

Name & Surname: Amna Hassan

Faculty: Law, University of Pecs, Hungary

Department: Civil Law

Level: PhD (Doctorate)

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"Women and Contracts in Pakistan - A Comparative Analysis of Women's Contractual Rights on the Basis of Anglo-Saxon and Muslim Legal Traditions"

Abstract

In this paper, I would like to draw attention towards the legal status of women regarding contractual rights in the Anglo-Saxon (common law) and Muslim legal traditions (Shariah law) of the Islamic Republic of Pakistan. In the beginning, the paper opens up with the prime focus on elaborating the concept, origin and historical background of Shariah law, generally. 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 paper seeks to address specifically those teaching of the Shariah that are related to the Muslim women. The paper then chalks out in detail the historical background of status of women in Pakistan since independence to date. Moving on, the paper then focuses on analyzing in length the status of women in Pakistan through based on two basic parameters, that is, on the basis of their contractual rights under Shariah law and on the basis of their rights under Constitutional and other legal Statues in Pakistan. Although Shariah law treats women equal to men, yet there are certain matters in which women are treated unequally. That is, they are allowed to enter into contractual relation with others but do not enjoy the same kind of autonomy in the contractual matters as the women in other parts of world do. For instance: marriage; divorce; inheritance; property rights; custodial rights etc. In the end, the paper concludes with a comprehensive analysis of the contractual rights of women in Pakistan under both the systems of laws.

Keywords: Status of Women; Contractual Rights; Shariah Law; Common Law; Pakistan; Comparative Analysis.

1. Introduction

Pakistan bears a mixed legal system, that is, a combination of Sharia law and common 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 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 Islamization process in the country¹.

The Sharia law (also known as Islamic law) has been in existence since the premature times of the Islamic states in the 18th and 19th centuries, along with some other cultural norms². 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 laws³. 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 hudud punishments e.g. stoning to death⁴. There are certain Muslim minority countries, in addition to Muslim majority countries, that enforce Shariah laws in matters relating to 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)⁵. Several schools of thought in Islam, (including Hanafi, Maliki, Shafi’i, Hanbali and Jafari) developed their legal methodologies in accordance with the teachings of these four basic sources of Islamic law⁶. 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 topics⁷, which leads to an overlapping of certain Shariah law

¹ Saigol, Rubina: (2009). [Pakistan's Long March](#). In: Development and Cooperation 36/5 (2009) 208–210.

² Otto, Jan Michiel: Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present. (Leiden: Leiden University Press, 2009) 615–616.

³ Otto, Jan Michiel: Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy. (Netherlands: Amsterdam University Press, 2008) 19.

⁴ 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.

⁵ Esposito, John L. / DeLong-Bas, Natana J.: Women in Muslim family law. (US: Syracuse University Press, 2001) 2.

⁶ Esposito, John L.: Islamic Law. The Oxford Dictionary of Islam. (Oxford: Oxford University Press, 2014).

⁷ Calder, Norman: Law. Legal Thought and Jurisprudence. In: Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009).

notions with that of the Western law, whereas certain Shariah Law issues remain intact emphasizing on the need to live in accordance with 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 in accordance with the Shariah law or State law⁸. The minority communities (usually non-Muslims) enjoined the legal independence in matters pertaining to personal status, where Shariah law was no longer applied and they were given autonomy to seek justice in the light of their own religion. It took centuries for the Sunni jurists to acquire a credible position in the state bureaucracies⁹, thus struggling to complement the laws enacted by Muslim rulers related to economics, criminal and administrative law¹⁰. 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 law¹¹.

Nevertheless, at present, several Statutes based on European models are in regulation in most of the Muslim countries attempting to replace the classical Shariah laws¹². Not only this, 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 jurisprudence¹³. In the 20th century, Islamist movements called for the complete implementation and enforcement of Shariah law, together with hudud 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 judiciary¹⁴. Although these *hudud* punishments are held with symbolic importance in seeking international attention, the Muslim countries are seen reluctant in enforcing these *hudud* punishments in their territories and their implementation is based in accordance with the political climate of the country¹⁵.

⁸ Ziadeh, Farhat J.: [Criminal Law](#). In: Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009).

⁹ Dallal, Ahmad S. / Hendrickson, Jocelyn: [Fatwā. Modern usage](#). In Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009).

¹⁰ Stewart, Devin J.: Shari'a. In: Böwering, Gerhard / Crone, Patricia: The Princeton Encyclopedia of Islamic Political Thought. (US: Princeton University Press, 2013) 500.

