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The treatment of women with Pakistani domestic legal system: A relativist challenge to the universalist concept of human rights: the potential of European Union's mandate of external relations and actions for addressing the challenge

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The treatment of Women within the Pakistani domestic legal system: A relativist challenge to the universalist concept of human rights The potential of European Union's mandate of External Relations and Actions for addressing the challenge

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List of abbreviations

ADB	Asian Development Bank
CCP	Common Commercial Policy
CFSP	Common Foreign and Security Policy
CCT	Common Customs Tariff
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
CrPC	Criminal Procedure Code
CIGEPS	The Intergovernmental Committee for Physical Education and Sport
CRC	Convention on the Rights of Child
CRPD	Convention on the Rights of Persons with Disabilities
CTEO	Chief Trade Enforcement Officer
EBA	Everything But Arms
ECOSOC	The Economic and Social Council
ECOWAS	Economic Community of West African States
EEAS	European External Action Services
EEC	European Economic Community
FATF	Financial Action Task Force
FSC	Federal Shariat Court
ICCPR	International Covenant on Economic Social and Cultural Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
IMF	International Monitory Fund
GDP	Gross Domestic Product

GGGR	Global Gender Gap Report
GSP	Generalized Scheme of Preferences
HRC	Human Rights Committee
ILO	International Labour Organization
MFLO	Muslim Family Law Ordinance
NAALC	North American Agreement on Labor Cooperation
NAFTA	North American Free Trade Agreement
OHCHR	Office of the High Commissioner for Human Rights
OIC	Organization of Islamic Cooperation
SEP	Single Entry Point
PPC	Pakistan Penal Code
TEC	Treaty Establishing the European Community
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of European Union
TIC	Treaty Implementation Cell
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations International Children's Emergency Fund
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Council
VCLT	Vienna Convention on the Law of Treaties
WB	World Bank
WHO	World Health Organization
WDI	World Development Indicators
WEF	World Economic Forum

CHAPTER I

INTERNATIONAL LEGAL STANDARDS ON WOMEN RIGHTS TO EDUCATION, EMPLOYMENT AND MARRIAGE BINDING ON PAKISTAN

Introduction:

Despite its international legal obligations, the domestic laws, policies and practices of Pakistan relating to women rights are hardly in line with its international commitments. International human rights law provides the substance, procedures, mechanisms, and tools to guide and facilitate the effective domestic application and meaningful realization of international human rights standards. The provisions of international human rights treaties and their thorough analysis elucidates what those rights are, what is the philosophy of those specific rights and in what manner state parties must ensure and protect those specific rights.

Before analyzing the treatment of women within the domestic legal system of Pakistan and particularly in the areas of their right to education, employment and the institution of marriage and family life, it is necessary to analyze the international human rights legal standards on the subject. Therefore, this chapter will analyze the relevant substantive provisions of international human rights law with respect to the right to education, employment and marriage binding on Pakistan. The most notable among these international human rights law treaty regimes are the International Covenant on Civil and Political Rights (hereinafter ICCPR) ratified by Pakistan on June 23, 2010,[1] the International Covenant on Economic Social and Cultural Rights (hereinafter ICESCR) ratified by Pakistan on April 17, 2008,[2] relevant ILO Conventions,[3] the Convention on the Rights of the Child (hereinafter CRC) ratified by Pakistan on November 12,

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[1] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

[2] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

[3] Such as ILO Conventions No. 100 and 111 and 156, ratified by Pakistan respectively on 24 Sep 1959 and 24 Jan 1961.

1990[4] and the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW) ratified by Pakistan on March 12, 1996.[5]

This chapter is divided into three sections. Relevant substantive provisions of international law instruments and the required approaches for applying and realizing international human rights standards within domestic legal systems will be analyzed in section I of this chapter. Once having exhaustively analyzed these international human rights standards, procedures and mechanisms, the cross-cutting obligation of applying these rights indiscriminately to everyone will be discussed from the perspective and reference point of CEDAW in section II. Section III of this chapter will analyze the relativist challenge to the universalist concept of human rights. The close relationship and interdependence of right to education, right to work and equal rights within the institution of marriage and family, which is highlighted at the end of the section I of this chapter, prompted us to fucus primarily on these three specific set of rights within this research dissertation.

[4] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

[5] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249.

SECTION: I
RELEVANT INTERNATIONAL HUMAN RIGHTS STANDARDS

1. Right to Education

1.1 Introduction:

Education can be termed as the whole process within a society where knowledge, beliefs, culture and other values are transmitted to others.[6] Education is the transmission of knowledge and intellectual development with social utilitarian elements in terms of a prerequisite for the individual as well as society's development. Alongside human and society's development, education is the dynamic and central component in the realization of a broad range of human rights, because education 'epitomizes the indivisibility and interdependence of all human rights.'[7]

The Universal Declaration of Human Rights 1948 (Hereinafter UDHR) considers the right to education as a basic human right.[8] Subsequent to the Declaration, the right to education has been enshrined in number of legally binding international human rights instruments,[9] with ample reflection in numerous courts decisions, attesting the right to education as fully enforceable by law.[10] These international legal instruments and courts' decisions therefore

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[6] The term education has been explained within the UNESCO's Recommendation concerning Education for International Understanding, Cooperation and Peace and Education relating to Human Rights and Fundamental Freedoms of 1974. Education is *"the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge".*

[7] These arguments can be found within the interpretation of Article 13 of ICESCR within Committee on Economic, Social and Cultural Rights' General Comment 11, Plans of action for primary education (Twentieth session, 1999).

[8] UN General Assembly, *Universal Declaration of Human Rights*, Art. 26, 10 December 1948, 217 A (III).

[9] ICESCR (article 13, and article 2 guarantees the realization all the Covenant rights without discrimination); International Convention on the Elimination of All Forms of Racial Discrimination (article 5); Convention on the Rights of Persons with Disabilities (article 24); Convention on the Rights of the Child (article 28); International Charter of Physical Education, Physical Activity and Sport of UNESCO (article 1); and Convention on Technical and Vocational Education of UNESCO.

[10] See, for instance, *SERAP v. Nigeria*, judgment, Court of Justice of the Economic Community of West African States (suit No. ECW/CCJ/APP/12/07; judgment No. ECW/CCJ/JUD/07/10 (30 November 2010)).

provide protection against the violation of the right to education.[11] They may also be considered as evidence of the right of education having by now acquired the status of customary international law.

1.2. Nature of the right to education and the extent of states' obligations:

Education...*"epitomizes the indivisibility and interdependence of all human rights,"*[12] which is a key element in achieving the objectives of economic independence and realization of other human rights.[13] In this respect the state parties to international human rights treaties have three kinds of obligations with respect to the realization of the right to education, namely, the obligation to respect, protect and fulfil the right to education. The obligation to 'respect' is a negative obligation, where the state parties shall refrain from taking actions and measures that may hinder the enjoyment of the right to education. The responsibility of the state to protect is to prohibit third parties from interfering with the enjoyment of the right to education, whereas the responsibility to fulfil requires state parties to provide all the facilities and measures required for realizing the right to education meaningfully.[14] Keeping in view all these aspects of the state obligations with respect to the right to education, it may be useful to determine the genre of the right to education, and thus to enquire whether the right to education is a civil, political right, if it is an economic social and cultural right, or if it can be accommodated within both the groups.[15]

Traditionally, civil and political rights are identified as first generation rights, setting negative obligations for the state parties to refrain from interfering with the enjoyment of these rights. Economic, social and cultural rights, on the other hand, are understood as carrying positive obligations for the state parties to take certain measures required for the realization of these rights. They are considered second-generation human rights. Both these generations of human

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[11] UNESCO, *"The right to education: law and policy review guidelines"* (2014).

[12] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 11: Plans of Action for Primary Education (Art. 14 of the Covenant)*, 10 May 1999, E/1992/23.

[13] ICESCR, Article 13. The first paragraph of Article 13 refers to educational aims while the second paragraph lays out obligations by which the State must abide with at all levels of education, primary, secondary and post-secondary (or higher). It also refers to literacy, scholarships, and the conditions of teaching staff.

[14] ICESCR's article 13 as interpreted in General Comment No. 13 of CESCR.

[15] Klaus Dieter Beiter, *The Protection of the Right to Education by International Law: The Protection of the Right to Education by International Law* (Martinus nijhoff publishers: Leiden, 2006) 17-19.

rights are individual rights. There is a third generation of human rights that is made of solidarity rights. Solidarity rights are possessed by groups and not by individuals. The right to healthy environment is an example of these rights.

The right to education may certainly be considered as a social and cultural right and, as such, it is enshrined in the ICESCR. However, the right to education also includes an aspect of freedom within itself which is typical of civil rights: the right to choose the type of education and to select the school of one's choice. Ensuring academic freedom without state interference is a negative obligation of the state parties, while providing and ensuring the required facilities in order to realize the right to education is a positive obligation of the state parties. Thus, the right to education entails both positive and negative obligations for the state parties.[16]

With respect to the right to education, article 13 of ICESCR is a central legal provision. It provides for the commitment of state parties with respect to the encouragement of basic education, developing a system and structure of educational institutions, taking steps and utilizing the resources for the realization of the right to education. These are all positive obligations of the state parties.[17] The freedom in school selection and education type has been set out within article 13 (3) which impose negative obligations on the state parties. This "civil aspect" of the right to education can also be found within art 26 (1) of UDHR, 28 (1) of ICRC, art 4 of Convention against Discrimination in Education and article 18 (4) of ICCPR. These international human rights law instruments alongside the positive obligations, also provides for the negative obligations in terms of protection against state indoctrination and interference within right to education and freedom within the selection of form of education and type of educational institute in compliance with one's own religious and cultural norms and values.[18] Furthermore, the right to education relates to *"all types and levels of education, [including]*

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[16] Right to education is also protected by ECHR, (Protocol I, Art. 2) which is otherwise devoted to Civil and Political Rights. in fact, the idea that first and second generation of human rights are substantially different has been challenged over the last couple of decades.

[17] Article 13 of ICESCR provides for the free and compulsory primary education for all, the state parties are under an obligation to ensure that secondary education is available and accessible to all, and higher education available and accessible to all based on one's capacities and capabilities.

[18] Klaus Dieter Beiter, *The Protection of the Right to Education by International Law,* (Leiden/Boston: Martinus Nijhoff Publishers, 2006) 38-40.

access to education, the standard and quality of education, and the conditions under which it is given".[19]

From the perspective of generations of human rights, one very important aspect of the right to education that needs to be considered is that one generation of human rights must not be used for justifying the violation of another generation of human rights. Specifically, with respect to the right to education, this conflict is obvious at the face of the fact that the right to education finds its place within both the first and second generation of human rights providing for both the positive and negative obligations of the state parties. The individual's freedom within the education will not relieve the state from its obligation of providing education, and, on the other hand, the state's obligation to provide for an education cannot deprive the individual of his or her freedoms within education. Therefore, the right to education is a freedom right, which alongside limiting the interference of the state also obligates the state for taking positive measures for providing and ensuring this right to its population.

1.3 The tripartite framework/mechanism for achieving international standards for women right to education

With respect to the obligation of the state parties relating to the right to education, the language used within relevant legal instruments adopted under UN auspice is *"shall,"* which demonstrates the binding nature of the state obligations relating to the right to education.[20] A comprehensive and detailed mechanism for the realization of the right to education to everyone and especially women and children has been envisaged within the general recommendation no. 36 of CEDAW. It provides that the right to education needs to be realized keeping in view its three aspects. These three aspects are;

a. Education Accessibility:

b. Rights within education: and,

[19] UN Educational, Scientific and Cultural Organisation (UNESCO), *Convention Against Discrimination in Education*, 14 December 1960, article 1(2), available at: https://www.refworld.org/docid/3ae6b3880.html [accessed 27 September 2019].

[20] The instances from the international law where the term "shall" have been used with respect to state obligations relating to the right to education are the following: article 26(1) UDHR, article 13(2)(a) CESCR, article 28(1)(a) CRC and article 4(a) of the Convention against Discrimination in Education.

c. Rights through Education: Instrumentalization of education for the enjoyment of all the other human rights. [21]

a. Education Accessibility: The right to access education:

State parties are under an obligation to guarantee the right to education warranting everyone's access to education. In this respect, along with the adoption of relevant legislation in line with international standards on the right to education, state parties in pursuance of that law and policy, are under an obligation to ensure the availability of relevant resources, such as human, financial, and budgetary resources, as well as the adequate infrastructure required for the materialization of the right to education within their jurisdiction. State parties shall pay attention to the physical, technological, and geographical aspects of their obligations under relevant international human rights law with respect to right to education.[22]

Removal of religious and cultural barriers to education: As part of the right to access to education for women and girls, the elimination of critical religious and cultural barriers is the biggest challenge for state parties. Stereotyping the right to education through religious and cultural ideologies and principles forming social behaviours and practices proves to be detrimental to the right to access to education.[23]

Therefore, state parties as part of their national policy, shall take steps and measures required for discouraging and eliminating the religious, social and cultural prejudices and attitudes that constitutes a barrier to the right of access to education for women and girls. As it will be discussed in detail in the later part of this chapter, the state parties are required to enter into dialogues with those religious, civil, political and cultural stakeholders that influence the right to education with intention of making them realize the different aspects and benefits of education and especially that of women's right to education. The state obligations relating to

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[21] The CEDAW Committee *General Recommendation No. 36* elaborates the right to education and the requirements of the right to education:

- Availability of sufficient educational facilities;
- accessibility of education in both law and practice;
- acceptable substance of education (cultural, societally and religiously) to be of good quality; and
- education must be flexible and adaptable to changing needs of society and students.

