). An argument under Article 5 of Protocol No. 7 to the Convention (equality between spouses) was also dismissed by the Court by a majority as manifestly baseless. It also stated that the father was allowed to present his case before the court in entirety and the decision of the court is relevantly sufficient in not providing him with his child's custody. More specifically, the court was not satisfied by the father's claim that the judge in his previous case believed in the fact that small children must be raised in the custody of their mother, rather than the father.

In conflicts over their upbringing, family law in domestic legal systems across Europe places a specific emphasis on the welfare or best interests of children[752]. These domestic regulations are backed up by the United Nations Convention on the Rights of the Child, which states that "the best interests of the child should be a priority consideration[753]" in all acts involving children. More recently, the European Union's charter of basic rights has adopted the same phrase[754]. While domestic regulations frequently employ somewhat different terminology than these international texts, the concept that the child's wellbeing deserves special attention when making decisions about their upbringing is ubiquitous.

[751]Case of Leonov v. Russia: Application no. 77180/11, 10 April 2018.

[752]United Nations Convention on the Rights of the Child, 1989: Article 3.

[753]Charter of Fundamental Rights of the European Union, 2010: Article 24 (2).

[754]Arguments of Philip Cayford. In: Payne v. Payne (2001) EWCA Civ 166, 1 FLR 1052.

Two important English legal instruments will be stressed out here: the Children Act 1989 and the Adoption and Children Act 2002. The former is concerned with conflicts between parents over their children's upbringing as well as disagreements between the state and the family over child protection issues, which English family attorneys refer to as private law and public law, respectively. The Adoption and Children Act, on the other hand, only applies to adoptions that arise as a result of substantial child protection issues. In all of these circumstances, the welfare of the particular child will take precedence over all other considerations when making decisions about the kid's upbringing[755].

In both the Children Act and the Adoption and Children Act, these broad declarations of welfare primacy are then reinforced with a list of important elements that the concerned people and policymakers should consider when judging wellbeing[756]. The list of children's behaviours in Section 1 (3) is known as the welfare checklist and the list in Section 1 (4) of the Adoption and Children Act 2002 is in many ways similar to its Children Act counterpart. The checklist is stated below:

1. The discernible wants and sentiments of the youngster in question, i.e. his age
2. His physical, emotional, and educational requirements.
3. The potential impact of any change in his circumstances on him.
4. His age, gender, history, and any other criteria that the court deems relevant.
5. Whatever harm he has endured or is likely to suffer.
6. How competent each of his parents, as well as any other person to whom the court judges the subject to be pertinent, is of providing his requirements.
7. The scope of the court's authority under this act in the proceedings at hand.

In English law, the term 'welfare' is defined in terms of two aspects: 1) When making decisions about children, the welfare of the child must be the single deciding factor, which means it must take precedence over, and have a greater impact than, all other considerations[757]; and 2) When applying the welfare principle, the rights and wishes of parents, whether unimpeachable or not, must be assessed and weighed concerning the welfare of the child in conjunction with all other relevant factors. Based on this definition, claiming that wellbeing trumps all other concerns risks confounding a welfare decision with the variables that go into making one. The checklists are geared at difficulties from the child's perspective, although they are by no means comprehensive. Other factors can and should be considered since they are indicated to be considerations for the court to take into account in particular. Given the major significance of child welfare as a legal concept across Europe, it is critical to determine whether this approach complies with the standards of human rights treaties[758].

- ***Custodial Rights in Germany***

In Germany, custodial rights for both the husband and wife are the same. They may agree on mutual custody for their children or otherwise. Where the spouses agree on mutual custody and later get divorced, in such a case they shall continue to share mutual custody of their children no matter what. Conversely, if one of the spouses requests the Family Court for custody, the court possesses the authority to grant custody to one of them. There are two conditions for

[755]Scherpe (2016) 211.
[756]Similar lists of factors are found in other European jurisdictions, e.g. the French Code Civil: Articles 373-2-11.
[757]Scherpe (2016) 213-217.
[758]Scherpe (2016) 213-217.

granting custody to a single spouse: if both the husband and wife had mutual consent before the moving of such a request before the court unless their children are 14 years old, or if granting such custody is considered in the best interest of their children by the court. Despite the spouses' divorce, matters of their children's custody arise only after an application is submitted in the court requesting custody, except for the cases where the wellbeing of a child is at stake[759].

- ***Custodial Rights in France***

In France, the separation or divorce of spouses does not impact the laws related to custody of their children. Both the husband and wife should remain in joint custody and make mutual decisions in the best interest of their children. However, if they fail to agree on joint custody, they have the authority to seek family court. The judge will then grant custodial rights to either of the spouses based on the following considerations: previous agreements or arrangements practised by the spouse, perceptive of the children in question, spouses' capability to perform their obligations and respect for each other, age of the children based on the expert's report, information acquired from any social investigations, and physical or mental abuse by one spouse on another[760].

4.5.4. Maintenance Rights

Concerning the maintenance claims, both the husband and wife are allowed to enter into a mutual agreement in writing post-divorce. In the agreement, they must decide upon the magnitude, implementation, period and conclusion of the maintenance requirement and the likely renouncement of the maintenance claim. But such an agreement must be validated after scrutiny from a competent authority (usually a family court). In addition, claims for maintenance can also be settled down by seeking family courts. In the instance of divorce, the spouse making claims for maintenance must satisfy the court that he/she possesses insufficient means to meet his/her needs and the other spouse possesses enough resources to support those needs. The court should look into several factors before settling maintenance claims, for instance, the working capabilities of both the spouses', their ages and well-being, attention towards children, division of responsibilities, length of spouses' marriage, their living standard while married, and new marriage of the spouses' etc[761].

After taking into consideration all the aforementioned factors, the court shall decide the maintenance claims which shall be paid to either of the spouses. The amount of maintenance must be given to the claimant at fixed intervals and also in advance. The court may also provide for maintenance to be given in a lump-sum form, in case anyone or both spouses request for it. payment upon request of either or both spouses taking into account the circumstances of the case. The court must also take into account that such maintenance must be provided for a limited time, however, in extraordinary circumstances, it may increase the time duration. In instances of peculiar difficulties due to the actions of the claimant spouse, the spouse providing maintenance might be directed by the court to either prohibit or terminate maintenance. The maintenance claims also terminate upon the claimant spouse's remarriage or forming a long relationship with someone else. This termination remains in effect even if the new marriage or

[759]Choudhry, Shazia/Herring, Jonathan: The Cambridge Companion to Comparative Family Law. (Cambridge: Cambridge University Press, 2019) 87.
[760]Scherpe (2016) 58-63, esp. 61-62.
[761]Scherpe (2016) 147-148.

long-term relationship does not work out. Of course, if any of the spouses die, the maintenance obligation ceases[762].

Divorce's financial repercussions are controlled in significantly diverse ways throughout EU states. Even the most fundamental understanding of the nature and structure of divorce's financial repercussions appears to be significantly different. The most obvious contrast here is between the Anglo-Saxon jurisdictions of England and Wales, Pakistan, Ireland, and continental European civilian tradition jurisdictions for the stop only the later no statutory matrimonial property regimes that play a pivotal role in the financial consequences of divorce. Without a question, the division or allocation of marital property following divorce is important in Anglo-Saxon jurisdictions, but it is embedded in a completely different structure and method. It is part of a more comprehensive experience, but it is an activity that analyzes all of the potential repercussions of divorce at the same time. In contrast, jurisdictions with a marital property system, whether it applies by default or was selected by these parties, independently varied implications indicated above in two different remedies, often beginning with a division of marital property. In these countries, the financial repercussions of divorce are therefore usually stated to rely on numerous pillars, whereas in Anglo-Saxon jurisdictions, the financial effects of divorce are provided as a bundle. Another notable distinction across EU countries is whether property ramifications come from the fact of marriage itself or solely at the moment of divorce. In most EU jurisdictions, the act of marriage creates some form of Community property, or at least the potential for one, whereas in others, particularly jurisdictions of the Germanic legal tradition and the Nordic countries, as well as Anglo-Saxon jurisdictions, marriage does not change the couple's property relationships. All states in the EU, however, have what is known as default rules for the financial repercussions of divorce, which are legal standards that apply in the absence of an agreement or contract[763].

The Dutch courts have broad discretion when it comes to spousal maintenance, informed by the general concept of fairness as well as other criteria such as lack of means and ability to pay. Maintenance claims are restricted to a maximum of five years in the event of brief, childless marriages and 12 years in all other circumstances unless there is a case of hardship. Periodical maintenance payments are to be used to address hardships and/or needs, and such payments continue to play a significant role in German legislation regarding the financial implications of divorce. The conditions in which the court can use its legal discretion to provide such payments are outlined in legislation and include, for example, continued childcare responsibilities, old age, sickness, unemployment, imprisonment, and so on. It is worth mentioning that marriage does not have to create a will. Furthermore, the payments may have a compensating role, at least in principle[764].

- ***Maintenance Claims in Germany***

In Germany, the maintenance amount agreed between the spouses must be given to the claimant spouse at regular intervals. The amount of maintenance must be decided based on the needs and necessities of the claimant spouse and the capability of the spouse liable for paying maintenance. In Germany, the higher district courts (known as the ***Oberlandesgerichte***) have established tables and guidelines to assist in regulating a regular amount for the items under

[762]Scherpe (2016) 147-148.

[763]Scherpe (2016) 147-148.

[764]Antokolskaia, M./Boele-Woelki, K.: Dutch Family Law in the 21st Century: Trend-Setting and Straggling behind at the Same Time. In: Electronic Journal of Comparative Law 6/4 (2002) 1-21.

consideration for maintenance claims. One of the commonly used tables in Germany includes the *Düsseldorf* table for evaluating child maintenance. As a principle, maintenance shall be disbursed in advance every month to the claimant spouse or to any other institution otherwise authorized to accept payment[765].

It's not unexpected that the contractual aspect of marriage should take precedence over its ethical and institutional character exactly during the moment of divorce when the parties to the marriage want to be free of the shackles of this "conjugal existence in common." The contractual aspect of marriage, which comes to the fore so strongly at the moment of its "liquidation," naturally sets the tone for alimony legislation. It would be a mistake, however, to imply that the "liberal citizen" regards marriage just as a bilateral compact. Even though they have become a significant proportion of existing marriages in Germany in recent years, and surprisingly have increased appreciably during the first years of the National Socialist regime, which wishes to restore to marriage its institutional character as modified by the National Socialist conception of the "Volk[766]," they remain a minority. On the other hand, it is impossible to deny that the fact that marriage could be broken just as easily as a private contract motivated many people to enter that relationship who would not have done so if the marriage had been viewed as a foundation for a larger duty. As a result, many weddings took place under the auspices of a contract rather than a moral community of life interests.

When regarded from a secular and political perspective, marriage must lose all institutional and ethical qualities upon dissolution and can only have value as a pre-existing legal relationship. As a result of this idea, the reciprocal entitlements of the spouses on the dissolution of the marriage can only be adequately assessed by contract law rules. As a result, the concept of contract violation is crucial not only for the formation of these claims but also for their scope. Acceptance of culpable contract violation as the basic theory of culpability leads logically to the following alimony principles, which are stated in the Civil Code sections highlighted in parentheses: (1) An alimony claim can be made only against the party that is responsible for the divorce and in favour of the innocent party. Both spouses cannot seek alimony if they are both at fault[767]. (2) If the alimony claimant is the wife, it is presumed that she does not work for a living, and her right, under general contract law principles, is to obtain "what she would have had if the damaging event had not occurred[768]," which in this case means that she is entitled to maintenance commensurate with her station[769]. The phrase "maintenance suiting her station" is interpreted to relate to the husband's standing at the moment of divorce,

[765]Scherpe (2016) 101-105.

[766]The following figures indicate the number of divorces per 10,000 marriages granted in Germany for the period 1929-1937:

Year	Number of divorces/10,000 marriages
1929	29.0
1930	29.5
1931	28.5
1932	29.7
1933	29.7
1934	37.0
1935	33.0
1936	32.6
1937	29.8

[767]German Civil Code: Section 1578 (2).

[768]German Civil Code: Section 249.

[769]German Civil Code: Section 249.

not to the status he may subsequently have[770]. Increased need, such as a result of sickness, does not entitle you to an increase in alimony payments[771]. (3) The "damage" to the woman is minimized, however, if "earning by the wife's work is customary, according to the circumstances in which the spouses lived." In this scenario, the spouse who was found to be at fault in the divorce action is only obligated to provide maintenance commensurate with the wife's position to the extent that her wages are insufficient[772]. (4) Similarly, if the woman has an income from her property, the husband is only obligated to give maintenance if the wife's income is insufficient[773].

This outcome, once again, is not in conflict with conventional contract law principles, but rather an application of them. Except in the case of separate property, the husband has administration and use of the wife's property during the marriage under German law of marital property rights. Even under such arrangement, the wife is required to pay from her income to the marriage costs[774]. As a result, reducing her alimony claim by the amount of her separate income is merely an application of the general notion that she should be placed in the situation she would have been in if her husband had not wrongly terminated the marriage. The divorced wife is not obligated to touch the principal of her money, even if she is wealthy and her husband is reliant on his work, according to the same notion. She was not obligated to spend her principal throughout the marriage, and forcing her to do so now would be a "harm" to her. (5) If the husband is unable to care for the family's needs, the wife is obligated to do so. As a natural consequence of the above principles, in the event of divorce, the wife declared solely responsible is obligated to give her husband maintenance commensurate with his rank since he is unable to sustain himself[775].When the divorce decision enters into force, the demand for alimony emerges. In the meanwhile, the court overseeing the divorce case might make a provisional decision on the issue of maintenance that will endure until the divorce order takes effect.

A claim for alimony is essentially a claim for regular payments[776]. However, an income can be secured by paying a lump amount, and the law states that if there is a compelling cause, the party entitled to alimony can request a capital sum adjustment[777]. There is also a provision for securing the commitment to make future monthly payments. The Code of Civil Procedure makes the procedure for acquiring security for future performances, often through sequestration of the debtor's property, subject to various circumstances that are not always easy to show. A decree in personam, on the other hand, instructing the obligor to provide security for the fulfilment of unpaid debts is a rare practice. Section 324 of the Code of Civil Procedure provides a particular claim to security for future performance in this instance due to the unique nature of the claim to support. The obligee can seek security, even if none was supplied in the initial decree, or an increase in the security originally provided "where the obligor's economic status has deteriorated to a sufficient degree," according to this clause. As a result, there is no

[770]Mankiewicz, H./Fuller, L. L.: The German Law of Alimony before and under National Socialism. In: Law and Contemporary Problems 6/2 (1939) 301–318.