¹¹ Supra 3.

¹² Otto, Jan Michiel: [Sharia and National Law in Muslim Countries: Tensions and Opportunities for Dutch and EU Foreign Policy](#). (Netherlands: Amsterdam University Press, 2008) 19.

¹³ Supra 3.

¹⁴ Rabb, Intisar A.: [Law. Civil Law & Courts](#). In: Esposito, John L.: The Oxford Encyclopedia of the Islamic World. (Oxford: Oxford University Press, 2009).

¹⁵ Supra 11: at 20.

There are several instances where non-Muslim countries allow for the use of Shariah law for their Muslim-minority in matters of personal status¹⁶. While there some other non-Muslim countries where their significant Muslim minority has made several calls for adoption of Shariah law in the legal system and these calls have become the hot issues of international debate¹⁷. 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*'¹⁸, and such calls for re-instating or expanding Shariah law accompanied with controversy¹⁹, violence²⁰, and even warfare.

2. Status of Women in Pakistan

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 lives²¹. Several religious groups and ulamas who acquired political power during and after the period of Zia-ul-Haq advance and support the 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 the passage of time, 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 Bhutto²². Additionally, the All Pakistan Ulema Council has recently released fatwas condemn honor killings²³. Some other improvements also surface as lady traffic wardens are employed in road traffic control measures and an attempt in being made to increase women percentage in police force as well²⁴. Despite these improvements, widespread domestic abuse, increased child marriages and rapes still remain a bitter truth of the Pakistani society.

2.1. Historical Background of Status of Women in Pakistan

Historically speaking, Muslim reformers like Syed Ahmad Khan advocated for women's right to education, prohibition of polygamy, and women empowerment by way of education. Jinnah was also known to possess positive outlook towards women's rights. His sister Fatimah Jinnah became a well known feminist struggling to alleviate socio-economic discriminations against women and she became a valiant force after independence for women rights. She also organized

¹⁶ 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.

¹⁷ Brooks-Pollock, Tom: [The countries where a majority of Muslims want to live under Sharia law](#). The Independent (December 15, 2015).

¹⁸ Lapidus, Ira: The Cambridge Illustrated History of the Islamic World. (Cambridge: Cambridge University Press, 1996) 293-98.

¹⁹ Iijima, Masako: [Islamic Police Tighten Grip on Indonesia's Aceh](#). Reuters (January 13, 2010).

²⁰ Ibrahimova, Roza: [Dozens Killed in Violence in Northern Nigeria](#). Al Jazeera (July 27, 2009).

²¹ Pal, Mariam S.: [Women in Pakistan: Country Briefing Paper](#). Asian Development Bank, 2000.

²² Tyab, Imtiaz: [Pakistani police seeks to recruit more women](#). Aljazeera (January 7, 2014).

²³ National Assembly of Pakistan: [The Constitution of the Islamic Republic of Pakistan](#) (April 20, 2010).

²⁴ O'Connor, Karen: [Gender and Women's Leadership: A Reference Handbook](#). (London: SAGE Publishing, 2010) 382.

and established several women's groups and feminist organisations to further her mission of empowering women in the nascent country - Pakistan.

According to Jinnah's own reflections, it is clear that majority of the Muslim women supported Pakistan movement in the 1940's and this movement was a success partly due to the un-yielding 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 seats reservation in Parliament for the women to give them the opportunity to participate in political process of the country.

In 1973, 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 on the basis of 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*'.²⁵ The tenure of PPP government (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 economical crisis due to East Pakistan separation in 1971 and could, therefore, not succeed well with the implementation of all such policies regarding women participation in legislative bodies.²⁶ Also several judges upheld the implementation of Shariah laws, which were often mis-interpreted and against the express provisions of the Constitution calling for non-discrimination based on sex alone.²⁷

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 with regard to 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*'.²⁸ 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)²⁹.

However, the darker side, which is a bitter truth, states that his Islamization process introduced discriminatory laws against women including the Hudood Ordinances and *Qanun-e-Shahadat*

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

²⁶ Supra 48: at 202-224.

²⁷ Bettencourt, Alice: [Violence against women in Pakistan](#). (Human Rights Advocacy Clinic: Litigation Report, 2000) 3.

²⁸ Supra 51.

²⁹ Supra 48: at 213-224.