[22] UNESCO, *"The right to education: law and policy review guidelines"* (2014). Available from http://unesdoc.unesco.org/images/0022/002284/228491e.pdf.

[23] General Recommendation No. 3 that interprets the Article 5 and 10 of the CEDAW.

the realization of the right to education at the face of religious and cultural barriers to this right had been described by the CEDAW Committee in following words:

> Discrimination faced by girls and women in education is both ideological and structural. The ideological dimension is addressed in articles 5 and 10 (c) [of the CEDAW]; States parties are to modify accepted social and cultural patterns of conduct of men and women which are based on stereotyped roles for women and men, which is of paramount significance in ensuring that women and girls can enjoy their rights to, within and through education, and essential, as these discriminatory practices not only are exercised at the individual level but also are codified in law, policy and programmes and are therefore perpetuated and enforced by the State. [24]

b. Rights within Education

Subsequent to ensuring the accessibility of education through legislative, infrastructural, human resources and by removing social, religious and cultural barriers, state parties are under obligations to make education available and effective in terms of content, form, substance and quality. This is usually referred to as rights within education. The state shall be responsible for the stratification of the educational system, and classification of the school and classes shall be done in accordance with the needs and requirements of right to education in compliance with applicable international human rights law. State parties are under obligations to engineer the contents of the educational curricula so as to promote and advocate for gender equality instead of one gender dominance.

Education shall not be aimed at subjugation, that may create hierarchical divisions between different sections of the society, such as the different sexes. Since institutionalized schooling can lead to one gender's dominance and other gender's inferiority as well as to a private and public hierarchy within the society state parties are under an obligation to eliminate the hazards associated with institutionalized schooling.

c. Rights through education: Instrumentalization of education for the enjoyment of other rights

[24] Para 25 of Committee on the Elimination of Discrimination Against Women (CEDAW Committee), *General recommendation No. 36 on the right of girls and women to education*, November 2017, CEDAW/C/GC/36. Para 11 of General Comment no. 20 of ICESCR deals with the same issue.

International human rights law obligates state parties to ensure as well as utilize the right to education in a manner that allows education to become an instrument for the realization of other human rights.[25] "Rights through education" means the way education can enable individuals to realize rights and freedoms other than education itself. State parties must ensure that the regional and national disparities resulting from multiple and intersecting forms of discrimination must not prevent women from their right to and rights within their educational process.

General recommendation no. 36 of the CEDAW Committee elaborates upon article 10 of CEDAW which guarantees the right to education as an instrument for the enjoyment of other rights. It links the right to education with the enjoyments of other rights enshrined within other articles of CEDAW. The CEDAW Committee urged the state parties to adopt the required measures in order to meet the requirements of article 10 of CEDAW. For instance, educating all the relevant stakeholders regarding the international standards of right to education, establishing a national task force with representation from all the stakeholders to develop, implement and monitor strategies with viable and effective targets, timelines and benchmarks.[26] Also, CEDAW obligates the state parties to train the general public through education for the challenges of practical life, where the education must be adaptable and in accordance with the changing needs of the contemporary world.[27]

The transformative aspects and effects of the education should prepare individuals to participate and contribute positively within the civil, political, economic, social, and cultural life as well as for various positions and roles within the society they are part of. One such example is that education shall enable human beings to effectively attain and enjoy their right to work and employment leading to their independence and positively contributing to all the public spheres and economic life of the state and society. In sum, education shall be the vehicle to individual's personal, social, economic, and political empowerment leading to their positive contribution within the national life of the state.

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[25] Commission on the Status of Women, Statement by former Committee member Barbara Bailey, fifty-fifth session. Available from www.un.org/womenwatch/daw/csw/csw55/panels/HLRTA-Bailey-Barbara.pdf.

[26] Article 10 of CEDAW as interpreted in General recommendation No. 36 (2017) of CEDAW Committee, paras. 5, 18 20, 62, 83.

[27] Sandra Fredman, "Substantive equality revisited," *International Journal of Constitutional Law*, 14, Issue 3, (July 2016), pp. 712–738.

2. Economic Life: Right to Work/Employment

2.1. Introduction:

Every human being is endowed with the right to pursue freely and with dignity, his or her economic and material wellbeing with equal opportunities. It is a fundamental human right and essential condition for individuals to be able to freely choose their employment, develop their potential for achieving economic stability and independence according to their capabilities. The societies where the profits of the globalized economy are fairly distributed, achieve greater social stability and public support for economic development, while *"poverty anywhere constitutes a danger to prosperity everywhere"*.[28]

The regulation of labour has long been considered as pertaining to the state's domestic jurisdiction, to defined at the national level. Labor rights issues were decided according to the national laws and traditions through the national courts. It was only after World War I, thanks to the International Labour Organization, that the issue became an international concern, paving the way for the adoption of international standards in this field. Nowadays, the right to work is considered as a human right, and is protected by several instruments of human rights law, the most relevant of which are CEDAW, CCPR and ICESCR.

From a legal perspective, the right to work can be regarded as a legal principle or as a legal rule. As a matter of legal principle, it calls upon states to ensure jobs availability and to reduce unemployment. However, the right to work as a legal rule, gets stronger and more binding on the state as the violation of the rule will entitle the affected person to go before a court of law to lament the violation of his or her right to work. General comment no. 18 on article 6 of the ICESCR relating to the right to work clarifies what are the specific legal obligations stemming

[28] International Labour Office, *ABC of women workers' rights and gender equality* (Geneva: ILO Publications, 2007), citing The declaration adopted by the international labour conference at Philadelphia which resulted in the adoption of the Declaration of Philadelphia in 1944. Declaration of Philadelphia maintains:

> "that labour is not a commodity; that freedom of expression and of association are essential to progress; that poverty anywhere constitutes a danger to prosperity everywhere; and that all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security, and equal opportunity."

from this right, instead of merely providing the philosophical principles of the right to work. States are called upon to progressively realize the right to work.

The right to work entails a few important and intertwined aspects. Similar to the right to education, it entails both positive and negative obligations. Alongside obligating the states to take certain positive measures, it prohibits the states from taking the measures and actions that may jeopardize the free exercise and enjoyment of this right. The right to work includes the right of every human being to decide freely to accept or choose work, prohibiting states from unduly interfering with this right. This implies not being forced in any way whatsoever to engage in any employment and the right of access to a system of protection guaranteeing each worker access to employment. It also implies the right not to be unfairly deprived of one's job. The right to work, however, cannot be understood as an absolute and unconditional right to obtain employment. States are under a positive obligation to ensure that work be decent, keeping in view the human dignity of the workers, thus ensuring that no one be subjected to slavery and compulsory labour and ensuring that workers' social rights be protected. Positive and negative aspects of the right to work need to be realized by the state parties in a balanced manner and not one at the cost of another.

2.2. International standards and laws relating to the right to work:

International human rights law endeavors to regulate, protect and humanize different aspects of the right to work, such as everyone's equal right to work, the mandatory minimum age and wage, protection against exploitation in work and the protection of mental and physical health in work.[29] Within the language of the Universal Declaration of Human Rights' article 23 (1), the right to work has been protected as followingly …

> *"Every person has the right to work, to free choice of employment, to just and favourable conditions of work, as well as to protection against unemployment."*

In a similar way, ICESCR puts this right to more binding shape as well as it consolidated the significance of this right in its article 6 stating that *"the right to work which includes the right which every person has to obtain the possibility to earn his living under freely chosen or*

[29] Natalia Chirtoaca; Alina-Paula Larion, "The Right to Work and Its Corollaries - Fundamental Human Rights in the Light of the International Regulations," *European Journal of Law and Public Administration,* 2, no. 3 (2015): 45

accepted work." The state parties are further under an obligation…*"to take adequate actions to concede this right"* these adequate actions may come in the shape of *"guidance and technical and professional preparation, drawing up of programmes, of measures and adequate techniques in order to ensure a constant economic, social and cultural development and a full productive use of the labour forces under conditions which guarantee to the individuals the use of the fundamental political and economic liberties.*"[30]

Article 32 CRC provides for minimum wage, the regulation of the working hours, protection of children against economic exploitation, prohibition of the work that may negatively affect the education of the child and prohibits the work which might be detrimental to workers' "health or physical, mental, spiritual, moral or social development."[31] Article 23 (2) of UDHR and article 7 (a and b) of ICESCR provide for non-discrimination within matters relating to right to work, and the rights relevant to, and rights within work, thus ensuring equal access, opportunities and remunerations.

As stated above, with respect to the right to work the most important body of international law are the Conventions adopted by the International Labour Organization. It is important to analyze the substance of those ILO Conventions that relate to Pakistan being ratified alongside other relevant international laws. The crucial core areas where the International Labour Organization set international standards concern the abolition of forced labour, equal remuneration, non-discrimination, minimum work age, prohibition of worst forms of child

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[30] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18.

[31] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Article 32:

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a)Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

labour, freedom of association, and the right to organize and collective bargain. [32] Out of the crucial core eight areas of International Labour Organization, the following are particularly relevant to this research work: the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; required minimum age for employment; non-discrimination; equality, equal remunerations and the tripartite consultation mechanism. The succeeding paragraphs will analyze the relevant substantive provisions relating to right to work and employment and the legal protections available in this respect, taking into consideration the legal instruments to which Pakistan is a party.

In the very first place, international labour law provides for equal opportunities of employment and occupation and prohibits any discrimination in this respect. It provides for the definition of discrimination in employment and occupation in the following words:

> *"any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."*[33]

We will analyse again a similar definition in the later section of this chapter that argues for the application of all the relevant international human rights standards without discrimination from the perspective of CEDAW. The state parties to the ILO Conventions and CEDAW are obliged to adopt all the measures required, including the temporary special measures in order to ensure

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[32] The most relevant international legislation are the following:

- the Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol);
- the Abolition of Forced Labour Convention, 1957 (No. 105);
- the Minimum Age Convention, 1973 (No. 138);
- the Equal Remuneration Convention, 1951 (No. 100);
- the Discrimination (Employment and Occupation) Convention, 1958 (No. 111);
- the Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144);
- the Employment Policy Convetion 1964 (No. 122).

[33] Article 1 (1) (a), International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, C111.

the equal employment opportunities and equal wellbeing in all the aspects of the right to work.[34]

The state parties are under an obligation to abolish the existing legal provisions that negate and contradict the concept of the principles of *“equal remuneration for equal value of work.”* ILO Conventions obligate all the member states to ensure the application to all the workers, men and women, of the principles of equal remuneration for equal value of work.[35] Furthermore, the ILO Convention on the minimum wages provides for legally insuring and protecting the rights to minimum wages as per the international standards. The state parties are obligated to envisage and adopt a wage fixing machinery for the purpose of keeping reviewing the minimum wage rates as per the ILO standards.[36]

Poverty is linked to child labour, child labour perpetuates poverty through generations by keeping the children of the poor out of school and limiting their prospects for upward social mobility. Keeping in view the wellbeing and development of child, international human rights laws as well as international labour laws prohibit child labour as it hinders children’s development and leads to lifelong physical and psychological impairment. Elimination of child labour could generate greater economic development than that of its costs. State parties through their laws and policies must ensure the observation of the minimum age requirement for employment as prescribed by international legal standards.[37]

It is evident that the more the workers are engaged with excessive family responsibilities, the more they are discriminated against with respect to their educational and employment rights.[38]

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[34] Article 1 (1) (a) and article 5, International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, C111.

[35] Article 3 (3) CEDAW, Also International Labour Organization (ILO), *Equal Remuneration Convention*, 29 June 1951, C100.

[36] ILO, *Minimum Wage Fixing Convention, 1970 (No. 131).*

[37] The International Laour Organization has adopted a number of instruments intended for the prohibition and elimination of child labour. In this respect the relevant ILO instruments are *Minimum Age Convention, 1973* (No. 138) and *Worst Forms of Child Labour Convention, 1999* (No. 182). Convention 138 sets the general minimum age for admission to employment or work at 15 years (13 for light work) and the minimum age for hazardous work at 18 (16 under certain strict conditions). It provides for the possibility of initially setting the general minimum age at 14 (12 for light work) where the economy and educational facilities of the country are insufficiently developed. On 1st January 2019, 171 countries had ratified Convention No. 138 and 182 countries had ratified Convention No. 182.

[38] Article 1, International Labour Organization, *Workers with Family Responsibilities Convention*, 1981 (No. 156), C156.