[771]Deutscher Anwaltstag: Juristische Wochenschrift: Organ des Deutschen Anwaltvereins (Berlin: Moeser,1935) 70.

[772]Mankiewicz / Fuller (1939) 301–318.

[773]German Civil Code: Section 1578.

[774]German Civil Code: Section 1427.

[775]German Civil Code: Section 1427.

[776]German Civil Cide: Section 1580, Para 1.

[777]German Civil Code: Para 2.

need to show that the execution of future obligations has been jeopardized in this circumstance[778].

- ***Maintenance claims in France***

In France, there exists no specific mode of maintenance payment set out in the French *Code civil.* It is left to the spouses to decide a particular mode of maintenance payment through mutual agreement. However, if the spouses fail to reach an agreement, then the family courts may be sought to decide upon such a matter[779]. Once the case falls under the ambit of a court, then the judge has to decide whether the maintenance be paid monthly to the claimant spouse, or in a lump sum based on the total costs encountered during the children' custody. The judge calculates the contribution/amount of maintenance in accordance with the resources of each spouse and the needs of the children. Meanwhile, since 2010, the French Ministry of Justice (*Ministère de la justice*) has provided a reference table in a published version for the courts to calculate the maintenance claims. This reference table was drawn based on the financial situation of both the spouses, the number of children, and the extent of visiting rights and housing.

Since the law's formulation in 1804, French courts have worked tirelessly to alter it to better protect the woman during a divorce or separation proceeding. The position, as initially envisioned by the lawmaker, placed the husband in charge of nearly all family finances. Only real estate was adequately protected by law. With the rising importance of moveable property in individual fortunes, the problem became increasingly critical, and the courts employed every tool at their disposal to correct this unacceptable state of things. The issue of the wife's alimony *pendente lite* was one of the areas in which they exerted influence. Their efforts tended to instil greater flexibility in the law on the matter so that the wife would not be under-provided throughout the action, although the husband kept control of the finances until the marriage was dissolved and the marital settlement was liquidated. These efforts resulted in certain legislative changes. A divorce decree or a judgment of separation may, under certain circumstances, order the guilty spouse to pay perpetual alimony to the other. Of course, this alimony is calculated based on the circumstances at the time of the decision. At this time, courts are frequently called upon to resolve technical issues that prevent the modification of this estimate, which is necessitated by a change in either spouse's financial condition. The problem is that the legal foundation for granting permanent alimony appears to be different from that of alimony pendente lite, with the decree's sole purpose being the dissolution of the marriage bond. As a result, it appears that permanent alimony is more in the character of damages for the innocent spouse's loss of the ability to seek support under Section 212 of the Civil Code. As a result, the tougher standards for estimating damages are applied instead of the rules for estimating allowances for necessities amongst relatives, which regulate alimony pendente lite[780].

The responsibility imposed on both spouses by Section 212 of the Civil Code to support each other underpins alimony pendente lite. Cohabitation, which is also one of the main marriage responsibilities in French law, fulfils this responsibility as long as there is harmony in the family. When a divorce or separation action is filed, the first step, after all, attempts at reconciliation have failed, is the assignment of a separate domicile to the wife by order of the President of the Court of First Instance. This metric appears to not affect the spouses'

[778]Mankiewicz / Fuller (1939) 301–318.

[779]Boele-Woelk / Braat / Curry-Sumner (2009b) 62-63.

[780]Mitchell, L. M.: Alimony in French Law. In: Law and Contemporary Problems 6/2 (1939) 293–294.

relationships. However, due to French marriage law, it inevitably has the most significant immediate implications for their patrimonial connections. Couples planning to marry might pick from a variety of matrimonial regimes (marriage settlements). The legal patrimonial status, known as the regime de communaut (community property), will apply if no formal contract is made about their property. Almost all of the couples' moveable property becomes communal property in this type of settlement. The income from the couples' estates must be contributed to this fund. Naturally, the spouse has sole control over his estate as well as the joint fund. As a result, he has exclusive authority to govern the wife's separate wealth, as the income belongs to the community, of which he is the natural manager. The wife's dowery is set aside if the couples have opted to get married under a specific fund by express agreement. It cannot be sold, and the money is only for the benefit of the family. The husband is the only manager of the dot once more. Even though the settlement rejects all community of interests, the spouses' property remains theirs, but because the wife's income is allocated for the family's maintenance, the husband has a beneficial interest in it known as usufruct. The woman keeps control of her separate estate only if the agreed-upon settlement is one of property separation. She is, however, required to contribute up to one-third of her income to domestic costs[781].

As a result, alimony pendente lite may be given even though the spouse in need may be the guilty spouse in terms of the eventual divorce or separation decision. It can be given to either the woman or the husband (though the former is more common according to the French law of marital settlements already mentioned); like other allowances for necessities, it is based on a reciprocal responsibility arising from the family relationship. Alimony pendente lite is subject to the basic rules of Section 208 in terms of its valuation: it must be commensurate to the creditor's demands and the debtor's ability to pay. The creditor's requirements encompass all of life's necessities, such as food, accommodation, and clothes, as well as the costs of the current lawsuit. They may also include the creditor's family members, such as children from a previous marriage. On the other hand, all of the creditor's assets must be considered. However, the fact that the creditor might be able to seek help from his or her parents is no protection for the debtor, because the reciprocal responsibility of assistance between spouses is the most important of all such family duties. If the debtor is the husband, the income from the wife's estate must be included among the debtor's resources if he manages it under the marital settlement. It should be remembered that alimony is based only on income. On the other hand, one must look to the eventual division of property at the dissolution of the marital settlement to establish who will carry the ultimate burden of the debt. In terms of patrimonial connections between spouses, the court's judgment under Section 252 stretches back to the beginning of the proceedings. As a result, if the couples were married under community property, income from either spouse's wealth, which the community benefits from, will no longer flow into the common fund as of that day. As a result, if the woman has no personal estate at the time of the winding-up, alimony will be treated as a true allowance for necessities, taxable to the husband under Section 212. However, if the woman owns any income-producing property, alimony paid pendente lite will be used to offset this income over the same time[782].

This is a basic description of the actions performed during the proceedings to carry out Section 212's reciprocal responsibility of support. However, due to the unusual circumstances surrounding a divorce or separation litigation, the courts have deemed it essential to supplement them with alternative remedies to fulfil the needs of the parties. They were naturally drawn to make use of the wife's ability to charge her husband's credit, although, as previously stated, the

[781]Mitchell (1939) 294-295.

[782]Mitchell (1939) 297 and Footnote 1.

married woman was legally incapable until the statute of February 19, 1938. However, more recent rulings show a trend of rejecting the idea in this circumstance[783]. Some courts went even farther, appointing a trustee to pay alimony on the husband's behalf, or, more commonly, restoring the wife's pendente lite ability to handle her wealth. In this regard, the lawmaker himself aided the courts. Married women have the management and disposal of property acquired from their professional activity, and they have the right to attach their husband's pay if he fails to provide for them, according to legislation passed on July 13, 1907. This isn't the only way to make sure that the court-ordered alimony is paid. Legislation of April 7, 1924 (amended April 3, 1928) made non-payment of alimony a criminal offence in response to the large number of cases in which the debtor did not fulfil his duty, and because the civil forms of enforcement were ineffective. The debtor might face a term ranging from three to twelve months in jail and a fine ranging from one hundred to two thousand francs. If the offence is repeated, additional punishments, such as destitution from paternal authority, may be imposed[784].

When a divorce is finalized, alimony pendente lite ceases to be owed due to its goal and legal foundation. The marriage is dissolved as a result of the verdict. The reciprocal responsibility of assistance vanishes with it. Furthermore, the marriage property is wound up, and each spouse regains complete authority over his or her assets, allowing them to sustain themselves. There is only some debate as to whether the debt is extinguished when the ruling is final and no longer susceptible to appeal, or if it should be extended until the matrimonial estate is liquidated. This last option has received a lot of support from the courts. As a result, divorce seems to destroy all personal and patrimonial links between the spouses, as well as put an end to alimony payments. However, the issue is more difficult to resolve. In accordance with Section 301 of the Civil Code, "Unless the marriage settlement provided some benefit on the dissolution of the marriage, or provided insufficient benefits for the spouse who obtained the divorce, the court may award such spouse alimony, based on the guilty spouse's property and not exceeding a third of the latter's income. If alimony is no longer required, it will be rescinded." As a result, alimony pendente lite is replaced by permanent alimony, which is awarded only to the spouse who obtained the divorce under the aforementioned criteria. In theory, perpetual alimony awarded after a divorce is similar to indemnity repaying damages. Even though it is referred to as a "food allowance," it is recognized that it cannot be managed by the basic rules governing other allowances for necessities tied to particular family relationships between debtor and creditor. This is because divorced couples no longer have any familial ties. The difference of nature can be seen in the provisions of the law, which, despite using the term "pension alimentaire" and subordinating its grant to the absence of creditor-friendly stipulations in the marriage settlement, makes it the exclusive privilege of the innocent spouse and only considers the debtor's paying capacity up to one-third of his or her income. Permanent alimony becomes the consequence of a tort: the marriage offence—which led to the divorce—because it can only be awarded to the innocent spouse. No alimony would be payable if both spouses were found guilty and divorce was granted "against both," because the lesser of the two offences were sufficient to warrant the breakup of the marriage. The loss of the benefit of Section 212 and the claim to support from the other spouse is the harm inflicted to the innocent spouse by the marital infraction[785].

[783]Mitchell (1939) 297 and Footnote 2.

[784]Mitchell (1939) 297.

[785]Mitchell (1939) 297-298.

4.5.5. Employment Rights

According to the EU Continental Law, women are allowed to work without any restrictions. They are provided with equal opportunities to work unlike the Islamic countries, where women are highly restricted to work outside. The EU women can work in any field and anywhere they desire. They are considered to be the earning hand of a household just like the men in the EU. However, they too face gender discrimination when it comes to paying gaps, violence against women or women trafficking etc[786]. Although the women in the EU face several challenges in the employment regime, yet they get along on better grounds than women in Islamic countries.

In Emel Boyraz v. Turkey[787] case, a Turkish woman filed a suit in court against gender discrimination at the workplace. She was working as a security officer in a branch of a government-run electricity company on a contractual basis for about 3 years. She got dismissed in March 2004 on the pretext of gender discrimination. She was told that as she cannot meet the requirements of "being a man" possessing military services, she can no longer be appointed to the aforementioned post of security officer. The court dismissed her suit while taking into account a previous ruling given by the Supreme Administrative Court on this matter, where it was legally upheld that the post required a male candidate. However, in the current case, the court held that there has been a violation of Article 14 of the Convention (prohibition of discrimination) in concurrence with Article 8 (right to respect for private and family life), as well as a breach of Article 6 (1) (right to a fair trial), on account of the excessive length of the proceedings, the conflicting decisions adjudicated by the Supreme Administrative Court, and the lack of satisfactory reasoning in the Supreme Administrative Court's prior ruling.

- ***Employment Rights in France***

Due to the recent reorganization of production and changes in working time arrangements, the growth of intermediate statuses — temporary employment, recurrent employment, and part-time labour - has arisen. These are frequently work-related positions for women. Part-time work, for example, is nearly entirely reserved for women in both the United Kingdom and France. They're also quite tough to classify. Even though French women had greater levels of formal economy engagement earlier this century due to the survival of family farms and companies and their continued economic relevance in the manufacturing industry, currently women's activity rates in the two nations are identical. In France, the percentage is 45.4 per cent, whereas, in the United Kingdom, it is 49.2 per cent. Furthermore, despite the recession, they have continued to increase in both nations. Women also make up about comparable shares of the economically active labour force in the United Kingdom and France. It is tempting to take such activity rates at face value, and cross-national studies usually do. However, there are two key areas where women's activity rates in France and the United Kingdom differ significantly. First, the job profiles of women in the two nations are significantly different. Work history statistics demonstrate that in France, women engage in the labour market in the same way as males, except for having three or more children or being declared redundant. Women's employment histories in the United Kingdom, on the other hand, still tend to follow a bimodal pattern (although this is being modified among younger cohorts). When British

[786]Bettio, Francesca/Sansonetti, Silvia /Davis, Jacki: Visions for Gender Equality. (Luxembourg, Publication Office of the European Union, 2015) 9.

[787]Case of Emel Boyraz v. Turkey: Application no. 61960/08, 2 December 2014.

women have children, they are more likely to leave the workforce rather than take maternity leave, then return to part-time employment. In Britain, the existence of dependent children, particularly the age of the youngest kid, is the most important factor of women's labour market engagement, but in France, the significant variable is the number of children a woman has: whether she has three or less. The prevalence of a high degree of pan-time employment among women in Britain, particularly white women, is the second notable variation in women's activity rates. Men's part-time work is insignificant in both nations (less than 5 per cent). However, in the United Kingdom, one out of every two women works part-time, and in France, one out of every five women works part-time. In recent years, part-time work has increased significantly in France, although it is not a basic basis of labour market organization there. In France, the majority of women work full-time[788].

Several factors play a role in understanding the various kinds of women's labour market engagement in France and the United Kingdom. On the supply side, state policies and cultural constructs are particularly significant variables[789]. In both nations, women are over-represented in lower-level professions and under-represented in higher-level occupations, but there is one significant difference: French women appear to have advanced farther in administrative and lower-level management roles in the 1970s than British women[790]. In terms of pay, there isn't much of a difference between the two nations. Even though women receive equal pay for doing precisely the same tasks as men, occupational segregation has left a disparity of over 25% between men's and women's incomes. In the private sector, the difference is bigger than in the public sector, and it is largest at the top of the occupational ladder. The disparity between men and women with the greatest qualifications is the biggest in both nations, and it worsens with age. Part-time employees in both nations are notably low-paid, owing to their concentration in low-paying sex-segregated vocations and sectors of labour.Employer and trade union policies and practices that have restricted women to lower-paid and less valued jobs, state policies[791] (e.g. national insurance contributions, employment legislation), education and training programs and cultural factors that have resulted in women being constructed as distinct kinds of workers all contribute to these similarities between the two countries.