Order (Law of Evidence)³⁰. 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 on the basis of sex. In reaction to Zia's controversial Hudood Ordinance, feminist struggle arose in the 1980's 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 the 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 most attraction and appeal during the rule of Female Prime Minister Benazir Bhutto, who served twice as the Prime Minister of Pakistan (1988-1990 and 1993-1996). 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. However, 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 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 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 1997 who came into power gaining strong support from Islamic parties and Mullahs. Consequently, women found themselves caught in losing battle against the conservative and religious political rivals³¹. During Nawaz Sharif's rule, the Council of Islamic Ideology (CII) also made recommendation to make burqa compulsory which led to an increased toll of honor 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. 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 honor killings and other vices faced by women in Pakistani society.

Moreover, during the rule of PPP under President Asif Ali Zardari (2008-2013) has raised the number of women participation on political forum by appointing women on esteemed positions like the Speaker of Parliament Dr. Fehmida Mirza, Foreign Minister Hina Rabbani Khar, Media

³⁰ Muslim, Abdul Ghafur: Islamization of Laws in Pakistan: Problems And Prospects. In: Islamic Studies 26/3 (1987) 265-276.

³¹ Supra 48: at 234.

Advisor Sherry Rehman³² 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 2010.³³ 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.³⁴ However, like the Nawaz government during its first tenure, the current government of Pakistan Tehrik-e-Insaf (PTI) party also seems a bit conservative and restrictive. The current Prime Minister – Imran Khan - seems to favor Islamic ideals which might ultimately affect the status of Pakistani women in future.

2.2. Contractual Rights of Women under Shariah Law

The role and status of women in the 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 definitely impact women and their status. As women in Muslim societies have always been kept away from seeking education, their capability to read and raise 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. As a matter of fact, the differences of rights of men and women in Muslim societies arise out of sexual, biological, and social realities, rather than on scientific basis.

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. With regard to superior position of men over women, the Quran states that men provide financial or economical support to the women. According to this argument, there seems to be no superiority of men over women based on natural facts, as it is entirely economical factor which 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 matters³⁵. Similarly, after going through the interpretation (tafseer) of 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 but there certain domestic, economic and political aspects where men lead women with a slight degree of superiority in the 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

³² Reuters: Sherry Rehman appointed Pakistan’s ambassador to US. DAWN (November 23, 2011).

³³ Rahman, Shamim ur: [Women’s bill sets tough penalties](#). DAWN (January 30, 2010).

³⁴ Staff Report: [President signs two women’s rights bills into law](#). Pakistan Today (December 23, 2011).

³⁵ Siddiqui, M. Mazheruddin: Women in Islam. (Pakistan: The Institute of Islamic Culture, 1952) 23, 24.

(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 ruled the country. As it is well known, the Muslim society and culture was completely opposite to that of the Persian Empire.

Since its inception, Islam was (presently as well) entirely male dominated providing in depth legislation favoring men over women in matters of dealing with marriage, divorce, property rights, inheritance etc. This legislation forms 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 substitution of the old Shariah laws with a new, yet modern law code. While others seek interpretations of state law in such a way so as to conform to the Shariah law making Qiyas such an essential source of legal discretion³⁶. 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.

i. Marriage

It is true that Islam 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 practices³⁷. Historians claim that the status of women before the advent of Islam was no less than 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 covenant³⁸. 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

³⁶ Waddy, Charris: Women in Muslim history. (London: Longman ELT, 1980) 30-31.

³⁷ 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.

³⁸ Nicholson, R.A.: A literary history of the Arabs. (Cambridge: Cambridge University Press, 1969) 38.

scholars favors 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.

Apart from this, the Islamic tradition also allows men to marry women to the count of four at the most, with the only condition of loving, caring, and supporting all the women equally. But this provision is not extended for the women in Islam, as she can marry only one man. In case she marries a second man, she is believed to have committed bigamy and her children from the second marriage are deemed illegitimate, who can never acquire legality by any way afterwards. Although Islamic teachings speak of equality between both the sexes, yet double standards are a common occurrence in the Islamic legal system. For instance, Muslim men are allowed to marry a woman of other faith like a Christian or Jewish woman, but the same is not applicable for women, as they cannot marry men outside of Muslim faith. If a Muslim woman did dare do so, she was declared outcast and her marriage was deemed as invalid or void. This particular provision raised considerable controversy in subcontinent during the times of British rule.

Moreover, there are some other kinds of marriages in Islam that forms the basis of cruel practices of discrimination against women and favoring men alone. One such kind is nikah halala (commonly referred to as *tahleel marriage*)³⁹ 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, in order to re-marry her former husband⁴⁰. Although this kind of marriage has been declared haram (forbidden) by the hadith of the Prophet (PBUH)⁴¹, yet it was in practice during the earlier periods of Islam and a small Muslim minority also practices it today⁴².