Therefore, states shall protect the rights of the workers with family responsibilities both in law and in practice. State parties are required to specially protect the rights of those workers who bear family and domestic responsibilities alongside employment, as workers burdened with such responsibilities might be adversely affected within their job one way or another.[39]

Worldwide, there are around 67 million domestic workers, out of which 80 percent are women. These numbers are exclusive of child workers. The number is specifically growing in developing countries. Domestic workers, who amount to a considerable portion of world's working force, are mostly engaged in the informal employment sector and constitute the most vulnerable workers, as they mostly work for the private household without any formal employment contract, undeclared and thus *de facto* excluded from the scope of relevant labour standards protections as well as deprived from the social security. Due to such conditions and treatment, these domestic workers are most susceptible to worst working conditions, labour exploitation, sexual abuse and harassment, and to deprivation of their other human rights. For instance, they often face the problem of very low wages, long working hours, no off days for relaxation, physical, psychological, and sexual violence and their freedom of movement is often constrained.

For the elimination of these malpractices against domestic workers, the ILO had adopted the Domestic Workers Convention. The Convention alongside recommendation No. 201 provides that the domestic workers globally, who care for the families and households, must have the same rights and the protections at work that are available to the other workers. Special attention and protection should be given with respect to reasonable working hours, break/rest days, contracts about their jobs, sufficient understanding and information about the terms and condition of their employment, and respect for their human and fundamental rights at work.[40]

2.3. Tripartite Consultation mechanism for the adoption, implementation and supervision of ILO International Standards:

For achieving the goals of fair and equal employment opportunities, minimum age, protected minimum wages, defined working hours, decent work environment, protection of non-formal workers (such as domestic workers) and workers with family responsibilities within the field

[39] Para 4, CEDAW's General Recommendation No. 21.

[40] International Labour Organization (ILO), *Convention Concerning Decent Work for Domestic Workers*, 16 June 2011, PR No. 15A.

of employment, ILO provides for the tripartite mechanism. According to this mechanism, state parties (Governments), employers, and workers coordinate and cooperate with each other in the process of the policy formulation and setting the relevant standards.

Subsequent to the policy formulation with the cooperation of the said three stakeholders, the first stage of this mechanism is the adoption of the national labor standard in law in line with the ILO standards intended for the protection of employers and workers. In the second phase comes the domestic application and implementation of the policies and standards adopted through the tripartite consultation mechanism in this first place.[41] The states can seek the assistance of the ILO for the effective implementation and realization of these standards or where the states are facing challenges within the application of the ILO standards, this assistance may vary according to the needs ranging from social dialogues to the technical assistance. The third phase of this mechanism consists of the monitoring and regularly reporting to the ILO with respect to the application and realization of the ILO standards.

This mechanism is very much instrumental and effective in the adoption, application, and implementation of the ILO standards domestically, where the governments through this mechanism can ensure that the ILO standards relating to labor rights are formulated, applied and monitored within their domestic setups. This mechanism contributes to the greater cooperation among the said social partners. The state parties are required by the relevant ILO Conventions to report regularly to the Committee of Experts on the Application of Conventions and Recommendations. In this respect state parties shall provide a report after each three to six years (depending on each Convention's separate requirements) outlining the measures taken for the implementation of the relevant ILO standards nationally. Where required, the committee can request the reports on the application of the Conventions provisions with shorter intervals.[42]

2.4. State parties' positive and negative obligations:

As stated above, the right to work entails both positive and negative obligations on states, so as to ensure the realization of the standards set within the ILO Conventions and relevant human rights instruments. As for what concerns positive obligations, state parties shall adopt and

[41] Relevant Instrument: Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144)

[42] Committee of Experts on the Application of Conventions and Recommendations (ILO), *Handbook of procedures relating to international labour Conventions and Recommendations,* revised edition, (Geneva: ILO Press, 2012.

follow a national policy framework intended to realize the obligations of the ILO Conventions relating to labour rights that could legally and uniformly protect and ensure everyone's right to work according to one's capabilities.[43] In order to ensure legal protection to everyone's right to work, in the cases where the relevant international laws' provisions are not directly applicable, state parties are required to incorporate those relevant provisions within their domestic legal system.

Alongside the standards provided by the ILO, the provisions of CESCR relating to right to employment and work must be given legal protections as well. The application of these legal standards extends to all the forms and kinds of workers and employment, such as home workers, rural workers and indigenous and tribal people.[44] Along with the adoption of laws, the state parties shall repeal any statutory provisions that are contradictory to the international legal standards on the right to employment and work.[45]

As for the negative obligations of the state parties, the state parties shall refrain from taking measures that are inconsistent or that may adversely affect the right to work as protected in international law. All the measures of the state parties are required to be consistent with the international standards relating to right to work and employment. Especially within the negative obligations of the state parties, the freedom aspect of the right to work must be protected both in law and in practice, keeping in view the needs of employment of the different segments of the society.[46]

3. The right to marriage, spouse selection, divorce and its economic face:

3.1. Content of the right:

The contemporary international human rights standards provide for the legal protection of equality between spouses within marriage. International human rights law ensures that every person must be given the freedom of choice to whom he or she wishes and is willing to marry.

[43] Article 6, ILO Convention No. 111, and Article 2 and 3 (3), ILO Convention No. C100. These measures may include such as adopting the national substantive and procedural legislation applicable uniformly and equally throughout their territories, adopting policy frameworks and creation of institutions and mechanisms as required.

[44] Article 2 (a) CEDAW, General Recommendation No. 33, para 41 and 42 (a, b, and c).

[45] Ibid, Para 46 (a-c).

[46] Article 4, International Labour Organization (ILO), Workers with Family Responsibilities Convention, C156.

Within article 16 of CEDAW the emphasis is placed on guaranteeing the freedom of spouse selection, freedom for entering into marriage, matters relating to their children, equal rights within property, and the equal rights and freedoms during the lifetime of marriage as well as in the cases of dissolution of the marriage. The same article maintains that betrothal and marriage of the child shall have no legal effect and it obligates the state parties to take all the required measures and actions, including legislation to make sure that the minimum age requirements are observed within marriage.[47]

In this respect, relevant international human rights law obligates the state parties to legislatively protect these individual rights and eliminate any constitutional and other legal arrangements that may prove hindrance in the realization of this obligation.[48] International human rights law provides for certain standards to be legally protected and practically observed with respect to

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[47] The most relevant legal provision in this respect is article 16 of CEDAW.

Article 16 reads as following:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

   (a) The same right to enter into marriage;

   (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;

   (c) The same rights and responsibilities during marriage and at its dissolution;

   (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;

   (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

   (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;

   (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;

   (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

[48] Article 16 (1) (a-c) of CEDAW, as interpreted within the paras 15, 16 and 17 of General Recommendation No. 21.

the right to marriage. These international standards and the state parties' obligations on the different aspects of the right to marriage will be thoroughly analyzed here within the succeeding lines.

3.2. Minimum required age for marriage:

Though international human rights law does not set the minimum age for marriage specifically at 18 years, however this minimum age requirement has been legally ensured and practically observed by many states in the world. The standard of minimum age for marriage as 18 years became a national legislative trend for states in the 1960s, as this age was presumed to be the age of attaining adulthood. From that point on Child marriage started to be a point of concern also for international law. The passing of such laws by many states at the national level motivated the prohibition of child marriage at international scene. However, according to a recent empirical study, this trend failed to make its way to the statute books of the Muslim majority states.[49]

The first mention of marriage in a human rights instrument can be found in the Universal Declaration of Human Rights of 1948. Article 16 enshrines the right to marry of men and women "of full age", providing that marriage can be entered into only with the free and full consent of both spouses, who are entitled equal rights as to marriage, during marriage, and at its dissolution. The issue of child marriage was addressed for the first time in a binding instrument with the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage 1962.[50] The Convention which has only been ratified by 56 States, some of which entered reservations[51] appeals to the member states to abolish child detrimental customs regarding child marriages, make sure that the condition of free and full consent to marriage is observed, and prohibit and eliminate the betrothal of young girls before the age of puberty. Subsequently, the Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, adopted by the UN General Assembly in 1965,

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[49] Irem Ebetürk, "Global diffusion of laws: The case of minimum age of marriage legislation, 1965–2015," *European Journal of Cultural and Political Sociology*, 8:3, (2021) 294. Also as cited above, Article 16 (2) CEDAW.

[50] UN General Assembly, *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 7 November 1962.

[51] UN General Assembly, *Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages*, 1 November 1965, A/RES/2018(XX). The state parties index can be accessed online at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=XVI-3&chapter=16&clang=_en.

specified the minimum age for the marriage as 15 years. This, however, is not a binding instrument.

The second most important piece of legislation with respect to the prohibition of child marriages is the ICCPR. Article 23 recognize the right of men and women "of marriageable age" to marry and found a family and provides that "No marriage shall be entered into without the free and full consent of the intending spouses".

Another explicit prohibition of child marriage is included in the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW) 1979. Article 16 (2) of the CEDAW binds state parties to prohibit and discourage the betrothal and marriages of children. In this respect the parties are required to take all the required measures including legislation. Such legislation shall legally ensure the minimum age for marriage, and it shall render the registration of marriage compulsory.[52]

General recommendation No. 27. Article 16 (2) and the provisions of the Convention on the Rights of the Child, as discussed within para 36 CEDAW's General Recommendation no. 21 obliges the state parties to ensure the observation of the minimum age requirement of both women and men that of 18 years in line with the definition of the child given in the Convention on the rights of Child in the following words, *"a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier."*

Due to its negative effects on child right to health and education, child marriages were the centre of debate in 1990's. In the process of institutionalization of children rights, the Convention on the Rights of Child was adopted in 1989 which is the third most important legislation on the prohibition of child marriages. The definition of children given by CRC became a legitimate standard in the global realm. According to Article 1, a child "means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

For the first time in 2012 the International Day of Girls was observed by the UN and the Nobel Peace Prize was given to Malala Yousafzai of Pakistan. The Human Rights Council adopted a resolution in 2015 devoted to the prohibition of early and forced marriages. Such practices

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[52] Article 16 (2), CEDAW: *"The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."*

according to the resolution violate human rights and create certain issues to the development of children.[53] These developments attested to the fact that adolescents, especially girls, must be protected against child marriages for which the international standard is 18 years the minimum. Since then, the issue of child marriages has emerged as priority on the agenda of international organizations.[54]

Child marriage is an impediment to ideal childhood which is critical for the creation of ideal individual of the society as it interrupts the ideal course of life. The early age marriage and the responsibilities associated with marriage in most cases adversely affects the right and access to education, employment and activities related to personal development.[55] If a person marries before attaining the minimum legal age required for marriage, the interruption of education can be more probable due to the responsibilities of the married life. The interruption in the education with fewer opportunities for employment leads to economic dependency on the other partner that further leads to the treatment of one spouse as inferior. The CEDAW's treaty body elaborate the situation in the following words:

"Interrupted education and employment histories and childcare responsibilities frequently prevent women from establishing a path to paid employment (opportunity cost) sufficient to support their post-dissolution family. These social and economic factors also prevent women living under a regime of separate property from increasing their individual property during marriage."[56]

However, in a number of states, the marriage age for men and women varies. The justification and logic for this practice is said to be that women have a different rate of intellectual development in respect of men, or that their stage of physical and intellectual development at marriage is immaterial. In some states, the betrothal of girls or undertaking by family members on her behalf is still permitted and frequently practiced. Such practices constitute a violation

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[53] UNHRC, *Strengthening efforts to prevent and eliminate child, early and forced marriage*, (2015).

The resolution is online accessible at the following link: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G13/175/05/PDF/G1317505.pdf?OpenElement

[54] Irem Ebetürk, "*Global diffusion of laws: The case of minimum age of marriage legislation*," 1965–2015, p. 295.

[55] The World Health Organization report as cited within Para 36 of CEDAW's General Recommendation No. 21.

[56] Para 37, 38, 44 and 45, General Recommendation No. 21. Also, Joint General comment No. 18 of the Committee on the Rights of the Child on harmful practices and General recommendation No. 31 of the Committee on the Elimination of Discrimination against Women, 9 May 2019, CEDAW/C/GC/31/CRC/C/GC/18, pp. 6-8.

of the international human rights standards as they also hamper the right to freely choose the partner.

3.3. Right to Equality within Marriage: Polygamy as the violation of equality rights within marriage:

Polygamy is the practice of marrying multiple persons. In some countries, it is permitted by law. Generally, the subject of marriage is an immutable subject across the religious and cultural communities. The practice of polygamy leads to numerous legal controversies and arises numerous moral questions. For instance, if a polygamous marriage is contracted with the consent of all the parties involved, a husband and wives, will it be legally justified from the perspective of international human rights standing on the freedom of different or same genders to be in more than one intimate relationships with their free consent. [57]

Equal rights within marriage and its dissolution have been guaranteed within article 23 (4) of ICCPR and article 16 of CEDAW, which calls on States Parties to *"take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations' in order to ensure 'a basis of equality of men and women."* The HRC held that *'Polygamy violates the dignity of women. It is an inadmissible discrimination against women' and 'should be definitely abolished wherever it continues to exist.'*[58] According to the Committee, polygamy is contrary to equal treatment concept and violative of the dignity of women. Generally, family laws and the personal status laws in Muslim countries that are based on Shariah rules are discriminatory against women in the contemporary human society. Polygamy according to Covenant's Committee is in violation of articles 2, 3, 23 (4) and 26 of the Covenant. The state parties are thus recommended to roll back and ultimately prohibit polygamy.