In terms of unemployment, the situation for women in France is consistently worse than in the United Kingdom. Given the varied patterns of women's economic involvement in the two nations, this is perplexing, just as the ubiquitous occurrence of occupational segregation. It is rather difficult to be accurate about the levels of unemployment among women, partly because of the difficulties in defining the notion and partly because of the difficulty in calculating the number of jobless people. Because official unemployment statistics cannot be compared, the Labour Force Survey is the only data available for cross-national comparison. In terms of unemployment, the situation for women in France is consistently worse than in the United Kingdom. Given the varied patterns of women's economic involvement in the two nations, this is perplexing, just as the ubiquitous occurrence of occupational segregation. It is rather difficult to be accurate about the levels of unemployment among women, partly because of the difficulties in defining the notion and partly because of the difficulty in calculating the number of jobless people. Because official unemployment statistics cannot be compared, the Labour

[788]OECD: The Integration of Women into the Economy. (Paris: O.E.C.D., 1985).

[789]OECD (1985) 371.

[790]Poval, Margery: Overcoming Barriers to Women's Advancement in European Organisations. In: Personnel Review 13/1 (1984) 32-44.

[791]OECD (1985) 374.

Force Survey is the only data available for cross-national comparison. The LFS verifies the official impression that women in France are more likely to be jobless than in the United Kingdom. While the UK has a slightly higher unemployment rate than France, the rate of female unemployment in France is greater, at 12.1 per cent, than in the UK, at 10%. (1984 figures). This contrasts to a rate of 7.6% for males in France and 11.5 per cent in the United Kingdom. Among young people, this gender-based tendency is significantly more evident. Male unemployment among persons under the age of 25 is similar in all countries, whereas female jobless rates vary significantly. In the United Kingdom, 17% of young women are unemployed, whereas, in France, 28.7% of young women are unemployed[792].

- ***Employment Rights in Germany***

The German Constitution, often known as the Grundgesetz or Basic Law, was established on May 23, 1949, by the Federal Republic of Germany. The Grundgesetz features two parts that directly impact female workers, both of which are included in the critical first nineteen articles labelled *'Basic Rights'*. For instance, Article 3 states: 1) all individuals shall be equal before the law, 2) equal rights are provided for men and women, and no one may be discriminated against or favoured because of his or her gender. In addition, Article 6 posits 1) marriage and family must have particular protection from the state, 2) the primary responsibility for the care and raising of children is that of the parents. In this regard, the national community will keep an eye on their efforts, 3) every mother is entitled to the community's protection and care[793].

German legislators and researchers alike perceive the protective employment rules for women as the lawmakers' rational evaluation of the biological distinctions between men and women, as well as the special role of women in society, to establish a special status for the pregnant mother. Because Grundgesetz guarantees equal treatment for men and women, this viewpoint recognizes that ignoring biological distinctions would result in unequal treatment[794]. Protective and Preferential Provisions for Female Workers in Germany: Germany's statutory law is expectedly extensive, as it is based on the Roman law legacy rather than the Anglo-Saxon English tradition of the UK and Pakistan. Similarly, its 146-article Grundgesetz dwarfs the United States' seven-article Constitution[795]. In German law, there is a significantly more detailed and unambiguous enumeration of rights, leaving the courts primarily with the obligation to implement the law rather than to interpret it. As a result, rather than judicial sources, the majority of German law comes from constitutional or legislative sources. Working-laws women's in Germany are divided into two categories: (1) those that apply to all women, and (2) those that apply to pregnant employees or new moms. Positions in mines[796], iron and steel industries, coking plants[797], and the construction sector are examples of this if the task is exceptionally taxing or hazardous to one's health. Rather than seeing these restrictions as a violation of Article 3's equality clause, the German Bundestag justified that they satisfy the charge of Article 3. Some of the physical disparities between the sexes used to

[792]OECD (1985) 375-376.

[793]The German Constitution: Article 6.

[794]Meisel, Peter: Arbeitsschutz For Frauen Und Mutter. (Munich/Germany: C.H. Beck,1980) 2-3.

[795]Note: Even after more than 200 years, the U.S. Constitution has been amended only 26 times, so that the document in its entirety is composed of only 33 articles.

[796]Working Time Regulations – Arbeitszeitordnung (AZO), 1938: at Section 16.

[797]Working Time Regulations – Arbeitszeitordnung (AZO), 1938: at Section 16.

explain these protective measures include the typical woman having 60% less arm strength and 25% less lung capacity than the average man[798]. The conclusion is that because of these physical disparities, women are "unsuited" (in German, "ungeeignet") for tasks that require very intense physical effort[799]. As a result, these restrictions are regarded as essential to safeguard women from physiological or moral hazards, rather than to impede their attainment of equal work opportunities[800].

In terms of the second set of protective legislation, the sanctity of motherhood in German law is unrivalled in American law. The attitude of the Bundestag on abortion gives a sense of the reverence with which childbirth and childbearing are held. Abortions are now punishable by law, with fines and jail sentences ranging from six months to five years depending on the circumstances[801]. In Germany, the current Mutterschutzgesetz was introduced in 1952. It ensures that both mother and child receive particular attention during pregnancy and breastfeeding. In Germany, pregnant women are prohibited from working for six weeks before their expected delivery date and for eight weeks following birth[802]. For preterm and/or multiple babies, this ban is extended to twelve weeks[803]. Nursing moms who return to work are entitled to time off for this purpose[804], and pregnant women and nursing mothers are not permitted to work overtime[805]. If the employer violates these regulations and so puts the mother's health in jeopardy, the employer will be fined[806]. The German federal government pays the working woman twenty-five, Deutsche Mark, each calendar day during her mandated time off[807]. Even if she had been jobless and thus not protected by employees' social insurance, the government nonetheless pays a total of 400 Deutsche Mark in maternity compensation (Mutterschaftsgeld)[808]. In the instance of a working woman, her employer is accountable for the difference between what she would have earned if she hadn't been on leave and what she would have earned if she hadn't been on leave[809]. She is entitled to the guarantee that she will not be discharged from the hospital throughout her pregnancy or for the first four months after giving birth[810]. This unique protection, according to the federal labour court (Bundesarbeitsgericht), ends if the pregnancy ends in miscarriage[811]. In the case of a stillbirth, she is entitled to the four-month post-delivery discharge protection[812].

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[798]Meisel (1980) 11.

[799]Meisel (1980) 2-3.

[800]Staudinger, J. Von: J. von Staudinger's commentary on the civil code with introductory law and subsidiary laws. In: Richardi, Reinhard/Reuter eds., Dieter: Recht der Schuldverhiialtnisse, 1989) Section 611-15, at Para 797.

[801]German Criminal Code – Strafgesetzbuch (STGB), 1998: at Sections 218, 218b, 219, 219a, 219b and 219c.

[802]Maternity Protection Act – Mutterschutzgesetz (MuSchG), 2018: at Sections 3(2) and 6(1).

[803]Maternity Protection Act: Section 6 (1).

[804]Maternity Protection Act: Section 7.

[805]Maternity Protection Act: Section 8.

[806]Maternity Protection Act: Section 21.

[807]Maternity Protection Act: Section 13(1).

[808]Maternity Protection Act: Section 13(2).

[809]Maternity Protection Act: Sections 11 and 14.

[810]Maternity Protection Act: Section 9.

[811]Maternity Protection Act: Section 9

[812]Maternity Protection Act: Para 809.

4.5.6. Property Rights

Whenever a marriage results in annulment, separation or divorce, it certainly ends the marital property held by both spouses. It is expressly provided for in several laws of the diverse marital property regimes. As in the EU, both the husband and wife are equal partners therefore they have an equal right to own their properties, individually. In a marriage, if spouses own joint property, then such property must be held in a co-ownership regime, and this co-ownership continues to be in effect even after the marriage results in annulment, separation or divorce. Once their marriage falls apart, the marital property may either be held individually by each spouse or liquidated based on their mutual consent.

In terms of property division in the event of divorce, there are three distinct approaches in EU jurisdictions: those that create some form of community of property upon marriage, those where no such communities are created but there is a statute tree regime governing the participation in the property of the other spouse in the event of divorce, and those where all financial consequences of divorce, including the division of property, are subject to the description. These three options will now be described one by one. In addition to the alternatives outlined above, two more European approaches are being studied, both of which are intended to offer a potential foundation for a uniform European response to the financial repercussions of divorce: the Franco-German agreement on an optional community of accumulated gains matrimonial property system and the Commission on European Family Laws' principle on EU family law regulating property relations between spouses[813].

a) Community of property jurisdictions

The act of marriage creates some type of community of property in the majority of EU nations, and Mary, therefore, has an immediate Pty impact. The Dutch universal community of property is the most severe version of such a community. The most popular version, by far, is a community confined to marriage requests. After Portugal abolished the universal community of property rule and replaced it with the community of activists, the Netherlands is currently the only European jurisdiction that maintains it. Several efforts to alter or update the default regime have failed, but additional measures are not ruled out. Under the universal community of property law, ALL assets possessed on the day of marriage become Community property in theory. Unless the dead or the giver stated otherwise, everything obtained during the marriage, including through inheritance or gift, becomes Community property. This implies that upon marriage, all property becomes the joint property and is split equally in the event of a divorce. The community property is shared equally in the event of a divorce. In theory, this makes the Netherlands appear to be a gold prospector's dream. People are being invited to marry into wealth and then divorce very fast. However, while the rules can only vary from equitable sharing of Community property in rare circumstances, the socially recognized potential of enforceable marriage property agreements precludes this utopia from becoming a reality[814].

b) Community of acquests

The community of acquest, often known as the community of accusations, is the most frequent default matrimonial property arrangement in Europe. It is the default matrimonial property system in the majority of romantic countries, such as Belgium, France, Luxembourg, and

[813]Scherpe (2016) 149.

[814]Scherpe (2016) 149-150.

Portugal, as well as the most touristy chains in Middle and Eastern Europe. The community of acquest is essentially a restricted community of property that, as the name suggests, pertains to marital acquest created during the marriage. As a result, the pre-and post-marital property is not included in the community. Money acquired as a gift or inheritance during the marriage is also often excluded. These assets remained the subjects' distinct or personal property. As a result, in a marriage governed by the marital property regime of a community of acquest, there are three types of property: communal or joint property, as well as each spouse's personal property. Damages for pain and suffering are considered community property in some jurisdictions if they were obtained during the marriage. In some countries, however, this is not the case. Another important distinction is whether or not income created by the personal or separate property during the marriage, such as interest dividends and rentals, becomes Community property, as it does in Belgium, France, Spain, and Portugal. The standards for determining whether debts accumulated during the marriage are personal or community property vary significantly, but if the debts are incurred for the benefit of the family rather than for a separate purpose, they usually fall into or are reduced from the Community property. The court's role in asset division is confined to deciding what assets belong to the community and then assigning them equally to the parties. This is sometimes easier said than done because the three groupings of assets are not always as different as the underlying principle suggests. The codes are not given any discretion, with extremely few and limited exceptions, even if the conclusion is possibly unjust or causes hardship[815].

c) Separation of property or participation systems

In contrast to the jurisdictions outlined in the preceding section, the default regime in many EU jurisdictions does not generate any sort of community of property, and the property of these authorities stays distinct during the marriage. This does not rule out the possibility of eventual proprietary implications if one of the parties dies or divorces. On the contrary, according to the precise legislative regulations, these files become part of the other's property. As a result, these jurisdictions are labelled as having participation systems as their default matrimonial property regime by paintings. These jurisdictions can be roughly divided into those in the Nordic countries where, in the event of divorce, a community of property is created and the system is thus a deaf word community of property and those where no such communities are created but we lost stipulates that certain compensation payments must be made. This is the case, for example, in the Germanic legal family of jurisdictions. Marriage does not change the property relations of his spouses in the Germanic legal family's jurisdictions. During the marriage, the property is kept separate. However, unlike the Nordic nations' marital property rules, no community of property is formed even after a divorce. Instead, marital property regimes follow legislative standards that allow these parties to file monetary claims in the event of divorce. Aside from severe instances, such as one spouse attempting to murder the other, Germanic courts cannot depart from the equitable distribution of acquired income. This can, of course, cause hardship and may be seen as manifestly unfair in some cases for the stop, but in recent reforms, the German legislature decided to keep this aspect of the default regime, and it must therefore be regarded as representing the German understanding of marital financial solidarity[816].

When comparing marriage agreements, one of the most important things to remember is that they apply against the backdrop of the default norms. Selected default rules provide for some type of community of property, and the agreement takes effect immediately. Of course, the

[815]Scherpe (2016) 151-154.

[816]Scherpe (2016) 155-157.

same is true if the couple chooses a form of Community property over the default regime of property separation. This suggests that the agreement's purpose is to apply not just in divorce situations, but also during the marriage. These aren't divorced settlements by any stretch of the imagination, but actual marriage agreements. There might be a variety of reasons for such agreements, but one of them could be to protect the other spouse from the negative consequences of a community of property, notably the possible liabilities if one spouse dies. In such circumstances, the goal and function of the agreement are to safeguard the other spouse rather than to disfavour or disenfranchise him or her. Another reason and this applies equally to jurisdictions where up separation of property is the default position, is that his powers' personal and financial circumstances are such that the default regime is inappropriate for them, particularly in the event of one of them dying, for example, because they have children from a previous relationship or because they have tax issues. That being said, in situations where there is no default regime, such as in EU Anglo-Saxon countries, and all pecuniary implications are at the discretion of the code, the essence of the agreement is unquestionably different. As Lord Wilson expressed it, a medical agreement that replaces one specified outcome with another defined outcome, as in a Continental Law nation, is significantly different from one that substitutes an undefined outcome contingent on future exercises for quotes debate with a defined outcome, as in a common-law country. Marital agreements are not and cannot be binding on courts in Anglo-Saxon nations due to the discretionary nature of financial remedies in the event of divorce[817].