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 period and for such marriage the amount of mehr is specified and agreed upon in advance⁴³. 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

³⁹ Ali, Shaheen Sardar/Griffiths, Anne: [From Transnational Relations to Transnational Laws: Northern European Laws at the Crossroads](#). (UK: Routledge, 2016). Chapter 5.

⁴⁰ Singh, Vatsala: What does Quran say about Nikah Halala? Will banning it help?. (The Quint: Bloomberg LP, 2018). <https://www.thequint.com/voices/women/so-what-does-the-quran-say-about-nikah-halala-triple-talaq-polygamy> [Last accessed 23-04-2020].

⁴¹ Ahmad, Yusuf Al-Hajj: The Book of Nikkah: Encyclopedia of Islamic Law. (Darussalam Publishers: Volume II) 23-25.

⁴² Ahmad, Athar: [The women who sleep with a stranger to save their marriage](#). BBC News (May 5, 2017).

⁴³ J. Esposito: [The Oxford Dictionary of Islam](#). (Oxford: Oxford University Press, 2003) 221.

ascertain the paternity of the child if the woman gets pregnant during the period of contract marriage⁴⁴.

The Shiites support for the contract marriages is based on the teachings of the Holy Quran, hadith of the Prophet, history, cultural and moral grounds⁴⁵. According to them, the verses of Holy Quran take superiority over any other sources of Islamic laws, thus justifying their 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.”

ii. Divorce

As Islam considers marriage a contract between two parties, therefore, it attaches high repute and respect with it. Although divorce carries no immoral connotation, yet it is strongly discouraged in Islam as it demolishes the existing family set-up. 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’*. In spite of 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-ambiguity⁴⁶.

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

⁴⁴ Supra 67: at 8.

⁴⁵ Rohde, Achim: (2014). [State-Society Relations in Ba’thist Iraq: Facing Dictatorship](#). (UK: Routledge, 2014) 171.

⁴⁶ Wilson, Roland Knyvet Sir: *Anglo-Muhammadan Law*. (Pakistan: Law Publishing Company, 1930) 61.

Holy Quran, as interpreted by the Sunni School of thought. In this regard, the practice and ideology of the Muslim minority Shiite Sect is deemed to be in accordance with the true interpretation of the verses of the Holy Quran from both Surah Talaq and Surah Al-Baqra. Therefore, in order to comprehend the teachings of Islam regarding divorce, it would be very useful to comprehend their meaning in depth by looking at the 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 fairness⁴⁷.
- 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 reconciliation⁴⁸.
- 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...⁴⁹
- When you marry the believing women, and then divorce them before you have touched them, they do not have to fulfill a waiting period, the completion of which you may demand of them⁵⁰.
- And if those of you who die, leave wives behind, the women should abstain (from marriage) for four months and ten days⁵¹.

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 for 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 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 woman is said to be four months and ten days⁵².

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

⁴⁷ The Holy Quran: Surah Al-Baqarah, Verse 229.

⁴⁸ The Holy Quran: Surah Al-Baqarah, Verse 228.

⁴⁹ The Holy Quran: Surah Al-Baqarah, Verse 230.

⁵⁰ The Holy Quran: Surah Al-Ahzab, Verse 49.

⁵¹ The Holy Quran: Surah Al-Baqarah, Verse 234.

⁵² Maududi, Abul A'ala: Syed Abu-Ala' Maududi's: Introductions to the Qur'an. (Amazon, 2012). Chapter 65.

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 of delegated divorce provides women with just a nominal way of acquiring freedom from her 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’⁵³.

Another way for a woman to seek 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 bribe in the form of money to her husband to free her from the martial 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.⁵⁴ In deciding the validity or reasonableness of grounds for divorce, the court is guided by the teachings of Islam which recognize 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 be dissolved, then each of them have 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.

iii. Custodial Rights

⁵³ FYZEE, Asaf A.A.: Outlines of Muhammadan Law. (Oxford: Oxford Publishers, 1964) 151, 152.

⁵⁴ Supra 65: at 77-79.

According to the teachings of Islam, a mother enjoys high status in the society and this has been proved by oft-repeated hadith of the Prophet (PBUH) himself stating '*paradise lies at the feet of mothers*'.⁵⁵ 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 the 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 in nature, 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 a 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 gives rise to the inequality existing 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 really enjoys in seeking 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 in lieu of her husband's approval to seek divorce.