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[57] For instance, not in all but in some polygamous marriages the consent of all the parties is involved. If there is the freedom for the different or the same genders to be in intimate relationships from different perspectives, then why should the polygamy be prohibited if there is the free consent of all involved?

[58] UN Human Rights Committee (HRC), *CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women)*, 29 March 2000, CCPR/C/21/Rev.1/Add.10. The prohibition of the polygamy has been provided for within UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 21: Equality in Marriage and Family Relations*, 1994. Further, from the perspective of right to adequate standards of living; polygamy is the violation of the article 25, 11 and 13 of UDHR, ICESCR and CEDAW respectively.

The committee is concerned about the reports of the extent of practice of polygamy. Some states parties further the argument that polygamy is not expressly prohibited by Covenant. The Committee in its Concluding Observations on the fifth Periodic Report of Sudan maintained that the Committee is:

"*Concerned about the State party's assertion that polygamy is not prohibited under the Covenant, the regrets that lack of statistical data on this practice and its effects on women*."[59]

Equally, the Committee's Concluding Observations on the sixth periodic report of Morocco maintained that:

> The Committee is still concerned, however, about: (a) the continued existence of legislative provisions that discriminate against women, particularly as regards the matrimonial regime that continues to permit polygamy, divorce, child custody, legal guardianship of children, inheritance and the transmission of nationality to a foreign spouse; (b) the high number of polygamous marriages; and (c) the increase in early marriages.[60]

The treaty bodies of relevant international human rights treaty regimes recognize that mostly, due to the economic dependence, the practice of polygamy may prevail, which may leave women with no choice but to enter into a marriage that is at least potentially, if not already, polygamous, regardless of their wishes. Polygamy not only violate the privacy rights, but also the right to reputation and dignity, causing degradation of women within the family and society at large.

Polygamy is contrary to the international human rights law principle of equality and wellbeing within the matters related to marriage, as the practice of polygamy carry great ramifications for the economic well-being of men, women and their children, and thus international law calls for

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[59] Concluding Observations on the fifth Periodic Report of Sudan, adopted on 19 November 2018, CCPR/C/SDN/CO/5.

[60] Concluding Observations of Committee on the sixth periodic report of Morocco, adopted on November 2, 2016.

its abolition within the laws policies and practices of the state parties, and it shall be condemned, discouraged, prohibited, and penalized by the state parties.[61]

From the perspective of relativist challenge to the universalist concept of human rights, according to the relativist opinion, the practice of polygamy is not only legitimate and permissible religiously and culturally, but also cannot simply be forbidden. According to this understanding, it is impossible to forbid something that is permitted by God or practiced within a culture for centuries.

In our view, the relativist actors have misunderstood the notion of polygamy being permitted. The question is, is this permitted or obligatory? And what are the prerequisite requirements of this permission? Justice? According to the religion, this practice is only permissible where the doer is sure that he can maintain justice in the polygamous relations. This requirement of maintaining justice is easier said than done, which more or less turns the practice of polygamy no less than prohibited. In this respect for instance in Islam, the example of Prophet Muhammad is always given as a reference and justification, as his followers take him as the perfect human being. Even taken that way, it is easy to deduce that only a perfect man can maintain justice within the polygamous relations (in this case Muhammad), which is not possible for the rest of human beings.

Moreover, some countries "allow marriage to be arranged for payment or preferment." "Payment or preferment" refers to marriage contracts in which as a consideration for the contract of marriage, cash, goods, or livestock are given to the bride or her family by the groom or his family, or when a similar payment is made by the bride or her family to the groom or his family. These practices and costumes constitute a violation of the provision of international human rights law that give every person the right to freely choose his or her spouse. In some state parties due to financial hardships and poverty, women are forced into marriages with foreign nationals. All these instances of marriage are in violation of the international human rights law related to the right to marriage.[62]

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[61] CEDAW within its General recommendation No. 21 (as cited earlier) states that *"[p]olygamous marriage contravenes a woman's right to equality with men and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited."*

[62] Article 16 (1) (a-c) CEDAW, as interpreted within the paras 15, 16 and 17 of the CEDAW's General recommendation No. 21.

3.4. The interaction between freedom of Religion and prohibition of polygamy

Common article 18 of UDHR and ICCPR provides for the freedom of thought, religion, and conscience. This right qualifies as a first-generation core civil right within both legal documents.[63] In this respect, the Special Rapporteur on Freedom of Religion and or Belief appointed by the UN Human Rights Council is mandated to adopt measures for the protection of the right to freedom of religion and belief, identifying and tackling the challenge that may arise. The Special Rapporteur is also mandated to examine the accidents and the actions of the states that are contradictory to the standards set by the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, and to ensure the application of gender perspectives and identify the abuses which are gender-specific.

The freedom of religion, conscience and belief is an absolute and non-derogable right. The initial wording of article 18 ICCPR as proposed by the Human Rights Commission and the third Committee of the General Assembly were "*everyone should have the freedom to maintain or to change religion.*" However, after criticism on this proposal on the ground that the wording of the proposal can be misused both in favour as well as against the religion through anti-religious propaganda. Therefore, the text of the article was changed as *"everyone should have the freedom to have or to adopt a religion or belief of his choice."*[64]

The veiled and indirect misuse of this freedom to choose, practice and profess any religion is evident in contemporary societies. In the first instance, the right to freely confess any religion according to one's desire should arguably also imply the right to practice that religion. Polygamy, which is a practice based and allowed by religion, would then also be a choice to be practiced without any violation. This argument leads to a question whether the prohibition

[63] Article 18 of UDHR provides for the religious freedom, freedom to practice its religion, change of religion and adopting any other religion or no religion. Article 18 (2) of the ICCPR provides that *"no one shall be subject to coercion which could impair his freedom to have or to adopt a religion or belief of his choice."* Similarly, paras 3 and 5 of Human Rights Committee's general comment 22 maintains respectively…

Para. 3: "*Article 18 does not permit any limitations whatsoever on the freedom of thought and conscience or the freedom to have or adopt a religion or belief of one's choice*;".

Para. 5: "The Committee observes that the freedom to 'have or to adopt' a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief."

[64] Special Rapporteur on Freedom of Religion or Belief, *Rapporteur's Digest on Freedom of Religion or Belief, Excerpts of the Reports from 1986 to 2011*, para 48.

of polygamy under international human rights law constitutes a violation of one's freedom of religion guaranteed within UDHR and ICCPR.

In the recent trends, the right to religion has been touted for the curtailment of women and girls by certain religious groups and states for regulating with ever-enlarging consequences in both public and private spheres of women's lives.[65] The right to profess and practice any religion has thus been used as an excuse and loophole against women's rights of equality within matters relating to marriage and divorce. The proponents of polygamy basing their case on Articles 18 of UDHR and ICCPR, often miss or ignore the fact that, whereas these articles protect freedom of conscience and belief in absolute terms, according to article 18 (3) of ICCPR, freedom to *manifest* one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. From the perspective of contemporary international human rights standards, justifying polygamy on religious freedom principle of human rights law would represent a deviation from the original purpose of the right to religious freedom.

Here in the effort to prohibit and ultimately eliminate polygamy, international human rights standards may face a relativist challenge. As we have discussed earlier, what constitutes public morality varies from culture to culture. Polygamy is considered against the public morality in one culture may not be considered the same in the other. According to our understanding, international human rights law at this juncture misses the potential and the tools to influence the national policies and practices even if it is successful in making its way to the statute books of the state parties, which in itself is challenging achievement.

According to Dworkin, it is often argued that culture and religion are special and that cultural, religious practices are so central and sacred that there should be no deviation from a religious or a cultural practice. But we cannot make culture or religion an exception if we want the law to protect the rights of others in broader perspectives. According to Dworkin, *"religion must*

[65] For instance, the ICCPR's article 9(1) prohibits such deprivation of human right to liberty and freedom. Further, religion undermines women equality rights in the sense that it provides for two rules, the obedience rule and the modesty rule. The obedience rule requires a wife to submit to the authority of her husband and gives him the right to discipline her, 'in other words to batter her.' The modesty rule requires a woman to be 'modest in matters of behavior and dress' and often, 'segregation of the sexes in education, health, and employment.' For instance, a wife cannot leave home without the permission of her husband's consent and approval; this is the required principle of obedience. Such practices and principles actually violate the principle of everyone's right to liberty that has been enshrined in international human rights law, such as "*no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.*

observe the principles of democracy, not the other way around."[66] Moreover, it is important to understand that the prohibition of polygamy is not a distinctive emblem of western culture or Christianity. Rather it is a universal standard of human rights for the purpose of betterment of humanity and protection of the rights of those vulnerable. As per the international human rights standards, the prohibition of polygamy should be considered as absolute.

3.5. Violence against women, forceful religious conversion, and forceful marriages:

The prohibition of coercion within freedom to confess and practice any religion is an important aspect which has been protected within the following international legal instruments:

UDHR

> "*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom [...] either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.*"[67]

ICCPR: Article 18 (2):

> *"[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."*

Making the prohibition of coercion explicit within the matters of freedom to confess and practice any religion in article 18 (2) signifies the intention of the drafters that the right to freedom of religion must be free from any type of coercion and force by state as well as non-state actors. Similarly, the Special Rapporteur maintains that international human rights law absolutely prohibits coercion to change or maintain one's religion.[68]

According to General Assembly's declaration on international standards on freedom of religion or belief 1981:

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[66] These arguments are based on Ronald Dworkin's *"Right to Ridicule,"* published in New York Review of Books on March 23, 2006.

[67] Article 18, Universal Declaration of Human Rights 1948.

[68] Special Rapporteur on Freedom of Religion or Belief, *Rapporteur's Digest on Freedom of Religion or Belief, Excerpts of the Reports from 1986 to 2011*, para 51.

> Art. 1 (2): "*No one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.*"

According to the Human Rights Committee:

> Article 18 (2) bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18 (2). The same protection is enjoyed by holders of all beliefs of a non-religious nature.[69]

The prohibition of discrimination against women and girls within freedom to practice and manifest any religion has been elaborated within Human Rights Committee's General Comment no. 28:

> state parties must take measures to ensure that freedom of thought, conscience and religion, and the freedom to adopt the religion or belief of one's choice - including the freedom to change religion or belief and to express one's religion or belief - will be guaranteed and protected in law and in practice for both men and women, on the same terms and without discrimination.[70]

The freedom of religion guaranteed within article 18 (1) ICCPR is also called *forum internum*. *Forum internum* implies that this right must not be interfered with in any way. Having the element of *forum internum*, the freedom to confess and practice any religion and belief, necessitates that there must be no limitation on the freedom to exercise this right. A law prohibiting any religious conversion will also constitute the violation of the right to freedom or religion. Therefore, limitations on this right as provided within article 18 (3) ICCPR and other international treaty regimes must be applied in consistency with *forum internum* principle. Moreover, the ICCPR Committee maintains that the article 18 must not be employed as justification for the violation or limitation of the very right guaranteed by the same article.

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[69] General Comment No. 22, para. 5.

[70] Para. 21, general comment 28.

The only grounds for the limitations placed on the freedom to manifest one's religion are those limitations prescribed by the law as necessary to ensure public safety, order, health and morals and the fundamental rights of others.[71]

The state parties to international human rights treaty regimes in this respect have both positive and negative obligations. State parties must clearly and absolutely prohibit within their laws, policies and practices any form of coercion on changing or maintaining religion and faith. States have the negative obligation of not interfering with individuals' freedom to practice and confess any religion or belief on its territory and under its jurisdiction. In order to discourage the interference of non-state actors with the freedom to practice, confess any religion, the international human rights treaty regimes such as ICCPR provides for positive obligation for the state parties intended for the protection from such interference.[72] The state parties as its positive obligation should take the required measure with due diligence to stop the violation of this right in anticipation. According to the ICCPR Human Rights Committee, the state is not only responsible for the acts and omissions of its organs, but also for those beyond its control, such as those committed by private individuals or groups of individuals. The Committee in relation to the activities of Boko Haram widespread violation of human rights of the civilian population in Nigeria, considered the state of Nigeria directly responsible for its failure to prevent the human rights violation of the civilian population.[73] The Committee recommends Nigeria for conducting impartial investigations and providing remedies and reparations to the victims and punishments of the perpetrators be that state or non-state actors.[74]

Where such interference is perpetrated, especially with respect to the freedom to change or maintain religion of one's choice, the state parties to international human rights treaty regimes

[71] Art. 1 (1), 1981 Declaration of the General Assembly; Art. 18 (3), ICCPR.

[72] General comment no. 28, para 53. The same obligation of the state parties concerning the freedom to practice and confess any religion has been reiterated by the Special Rapporteur by ascertaining that the state parties alongside insuring this freedom, shall prevent non state actors from intervening within the practice and enjoyment of this right.

[73] The Concluding Observations of the Committee adopted on July 19, 2019, CCPR/C/NGA/CO/2, para.30.