France and Germany reached an agreement on an alternative matrimonial property law called *'Franco-German Legal Regulations (FGA)'* on February 4, 2010. It became effective on May 1, 2013, and is the EU's first bilateral agreement on substantive matrimonial property law. However, article 21 enables all EU member states to join the agreement, therefore it does not have to be bilateral. The FGA includes an optional regime, which the couple can select instead of the default regime that would ordinarily apply to their marital connection. Spouses can adopt this marital property regime before or after their marriage as long as the substantive law of a contracting state to the agreement applies to their relationship under the appropriate private international law norms. As a result, the optional regime is not confined to German or French citizens or cross-border situations. For the optional regime to apply, the parties must sign a marital agreement or marriage contract specifying that this is the regime they want to apply to their matrimonial property relationship. The FGA does not contain any particular formal criteria for this. As a result, the required form is determined by the lex loci contractus; in both Germany and France, this is a notarized agreement. The FGA policy on marriage property is based on accumulated gains. It was easy to agree that the new optional marital property rule should be based on the discovery that such a regime existed in both jurisdictions. As a result, the regime is one of property separation during the marriage, but one that permits the spouses to earn monetary gains and in principle for half of the acquired profits after the marriage ends[818].

- ***Property Rights in Germany***

In Germany, according to the regime of statutory property, which is referred to as the *community of accrued gains*, is only divided equally between the spouses upon the termination of property regime by way of death of any spouse, divorce or mutual agreement in the form a contract. This equal division of the accrued gains simply refers to the mechanism where one of

[817]Scherpe (2016) 195-196.

[818]Scherpe (2016) 174-178.

the spouses obtains more assets or belongings than the other spouse in the marriage, and that spouse has to provide compensation to the other spouse in the form of cash for equal division of mutual assets held during the marriage.

On the other hand, in accordance with the regime of *community property*, that is the property held jointly by the spouses, gets alienated in the incident of divorce after settling any remaining obligations related to such property. As per the law, every spouse is legally authorized to the remaining surplus in half. In case the spouses agree to the separation of their property regimes after their divorce, there shall be no division of equal assets regulated under statutory law owing to the prior agreement between them[819].

- ***Property Rights in France***

In France, the marital property regime shall be abolished and liquidated in the case of divorce or annulment of the spouses' marriage. The liquidation of the marital property takes place before a notary according to which each spouses' properties and assets are calculated and measured. However, where there is no immovable property to separate, the use of a notary is not obligatory. The French *Code civil* states the reasons for the division of the community property between both spouses in Article 1441. According to Article 1441, the reasons include the death of any of the spouses, missing spouse, divorce, judicial separation, separation of property or changes in the marital regime. Concerning the date on which the divorce becomes valid, the marriage shall be dissolved in the case of divorce by mutual consent on the date on which the divorce arrangement reached by a private act countersigned by lawyers becomes enforceable. That is the date from which the divorce decision becomes binding in the event of a divorce from the courts[820].

4.5.7. Inheritance Rights

The European Parliament and the Council have introduced a Successions Regulation (Regulation no 650/12) applying to men and women who died on or after 17 August 2015, to allow cross-border successions within the European Union. Therefore, it is appropriate for Germany to evaluate European legislation as a sanctioning state. According to the EU Law of Successions, the final "habitual residence" of the deceased is recognized as the jurisdiction applied to cross-border succession claims. This occurs as long as, by a choice of the statute, the deceased has not decided the relevant applicable laws. That means the individuals, including both men and women, can bequeath their estate based on their own choice of law, either personal or state law, thus ensuring equal standards for both genders in terms of inheritance rights. Moreover, both of them share an equal inheritance claim to their deceased family or relative's estate. This means there exists no division of estate like the one under Shariah Law, where women's share is half compared to that of the men. Furthermore, the laws related to the registration will differ in every Member State. Some of them make it obligatory for the testator to get his/her will registered, while others either this condition do not exist or they do allow registration as a mere recommendation or choice in a few specific cases.

The case involved a petition moved in the domestic court, concerned with dealing Shariah law cases, regarding inheritance claims between Muslim minority of Greek citizens. Mrs Mollah Sali's husband, belonging to a Greek Muslim minority, made a will in accordance with Greek

[819] Scherpe (2016) 97-101.

[820] Boele-Woelk / Braat / Curry-Sumner (2009b) 60-61.

law and bequeathed all of his property to his wife. The court found out that in cases of inheritance, Shariah law would be applicable for the Muslim minority of Greek citizens, hence, the will stands void. The wife claimed that she has suffered from discrimination based on religion and lost three-quarters of inheritance. Only if her husband was not a Muslim, she would have gotten the entire inheritance to which she deemed legally entitled. The Court unanimously found that there was a violation of Article 14 (prohibition of discrimination) of Protocol no. 1 in accordance with Article 1 of that protocol (protection of property). It observed that disparity faced by Mrs Molla Sali was not logically and fairly justified and pointed out, inter alia, that freedom of religion did not require the Contracting States to establish a particular legislative structure to give special rights to religious minorities[821].

In August 2015, the EU implemented new succession rules known as Brussels IV, intending to harmonize succession laws across the EU. Before this, each European country had its laws regulating which law applied to a deceased person's inheritance succession. Some nations looked at a residency, while others looked at nationality, while yet others, like the United Kingdom, looked at domicile (and still does). With the increase in European travel due to low-cost flights and the growing number of people owning vacation properties in continental Europe, the situation after their death may quickly become complicated, with many countries involved and overlapping and contradictory inheritance regulations. The fundamental difficulty is that several EU nations, like France, Spain, and Italy, have compulsory heirship laws in place, under which certain types of relatives are legally entitled to a certain amount of the deceased's fortune. Previously, these compulsory heirship restrictions would have meant that an English person owning a holiday house abroad, say, Spain, would not be able to testate over it as freely as they could over their English property. However, it should be noted that in England, testation freedom is not absolute, as the Inheritance (Provision for Family and Dependents) Act 1975 allows certain categories of people related to the deceased to apply to the court for a share (or larger share) of their estate if "reasonable provision" has not been made[822].

The new default position following the implementation of Brussels IV is that when someone dies, the law of the place where they were usually resident will apply to their assets located in an EU nation. Of course, this would not help an English person who had retired to, say, France and had lived there for many years before passing away and had established a regular residence there. The default position can be overcome in certain instances by electing in their Will to have the law of the testator's nationality apply to their assets instead. When a person has dual (or several) nationalities, they are free to choose which one they want. The new regulations' flexibility impacts not just who receives a deceased person's estate, but also the possible inheritance tax position because inheritance tax is likely to be charged on assets transferring to anybody other than a husband or civil partner on a big estate. Interestingly, the Brussels IV provisions will apply to anyone with assets in an EU country regardless of whether or not they are an EU national, so even though the UK (along with Ireland and Denmark) did not sign up, UK subjects with assets in other EU states will be able to benefit from the new rules, and this situation is unlikely to be affected by Brexit[823].

[821]Case of Molla Sali v. Greece: Application no. 20452/14, 19 December 2018.

[822]Withersworldwide: New EU Succession Rules (Brussels IV), 2015. Available online at https://www.withersworldwide.com/en-gb/insight/new-eu-succession-rules-brussels-iv.

[823]Napley, Kingsley: The U Succession Regulation now in Force – How will it Affect You? 2015. Available online at: https://www.kingsleynapley.co.uk/insights/blogs/private-client-law-blog/the-eu-succession-regulation-now-in-force-how-will-it-affect-you.

Despite having mostly shared foundations, primarily in Roman law, many European nations' substantive inheritance laws varied greatly. There are at least three theories on how a deceased natural person's rights and obligations are transferred to their legal successors. The concepts are: (1) le mort le vif saisit; (2) hereditas iacens; and (3) inheritance estate management[824]. The French phrase "le mort le vif saisit" means "the dead seizes the living[825]." The heir is deemed to have succeeded to the dead from the moment of his or her death, according to this concept. Despite the appointment of heirs, *Hereditas iacens* is a Latin expression that means "lying inheritance" or "recumbent inheritance," which refers to an inheritance that is in abeyance or not accepted[826]. Lastly,

> *'The inheritance administration system is one in which the inheritance administrator takes the lead and the inherited estate is transferred to him or her from the start.' The issue of responsibility for inheritance debts affects the personal assets of the deceased's legal successors under the first two concepts, whereas liability for inheritance debts is not assigned to the deceased's legal successors and is associated with the responsibility of other persons under the third concept[827].'*

Different responsibility grounds for inherited debts are provided by the separate regulators, based on these three notions. There are three basic types of responsibility for inheriting debts throughout Europe and the world: 1) unlimited liability, 2) liability confined to a specific asset, and 3) liability limited to a certain value[828]. These distinctions have substantial ramifications. For example, if the bequest is heavily laden with debts or consists only of liabilities, the successor may be required to cover the obligations out of their property in one system, whereas in another system, the liabilities are not the decedent's concern and creditors will not be paid[829]. In German law, the heir has the option of accepting or rejecting the inheritance, and the absence of any activity on the side of the heir indicates straightforward acceptance of the inheritance. This equates to the heir's infinite obligation for the inherited debt[830]. In England and Wales, the alternative paradigm governs, where the heir's duty for the debt under inheritance does not apply[831]. The obligation for the inherited debt is not allocated to the decedent's heirs in these countries; rather, it is contained inside the inheritance, which has its character. This indicates that the heirs do not get the inheritance since the deceased's rights and liabilities are transferred to the heirs, and the inherited assets are distinct from the heirs' assets[832]. It's also worth noting that in several European nations (such as Croatia, Hungary, the Czech Republic, and, until recently, Poland), intermediary procedures exist to restrict the heirs' obligation to the value of the inherited assets[833].

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[824]Leleu, Yves-Henri: La Transmission De La Succession En Droit Comparé. (Bruxelles: Bruylant, 1996) 46.

[825]Załucki, Mariusz: Uniform European Inheritance Law: Myth, Dream Or Reality Of The Future. (Poland: Oficyna Wydawnicza AFM, 2015) 131.

[826]Załucki (2015) 132.

[827]Załucki (2015) 132.

[828]Załucki (2015) 131.

[829]Załucki (2015) 131.

[830]See Bartsch, Herbert/Bartsch, Malte B.: Das aktuelle Erbrecht: Vorsorge - Steuern - Ansprüche; Die neue Erbschaftsteuer mit der Reform des Erbrechts. 15th Edition. (Germany: Walhalla und Praetoria, 2010).

[831]Ross, John G./ Et Al. Eds., Martyn: Theobald On Wills. 18th Edition. (UK: Sweet and Maxwell, 2016) 17.

[832]Et Al., Roger Kerridge: Parry And Kerridge: The Law Of Succession. 13th Edition. (UK: Sweet and Maxwell, 2016) 503–31.

[833]Civil Code of Hungary (Polgári Törvénykönyv - Ptk.): Section 7: 96.

These are only a few of the distinctions that exist in European inheritance systems (major variances also exist in terms of assets, inheritance benefits, the circle of eligible heirs, and the sorts of rights) [834]. The disparity between the various national inheritance rules, predictably, creates ambiguity. The fact that a possible successor has certain inheritance rights in one nation but none under another country's system—if that system applies in the context of inheritance—could lead to major disagreements. For example, in Polish inheritance law, a testator's spouse who is denied the legal status as an heir in the testator's last will, i.e., the testator denies the spouse the function of a beneficiary of the inheritance assets is entitled to a legitimate or forced share[835]. In these situations, and line with Article 991 of the Civil Code[836], the spouse is entitled to half of what they would receive if the testator did not leave a last will, whereas the right to inheritance would apply under the act of law's provisions[837]. If Dutch inheritance law applied in this case, the testator's spouse would not be entitled to a forced share because Dutch law does not provide for such a right[838]. This is the issue, and the solution is not simple. In this sense, without a standard European inheritance law, the situation is unsatisfactory, and these sorts of legal problems will continue to rise.

- ***Inheritance Rights in Germany***

In Germany, a will can be made in one of the two preceding methods: as a handwritten or public will. Under German succession law, only the relatives of the testator are listed as his lawful heirs such as the individuals who share the same parents, grandparents or great-grandparents with the testator, along with the individuals who have more distant mutual decedents with the testator. Where there is no will or contract of inheritance, the laws of legitimate succession apply. Relationships by marriage, according to this definition, are not deemed to be related to the testator at all and are thus exempt from legitimate succession, e.g. mother-in-law, son-in-law, stepfather, stepdaughter, aunt by marriage, an uncle by marriage, since they do not have any mutual ancestor.

Relationships can also be formed based on adoption as adoption leads to the building of an entire family bonding between the person adopted and the adopter, in addition to the accompanying rights and obligations. As a result, the adopted person acquires the equivalent rights as a biological person. The only exception to the relative only condition for inheritance is that of the spouses, who bear the right to inheritance from their spouses even though they are not related to each other by way of any common ancestors. But in the case of divorce, the spouses are no longer entitled to inheritance from each other. This rule also applies to spouses who do not live together to some extent.

[834]Załucki, Mariusz: Impact Of The EU Succession Regulation On Statutory Inheritance. In: Comparative Law Review 23/2 (2017)223, 224–227.

[835]Lasok, Dominik: The Law Of Succession. (Leiden: A.W. Sijthoff, 1973) 213, 251.

[836]Załucki, Mariusz: Przyszłość Zachowku W Prawie Polskim. In: Kwartalnik Prawa Prywatnego 21/2 (2012) 529, 535.

[837]See Księżak, Paweł: Zachowek W Polskim Prawie Spadkowym. 2nd Edition. (Poland: Wolters Kluwer Polska, 2012).

[838]Reinhartz, B.E.: Recent Changes In The Law Of Succession In The Netherlands: On The Road Towards A European Law Of Succession?. In: Electronic Journal of Comparative Law 11/1 (2007) 8–10.