Secondly, in 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 loses both a companion and the source of income or livelihood. Because she has not worked before (mostly in Muslim societies), therefore, she lacks necessary skills to obtain employment opportunities. Thus, in order to sustain herself and the children under her custody till they reach of age, she has

⁵⁵Nasai, Sunan An-: Hadith 20. In: The Book of Jihad: Chapter 6.

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 the Islamic law. In these circumstances, one can again question the degree of freedom provided to a woman in comparison of a man, who has no consequences to deal with after getting 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 law⁵⁶. Moreover, a divorcee woman is seen with abhorrence in the society and it seems like an uphill task for a divorcee woman to remarry, unlike a divorcee man. Here again, even though Islam allows the women to remarry, yet the society or culture would not make it an easy path for women and prioritize their own interpretations of Islamic teachings instead.

iv. Employment Rights

According to the Islamic law, women are allowed to work but this is usually under certain circumstances and under 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 honor 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 field work 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 working⁵⁷.

v. Property Rights and Inheritance

Since its inception, Islam has treated both men and women as distinct entities. Even after marriage, both sexes do not enjoy equal share into 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 common 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 entity⁵⁸.

⁵⁶ Honarvar, Nayer: Behind the Veil: Women's Rights in Islamic Societies. In: Journal of Law and Religion 6/2 (1988) 355–387.

⁵⁷ 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.

⁵⁸ Daniels, Ronald J.: The Legacy of Empire: The Common Law Inheritance and Commitments to Legality in Former British Colonies. In: The American Journal of Comparative Law 59/1 (2011) 111–178.

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 labor 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 property and to establish business without any male relative's consent, direction, or involvement. For instance, the Holy Prophet's own first wife 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 himself⁵⁹.

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 Islamic law is clear about the rights of women in relation to the holding, using and disposing of property, but these laws become intricate when explained through tafasir of scholars from various schools of thoughts in Islam. In addition, Islamic 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. Considering the fact that Islam requires women to remain 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.

Since Islam follows a patriarchal lineage, 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 favors to men with regard to inheritance⁶⁰. 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*'⁶¹.

The law of inheritance in Islam consists of two distinct elements: the pre-Islamic customs of Arabia; and the Islamic reforms introduced by the Prophet. In 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 the 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 follows⁶²:

⁵⁹ Supra 86.

⁶⁰ UKEssays: Ownership of Property in Islamic Law, 2018. <https://www.ukessays.com/essays/anthropology/property-ownership.php> [Last accessed 20-04-2020].

⁶¹ Supra 52: 823.

⁶² Supra 52: at 602, 603, & 822.

- 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;
 - 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 legitimacy⁶³. An individual may be excluded in one of two ways: imperfect and perfect. An imperfect exclusion is basically 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 exclusion⁶⁴.

Although women possess the right to inherit 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

⁶³ Murphy, Papa: Inheritance Laws in an Islamic Society: Islamic Cultures Are Distinct in Everyway. (US: iUniverse, 2012)177.

⁶⁴ Russel, Alexander David: Muslim Law: An Historical Introduction to the Law of Inheritance. (UK: Routledge, 2013) 227.

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). 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 practiced 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 majority 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 such⁶⁵.

In 1995, Annelies Moors⁶⁶ explained the fact that the women under Islamic law possess inheritance rights which are usually more restricted than the rights men. The preference is generally given to the 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 husband's 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 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 the property ownership.

vi. Testimony of Women

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 with regard to a right of a second party against a third

⁶⁵ Supra 90.

⁶⁶ Moors, Annelies: *Women Property and Islam: Palestinian Experience 1920-1990*. Cambridge Middle East Studies (Cambridge: Cambridge University Press, 1995) 286.

party. It co-exists with other forms of evidence such as the oath, acknowledgement and circumstantial evidence, in order to prove a case. A testimony should comprise of certain knowledge of the questioned event, and it cannot be based on mere speculation⁶⁷.

The testimony of women varies in accordance with issues and circumstances of the case in question. In 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 a testimony in financial situations as a witness.⁶⁸

'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 in justice. And get two witnesses out of your own 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 in order 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 witness, because of the woman's shortcomings, as the Prophet described.⁶⁹ 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.'*⁷⁰

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 jurist of his time disputed with regard to the status of women in matters of hudud and criminal punishments for serious crimes. He stated further that some of the jurists were of the opinion 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.⁷¹ One of the most influential Islamic

⁶⁷Hallaq, [Wael B.](#): Shari'a: Theory, Practice, Transformations. (Cambridge: Cambridge University Press, 2009) 347.