[74] Ibid, para 31.

must take appropriate measures required to investigate, bring the perpetrators into justice and provide compensation and reparation to the victims.[75]

There is a connection between the prohibition of coercion with respect to freedom of religion and the prohibition of force and coercion within the matters of marriage. International human rights law maintains that violence against one party within the marriage or for getting his or her consent for marriage is absolutely prohibited. The violence against one party within the contract of marriage may also constitute a violation of the prohibition of torture which is a peremptory norm of customary international law.[76]

However, despite the prohibition of violence within marriage, gender-based violence by both state and non-state actors' remains pervasive in many state parties in different and recurring forms. Within most of the states, either the legislation prohibiting the violence against women is non-existent, insufficient, or poorly implemented. The erosion of principle of customary international law that is the prohibition of torture within the affairs of marriage and family is most of the time justified at the pretext of religion, culture, tradition and/or fundamentalist ideologies.[77]

One prime example is the forceful religious conversion of the minority Hindu girls in the Sindh province of Pakistan. The girls and women who belong to minority religions of Hinduism or Christianity, after their forceful conversion to Islam, are further forced to enter into marriage with Muslim men. Such practices perpetrated by the non-state actors with the gruesome negligence of the states constitutes the violation of a number of state obligations, such as the obligation to prohibit coercion to freedom of religion conscience and belief, prohibition of coercion and prohibition of violence against women.

Relevant to above discussion, we may also analyze that when violence amounts to torture. This can be understood from the definition of torture given in article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The

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[75] E/CN.4/2005/61, para. 42.

[76] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 12: Violence against women*, 1989.

[77] Para. 5, 6 and 12, CEDAW Committee, General Recommendation no.35. See also General recommendation No. 33, paras. 8 and 9.

definition of torture provided in CAT requires the involvement of public official, and this definition may exclude the omissions and crimes perpetrated by provide individuals. However, alongside considering states' due diligence obligations where the states are under obligation to take measures and actions against the omission and crimes perpetrated against women by private individuals, we should analyze the definition of torture provided in CAT alongside the factor of states' inability or unwillingness to prohibit in anticipation and prosecute the perpetrators of the crimes against women, despite the fact that it is taking place on a large scale:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[78]

The minority women and girls are threatened with their or their family member(s) death, should they refuse to change their religion and/or to enter into marriage with Muslim male. From above definition of torture, this meet the threshold of torture which the state parties are under an obligation to prevent.

3.6. Divorce, leading to unequal financial burdens:

International human rights monitoring bodies observe that within the state parties, in the cases of the divorce between husband and wife, one party is unequally subjected to financial burden following such divorce/separation. In particular, in many states once the woman is divorced or she becomes a widow at the death of her husband, she is the sole responsible person to support herself as well as family. It is because women are not given their due share within the property at the end of marriage, de facto relationship or at the death of her husband.[79] In a number of

[78] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85.

[79] In some countries within the inheritance of parents, Pakistan is one such example.

the state parties women are not entitled to equal share within the property during the marriage, de facto relationship, or when the marriage or de facto relationship ends; such attitude constitute a violation of the relevant international law of equal protections within the matters of marriage.[80] Further, in case of fault based divorce (for instance 'Khula') the wife or her family is required to return any financial gain and economic benefits in the form of payment or preferment, or other such payments that were an element of marriage formation that she received during the lifetime of the marriage.

3.7. State parties' obligations:

The state parties are under an obligation within the applicable international human rights laws to take the appropriate measures in order to ensure the equal freedoms and rights in the matters of marriage, family institution and the economic face of all the aspects of marriage, divorce and post-divorce.[81] The state parties' measures of adopting legislation shall focus on the following aspects of marriage, divorce and post-divorce life: prohibition and criminalization of forced, polygamous, and child marriages, prohibition and elimination of practice of *payment or preferment* as compulsory (or the sole consideration) for a marriage to be performed or the marriage to be considered valid. The state parties shall ensure the alleviation of the suffering of women in the fault-based divorce, the financial aspects and the procedural requirement to obtain a divorce must be equally convenient for men and women.[82] Post-divorce maintenance shall be guaranteed both legislatively as well as in practice for those women who have no source of income and who are burdened with responsibilities of maintaining family and children. The state parties shall legislatively ensure that women have been well compensated for the contribution of economic well-being that she had made to the family during the lifetime of the marriage.

Along with the adoption of national legislation, state parties are also under obligation to review the existing domestic legislation that may constitute a violation of equal rights and freedoms to and within marriage, equality, and equal say in divorce matters. Furthermore, state parties shall criminalize forced marriages and violence in married life and review the existing

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[80] Para 28 and 30 general Recommendation No. 21.

[81] Examples of one such obligation can be found in Article 16 of CEDAW.

[82] Ibid. Para. 41. In case of fault-based divorce the return of financial and economic gains acquired during the lifetime of marriage.

legislation for eliminating and removing any such provisions that may constitute or encourage forced marriages, violence in all the aspects of life and especially within married life.[83] In the cases of forced marriage and violence against women, the state parties are beholden to adopt additionally the following special legislative and executive measures for the protection of victim and prosecution of perpetrators:

Protection, Prosecution, and punishment: During and after the judicial proceedings for the perpetrator of the alleged crime of forced marriage or violence, the cases shall be determined keeping in view the right to life, physical, sexual and psychological integrity and best interests of women.[84] The states shall ensure the access to the courts and tribunals that are required and appropriate for addressing the grievances of victims. The right to fair, impartial, timely and expeditious trial, and adequate penalties and sanctions in case of conviction shall be legislatively guaranteed and implemented through appropriate and competent executive bodies.

Reparations: The state parties are under obligation to provide for the effective remedies and reparations to the victims of the violation of different rights related to marriage. The remedies and the reparations shall be in the form of different legal measures, such as monetary compensations ensured through legal provisions aimed at the full recovery of the victims, satisfaction and guarantees of non-repetition. Such reparations should be adequate, promptly attributed and proportionate to the gravity of the harm suffered.[85]

Coordination, monitoring and data collection: For the purpose of data collection and maintenance, the state parties shall maintain a database with all the information including the statistical data on the subject to the relevant authorities as well as public at large that provides the full picture about the number of cases/complaints reported, convictions made, compensations and remedies given. The state parties are under an obligation to provide the pertinent statistical data within their relevant reports to the concerned international human rights treaty bodies. These reports should contain information relating to the legislative measures taken, such as criminal penalties and civil remedies, compensatory provisions within domestic laws and its implementation and effectiveness. The state parties shall also report on

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[83] Para 25, 40, 42, 44 and 45, CEDAW's General recommendation No. 21.

[84] Para 31 (a) (ii) CEDAW Committee, General Recommendation No. 35, para 31 (a) (ii). CEDAW. *Case of Yildirim v. Austria,* Committee on the Elimination of Discrimination against Women (CEDAW); 2007.

[85] CEDAW Committee, General recommendations No. 28, 30, and 33.

the monitoring of the implementation of such legislative steps adopted, problems faced by the state parties within the implementation and its causes.[86]

4. Correlation between right to education, work/employment, marriage of choice and violence against women: dependent variables:

The right to education, employment and marriage are intertwined and interlinked. Experience demonstrates that deprivation of the right to education leads to early age marriages, which in most cases are forced marriages as the victims are unaware about their rights. Furthermore, such early age marriages in themselves lead to the deprivation of the right to education in converse manners, as well as it leads to domestic violence. By failing to prevent child marriages states also fail to meet their obligation of ensuring the right to education.[87] Early age marriages alongside the deprivation of the right to education also causes the deprivation of the right to work. Similarly, the right to education and marriage are dependent variables to the right of economic stability that can be ensured through equal right to employment. These situations lead to the deprivation of employment rights that results in economic dependency, and economic dependence in most cases force and coerce the parties to marriage to stay in compromising and violent relationships.[88]

Economic independence is very important and crucial for the elimination of the problems associated with the right to equality and freedoms within the matters related to marriage. This

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[86] CEDAW Committee, General Recommendation No. 19.

[87] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 36 on the right of girls and women to education*, November 2017, CEDAW/C/GC/36. Paras. 25 - 27. Moreover, as mentioned above, article 28 and 13 of UDHR and ICESCR respectively protect the right to education. Polygamy is the violation of the right to education that has been guaranteed within the above-mentioned article, which provides for the everyone's right to education, education for the full development of the human personality and a tool for the realization of other rights. General comment no. 13 of CESCR provides for the broad role and education in the human life and realization of other broad range of human rights.

[88] International Labour Organization (ILO), *World Report on Child Labour 2015: Paving the way to decent work for young people*, 2015, available at: https://www.refworld.org/docid/558bb1d74.html [accessed 02 July 2020]. Further, poverty, combined with cultural practices, directly and indirectly coerces children for undertaking both paid and unpaid work. In a report of 2015 on *"Child Labour and Education,"* the International Labour Organization (ILO) indicated that 168 million children 5 to 17 years of age were trapped in child labour. In this respect, girls are more prone to be the victims. As they bear, the double burden of work inside and outside the home, leaving them with no, or very little time for the study and schooling. For those who manage to combine school and work, performance often suffers, leading to dropout. In many regions, the practice of child labour is also culturally determined.

objective can be materialized through ensuring the right to education in the first place and then by ensuring equal rights and opportunities to work and employment.

5. Access to justice

The right to access to justice is a precondition and a central component for the meaningful application and realization of all the above-mentioned rights within the spheres of education, work and institution of marriage. The right to access to justice is the fundamental element required for good governance within all the state practises and policies. The relevant legal provisions in this respect are articles 8, 10 UDHR and article 2 of ICCPR, which provides the right to effective remedy, equal and fair public hearing.

International human rights law obligates states to ensure that the victims of human rights violations are sufficiently independent to bring judicial litigations, and to seek redress for wrongs perpetrated against them. The value and status of evidence and witness shall be equally considered credible and important of both the men and women. The negation of equal treatment in these matters limit the right to equality before law, thus undermining the victim's standing as an independent, responsible, and valued member of the community.[89]

However, despite the existence of these international human rights standards on the subject of the right to access to justice, there exist a number of challenges and obstacles with respect to the right to access to justice on an equal basis. The lack of jurisdictional protection is one of these hindrances. This lack or absence of the jurisdictional protection is consequent to the failure of state parties to systematically ensure that judicial mechanisms are physically, economically, socially and culturally accessible to all.[90] International law obligates the state parties to review their legislative frameworks in order to bring them in conformity with international human rights standards, where both the direct and indirect obstacles to the right to access to justice should be discouraged and prohibited by the state parties.[91]

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[89] Para.7 CEDAW Committee, General Recommendation No. 21.

[90] Para 4, 21 and 26, CEDAW Committee, General Recommendation No. 33. Also, para 10, ILO, *World Report on Child Labour 2015.*

[91] Ibid, para 25 (a, c, i, d). Such as the obligation for the women to seek the permission of the family or community members before beginning a legal action. The CEDAW obliges the state parties that the corroboration rules that discriminate the women as a witness within the judicial processes and the higher burden of proof on the women shall be repealed and eliminated from the municipal laws of the state parties. The laws and the provisions within

Number of states in terms of personal laws maintain multiple laws on a single subject. Such existence of multiple laws on the same subject poses a challenge to the realization of the right of access to justice. Similarly, there exists a *"plural justice system"* within many state parties to international human rights law instruments. The plural justice system is often based on the coexistence of state laws, regulations, procedures, and judicial decisions founded on either common or civil law principles on one hand, whereas the alternate can be based on religious, customary, indigenous and/or community laws and practices on the other hand. This combination of formal and informal plural justice system hinders the access to justice within the spheres of marriage, work, and education.[92]

International law obligates state parties that in the event where there are multiple legal setups available on the same subject with equal application, there shall be the choice of law to those associated with the matter, and the plural justice system shall not prove as an obstacle in right to access to justice.[93] International human rights law with respect to right to access to justice maintains that the state parties are under obligation to ensure the following six interrelated and essential components that are instrumental and essential to the realization of right to access the justice: justiciability,[94] availability,[95] accessibility,[96] good quality,[97] provisions of remedies for

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the domestic legal systems that undermine women empowerment shall also be repealed and eliminated such as the rules and practices that require parental or spousal authorization for access to services such as education as well as to legal services and justice systems.

[92] Susan C. Mapp, *Human Rights and Social Justice in a Global Perspective: An Introduction to International Social Work* (Oxford: Oxford University Press, 2008), 127.

[93] In this respect state parties are obligated within the CEDAW's article 2, 5 (a) and article 15 as well as within the other sets of international human rights laws that such factors must not prove as an obstacle within the realization of the women equal right to access to justice within all the apparatuses of plural justice system.

[94] Justiciability requires the unhindered access by women to justice and their ability and empowerment to claim their rights as legal entitlements as guaranteed under the CEDAW.

[95] Availability requires the establishment of courts, quasi-judicial bodies or other bodies throughout the State party in urban, rural and remote areas, as well as their maintenance and funding.