There is a hierarchy in the inheritance or succession rights of individuals in Germany as well but it is not based on gender discrimination, rather based on proximity of relationship with the deceased. The succession law in Germany divides them up into heirs of the following degrees:

- ⇒ *First degree:* Only comprises of the offspring of the deceased, i.e. the children, grandchildren, great-grandchildren, etc.
- ⇒ *Second degree:* Comprises of the parents of the deceased along with their children and children's children, i.e. the siblings, nephews and nieces of the testator. The latter would only inherit if the parents of the deceased are dead already.
- ⇒ *Third degrees:* Encompasses the grandparents along with their children and children's children (aunt, uncle, cousin, etc.),
- ⇒ *Fourth degree:* Covers the great-grandparents, their children and children's children, and so on.
- ⇒ *Spouses:* Notwithstanding the applicable matrimonial property regime, the surviving wife, husband or registered partner shall be listed as legitimate heirs and shall be entitled to 1⁄4 of the estate along with any descendants and 1⁄2 of the estate along with any 2nd-grade relatives (i.e. parents, brothers, nephews or nieces of the testator) as well as any grandparents. The living spouse/partner holds the entire inheritance where there are no 1st or 2nd-degree ancestors and no grandparents either.
- ⇒ *The Legal Right of the State:* In case a deceased person leaves behind no relatives, or spouse, his entire estate goes to the State, who becomes his/her legal heir in such circumstances[839]. Moreover, besides the matrimonial property regime in place, the surviving wife, husband, or registered partner is considered a legal heir and is entitled to 14 per cent of the estate along with any descendants, as well as 12 per cent of the estate along with any 2nd-degree relatives (i.e. the testator's parents, siblings, nephews or nieces), as well as any grandparents. The aforementioned percentage rises by 14% if the couples lived under the 'property regime of community of accumulated profits' (which is the default unless the spouses agreed to a different property regime as part of a pre-nuptial or post-nuptial agreement). It's the same for registered partners. If there are no 1st or 2nd-degree relatives and no grandparents, the full bequest goes to the surviving spouse/partner. For instance: The testator is survived by his wife (with whom he lived under the community of accumulated gains property regime) and his parents. The wife receives 34 (112 + 14) of the inheritance, while the parents, as 2nd-degree heirs, each receive 18. Furthermore, whether the other heirs are 2nd-degree relatives or grandparents, as in this case, the wife is entitled to what is known in German as the 'Großer Voraus,' which is a preferential right that in most cases covers all household effects and wedding presents (where the other heirs are relatives of the 1st degree, a surviving spouse inheriting as a legal heir is entitled to these effects only in so far as he or she needs them to run a proper household)[840].
- ⇒ If no spouse or partner can be found, and no relatives can be found, the State becomes the legal heir. Its obligation is always restricted to the estate's size[841].

[839]Schwab, Dieter/Gottwald, Peter/Lettmaier, Saskia: Family and Succession Law in Germany. 3rd Edition. (The Netherlands: Wolters Kluwer, 2017) Chapter 2.

[840]Schwab / Gottwald / Lettmaier (2017) Chapter 2.

[841]The Netherlands: Wolters Kluwer, 2017) Chapter 2.

Schwab / Gottwald / Lettmaier (2017) Chapter 2.

➢ ***Inheritance Rights in France***

In France, a will can be made in one of the following ways: as a handwritten or public will, just akin to Germany. Under French law, there also exists the system of hierarchy in inheritance or succession rights of individuals but it is not based on gender discrimination, rather based on proximity of relationship with the deceased. However, in the instances of absence of a will, the French law of succession applies in the following order:

⇒ If the testator has no spouse and leaves children, the estate passes to the descendants in equal shares[842].
⇒ If the testator is single and has no children, the estate passes to the parents of the testator, his/her brothers and sisters and the latter's descendants[843].
⇒ If the testator does not leave any brothers or sisters or any of their descendants, his/her mother and father inherit, each receiving half the estate[844].
⇒ If the mother and father of the testator are dead too, the brothers and sisters of the testator or their descendants inherit, excluding any other parents, ascendants or collateral relatives[845].

If the testator leaves a spouse, the matrimonial property rights must be settled before the settlement of the estate proper. After settlement of rights arising out of the matrimonial property regime, the following rules apply:

⇒ If the testator leaves a spouse and children, the spouse may choose between usufruct (right to enjoy the use and benefits) of all existing assets or full ownership of one-quarter of the assets where all the children were born to the two spouses and full ownership of one-quarter where one or more children were not born to the two spouses[846]. The spouse will be deemed to have opted for usufruct if he/she dies without having made a choice.
⇒ If the testator leaves a spouse and ascendants, half of the estate passes to the spouse, one-quarter to the father and one-quarter to the mother. If one of the ascendants has predeceased the testator, their quarter passes to the spouse[847].
⇒ If there are no ascendants or descendants, the entire estate passes to the surviving spouse[848]. Notwithstanding Article 757-2 of the Civil Code, if there are no ascendants, the brothers and sisters of the testator or their descendants receive half the assets in-kind included in the estate, which are assets received by the deceased from his/her ascendants through succession or gift. This is the right of reversion[849]. All other assets pass to the surviving spouse[850].Furthermore, a registered partnership's surviving partner has no legal claim to inherit. He or she may, nevertheless, be left a legacy. As a result, a registered partner is not considered an heir of the dead. According to Article 515 (6)

[842]The French Code Civil: Articles 734, 735.
[843]The French Code Civil: Article 738.
[844]The French Code Civil: Article 736.
[845]The French Code Civil: Article 737.
[846]The French Code Civil: Article 757.
[847]The French Code Civil: Article 757-1.
[848]The French Code Civil: Article 757-2.
[849]The French Code Civil: Article 757-3.
[850]Eekelaar, John/ George, Rob: Routledge Handbook of Family Law and Policy. (London-UK: Routledge, 2014) 178-182.

of the Civil Code, registered partners have only a one-year temporary and gratis right to use and enjoy the family home (and its furnishings) following their partner's death, provided that this was their principal house in which they were residing at the time of death. As a result, they only inherit if they are mentioned as an heir in a will. Only the disposable (non-reserved) share of the estate can be left to the surviving spouse if there are children, whether or not they were born to the partnership. The amount of the estate that is disposable varies depending on the number of children: one-third of the estate if there are two children, one-quarter if there are three or more children. There are no required heirs if there are no children, therefore the entire estate might be bequeathed to the surviving partner or a third party. If the deceased's parents are still alive, they can file a claim to recover assets bequeathed to their predeceased child, up to one-quarter of the estate for each remaining parent (Article 738 of the Civil Code)[851].

4.6. Comparative Analysis of Rights of Women concerning Contractual Issues in Pakistan and Europe

The socio-economic and legal status of women in Pakistan stipulates the core for comparing it with that of the women in the EU. As a matter of fact, in Pakistan, women suffer from low opportunities for work, labour or business as opposed to men, varying from 9% to 26%.[852] Additionally, there is a high degree of unpretentiousness/informality comprising of exploitation or gender discrimination rendered against women at the workplace. This discrimination at the workplace discourages around fourteen million women in Pakistan, engaged in informal employment, who face limited opportunities for work and as a result undergo lower wages compared to men in the country. Not only this, but women also face social restrictions that prohibit them from both workings outside of their homes and working in a particular sector only.[853]

The key to women empowerment is an unbiased approach towards financial stability, which unfortunately remains restricted for women in Pakistan. In general, there is a very small percentage (around 13 %) of women that have an opportunity to seek a loan as compared to 87% of the men in the country. In addition to the loan, men also have access to greater loan sizes than women. Women also lag behind men in matters related to ownership of property or house, which is believed to be a significant factor for women's financial or economic empowerment. Sadly, women also hold lesser positions in the fields of legislation, high ranked officials, managers, technicians, professionals etc.[854]

Based on the above situation of women in Pakistan, it seems fair enough to compare the status of women in socio-economic and legal aspects in the EU to determine the difference in treatment of women. By careful analysis of the comparative study, it might lead to observations for improvement of women's status in Pakistan, either through reforms or the process of incorporation of EU laws related to women empowerment into domestic legislation of

[851]European Judicial Network: Succession – France. Available online at https://e-justice.europa.eu/content_general_information-166-fr-maximizeMS_EJN-en.do?member=1.

[852]Pal, Mariam S.: Women in Pakistan: Country Briefing Paper. (Asian Development Bank: 2000, 5).

[853]UN Women Pakistan: Status Report on Women's Economic Participation and Empowerment. Status Report, 2016, 18, 42-52. Available online at http://asiapacific.unwomen.org/en/digital-library/publications/2016/05/status-report-on-womens-economic-participation-and-empowerment. Last visited on 13-01-2021.

[854]The French Code Civil: Article 737.

Pakistan. Here, I do not aim to prove that EU women have achieved absolute equality with men. They are progressively becoming more qualified than men, as a large number of women in the EU graduate from universities rather than men. But they still do not possess absolute freedom in opting for jobs of their own choice or acquiring job opportunities equal to that of men. This is large because of their obligations as the caretaker of the family. Therefore, it is essential to surge women's labour market participation, where they remain underrepresented. Although, there are certain issues where EU women also lag behind men in the EU, yet they stand at a much better pedestal or position as compared to women in Pakistan, who are still contained in the religious and cultural bound opposed to men in the country. Let us compare the contractual rights of women in Pakistan and the EU below and analyse areas that need improvement to uplift the status of women in Pakistan, in terms of economic or financial stability.

4.6.1. Marital Rights

As seen above in detail, Pakistani women are allowed to enter into *marriage contracts*[855] based on their free will under Shariah law. Yet, they do not enjoy the same degree of *autonomy and equality* as compared to the women in the EU. The EU women, from the beginning of the marriage contract, are considered to be equal partner and thus share the same rights and obligations as the men in the EU. Their marriage is regulated under Continental Law, which is much less rigid than the Shariah law. Moreover, the men in Pakistan are allowed to contract up to four marriages or opt for muta' marriages, which are discriminating against women, who are only allowed to contract one marriage. She is also prohibited from contracting marriage to men outside of her faith, while men can marry women from outside Islam upon the condition of conversion. Such conservative regulations have no room in the EU, and they do not allow for polygamy or marriages contracted within their religion only for both men and women. This distinction makes EU women appear better in terms of contractual capacities and equality with men.

4.6.2. Divorce Rights

Although Islam provides women with the freedom to contract marriage based on their own choice, yet it takes away their right to divorce men. Logic supports the fact that when a contract has been entered into by *mutual agreement* of a man and woman, they shall also have the *freedom* to opt-out of it or break it through *mutual consent*. This logic is very much available for women in the EU under their Continental Law, who have the right to divorce as men. In the EU, both men and women can agree to divorce mutually or approach the court for that matter either jointly or separately. Unfortunately, this logic is not provided for Pakistani women because they are regulated under Shariah law which grants absolute rights of divorce to men alone. Women also have rights to divorce but are quite restricted, that is, through *khula* or delegated divorce. However, such rights are highly limited in terms of equal rights to men and women in the EU.

4.6.3. Custodial Rights

In matters of custodial rights, Pakistani women do not have equal rights as the men under Shariah law. Shariah law has already provided for limited rights of custody for women in case

[855]Note: The highlighted phrases show the contractual TLTs involved with regard to mentioned rights from sub-sections 4.6.1 to 4.6.7.

of divorce or dissolution of marriage. It states that a woman (wife) can only have compulsory custody of minor children, of specific ages for boys and girls, and after which the custody of children goes to a man (husband) automatically. That is, the children are considered to belong to their father, and not the mother. The women suffer from this unequal treatment of Shariah law and lose their *right to negotiate custody* as a bargain in the marriage contract. Therefore, the example of EU women can be witnessed where women have equal rights with men concerning their children after divorce, separation or annulment of marriage. They can settle down the issue of custody either by *mutual agreement by way of forming a contract* or simply knock on the door of the court for help.

4.6.4. Maintenance Rights

Usually, the financially unstable condition of women in Pakistan forms the basis of maintenance claims before the court after divorce. The reasons for Pakistani women's financial instability include restrictions on employment or labour opportunities and confinement within the four walls of the house serving as a primary house caretaker. When women are divorced, they have no sufficient financial resources of their own to support both themselves as well as their minor/abandoned children. Therefore, they are solely dependent on their husbands who possess better financial conditions. Although Shariah law provides women with maintenance after divorce, it certainly makes women weak and co-dependent on the men even after divorce. While under Continental Law in the EU, women possess enough financial resources to cover their expenses as well as their children, as they have access to fairly equal opportunities at work as men. However, the law recognizes the principle of shared or equal custodial liabilities, that is, if one parent is in charge of children's take-care, the other parent has to support children financially regularly. The spouses may agree on the *custodial rights through mutual consent* or seek the court for action. Whereas no provision for entering into a contract regarding custody of children through mutual consent between spouses is provided to women in Pakistan.

4.6.5. Employment Rights

As aforementioned, Pakistani women do not share equal opportunities at contracting a job outside their homes. Although recent trends hint towards a surge in women employment in Pakistan, yet according to Shariah law their share in the employment sector is far lesser than the men in the country. This surge owes mostly to constitutional law and feminist struggles. Still, Shariah law remains an instilling obstacle in the path of women empowerment in Pakistan, which can only be achieved through the economic up-gradation of women. On the contrary, EU women have no such limitations under Continental Law and share equal rights to contract jobs wherever they desire. Despite certain employment issues at par with absolute equality with men, the EU women still hold better status in autonomy and freedom of job opportunities compared to Pakistani women, whose main role is deemed to be that of a house caretaker.

4.6.6. Property Rights

The only right Shariah law grants Pakistani women in equal terms with men is their *right to property ownership, possession and disposal*. For this reason, Shariah law is to be applauded. It provides women with equal opportunities at buying, selling or management of their properties, of their own accord without the need for any male relative. This means that the women have their own distinct and *autonomous legal entity concerning property matters*. However, in practice, women in Pakistan are not permitted to manage or dispose of their

properties on their own. Rather their male relatives, including fathers, brothers or sons, are assigned the responsibility of taking care of their properties. Women are not considered distinct legal entities when it comes to property ownership, therefore, the men usually take away their properties either by force or marrying them with the Holy Quran in suburban areas to disallow the transfer of property into another family through marriage. These cruel practices make women suffer at the hands of authoritarian men in Pakistan, who are to blame for the discriminatory treatment of women in the country. In contrast, EU women bear unfettered and equal property rights with men under Continental Law. They are provided with essential safeguards under the law to protect them from injustices at the hands of men.