⁶⁸Fadel, 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.

⁶⁹Kathir, [Ibn: Tafsir Ibn Kathir. \(Surah Al Baqarah: Part II\)](#).

⁷⁰ Khan, [Nazir / Alkiek, Tesneem / Chowdhury, Safiah](#): Women in Islamic Law: Examining Five Prevalent Myths. In: Yaqeen Institute for Islamic Research, 2019.

⁷¹Rushd, [Ibn](#): Bidayatu'l-Mujtahid. Edition 1st. (Beirut: Daru'l-Ma'rifah, 1997) 311.

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, there are some hadiths that 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 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 the matters relating to bodily affairs such as divorce, marriage, freedom of slave, and restitution of conjugal rights. According to Averroes, the Imam of Hanafi school of thought believed in the acceptance of women testimony in such matters. In contrast, the Imam of Maliki school of thought believed on 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 is⁷². 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.

2.3. Status of Women under Anglo-Saxon (Common) law

Many Islamic fundamentalist are against any change regarding women's rights that can undermine male domination with regards to family and society. Their goals are to setup special curriculum to train girls for their role as housewives, to restrict their access to political life, remove them from the legal profession, and to 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-set⁷³.

However, over the times, women have been provided with rights other than Islamic rights, by way of common legal system in the form of legal rights/safeguards provided in the Constitution and Legal instruments of the country. A legal right has been defined in Black's Law Dictionary 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 Civil Law.
- iv. Rights provided to women under Family Law.

⁷² Supra 100.

⁷³ Offen, Karen: Women in the Western World. In: Journal of Women's History 7/2 (1995) 145-151.

i. Rights provided to women under Constitutional law

The Constitution of Islamic Republic of Pakistan guarantees fundamental rights to every citizen without discrimination on the basis of gender. 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 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 on the basis of sex. In the urban areas of Pakistan, women are participating in every field of life and working for the social and economic development of the society. At the same time, condition of women in rural areas is deplorable amidst heinous anti-woman practices like forced marriages, rape, vigilante justice, acid attacks, mutilations, honor killings, sawara, karokare and vani etc⁷⁴. 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 high court and seek remedy against infringement of fundamental rights guaranteed there under.

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:** Sections 52, 497, 167, 203(A)(B)(C).

⁷⁴ Shaikh, [Dr. Abdul Razak](#): Women’s status in Pakistan DAILY TIMES (March 8, 2019).

- c. *Offences of Qazaf (Enforcement of Hadd) Ordinance, 1979*: Sections 7, 14.
- d. *Rights of Women Prisoners*: Women prisoners enjoy 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 competent Court of law and they also have the right of remission during their imprisonment on different occasions.

iii. Rights provided to women under Civil 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 execution of decree and in financial matters.
- b. *Factories Act, 1934*.
- c. *Married Women Property Act 1874*: This enactment protects the rights of married woman with respect to 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 in 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 child is 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 fulfill this liability the minor may seek help of the Court and the Court may fix 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.²⁷
- e. *Child Marriage Restraint Act, 1929*: Marriage of girls during childhood is prohibited. The parents and the *nikkahkhwān* 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 years²⁸. Minimum marriage age was extended to 18 years through an amendment in family law amendment.²⁹

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

3. Conclusion

In a nut-shell, the whole paper can be summarized through a brief overview of its contents. In the beginning, the paper states the dual legal system operating in Pakistan, i.e. common law and Sharia law systems. It states that the latter has been in existence since the premature 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 at the legal system of Pakistan which is composed of a combination of Sharia and common 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 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 Islamization process in the country.

Furthermore, the paper 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 advance and support the 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 the passage of time, 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.

The role and status of women in the 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 definitely impact women and their status. As women in Muslim societies have always been kept away from seeking education, their capability to read and raise 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. As a matter of fact, the differences of rights of men and women in Muslim societies arise out of sexual, biological, and social realities, rather than on scientific basis.

Since its inception, Islam was (presently as well) entirely male dominated providing in depth legislation favoring men over women in matters of dealing with marriage, divorce, property rights, inheritance etc. This legislation forms 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 substitution of the old Shariah laws with a new, yet modern law code. While others seek interpretations of state law in such a way so 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.

At 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 Civil Law; and rights provided to women under Family Law.