[96] Accessibility requires that all justice systems, both formal and quasi-judicial, be secure, affordable and physically accessible to women, and be adapted and appropriate to the needs of women, including those who face intersecting or compounded forms of discrimination;

[97] Good quality of justice systems requires that all components of the system adhere to international standards of competence, efficiency, independence and impartiality5 and provide, in a timely fashion, appropriate and effective remedies that are enforced and that lead to sustainable gender-sensitive dispute resolution for all women. It also

victims and accountability of the justice system.[98] State parties are obliged to ensure that the justice system is of good quality in accordance with the international standards in terms of standards of competence, efficiency, independence and impartiality, that provides effective timely, appropriate remedies, and that ensure the equality of the evidentiary rules. The investigation procedures must be impartial, and not influenced by gender stereotypes or prejudices.[99]

Within the process of insurance of right to effective access to justice, non-judicial conduits and methods, such as pardons, apologies, public memorials, guarantees of non-repetition, justice and the reconciliation commissions should not be employed as the substitutes of the investigations and the prosecutions of the perpetrators of the human rights violations. Further, state parties should not place statutory limitations to the prosecution of such violations, as these limitations prove to be an obstacle to access to justice. States parties should also ensure that the existence of plural justice systems and alternate dispute resolution mechanisms do not pose an obstacle to the realization of the equal right to access to justice.[100] Right to access to justice shall be ensured within all the instances of the justice systems of the state parties be that judicial, quasi-judicial that deals with family matters, inheritance, criminal prosecutions, labor, property claims, and other administrative bodies.[101]

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requires that justice systems be contextualized, dynamic, participatory, open to innovative practical measures, gender-sensitive and take account of the increasing demands by women for justice.

[98] Accountability of justice systems is ensured through monitoring to guarantee that they function in accordance with the principles of justiciability, availability, accessibility, good quality and provision of remedies. The accountability of justice systems also refers to the monitoring of the actions of justice system professionals and of their legal responsibility when they violate the law. Furthermore, Para. 18 (a), (d), 19 (a) of General Recommendation No. 33 adopted by CEDAW obligates the state parties to ensure that justice system accords to the international standards in terms of standards of competence, efficiency, independence, and impartiality, as well as to international jurisprudence. Assurance of effective, timely, appropriate remedies, and the assurance that the evidentiary rules, investigations procedures are impartial, and not influenced by gender stereotypes or prejudices.

[99] Para. 18 (a), (d), 19 (a), CEDAW Committee, General Recommendation No. 33.

[100] Ibid, paras. 58, 60 and 62 - 64.

[101] Article 2 and 15 of CEDAW. Also, para 47, 51, 52, 54 and 56 of the CEDAW Committee General Recommendation No. 33.

SECTION II

APPLICATION AND REALIZATION OF INTERNATIONAL HUMAN RIGHTS LAWS WITHOUT DISCRIMINATION

1. The principle of non-discrimination

With respect to the international human rights standards discussed above related to the right to education, employment and marriage, it is required that these rights must be provided to all human beings indiscriminately. Since its very inception, international human rights law has called for the equal application of the entire corpus of international human rights law. The UN Charter's preamble is the very first instance of this statement where it guarantees the equal rights of all, article 55 of the same provides for the promotion of human rights without any distinction. The same principle of non-discrimination at the face of the application of the complete corpus of international human rights law has been reiterated in UDHR's articles 2, 16 and 26, which guarantees equal rights within marriage and education to both men and women. Moreover, article 23 (4) of CCPR provides for the equal rights within marriage, during marriage and upon its dissolution, as well as CESCR provides for the equality and non-discrimination within economic, social and cultural aspects of the marriage within its article 2 (2), 3 and 13.[102]

The core objective of International human rights law is to focus on the protection of rights of various groups vulnerable to discrimination. Out of these vulnerable groups, due to their gender, women form the largest vulnerable group subjected to various kinds of discrimination throughout the world in most walks of their lives.[103] The most notable and comprehensive

[102] Apart from the mentioned provisions, the following provides for the same: article 5 of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief of 1981, article 3(1) of the Declaration on the Elimination of All Forms of Racial Discrimination of 1963, article 5(e)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965, article 9 of the Declaration on the Elimination of Discrimination against Women of 1967 and article 10 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 will be referred to.

[103] Simone Cusack and Lisa Pusey, "CEDAW and rights to non-discrimination and equality," *Melbourne Journal of International Law* 14 (2013) 33.

international law on the subject of prohibition of discrimination against women is the CEDAW, adopted in 1979.[104]

Apart from the fact that the CEDAW protects the women's civil, political, economic, social, and cultural rights, it is important to note that CEDAW provides for cross cutting and supplemental obligation of the states to the uniform and indiscriminate application of the broad range of international human rights legal standards. Keeping in view these characteristics of the CEDAW, subsequent to discussion of its substantive parts in combination with other applicable international human rights laws related to the right to education, employment and marriage, in this section we will analyze the provided mechanisms, tools and procedures that ensure the indiscriminate and uniform application of international human rights standards to everyone equally. The definition of discrimination provided by CEDAW is as following:

> *"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*[105]

CEDAW obliges state parties to condemn, prohibit and eliminate discrimination in all its forms and dimensions by taking appropriate measures, such as adopting national policy in this regard, embodying the principle of equality within all the instances of the national constitutions, other relevant national legislation, and to ensure the practical realization of these legislative measures taken. In case of existing municipal legislation which constitute discrimination against women, the state parties shall modify, abolish or repeal such legal provisions accordingly as required. Moreover, CEDAW aims at prohibiting the discrimination not only committed by state actors, but also by non-state actors, such as individual(s), organization(s) and/or enterprise(s).

The CEDAW Committee, which is the Convention's monitoring body, has so far come up with numerous general recommendations in this respect intended to the interpretation of the

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[104] UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

[105] Article 2, CEDAW.

CEDAW provisions. It has also assessed state parties' progress with respect to the application of the provisions of the Convention.[106]

2. Implementation methods and approaches - Quadripartite approach for the realization of Human Rights obligations indiscriminately and equally: A layered practice

The approaches, mechanisms as well as tools for the indiscriminate and equal application of the relevant international human rights standards within national laws, policies and practices will be discussed in the following sections. We will in particular focus on the so-called quadripartite approach for the elimination of discrimination within the application and realization of international human rights standards.

The quadripartite approach is a comprehensive mechanism which provides for the procedure and guidelines for the state parties to implement international human rights law provisions domestically and to achieve the goal of the realization of the international human rights standards indiscriminately. The foundation of this mechanism is article 2 of CEDAW. Article 2, as interpreted within General Recommendation No. 28 of the CEDAW Committee, clarifies the quadripartite approach to be followed by state parties to domestically implement the international human rights standards in a non-discriminatory manner.[107]

According to article 2 of CEDAW, which is the foundation of quadripartite approach, states parties must: (a) condemn discrimination against women in all its forms, (b) adopt an appropriate legislative and policy framework to eliminate discrimination against women, (c) implement human rights standards indiscriminately and, (d) monitor compliance with obligations emanating from the provisions of CEDAW. The wording *"without delay"* of article 2 suggests that state parties are not justified for any delay in the realization of these objectives.

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[106] Jack Goldsmith and Eric A Posner, *The Limits of International Law* (Karachi: Oxford University Press, 2005) as cited in Ekaterina Yahyaoui Krivenko, *Women, Islam and International Law within the Context of the CEDAW on the Elimination of All Forms of Discrimination Against Women* (Boston: Martinus Nijhoff Publishers, 2009).

For the purpose of extensive understanding of the Treaty Provisions, the following General Recommendations can be seen through: General Recommendation No. 12 (*Violence against women*); General Recommendation No. 16 *(Unpaid women workers in rural and urban family enterprises)*; General Recommendation No. 18 (*Disabled women*); General Recommendation No. 19 (*Violence against women*); General Recommendation No. 21 *(Equality in marriage and family relations)*; and General Recommendation No. *23 (Political and public life)*.

[107] CEDAW Committee, General *Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the CEDAW,* 16 December 2010, CEDAW/C/GC/28.

Delay cannot be justified on any grounds, including political, social, cultural, religious, economic other considerations or constraints prevailing within the state parties.

2.1. Condemning discriminatory practices

Within quadripartite approach, the starting point for the state parties is the condemnation of the discrimination as provided within the introductory sentence of the article 2 in the following words: *"States Parties condemn discrimination against women in all its forms."* The provision also imposes a due diligence obligation on state parties, obligating them to be vigilant to condemn those forms of discrimination that are not explicitly mentioned in the CEDAW or that may be emerging within contemporary circumstances. Therefore, state parties are obligated to condemn direct discriminations as well as indirect discriminations committed and perpetrated by private actors.

According to the CEDAW Committee: "*Direct discrimination against women constitutes differentiated treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women but has a discriminatory effect in practice on women".*[108]

Article 2 requires also States parties to refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights without discrimination. In this respect, the state parties are under CEDAW's

[108] Para 8 and 9, CEDAW Committee, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the CEDAW*. See also Para 10, UN Committee on Economic, Social and Cultural Rights, General comment No. 20: *Non-discrimination in economic, social and cultural rights*, which describes direct and indirect discrimination in following words:

(a) Direct discrimination occurs when an individual is treated less favourably than another person in a similar situation for a reason related to a prohibited ground, e.g. where employment in educational or cultural institutions or membership of a trade union is based on the political opinions of applicants or employees. Direct discrimination also includes detrimental acts or omissions on the basis of prohibited grounds where there is no comparable similar situation (e.g. the case of a woman who is pregnant);

(b) Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination. For instance, requiring a birth registration certificate for school enrolment may discriminate against ethnic minorities or non-nationals who do not possess, or have been denied, such certificates.

obligation to take a wide range of steps to condemn and discourage discrimination against women.

2.2. Adopting an appropriate legislative and policy framework to eliminate discrimination against women

The adoption of an appropriate domestic legislative and policy framework of eliminating discrimination against women is the next obligation of the state parties within quadripartite approach. This obligation of the state parties has been set out in the substantive provisions of CEDAW's article 2 subparagraphs (a)–(g) and article 3.[109] Subparagraphs (a), (f) and (g) of article 2 establishes the obligation of States parties to provide legal protection and to abolish or amend discriminatory laws and regulations as part of the policy of eliminating discrimination against women within domestic laws, policies and practices. The CEDAW binds States parties to *"pursue by all appropriate means"* a policy of eliminating discrimination against women. States parties must ensure that, through constitutional amendments, adoption of new laws or by other appropriate legislative measures, the principle of equality and non-discrimination between women and men is enshrined in domestic laws with an overriding and enforceable status. In this respect, both the policy and the legislative framework protections shall be provided by competent authorities and public institutions, backed by penal sanctions and remedies where appropriate and required.

Alongside CEDAW, ICESCR is of the view that the duty and the responsibility of the state parties of ensuring the non-discrimination against women in the implementation of the human rights standards should be performed and realized both formally and substantively.[110] State parties shall substantively eliminate discriminations in order to meet the requirements of the substantive equality that has been envisaged within the Article 2 (2) of ICESCR.[111]

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[109] Article 3 refers to appropriate measures that States parties are expected to take in "*all fields*" to ensure the full development and advancement of women.

[110] UN Committee on Economic, Social and Cultural Rights (CESCR), *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, 2 July 2009, E/C.12/GC/20, Para 8.

[111] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, 11 August 2005, E/C.12/2005/4.

2.3. Implementing human rights standards indiscriminately

From the perspective of non-discrimination against women, state parties shall ensure that all branches of Government (executive, legislature and judiciary) and all levels of Government assume their respective responsibilities for the domestic implementation of international human rights standards indiscriminately, in compliance with the international human rights standards binding on the state in question. State parties shall adopt result oriented and sufficiently funded policies and mechanisms, shall set benchmarks, timelines and goals. The approach given within article 2 and article 3 of the CEDAW is moving forward: it starts from the evaluation of the situation and the formulation and initial adoption of a comprehensive range of measures, but it requires states also to build on those measures continuously in the light of their effectiveness and new or emerging issues, in order to achieve the goals of CEDAW.

a) Domestic implementation of international human rights standards:

International human rights rules are made with the intention to be enacted and implemented within its domestic legal setup by states. This sharing of work and labour between international and national legal systems necessitates the close and intense interaction between the two. If not, international law will lose its efficacy.

How international law is received in the domestic law is determined on the basis of legislative and judicial dimensions of the recipient state. Whether international law is directly applicable within the domestic laws, or it needs incorporation into the fabric of the national legal system depends on whether the domestic system is monist or dualist. According to monism, international law and municipal law are part of greater single legal order or overall legal phenomenon. International law is based on the acts and facts of the states. Thus, according to monist construction, international law is the outflow of state practices and can be considered as a sort of external constitutional law. As such, international law cannot be termed or seen as foreign legal order. According to the monist perspective, international law infiltrates and automatically becomes part of national law without any further ado once it becomes binding upon the state. In the case of conventional law, this happens as soon as a treaty ratified by the state enters into force at the international level

On the other hand, dualist legislative and judicial conception maintains that international legal order and municipal legal system are separate. Dualism is based on the ground that the subject

of international law are states whereas the municipal legal system addresses the individuals. The sources of both the systems vary, as for the sources of national legal order it is the internal legislation, for international legal systems it is the bilateral or multilateral treaties. The functionality of the internal legal rules and principles are different to international norms. The fundamental norms of both the systems vary where international legal order rests on the principle of *pacta sunt servanda* and the internal legal system relies on the constituent powers of its people. These acts and facts of the two renders them independent one from another. Therefore, international law can only operate within the municipal law fabric once it has been incorporated into it. In dualism the domestic legislator is the ultimate decision maker as to what rule of international law shall apply and how.