Apart from these countries, there are still several that do not have a matrimonial property rule, particularly Anglo-Saxon jurisdictions. It appears that attorneys from continental European jurisdictions, in particular, find the thought of states without a marital property regime unthinkable. Nonetheless, it is correct. England and Pakistan are referred to as wonders, but Ireland lacks matrimonial property legislation. Where a marital property regime exists, it is examined, and property partition is handled individually and independently. Pakistan, for example, does not have a suitable marital property policy since it was influenced by England both before and after separation. In addition, Pakistan has a dual legal system, consisting of a Sharia legal system and a Anglo-Saxon law legal system. As a result, family law and family concerns fall within the Sharia legal system. Depending on one's faith, certain things are given precedence under Pakistani personal law. However, the cases in England, Wales, and Ireland are different since they solely use Anglo-Saxon for the stop. In these jurisdictions, the court's discretion is applied holistically, taking into account all of the facts and circumstances of the case. No, there are no hard and fast laws or required distinctions between marital property, maintenance, pensions, and other financial remedies. As a result, certainty and predictability are not viewed as critical components of the reduced financial repercussions of divorce. On the contrary, the Anglo-Saxon jurisdiction strives to provide a tailor-made package for each instance, which may or may not include the transfer of property, pensions, or periodic payments, and so on. The actual remedies awarded by the courts vary from case to case, depending on the facts of the case. This is critical to comprehend the financial implications of divorce in various jurisdictions, as well as any meaningful comparison.

4.6.7. Inheritance Rights

Not only do men take away the unfettered property rights of women in Pakistan through discriminatory practices, but they also acquire a better share in rights to property through inheritance. According to Shariah law, women possess half the share to that of men in terms of inheritance. That is the rights of a daughter in her father's property or inheritance is calculated to be half as compared to a son i.e., daughter: 1/2 and son: 1. Even if the father bequeaths an entire or more share of inheritance to her daughter by way of a will that would not be accepted in Pakistan, as She is the Islamic Republic and therefore in matters of inheritance, Shariah law would apply to the case of Muslims in the country. This unequal share in inheritance again paves way for patriarchal culture in Pakistani society where men have greater authority than women. Once again, women have to face financial disadvantages which makes their position worse opposed to men in acquiring property through inheritance and contracting it further in future as she deems suitable. Whereas, in the EU, there is no gender discrimination rendered in matters of inheritance. The only form of discrimination exercised in the EU is in terms of proximity of the relationship of the relatives with that of the testator under Continental Law.

4.7. Summary

This chapter, as a whole, attempts to address the reasons and outcomes of comparing contractual rights of women between Pakistan and EU, with special regard to the theoretical legal techniques ascertained earlier in Chapter 2 of the thesis. Through this comparative methodology, it can be seen that there is still a lot of room left for changes in mindset, cultural practices and national legislation of Pakistan to empower and uplift their legal status in terms of contractual rights as well as general rights. Since the women in the EU enjoy much better legal in their society, therefore the example of EU Continental Laws providing safeguards to women shall be enforced likewise in Pakistan. This can be done either by an amendment in the existing Pakistani laws or through a process of incorporation of safeguards for women in the EU into the domestic legislation. Several case laws have also been mentioned side by side to reflect the court's practice in the EU as well as Pakistan while explaining the contractual rights of women. The difference of court interpretation and application of laws can be viewed as an insight into the working of both different systems and employed conversely wherever need be.

So far, it can be seen that the legal, and socio-economic status of women bear immense ramifications in matters pertaining to marriage, decision making in the family, property rights, divorce and inheritance etc. Consequently, these impact women's struggle towards independence and empowerment. It can be said that there have been attempts at fostering equality between men and women in Pakistan over time such as the insertion of the concept of mutual consent in marriage according to the recent practices of courts interpretations. Several other laws have been changed including laws relating to polygamy and divorce. Still, gender inequalities continue to persist in matters of decision-making in family and divorce matters. Moreover, the laws relating to marriage, divorce, custody, maintenance, property or inheritance matters are still not in compliance with the agreed international agreements along with the law of the land i.e., the Constitution of Pakistan, 1973.

Chapter 5: Thesis Summary

5.1. Conclusion

Contracts have existed since the dawn of time, and their importance in social life cannot be questioned. When striking an agreement or a bargain among its members, every culture relies on the concept of a contract. As a result, it has become an unavoidable evil in everyone's life, whether in the shape of a barter system or modern-day commitments. The necessity to govern such agreements grew as society advanced, and this need was supplied by the introduction of Contract law into national legislation in every country.[856] Even though contract law is a branch of domestic continental law, the comparative law method allowed the subject to find a parallel in the international arena. In **Chapter 1** of my thesis, I set out to compare contract law in Pakistan - an Anglo-Saxon regime, and Europe - a Continental Law regime, to enhance the international character of contract law, because they both belong to different legal systems and, as a result, constitute different contract laws in several ways. According to my study, this legal distinction may be used to solve current difficulties in both systems, particularly in Pakistani contract law. As a result of the exchange and application of foreign legal concepts into either of their domestic legal systems, international acceptance of those imported legal principles will begin.

International business contracts are frequently formed using Anglo-Saxon contract models, which cannot be overlooked. They are not only written in the English language, but they also typically use Anglo-Saxon legal vocabulary and organization. The concepts of clarity and predictability underpin the Anglo-Saxon law of contracts. The parties are believed to be capable of assessing the transaction's risks and establishing suitable relationship regulation and risk distribution. As a result, the contract is regarded to be adequate to govern the parties' transactions. Good faith and fair dealing are not required to integrate the parties' agreed-upon regulation; in fact, they are judged undesirable since they add a level of discretion and ambiguity that is unacceptable in business and commerce.[857]

Contract law in continental legal systems, on the other hand, is focused on ensuring that justice is served in the individual situation. The contract is construed in light of implied principles of reasonableness, good faith, or fair dealing (to varying degrees in the various national systems), allowing for the avoidance of unfair solutions based on a literal interpretation of the contract. In fact, in the case of commercial contracts, the judge is expected to exercise his discretion in a limited manner since the parties are presumed to be capable and willing to analyse and accept the risks associated with the transaction. Nonetheless, a party from a continental legal system may expect the controlling legislation to intervene, either to incorporate or rectify the contractual rule. As a result, a contract controlled by the law of a continental legislation system is vulnerable to intervention by the governing law. However, when the contract is based on an Anglo-Saxon paradigm, the contractual structure appears to preclude such involvement. This clash of two opposing attitudes toward the ruling legislation may lead to ambiguities in the interpretation.[858]

[856] Zumbansen (2007) 191–233.
[857] MUNOZ (2017) 727.
[858] MUNOZ (2017) 727.

To get around these problems, it is occasionally advised that we look out for sources of law that do not refer to a certain legal system. These can be authoritative sources of international law, such as international conventions like the Vienna Convention on Contracts for the International Sale of Goods (CISG)[859] or Principles for International Commercial Contracts (PECL) or Draft Common Frame of Reference (DCFR), or non-authoritative sources, such as generally accepted principles of international trade, international contract practice, trade usages, as well as private codifications of contract terms, standard negotiating clauses, and standard negotiating clauses. While some of these sources are incredibly informative and represent the parties' actual needs and progress, they can be difficult to locate and have a fragmented nature. To address these issues, significant attempts have been undertaken in recent decades to restate worldwide contract practice or widely accepted principles and usages, such as the UNIDROIT Principles of International Commercial Contracts and the European Principles of Contract Law (PECL).[860] The restatements undoubtedly increase the availability of *lex mercatoria* norms by placing them in a context that improves the fragmented nature of some of the sources to a larger extent. However, it is debatable whether the restatements successfully assist in resolving the contradiction between the contract's Anglo-Saxon framework and the continental controlling law.

The CISG, in connection to my research, demonstrates the convergence of contract law norms from the two most major legal families, namely Anglo-Saxon and continental law. Because the CISG Working Group's goal was to discover the optimum answer for each sales challenge at an international level by comparing them, the CISG has favoured rules of one legal family above others in some cases. Of fact, the drafters' purpose was not to support one legal system over another. It simply followed that some characteristics of international sales of commodities may be better addressed by a single rule that had its origins, for example, in the Continental Law tradition. As a result, I believe that the CISG might be utilized as a comparative teaching tool to educate and study foreign/international contract law. If one follows the constructive educational technique, in which each student is viewed as an active individual actively creating or constructing knowledge and skills, then the information offered by the professor is regarded as a type of stimulus that initiates the student's learning process in action. The stimulus (teaching material) is not as significant as the cognitive process that the stimulus produces in engaged learners. From the standpoint of law instruction, comparative law may be viewed as a pedagogical strategy that provides the content needed to kickstart the learning process. The main educational goal here is to '*attempt to make pupils study the laws of systems that differ from their own* by employing provisions of an instrument founded in principles from both their own legal family and a different legal family as material. The origins and organization of CISG comparative law provide ideal material for comparative law instruction. However, in this scenario, it is advised to decompose the material first to subsequently develop knowledge about foreign systems. In other words, law professors and students can use a reverse engineering approach to extract information and design from the CISG to duplicate the key rules and principles of contract law in both the Anglo-Saxon and continental law families in distinct segments.[861]

Moving forward, **Chapter 2** of the thesis explores several important topics that form the basis of comparative analysis in the later chapters that follow. The chapter begins with explaining

[859]United Nations Convention on Contracts for the International Sale of Goods, 1988.
[860]Ole / Hugh (2000) XXVII.
[861]MUNOZ (2017) 727.

Shariah law, which has been there for a long time, as well as certain other cultural traditions.[862] Traditionally, autonomous muftis (also known as jurists) interpreted Shariah law based on Islamic teachings and numerous legal sources. However, in the majority of Muslim nations, these Shariah laws have been superseded by European Statutes or Codes, but the traditional Shariah norms have been preserved in the field of family law.[863] In essence, a comprehensive summary of Shariah law's existence, history, and contemporary implementation have been covered. The thesis then considers Pakistan's hybrid legal system, which combines Shariah and Anglo-Saxon laws. English laws remained in effect after Pakistan gained independence in 1947 until a new constitution was drafted. Muhammad Ali Jinnah, Pakistan's founder and father, envisioned a legal system for the country that was completely consistent with Islamic principles, but this vision was never realized during his lifetime. However, his idea was carried on for a long time and had a lasting influence on Pakistani legislators. General Zia-ul-government Haq's bears evidence to Jinnah's vision since Shariah law was included in Pakistan's Constitution, opening the path for the country's Islamization process.[864] From the time of independence till now, the whole process of creating a constitution and enforcing it in the country has been meticulously analysed.

The chapter then goes on to discuss the general and contractual position of Pakistani women, who are often subjected to gender subordination according to their social class and area. The fundamental explanation for this is that socio-economic growth has been unequal, and religion and feudal institutions have had an influence on their lives.[865] Since its origin, Islam has been (and continues to be) fully male-dominated, with extensive legislation favouring males over women in subjects like marriage, divorce, property rights, inheritance, and so on. This legislation lies at the heart of Shariah law's family rules, which are regarded to be one of the most sensitive problems in modern Islamic nations like Pakistan. However, specific Islamic teachings make it apparent that Islam grants males primacy over women in issues of the heart. This is discussed in detail in Chapter 4 under the title of women's contractual rights in terms of marriage, divorce, property, inheritance, and so on. Several religious groups and ulamas who gained political influence during and after the Zia-ul-Haq era encourage and support women's subordination in Pakistan in various areas, as can be shown.

We can see that Pakistan was founded based on Islam, and it is upsetting to see how religious and Quranic principles are frequently overlooked and perverted, especially when it comes to women's roles. Interestingly, the societal problems that Prophet Muhammad struggled against during his life remain firmly established in Pakistani culture, and the so-called custodians of the religion regard them as ordinary punishment and ostracization of women. It is necessary to discourage the present mentality of supporting cruelty and injustice in the name of Islam. Religion has not been able to eliminate decades of un-Islamic and even barbaric societal problems in Pakistan, which has been a source of grave concern. In Pakistan, illiterate behaviours, often known as Jahiliyyah[866], are still prevalent. Worse, in the guise of Islam, religious clerics and preachers are sanctifying and promoting 'customary rules.' Furthermore, widespread ignorance and fear contribute to violence against women, since women are

[862]Otto (2009) 615–616.
[863]Otto (2008) 19.
[864]Saigol (2009) 208–210.
[865]Pal (2000).
[866]Sulaimani (1986) 5- 6.

incorrectly trained from infancy not to "question the scriptures." They are taught to be ignorant not merely of legal rights, but also Islam's fundamental values.[867]

Recent developments, on the other hand, suggest that the situation in Pakistan has improved in some areas, including the issue of establishing their rape using DNA evidence, which is accepted as convincing proof in Pakistani courts. Furthermore, there are various examples of women who have occupied high-ranking posts in Pakistan's government, the most notable of which being twice-elected Prime Minister Benazir Bhutto.[868] Improved law appears to be an essential instrument in bringing the position of women in the context of social, economic, and political elements, in light of the foregoing debate regarding women's status in Pakistan. For this reason, the Supreme Court of Pakistan has consistently supported and protected women's rights within the constitutional framework by using a progressive interpretation of Shariah law. However, despite the courts' progressive stance toward women's position and rights in Pakistan, there is still more work to be done in this area. To discover answers to the current laws of inequality and subjugation of women in Pakistan, it is critical to identify a common core between the rulings/rules of both legal systems. As a result, it is critical to hold frequent training and awareness programs to educate women about their rights and empower them to make only legitimate demands. Furthermore, existing laws must be updated and amended. In a dogmatic culture like Pakistan, competent law enforcement is important to provide women with a safe and secure environment in which to flourish. In addition, a national and district-level women's legal aid centre is required.[869]

Furthermore, while considering women's rights in Pakistan, it is clear that Pakistan is torn between traditional Shariah law and a contemporary Anglo-Saxon legal system. This contemporary legal system was imposed on Pakistan, as it was on every other post-colonial country, but the culture has not transformed completely from inside. As a result, the ongoing squabble between the two is affecting the female population, culminating in women subjugation. To summarize, Pakistan must handle the issue of women's position with intelligence by narrowing the existing gap between theory and reality about women's empowerment. The government of Pakistan must bridge this gap by adopting effective actions to empower women, who have become a symbol of injustice and inequity not only in Pakistan but also globally. It should give women equal opportunity to compete with males on an equal playing field so that they can achieve the same status as women in other industrialized nations. Finally, the chapter outlines the legal safeguards offered to women in Pakistan throughout history in the form of constitutions and legal instruments, including rights guaranteed to women under constitutional law, criminal law, Continental Law, and family law. These are some of the safeguards put in place by recent administrations to protect and empower Pakistani women after years of persecution.