Even if a State conforms to the monist approach, an effort by the legislator may still be necessary, in order to ensure the implementation of non-self-executing rules included in the treaty.

From the perspective of international law, whether the state conforms to the monist approach or to the dualist approach is irrelevant. What matters, is that international obligations are fully implemented at the domestic level without delay. As provided under article 27 of the Vienna Convention on the Law of Treaties, “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

b) Role of the domestic courts

According to article’s 2 subparagraph (c), States parties must ensure that courts are bound to apply the principle of equality as embodied in applicable international human rights law and to interpret the law to the maximum extent possible, in line with the obligations of states parties under international law. However, where it is not possible to do so, courts should signpost any inconsistency between national law and practices (including national religious and customary laws) and the state party’s obligations under the international law to the attention of the appropriate authorities to be improved accordingly, since domestic laws may never be used as justification for failure by states parties to fulfil their international obligations.[112]

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[112] Mala Htun and S. Laurel Weldon, *The Logics of Gender Justice: State Action on Women’s Rights around the World* (Cambridge: Cambridge University Press, 2018) 103.

c) Adoption of special measures

Where inequalities between men and women are particularly sharp, states parties may be required to adopt *"temporary special measures"* aimed at accelerating de facto equality between men and women. Such setup has been provided within article 4 (paras 1 and 2) of CEDAW as interpreted within general recommendations No.20, 23 and 25 of the treaty body. [113] According to Article 4 (1) of CEDAW:

> Adoption by States parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

Article 4 (2) adds:

> "Adoption by States parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory."

Whereas the term 'measures' consists of a variety of legislative, executive, administrative, and other required instruments, policies and practices, allocation of resources, targets, and timelines, measures will be adopted in accordance with articles 2 and 4 of CEDAW and according to the needs and suitability to the objective of indiscriminately realizing international human rights standards nationally. The states must differentiate between temporary special measures and other measures aimed at improving the situation of women. The general measures provided under article 2 (b) of the CEDAW aimed at ensuring the civil, political, economic, social and cultural rights cannot simply qualify as temporary special measures. According to the CEDAW Committee, "temporary special measures" as per article 4 (1) are "temporary" and "special" in nature. 'Temporary' means that these measures should remain in force for a limited amount of time. The duration of temporary special measures should be determined according to the needs and results of the measures. Once their objectives and results are achieved, the temporary special measures should be discontinued. According to the

[113] See, in particular, UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 25, on article 4, paragraph 1, of the CEDAW on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004.

Committee, these measures are termed as ‘special’ because they should be designed by the states for serving a specific goal.

d) Addressing systematic and structural discriminations and gender stereotypes

Within the process of the implementation and realization of the international human rights standards for everyone indiscriminately, the state parties shall also endeavour to combat systematic and structural discrimination.[114] Thus, state parties are under an obligation to eliminate discrimination that is based on gender stereotypes entrenched within social behaviours.

Article 5 of CEDAW maintains that undermining women rights and equal treatment through gender stereotyped socio-cultural-religious and economic practices and behaviours leads to the perpetuation of discrimination against women based on their gender.[115] The CEDAW Committee clarified that the concept of gender is a tool that conceptually categorizes “*woman*” and “*man*” and “*masculine*” and “*feminine,*” and that gender stereotyped roles may put persons in discriminatory positions.[116] Considering the ideological dimension of discrimination based on gender stereotypes especially with respect to the right to education, the CEDAW committee held that:

> *“Discrimination faced by girls and women in education is both ideological and structural. The ideological dimension is addressed in articles 5 and 10 (c) of the CEDAW; States parties are obliged to modify accepted social and cultural patterns of conduct of men and women which are based on stereotyped roles for women and men, which is of paramount significance in ensuring that women and girls can enjoy their rights to, within and through education, and essential, as these discriminatory practices*

[114] Rikki Holtmaat, *The CEDAW: a holistic approach to women’s equality and freedom* in *Women’s Human Rights Convention in International, Regional and National Law* Eds: Anne Hellum and Henriette Sinding Aasen (Cambridge: Cambridge University Press, 2013), 95.

[115] Article 5 of the CEDAW was interpreted and elaborated within General Recommendation No. 36 by the treaty body.

[116] Mala Htun and S. Laurel Weldon, *The Logics of Gender Justice: State Action on Women’s Rights around the World* (Cambridge: Cambridge University Press, 2018) 124.

not only are exercised at the individual level but also are codified in law, policy and programmes and are therefore perpetuated and enforced by the State."[117]

Gender equality requires challenging the prevailing attitudes and patterns of cultural and religious norms and calls for the modification of societal norms at macro level as well as the social practices to the micro level in daily human lives. Different aspects of prevailing social and cultural practices, in different ways to different degrees pose different challenges to the equal and indiscriminate application of contemporary international human rights standards.

State parties are under the obligation to eliminate through appropriate measures the gender stereotypes relating to women's forced marriages, education, and discriminatory attitudes towards women's work and employment rights. The obligation to eliminate gender discrimination within the fields of employment, marriage and family matters has been addressed within articles 6-16 when read in combination with article 2 (f) and 5 of CEDAW. This signifies that the obligation of elimination of gender stereotypes contained within the articles 2 (f) and 5 of CEDAW are overarching and cross-cutting obligations of the state parties. The obligations in articles 2 (f) and 5 not only applies to the rights guaranteed within the CEDAW, but also the rights that are provided within other instruments of international human rights laws applicable to the state parties.[118]

Eliminating gender stereotypes is not an easy task. International human rights law lacks a uniform set of mechanisms and tools to achieve this end. Neither the required measures are defined, nor the extent of behavior and patterns to be reformed is clarified.

The challenge state parties face with respect to their obligation of the elimination of discrimination based on gender stereotypes has been explained by Laurel Weldon, by reference to the concepts of role change and role equity. A "role change" requires more radical changes leading to more controversies and provokes greater opposition by the religious and political stakeholders in comparison to mere "role equity". In this respect, the political role of the

[117] CEDAW Committee, *General recommendation No. 36* para. 25.

[118] ICESCR Committee, *General Comment No. 16: The Equal Right of Men and Women to the Enjoyment of All Economic, Social and Cultural Rights (Art. 3 of the Covenant)*, para. 14; ICESCR Committee, *General comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2 of the International Covenant on Economic, Social and Cultural Rights)*, para 20; ICCPR Committee, *General Comment No. 28: Article 3 The Equality of Rights Between Men and Women*.

religion and culture is important, as the religious and cultural institutions are strong in many of the states where more people are devout, and the attitudes to gender and the institution of family is conservative. In these state parties the religious forces easily influence the legislature and the other stakeholders not to adopt laws and policies that aim at empowering and liberating women. In comparison to the role equity principle, the role change principle is comparatively hard to achieve, as the role change requires altering the social meaning of women's roles.[119]

In order to eliminate the prejudices and gender stereotypes there is first of all the need for promoting the intercultural/cross-cultural dialogues between the relevant religious, civil, traditional and cultural stockholders both by the relevant human rights law treaty bodies and the state parties.[120] In this respect state parties are required to interpret their culture in a non-essentialist and dynamic manner, where the cultural and social processes and standards shall be interpreted as living and evolving over time.

It should not be forgotten, however, that the international human rights obligation to erase gender stereotypes may be perceived by some countries as an attack against their national identity. Demanding a State Party to modify gender stereotypes and fix gender roles, as article 5 of CEDAW does, strikes at the heart of the State's fundamental understanding of its own identity, because the placing of different genders at different positions can be the basis of the distinct national identity of a state. Fulfilling such obligations requires political will for positively changing attitudes and behaviours. In these cases, even if the state ratified the relevant international human rights treaty under international pressures, the adoption of that treaty provisions within domestic law and then further eliminating and prohibiting gender stereotypes will be a huge challenge for that state. This is particularly so when an international norm requires a change of well-established patterns of conduct that are based on tradition, religion, custom or culture. When gender equality is considered at odds with the national and

[119] Mala Htun and S. Laurel Weldon, *The Logics of Gender Justice: State Action on Women's Rights around the World* (Cambridge: Cambridge University Press, 2018).

[120]Article 2 (f), 5 and 10, as elaborated within UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendation No. 19: Violence against women*, 1992. Also, Marsha A. Freeman, Christine Chinkin and Beate Rudolf (Eds.) *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary* (Oxford: Oxford University Press, 2012).

cultural identity of the State, then the implementation of the relevant international standards become more challenging for the state parties.[121]

e) Achieving substantive and transformative equality

"*The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.*"[122] Equal application of law in some cases will prove detrimental to the rights of poor than rich. According to Sandra Freman formal equal treatment in some cases results in inequalities. Equality is a relative principle, and an important aspect of equality is that "likes should be treated alike," which means that "everyone should be treated according to her merits as an individual in her own right"[123] The prime aim should be the elimination of detriment that could possibly be associated with difference and not the difference in itself. In other words, the equality of results should be the prime objective instead of equality of means.

Similarly, Amartya Sen has argued, *"in terms of keeping the interests of the disadvantaged, equality will signify the need of treating them with equity keeping in view their needs."*[124] Equality implies both formal and substantive equality. Formal equality is a relative concept, requiring two similar individuals to be treated alike, with no difference between men and women. Substantive equality, instead, is comparative equality which adapts more in conformity with situational equality. This denotes that formal equality cannot be substituted for substantive equality. Formal equality can be achieved by removing benefits from males so as to bring them on equal footing to women, whereas substantive equality is not aimed at equal treatment between men and women, rather it is more concerned about addressing the problems faced by

[121] Some state parties, Afghanistan, Algeria, Pakistan and Saudi Arabia for example, explicitly emphasis on the importance and necessity of maintaining the subjected, discriminatory and stereotyped position of women in order to preserve their national, religious and cultural identities and practices. This is one of the most controversial, if not the most controversial challenges at the face of proper and uniform application of international human rights laws relating to women.

[122] Anatole France – as quoted in Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2011) 1.

[123] Ibid, 9.

[124] Amartya Sen, *Inequality Re-examined* (Oxford: Clarendon Press; 1992), 1. For instance, within the field of employment, in comparison to men, the hardships of women in this respect are many fold. Role in family, their unpaid caring roles and limited access to decent work, and other gender-based discriminations.

women. In this perspective, guaranteeing rights to minimum wages for women will be more useful and valuable than ensuring equal pay to that of men in low paid jobs for men. Substantive equality can be achieved by extending benefits to women. In its transformative form, substantive equality requires social behaviours and institutions to change, rather than expecting the individual to conform, taking into consideration the existing power structure and gender role in such structure. In the light of such understanding stemming from the concept of substantive equality it can be deduced that in cases where equal treatment of women may prove hazardous for women, the women should be treated differently in order to achieve equalities of outcome, as equality cannot be achieved by treating all equally badly, or by removing benefits from the advantaged class.

Substantive equality must be transformative as well. With respect to transformative equality, article 5 of CEDAW is a central legal provision and a vehicle for cultural change, that instruct states parties for adopting policies and measures resulting in substantive and transformative equality. Transformative equality requires fundamentally changing the society's features of culture, religion, traditions, legal social and economic structures that obstruct women's equality and dignity. This requires social reordering the political, economic and cultural valuations ascribed differently for men and women, and modification of social and cultural patterns of conduct.[125]

From the above discussion we can deduce that human dignity is the primary foundation for the enjoyment of all the human rights without discrimination. Equality must be based on dignity which is a developmental principle of equality.[126] From the perspective of dignity equality

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[125] Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2011) 74.

[126] Claudio Corradetti, *Relativism and human rights; A theory of pluralistic universalism* (2nd ed.) (Rome: Springer Publishers, 2022). Page 113 – 137. As for the historical roots, the term 'dignity' is derived from Latin *dignitas* and *dignitas hominis,* referred to individuals' dignity based on their social status which qualified them worthy of honour and respect. Due to the fact that relationship between the Crown and Royal dignity was mentioned in English Charter of Rights of 1689, the institutions ought to have *dignitas* as well. Dignity can be taken as parallel to the term honour from the perspective of French Declaration of the Right of Men and Citizens 1789.