Chapter 3 addresses two distinct but equally important issues: a) unifying contract law throughout the EU into a single, uniform civil code, and b) applying EU contract law to current practical difficulties of theoretical legal approaches in Pakistan. Several academics and practitioners are progressive on the problem of harmonization of the EU Civil Code, looking at any potential measures to promote harmonization among the EU's various legal systems. Exploring these current mechanisms to combine EU Continental Law into a unified code is a

[867] Supra Thesis Chapter 2: at 2.3.2.
[868] Tyab (2014).
[869] Cheema (2013) 95.

time-consuming and difficult task. The challenge of conducting a comparative study of contract law in the multiple Member States necessitates a detailed and complete examination of not just two, but several. Because, for one simple reason, the law of every country evolves into a system, which, if poorly altered, leads to the destruction of such a system. The UNIDROIT instrument - Principles of International Commercial Contracts - is an explicit example of such a work.[870] It took over twenty years, from 1971 to 1994, to make these UNIDROIT Principles a reality, although they are still regarded as scholarly suggestions. This is due to the Member States' unwillingness to alter their national laws in conformity with the UNIDROIT Principles or to accept that the laws of another Member State are superior to their own.[871] The proponents of harmonization have had some success, for example, in efforts to unify EU legislation through a few directives, especially those pertaining to consumer protection and corporation law, among others. Although these directives allow for some latitude in how they are implemented, actual progress toward harmonization of Member States' laws has been achieved. In 1995, Latvia (together with other Central and Eastern European nations) and the EU signed an Association Agreement.[872]

My research does not evaluate thoroughly the possible benefits of the current process in Europe to create and implement new bodies of law influencing the contractual activity of firms and individuals. Also, I will not analyse the draft CFR in-depth to remark on the benefits of the various normative remedies presented. I will restrict myself to a cursory review of the positive effects that, in theory, could result from a process like the current one, rather than committing to a normative assessment of the current enterprise's already available outcomes –even if still in draft form– and whether it has fully exploited all available opportunities to maximize those potentially positive effects. I will posit three examples to that effect: 1) to enhance the way current Contract Law affects the efficiency of contractual contacts, 2) to minimize transaction costs caused by variety in contract law, and 3) to realize economies of scale in legal change. Given the extensive extent of application of Contract Law, and the wide disparities among nations in the factors impacting the outcomes of such policies, I do not include any form of redistributive ideal in this section.[873]

Contractual contacts are a fundamental source of economic and social progress since they are the primary conduit for individual cooperation and exploitation of the evident advantages of division of labour, as well as trade between agents with differing valuations. In complex and developed societies like Europe, the law, specifically the law of contracts, is one of the most important mechanisms for fostering the proper functioning of contracting by creating incentives for cooperative behaviour within contractual relationships and removing incentives for non-cooperative attitudes. Is it feasible that legal reform will be able to expose current flaws and propose changes in legal norms, institutional structures, and legal decision-making processes that will benefit contractual parties? Naturally, the answer is yes, it is doable. Is it also feasible that such legal reform is put in motion and carried out significantly at the European level, that is, at a level that, in terms of abstraction and geographical extent, is beyond the current systems of Contract Law, which remain primarily national in design and scope to this

[870]UNIDROIT Principles of International Commercial Contracts (2004).

[871]Lake, Sarah: An Empirical Study of the UNIDROIT Principles – International and British Responses. In: Uniform Law Review 16/1 (2011) 686.

[872]European Union: Association Agreement. In: Official Journal of European Union 261 (2018) 4-742.

[873]See Ganuza, Juan José/Gómez, Fernando: Realistic Standards: Optimal Negligence with Limited Liability. In: Journal of Legal Studies 37/2 (2008). Also, Gómez, Fernando: The Unfair Commercial Practices Directive: A Law and Economics Perspective. In: European Review of Contract Law 2/1 (2006) 9.

day? The answer is, once again, yes. It is conceivable to increase the effectiveness of current Contract Law national systems by reform measures, even substantial ones, that may be implemented at the European level. The main question is, of course, how to do it correctly. It is not a simple effort to establish and implement an ideal system of contract law that improves issues while avoiding interference with the beneficial effects of competitive markets and the proper incentives provided by current norms and institutions. For example, how thorough should the European-led results be? How much variance in solutions and outcomes should we tolerate, given the undeniable reality that individual Member States are still more homogenous in terms of preferences and important elements determining legal solutions than the European ensemble? What degree of specificity do we believe is best for legislative solutions, and what role do we think courts and other adjudicators should have in developing more precise legislation? The kind of problems that are difficult to answer in this regard is indicative of the enormity of the challenge of optimum law-making at the European level and in contractual affairs. However, the theoretical point remains. It may be possible to improve the efficiency of Contract Law as a working legal instrument in Europe; however, if we do not believe we can do so at the European level, we should not waste resources on a process that will not improve the welfare situation of individuals and firms subject to Contract Law in their economic and other interactions.[874]

The rhetoric of eliminating barriers that obstruct the efficient operation of the internal market in goods and services appears big in the arguments given by European laws to support the adoption of uniform or harmonized regulations in a variety of sectors, including consumer law and contract law. The notion that harmonized contract law regulations help to develop the European internal market may be broken down into two parts or views. One refers to the reduction in the costs of doing business in various national markets for firms: If a firm plans to launch a product in the several Member States, the costs of complying with legal constraints are higher, and may even be much higher, in the presence of multiple legal requirements than in the presence of a single set of legal conditions for the business campaign. For example, in various Directives in the sphere of consumer law, this issue of lowering a firm's expenses of doing business in conjunction with harmonization has been highlighted. However, it may be argued persuasively that legal and regulatory variety, let alone shared conceptions and principles, would not vanish as a result of a harmonizing legal body in Contract Law. The consumer is the second piece in the image, and he or she is typically underappreciated in its importance. Indeed, some argue that consumer perceptions of legal and other uncertainties, as well as the shortcomings of transacting across national borders, are the key components of cross-border trade barriers, and thus the most important factor influencing the implementation of the internal market through regulatory and legal harmonization.[875]

The critical barriers to cross-border commerce and contracting would thus largely be demand-driven, that is, those that consumers perceive, albeit incorrectly, as negatively impacting their decision to contract cross-border. In all probability, harmonized Contract Law regulations would contribute to a decrease in complexity and discrepancy, resulting in some advantages for the internal market and hence for its players - the European consumers as the ultimate beneficiaries. These benefits would manifest themselves both statically and dynamically. In other words, to reap the genuine, not fictitious, benefits of harmonized rules in Contract Law, the reduced diversity and increased certainty must be internalized by the agents subject to the

[874]Pomar, Fernando Gómez: The Harmonization of Contract Law through European Rules: A Law and Economics Perspective. (Barcelona: University Pompeu Fabra, 2008) 6-7.
[875]Pomar (2008) 6-7.

rules, i.e. the potential contracting parties. Otherwise, transaction costs may endure long after the underlying foundation for them has completely vanished.[876]

All of the preliminary actions for the legal change to be developed, produced, and approved – and I am excluding implementation and enforcement difficulties here – are expensive. And a major portion of those expenditures is proportional to the number of people and businesses that would profit from the new legal framework. Part of those expenditures would be the same whether the Law is implemented in a jurisdiction with a population of one million or one with a population of one hundred million. That is, there are significant monetary and non-monetary fixed costs of law-making that are population-invariant. Furthermore, fixed costs allow for economies of scale, which means that when production is focused to serve a greater population, per-capita production costs fall. Thus, a legal reform that may not be cost-effective if it must be adopted separately by each Member State may be cost-effective if it is adopted at the European level, because the costs of implementing the measure are now lower due to the increased scale that produces significant savings for the same –assumedly, at least- level of benefit in terms of increased social welfare. When considering a broad and complicated body of legislation, such as Contract Law, this benefit of European law-making may be considerably greater. Because of the breadth and complexity of the subject matter, the costs of law-making (for example, political capital) are likely to increase more than proportionally. Contract Law is a crucial field of law in all European legal systems, not only because of its lengthy history and tradition but also because of its vast extent and foundational character for many, if not most, areas of Private Law and Law in general. Large-scale institutional choice in Contract Law is not a minor exercise; it is a highly serious issue that should be approached with all current knowledge and all necessary prudence. This is not, and should not be seen as an unequivocal defence of the status quo, but rather a reminder of the enormity, importance, and potential significance of the work of unifying Contract Law throughout Europe.[877]

Concerning the second issue at hand, I made a comparative analysis of a few theoretical legal techniques between the contract law of Pakistan and Europe, especially German and French Contract law. It may be stated that while studying or comparatively analysing the law, circumstances may develop in which a single legal phrase has many meanings, or several distinct legal terms have the same legal impact. Such circumstances may cause legal practitioners and their clients to become perplexed. The reason for this misunderstanding is that when a continental lawyer encounters Anglo-Saxon concerns or vice versa, it confuses. Although both legal systems have comparable answers to some issues, they cannot be said to be identical in terms of legal structure, categorization, fundamental principles, language, and so on. All of these disparities are too many to be handled in a single research paper or even a book of comparative law. Furthermore, any attempt to assign superiority to these distinctions between the legal systems based on their relevance would be a difficult endeavour. To be more precise, a comparison of two contract law systems - Pakistan and the European Union - exposes many discrepancies because the two legal systems have distinct histories and traditions. However, the relevance of these disparities is most likely determined by their ability to pave the way for solutions to current issues. These distinctions are not always clear to the Pakistani or EU lawyer. They may be surprised to learn that certain fundamental phrases, such as the definition of a contract, do not have the same meaning in their legal systems. The existence of these distinctions, on the other hand, opens the door to discovering shared solutions or common

[876] See Grundmann, Stefan: European Contract Law of What Colour?. In: European Review of Contract Law 1/2 (2005) 184.
[877] Pomar (2008) 9-10.

ground for harmonizing laws across legal jurisdictions.[878] For instance, initiatives like the CISG or PECL or DCFR etc. Such initiatives are beneficial for a variety of reasons. To begin with, such initiatives give a forum for attorneys and academics to discuss the differences in legal terminology through discussions or consultations to clear up any ambiguities. Second, these activities bring attorneys and academics together to discuss innovative approaches to dealing with a similar problem and finding a common solution. Finally, these initiatives lead toward the eventual objective of bringing these two legal systems closer together in some areas. As a result, Chapter 3 provides a unified account of the differences between the Anglo-Saxon and continental legal systems' contract law, including the definition of contract, consideration, the doctrine of privity of contract, duty to perform and good faith, the frustration of contract/force majeure, breach of contract, and remedies. In this Chapter, I would like to briefly provide an insight into the existing differences in the aforementioned theoretical legal techniques and the results of comparative methodology leading to the solutions[879] for existing issues.

Defining Contract law: Both the Anglo-Saxon and continental legal systems have different definitions of contract. The EU, particularly French contract law, places a premium on the contractual party's free will and encourages the parties to debate, resolve, and implement the contract in good faith; otherwise, the contract will be cancelled, and damages will be paid. The concepts of freedom, negotiation, and good faith are also present in Pakistani contract law, although this freedom is not tied to the parties' free choice, but rather to the freedom of making a contract alone. The concept of the parties' free will is set aside in favour of keeping the contract's economic element. This heightened utilitarian aspect of contract under Pakistani contract law can be mitigated by emphasizing the importance of giving parties' free will priority[880].

Form of Contract/Consideration: According to the Principles of European Contract Law (PECL), 1995, 'a contract does not need to be concluded or evidenced in writing, nor is it subject to any other form requirement. Any measures, including witnesses, may be used to prove the contract.' In contrast to Pakistani contract law, where this need is uncommon, the concept of contractual flexibility as to the form of a contract is popular in the EU. However, recent trends have shifted, and small adjustments toward less stringent contract form requirements are in effect. As a result, it may be deduced that a legitimate contract can be created between the parties without the use of any specified form, as needed by Pakistani contract law, which requires consideration for a valid contract, and French contract law, which requires lawful, specific substance for a valid contract. With the increasing demands of market economies, both the system and the PECL principle of contractual flexibility as to the form of a contract must be incorporated to facilitate contract conclusion[881].

Rights of Third-Parties: The Contracts (Rights of Third Parties) Act got Royal Assent on November 11, 1999, thereby abolishing the privity of contract theory. The purpose of this Act was to bring contracts for the benefit of third parties into Anglo-Saxon , which also got accepted in Pakistani contract law. Over time, the rigidity of this strict definition of contract privity weakened. These efforts to recognize the rights of third parties were influenced by German and

[878]Spamann (2009) 1813-1815.

[879]Note: All solutions mentioned are just recommendations or proposals for the future.

[880]Supra Thesis Chapter 3: at 3.21 and 3.3.1.

[881]Supra Thesis Chapter 3: at 3.2.2 and 3.3.2.

French contract laws. Both precedents and statutes supported the notion of granting rights to a third party where their interests are directly concerned[882].

Performance: A contract's performance must be completed within the specified time frame or within a reasonable time frame. However, when the performance is regarded to be completed within a reasonable period, the problem emerges under Pakistani contract law. If a party fails to do so, it is the court's responsibility to pronounce the performance reasonably. In such cases, rather than seeking the assistance of the courts, it is worthwhile to support the German contract law concept that states that the parties are obligated to perform the contract within the specified time or face a 'notice of default' that provides a grace period during which performance must be completed. The notion of 'notice of default' being included in Pakistani contract law can assist define the time of performance, resulting in better contractual goals being met[883].

Good-Faith: The obligation of good faith is applied differently in different jurisdictions across the EU Member States. Because Pakistan follows English law, it is clear that Anglo-Saxon was historically more hostile to the principle of good faith in contracts, i.e. 'adamantly refusing to accept any such obligation of good faith whatsoever.' There was some hesitancy in England to fully accept this at first, but recent rulings by the English courts show that the notion and application of the obligation of good faith in contract law are becoming more friendly. In Pakistani contract law, the courts apply the same principle of good faith by giving the parties provisions that they would not have anticipated otherwise. The courts in Pakistan do not have the power to revise or modify contracts in the event of changing circumstances, as courts in Germany and France do[884].

Force majeure/Frustration: In contrast to German and French contract law, Pakistani contract law does not have a clear or precise definition of the phrase ‘force majeure.’ The theory of force majeure, which can be found in German or French contract law, can be used to address cases of frustration under Pakistani contract law. This incorporation can assist Pakistani parties in concluding contracts with fewer and shorter force majeure clauses, as well as the facilitation of such clauses through courts if the parties forget to specify them at the time of contracting. Furthermore, replacing the notion of frustration with that of force majeure in Pakistani contract law will safeguard the parties from having the entire contract terminated in such circumstances. As a result, the party obligated to execute the contract is released from obligation, and the parties may choose to continue the contract once the circumstances of force majeure have passed. Since the First World War, German contract law has applied the idea of altered circumstances, or clausula rebus sic stantibus. It implies that in circumstances of force majeure, German contract law operates independently of any party agreement, safeguarding the parties from any damage even if the contract does not contain a force majeure clause[885].

Breach and Remedies: The strict liability principle in Pakistani contract law for violation of contract has lately been relaxed. This relief has been seen in cases of unanticipated events at the time of contract formation and as a result of the German and French contract law ideas of culpability for liability. According to the German Civil Code, "the debtor is liable for willful conduct and negligence," and "the debtor is not in default as long as the performance does not occur due to a condition for which he is not responsible." This fault condition to justify liability

[882]Supra Thesis Chapter 3: at 3.2.3 and 3.3.3.
[883]Supra Thesis Chapter 3: at 3.2.4 and 3.3.4.
[884]The Code Napoléon, 1804.
[885]Supra Thesis Chapter 3: at 3.2.5 and 3.3.5.

for breach of contract is acceptable and should be adopted into Pakistani contract law to reduce strict liability and encourage a rational foundation for enforcing liability clauses. In dealing with the subject of breach of contract, Pakistani contract law might also use either German or French contract law methods. The phrase 'clause penale' is used in EU law, particularly in French law, to specify the amount of money that the creditor receives from the debtor if he fails to execute his side of the contract. This sum should be in line with the anticipated damage suffered by the aggrieved party, and it can be decreased by the court in such situations as it considers proper, or when such amount is in stark contrast with the concept of good faith. Continental Law systems, such as the EU, limit government intrusion to enable effective contractual remedies. While government engagement is higher in Anglo-Saxon legal systems such as Pakistan, the state's role in providing adequate contractual remedies for people is limited. This continental legal system approach can be incorporated into the Pakistani Anglo-Saxon legal system to facilitate the smooth and free functioning of laws.[886]

Finally, **Chapter 4** of the thesis aims to examine the reasons and results of comparing contractual rights of women between Pakistan and the EU, with a particular emphasis on the theoretical legal techniques established previously in Chapter 3 of the thesis. Through this comparative technique, it is clear that there is still much opportunity for change in Pakistan's mindset, cultural traditions, and national legislation to empower and uplift women's legal standing in terms of contractual rights as well as general rights. Because women in the EU have a far higher legal standing in their society, the model of EU civil legislation providing safeguards for women must be followed in Pakistan. This can be accomplished either by amending current Pakistani laws or by incorporating EU-wide safeguards for women into local legislation. While explaining the contractual rights of women, several case laws have been stated side by side to represent the court's practice in the EU as well as Pakistan. The differences in judicial interpretation and implementation of legislation can be considered as an insight into the workings of both systems and used in the other direction when necessary.

So far, it has been demonstrated that women's legal and socio-economic position have significant implications in areas such as marriage, family decision-making, property rights, divorce, and inheritance. As a result, these factors influence women's efforts to achieve independence and empowerment. It may be claimed that initiatives have been made in Pakistan overtime to promote equality between men and women, such as the incorporation of the notion of mutual consent in marriage based on recent judicial interpretations. Several additional laws, notably those dealing with polygamy and divorce, have been amended. Gender differences in family and divorce decision-making continue to exist. Furthermore, the rules governing marriage, divorce, custody, support, property, and inheritance are still in violation of international accords as well as the law of the land, the Pakistani Constitution of 1973.

5.2. Need for Reforms

Based on the aforementioned position of women in Pakistan and the EU in Chapter 4, it may be argued that there is an urgent need to establish a few yet significant improvements in Pakistani legislation by adopting EU laws or policies relating to women. However, the lack of measures to increase women's position and autonomy in Pakistan has resulted in damage and unwelcome limits on their economic advancement. As a result, a few key areas have been identified to kick-start the reform process in Pakistan.

[886]Supra Thesis Chapter 3: at 3.2.6 and 3.3.6.

⇒ ***Reducing the current gender gap in work possibilities:*** In Pakistan, women and men are always at odds when it comes to pursuing and obtaining career opportunities. The current disparity in work chances between men and women is around 21.9 per cent for women and 80.3 per cent for males. This vast disparity serves as the foundation for women's economic insecurity in Pakistan, and as a result, women continue to rely on their male relatives, such as fathers, husbands, or sons. To increase women's independence, new legislation aimed at offering equal chances to both men and women at work must be enacted.

⇒ ***Eliminating existing pay or salary disparities caused by gender bias:*** Pakistani women also experience wage or salary disparities with males. The various nature of the jobs that women conduct is the major cause of such issues. They regularly abandon their professions or alter their work schedules to meet the requirements of their families, particularly in terms of childcare and household tasks. Furthermore, women are disproportionately engaged by industries that provide low-paying, part-time work. As a result, they are once again subjected to the wrath of males, who earn more than women for the same type of work. As a result, closing pay inequities is critical, and policies requiring equal pay for men and women must be implemented.

⇒ ***Creating a balance in outside-of-the-home life:*** For both genders to have equal employment possibilities, they must strike a balance between their work and home lives. This can only be accomplished by sharing duties at home and work. As the number of women in Pakistan gains greater access to job opportunities, they continue to bear an enormous burden of household responsibilities, as men rarely assist in household chores. As a result of this, women are unable to maintain a sense of balance in their life and are forced to leave their employment, which has a detrimental influence on their economic progress.

⇒ ***Autonomy in family decision-making:*** Pakistani women are severely limited in their ability to make decisions on family affairs since the patriarchal society of Pakistan places this authority solely in the hands of males. Women are under-represented in practically every element of their life, be it socio-economic, political, or legal, no matter how hard they fight to achieve equality with males. As a result, measures aimed at giving women autonomy in making their own decisions at all levels, including family affairs, are actively encouraged.

⇒ ***Promoting gender equality in contractual rights:*** Furthermore, Pakistani women will be treated equally to males as a result of reforms affecting their contractual rights, including marriage, divorce, custody, maintenance, employment, property, and inheritance rights, as detailed above.

⇒ ***Getting rid of existing preconceptions based on gender:*** Existing gender stereotypes or roles in connection to unequal distribution of rights and responsibilities can cause chaos for Pakistani women and their professions. They frequently wind up working part-time, which has an influence on their income for the rest of their lives, including their pension. Similarly, due to societal preconceptions about masculinity, gender-based stereotypes create barriers for males to help women in home and parenting chores. There is a need for change/reform to encourage both men and women to share or assist each other in their obligations.

5.3. Call for Governmental Initiatives

Pakistan's current and future governments must take all necessary steps for women's emancipation and independence. The Committee on the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW)[887] has recommended that Pakistan create a legal framework for marriage, divorce, custody, and inheritance that is fully compliant with international traditions and standards[888]. This framework is proposed to give all women in Pakistan successful and equitable legal security. The statutory framework must be translated into an actual enforcement strategy by putting in all efforts and raising public awareness on the

[887]UN Women: Convention to Eliminate all sorts of Discriminations Against Women (CEDAW). Available online at https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm. Last visited on 21-12-2020.

[888]Note: Pakistan ratified CEDAW Convention in the year 1996.

advancement of women's status in Pakistan after it has been enacted. The CEDAW Committee further demands that Pakistan take all necessary steps to eradicate discrimination against women in family issues, including ensuring gender equality in property ownership, acquisition, management, administration, enjoyment, and disposal. In light of CEDAW's guidelines, the following recommendations might be made to the Pakistani government to improve the situation of women in general. The Pakistani government should:

- ⇨ Ensure that women's contractual rights are consistent with the philosophies specified in international accords and the Pakistani Constitution of 1973 and provide for gender equality in terms of non-discriminatory personal law codes.
- ⇨ Promote the equitable distribution of rights and responsibilities between men and women in areas such as family tasks and the workplace, and/or the inclusion of favourable terms in marriage contracts for women.
- ⇨ Implement legislation that allows for post-divorce maintenance as a means of financial security for Muslim women.
- ⇨ Implement regulatory reform to document the properties and earning sources of husband and wife to promote the assessment of the direct and indirect share of wife in assets made by the family after marriage independent of the title deed of any acquired land.
- ⇨ Authorize statutory amendment to provide for the right to matrimonial property and to establish an equal share in the calculation of women's contributions in cash or kind during the time of marriage.
- ⇨ Review inheritance rules to protect gender equality ideals and encourage endowments between spouses or their legal heirs.
- ⇨ Educate the public on the challenges women experience under Pakistan's current legal frameworks, particularly in the case of divorce, and efforts to better defend their rights, such as allowing mothers to carry the title of "head of the family" or developing enforcement mechanisms.
- ⇨ Establish a competent panel to assess the financial effect of Continental Law rules and to garner support for legislative changes that would enable women to engage more fully in the economy.

5.4. Recommendations

In the end, a few proposals are suggested that may be used by a variety of stakeholders, including intergovernmental organizations such as the United Nations, government agencies, local and international non-profit organizations, and human rights and women's rights advocates. These include engaging in political activism, empowering and supporting local non-profits, encouraging an active civil society, and educating women. However, the patriarchal attitudes of Pakistanis are the most significant constraints to the proposals.

- ⇨ *Engage in Political Activism and Judicial Reform*

Pakistan has a large number of powerful female politicians and activists. Benazir Bhutto was the first woman to serve as Prime Minister of a Muslim country. Hina Rabbani Khar, Pakistan's former foreign minister, and Sherry Rehman, Pakistan's former ambassador to the United States, are two more women who occupy prominent government positions. All of the

aforementioned ladies, however, have one thing in common: they all hail from powerful, rich, and politically connected families. Women without these ties are rarely appointed to positions of power in the government. Moreover, women have 60 reserved seats in the National Assembly and 13 reserved seats in the Senate. Despite a quota for the number of seats in parliament, women accounted for around 20% of all seats in the National Assembly and 16% of all seats in the Senate in 2013 and 2012, respectively. In addition, fewer women are competing for or securing unreserved seats. The difficulty is that while women account for over half of the population, the number of women holding seats in parliament becomes unrepresentative. Several laws and bills for women empowerment have been passed to promote women's rights and end discrimination against them in Pakistan. However, Pakistan's present problem is a lack of control over these bills. Evidence tends to favour the guy in patriarchal nations such as Pakistan. Laws must be enforced, and penalties must be met. Women's presence in Pakistan's political and legislative spheres is currently insufficient. More women need to be empowered, taught, and encouraged to take up leadership roles and promote women's interests. The necessity of participating in a public activity must be emphasized. Incorporating leadership training programs focused primarily on strengthening women working in the public sector is one such strategy.

- ⇨ *Encourage an Active Civil Society*

For present prejudice against women to cease, and engaged civil society is required. The One Million Signatures Campaign, which brought Pakistani citizens together to fight violence against women, was previously in place. It began in Pakistan in 2011 during the annual 16 Days of Activism Against Gender Violence, organized by the Elimination of Violence Against Women and Girls (EVAWG) Alliance. This was the first large-scale campaign on the subject. It gathered more than 700,000 signatures in support of EVAWG aims by mobilizing and engaging 4,500 community people and 1,500 Pakistani women leaders." Furthermore, 57 districts created Charters of Demand for Change and delivered them to legislators.[889] Across the country, such activities have become a means of involving the general public in work linked to women's empowerment. It encourages marginalized women to take the lead in the fight against gender-based violence[890]. The Pakistani people must band together to put an end to discriminatory policies like the Zina Ordinance. This can only be accomplished if civil society joins forces and exerts pressure on the government to do so. A well-informed and active civil society has the power to effect change. To achieve progress toward equal rights, more projects like the One Million Signatures Campaign must be funded.

- ⇨ *Empower and Support Local Non-Profits*

Many women's rights organizations have taken it upon themselves to spearhead different initiatives aimed at empowering women around the country. Dastak, a non-profit organization, is one such organization that has helped women who have been victims of abuse. The advantages of empowering and supporting non-profits might trickle down to a wider audience. Non-profit organizations are also more efficient than larger government agencies. Many non-profits may also be better educated than government entities regarding the problems they represent. As a result, there is a need to expand the amount of financial and non-financial support provided to non-profits working on various issues in Pakistan.

[889]Supra Thesis Chapter 3: at 3.21 and 3.3.1.

[890]Supra Thesis Chapter 3: at 3.21 and 3.3.1.

⇨ *Educate Women*

In Pakistan, domestic violence against women is a taboo subject. Women are often afraid of the implications if they come out. Reporting domestic violence can result in alienation from one's community, including one's family. The fact that many women have nowhere to turn once they've been rejected is a greater issue. Many women suffer in silence as a result of abuse and never come forward to report it. As a result, the bigger purpose is to encourage women to come forward and report any forms of abuse they may be experiencing. According to a study I did last year, female literacy has a direct influence on whether or not women disclose incidents of violence against them. The investigation was limited to the province of Punjab and its districts. Districts with greater female literacy rates reported more incidents of violence against women, whereas districts with lower female literacy rates reported fewer occurrences. This is highly beneficial since a clear link can be established between literacy rates and the number of women reporting instances. Several things may be taken to guarantee that women in Pakistan receive an education. To begin, a safe place for discussion and educational programs on the hazards and effects of gender-based violence must be established. Multi-dynamic initiatives for women's empowerment should also be encouraged. Women's political empowerment, economic development, and human rights protection should all be emphasized in programs. Investing in a woman's education now will enable her to find work later. Women will be empowered as a result of this since they will no longer feel obligated to stay with violent spouses owing to financial dependency[891].

[891] Rathore (2015) 19-23.

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