Similarly in Republican Rome, the notions of dignity were combined with humanity. According to Cicero, the notions give it a particular connotation in line with stoic philosophy, that is of rational dignity, implying that humans are superior to other living beings. From the Middle Ages this concept was further developed in theological philosophy by taking man as *imago Dei,* a refined version of human superiority over other living

cannot be satisfied by equally treating everyone bad, because dignity requires the enhancement rather than degradation of individuals' status. Also, equality with dignity negates the one group (women for instance) are worse off than the other group (men for instance) are better off. Substantive equality must be taken as multidimensional concept composed of equality of opportunities, equality of results alongside dignity. Following are the important aspects of the substantive equality:

1. Elimination of disadvantage associated with the group(s);
2. Respect and accept the dignity of every human being;
3. Equality should not be aimed at conformity, rather accommodation of the differences aimed at structural changes;
4. Transformative substantive equality should ensure the full participation both socially and politically.[127]

The relevant case in this respect is pawers v. Ohio case in which it was held that "*it is axiomatic that racial classification do not become legitimate on the assumption that all persons suffer them in equal degree.*"[128] Interestingly, in Palmers v. Thompson case, in order to ensure the identical treatment to blacks, privileges of swimming pool were taken away from whites as it was deemed by the court that such action will ensure the equal treatment and eliminate discrimination.[129]

In some case there can be inequality of results but that will not amount to discrimination. For example, if, the fact that there is no women pilot is due to the fact that women lack the required qualifications and training, will not amount to discrimination, rather the inequality of results is based on the ground of lack of required qualification and training.[130]

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beings. The first association of dignity to human appeared in "*discourse on the dignity of man* (1486)" by Pico della Mirandola.

[127] Ibid, p 25-33.

[128] *Powers v. Ohio* 499, 410 (1991).

[129] *Palmers v. Thompson* 403 US 217217, 91 S.Ct. 1940 (1971).

[130] Sital Kalantry, *Women human rights and migration: Sex Selective abortion laws in United States and India* (Philadelphia: University of Pennsylvania Press, 2017).

f) State responsibility for the implementation of these standards

In the process of the application of international human rights standards indiscriminately, state parties are responsible for the acts and omissions committed by their organs and agents, officials of legislature, executive and judicial branches of the state, as well as all other state actors. State actors are obliged to refrain from the direct and indirect discrimination against women in the application of human rights laws. From the perspective of prohibition of violence against women, alongside ensuring the prohibition and elimination through legislation, policies, programmes and procedures, the state parties shall provide effective and accessible legal framework and services for addressing all forms of violence against women, committed territorially or extra-territorially by state agents.[131]

Alongside the responsibility for the acts and omissions of state actors, state parties may also be held accountable in respect of acts perpetrated by non-state actors, especially with respect to violence against women. State parties are under an obligation to take appropriate measures to prohibit and eliminate discrimination against women by non-state actors, such as individuals, enterprises and organizations.[132] This is an obligation of due diligence, whereby state parties are supposed to prevent any violence or discrimination against women, as well as to investigate, prosecute, punish and provide reparations to the victims of the acts and omissions of the non-state actors, territorially or extra territorially.[133] Failure to prevent the incidences of violence against women from the perspective of due diligence obligations is the violation of CEDAW obligations to ensure the protection human rights without discrimination.[134]

From the perspective of structural changes within the state machinery and distribution of powers, the accountability of States parties to implement their obligations under article 2 of the CEDAW is associated with the acts or omissions of acts of all branches of Government. The decentralization of power, through devolution and delegation of federal government powers

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[131] CEDAW, Art. 2 (c), (d) and (g).

[132] Ibid. Art. 2 (e).

[133] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General Recommendation No. 35 on gender-based violence against women,* (updating general recommendation No. 19), 26 July 2017, CEDAW/C/GC/35, para 24 (b), also see, General recommendation No. 19, para 9.

[134] This section is linked with women marriage rights given within the third section of this work, as well as it is linked with the forced conversion and marriage of minority girls in Sindh province of Pakistan.

does not in any way relax or reduce the direct responsibility of the state party to fulfil its obligations of ensuring the human rights to all within its jurisdiction indiscriminately. In all circumstances, the state party remains responsible for ensuring complete implementation and realization of human rights standards indiscriminately to all women under their jurisdiction. In any process of devolution, States parties must make sure that the authorities of devolved subjects and institutions from federation to provinces have the necessary financial, human and other required resources to effectively realize the state's obligations under international human rights law. [135]

2.4. Monitoring compliance with obligations emanating from the provisions of CEDAW.

As final component of quadripartite implementation process, state parties are under an obligation to provide for an effective and independent monitoring mechanism that could police the indiscriminate domestic implementation of the provisions of relevant international human rights standards. The obligation of monitoring can be complied by the state parties through the establishment of national human rights institutes, independent women's commissions, or the existing national institutes should be given a mandate to monitor the compliance to the indiscriminate implementation of international human rights standards guaranteed under the relevant international human rights laws. Also, in the cases of the devolution of powers between the center and provinces, these institutions shall be provided with sufficient coordination between them in order to work coherently and effectively.

[135] See also, in the same respect, UN Human Rights Committee (HRC), *General comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.13. Para 4, and Committee's Concluding Observations on Indonesia adopted on July 23-24, 2013, CCPR/C/IDN/CO/1.

SECTION III:

UNIVERSALISM OF INTERNATIONAL HUMAN RIGHTS AND THE CHALLENGES OF CULTURAL RELATIVISM

After having thoroughly analyzed the substantive provisions of international human rights law on the subject and the available mechanisms for the effective implementation and realization of those international human rights standards, the third and last section of this chapter will analyze the challenges to the universalist concept of indiscriminate realization of international human rights standards.

1. Introduction:

It cannot be underestimated that culture contributes greatly to the formation of an individual's worldview, because culture gives both the individual and the society the values and interests to be pursued and the legitimate means and methods of pursuing them. Cultural relativism according to Hatch is the judgment of the right or wrong via application of certain principles and standards of a specific culture. Human judgement of right and wrong is always based on experience and experience is construed by every individual in terms of his/her own enculturation. The concept of right or wrong may vary from one culture to another, as these are relative concepts.[136] Thus, there is no universal value for morality as the history of the world is always the plurality of the cultures. The content and the philosophy of human rights is not the same in all the cultures of the world, different cultures treat equality and human rights differently.

Further, the notion of cultural relativism denotes the recognition of the diversity of different cultures and people. The attempts of assertion of universality of one culture as criterion for morality will amount to the attempt of assertion of one culture imperialism.[137] When the notion of cultural relativism is faced with the concept of the universality of human rights standards, the two pose strong opposition to each other. Form above discussion, we can deduce the

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[136] Elvin Hatch, *Culture and Morality: The Relativity of Values in Anthropology* (New York: Columbia University Press, 1983) 5.

[137] R.J. Vincent, *Human Rights, and International Relations* (Cambridge: Cambridge University Press, 1986) 37-38.

following four important suppositions relating to human rights from the cultural relativist perspective:

- Human rights relate to moral conditions;
- moral conditions are determined by the cultural commitments; thus
- these commitments differ from culture to culture; consequently,
- the interpretation of the human rights standards will also differ from culture to culture.[138]

2. The misconception of Human Rights as a western construct

Generally, it is perceived that the concept of contemporary human rights came from western states. This assumption is however not entirely true. History is evident that the concept of human rights (the principle of non-discrimination specifically) as binding international rule was first proposed in 20th century by Japan, an Asian country, to be added to article 21 of the Covenant of League of Nations. The text of the proposed amendment was as following:

> The equality of nations being a basic principle of the League of Nations, the High Contracting Parties agree to accord, as soon as possible, to all alien nationals as states members of the League, equal and just treatment in every respect, making no distinction, either in law or in fact, of account of their race and nationality.'[139]

The proposed amendment was motivated by Japan's frustration due to the domination, humiliation, and discrimination of western states within their colonies and specially within the neighbourhood of Japan. The concepts of equality, non-discrimination proposed by Japan was fervently contested and opposed by today's human rights champion states, Britain, United States, Australia, Greece and Poland. This proposal of non-discrimination further from mere declaration to practical realization was unacceptable for the West. The reaction of British

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[138] Melville J. Herskovits, *Cultural Relativism, Perspectives in Cultural Pluralism,* (New York: Random House, 1972) 15.

[139] Quoted in Fernandde Varennes, "The fallacies in the "Universalism versus Cultural Relativism" debate in human rights law," *Asia-Pacific Journal on Human Rights and the Law* (2006) (1) 68.

Foreign Secretary, Lord Balfour, was evident of west's attitude towards the concept of human rights:

> *The notion that all men were created equal was an interesting one, he found, but he did not believe it. You could scarcely say that a man in Central Africa was equal to a European.*[140]

Same were the attitudes of Australian and New Zealand's representatives. In the face of such opposition, a refined version of the clause was proposed by Japan, which met with the same opposition and could not succeed to be adopted.[141]

It cannot be denied that western thinkers, Jean-Jacques Rousseau, John Stuart Mills played a decisive role in the promotion of human rights ideology, however, the Western states have not always been overly receptive to the human rights as legally binding on states as it is in contravention to the sovereignty of the states. Human rights as legally binding on states requires the limitation of states' sovereignty and requires the states to give up their absolute sovereignty which evolved in the 15th century. The tradition of absolute sovereignty was introduced and exported to the rest of the world within the process of Colonization and Marxism. Absolute sovereignty does not accept any limitations imposed by various sets of moral and human rights systems. This concern for the state sovereignty was evident within the comments of British delegate to the League of Nations, Lord Robert Cecil:

> *"[It would mean] encroaching upon the sovereignty of states members of the League... [opening] the door to serious controversy and to interference in the domestic affairs of states..."*[142]

The refusal of the Japanese proposal by the western countries demonstrates the attitude of the west towards international human rights after the first world war, as it contravenes the most important concept developed by the west, state sovereignty. The binding status of human rights

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[140] Ibid, 69.

[141] The vote casted in favour of the Japanese proposal was 11/16. However, Woodrow Wilson, the then US President, who was chairing the session, ruled that this issue needed to be unanimously approved, and since this was not the case, the bill of amendment was not approved.

[142] Ibid, 69; The notion of absolute sovereignty is the construct of western political thought rather than Asian or Islamic. This political thought is the main obstacle to the effective and meaningful implementation of international human rights standards.

lands above states' sovereignty thus unacceptable to a number of western states. The western idea of sovereignty at that time was felt at risk from outsider moral imperatives. This attitude still exists in some western states. For example, the reluctance of the United States to the creation of the Permanent International Criminal Court. According to the United States, this development will cut down on its sovereignty, by bringing American citizens under the jurisdiction of foreign legal forums.

It was after the Second World War that the human rights international standards got momentum against state sovereignty, when most states, including the European ones, found common moral grounds in the shape of international human rights. The international community at this juncture realized that one major reason for the WW II was blatant contempt and violations of international human rights standards, therefore, human rights standards should be part of the international legal system to prevent such atrocities in future. It was realized and started to believe that sovereignty must not come at odds with human rights and that states must not have absolute sovereignty to treat their population the way they want. For that, actions at the international scene were required by the international community and an international code of conduct was required which could ensure minimal guarantees of human rights for every human being.

The Universal Declaration of Human Rights 1948 was thus the first international inspirational document. In total, 58 states participated in the creation and adoption of the Universal Declaration. Apart from the European world, out of those 58 states, 20 states were Latin American, 4 states were African, and 14 of the participating states were Asian. This signifies the worldwide input to the creation and adoption of the first human rights inspirational document, which paved the way for future legally binding international treaty regimes. The principle of non-discrimination and equality which to many is a western construct was included within the Declaration on the advocacy and efforts of socialist and non-western countries, including Asian states and specially China. Alongside equality, the rights related to economic and social spheres were added to the declaration following the efforts of socialist and non-western states. Western states were mainly interested and concerned about the civil and political tights with individualistic conception. It was the hostility and pressure from socialist state which ensured the economic, social, and cultural rights making its way to be part of the Universal Declaration. The Universal Declaration is thus a child born of confrontations and compromises between varying cultural, moral practices and traditions from around the world.

Such rights, if not alien, were the least priority to the western states.[143] The Declaration contains a number of shortcomings and loopholes which is not due to the unwillingness of Asian or Islamic states, but rather due the constant confrontation of the western states. This attitude of the West was evident with respect to the right to self-determination, and rights related to various aspects of minorities. More importantly, the Universal Declaration aspiratory in nature instead of binding international legal document was due to the stern resistance from the West as well. Therefore, associating human rights to the cultural superiority of the west is based on misunderstanding. It is considered that the western countries will have fewer human rights problems in comparison to non-western, and that the opposition to the international human rights system must come from non-western countries.[144]

3. The inherent flexibility of human rights standards

In Asian and Muslim states, the challenge to the relation of states with international human rights system is based on the cultural relativism instead of universality of human rights. If the Human Rights standards are required to retain and maintain universal status, then the understanding that human rights standards vary from culture to culture needs to be rejected. Because for the universalism of human rights standards, it must maintain its uniform posture, and if the international community doesn't want to give up on the international nature of human rights standards, these standards must stand independent of local cultures and traditions.

The human rights system itself, however, gives heed to states' understanding of human rights based on culture and society and do not altogether reject the factor of cultural relativism. Human rights' core principle of non-discrimination can be taken as an example here. The principle of non-discrimination is required to remain the same all over the world. There can be

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[143] Antonio Cassesse, *Human Rights in a Changing World* (Cambridge: Polity Press, 1990) 29, as quoted in Fernandde Varennes, "The fallacies in the "Universalism versus Cultural Relativism" debate in human rights law," *Asia-Pacific Journal on Human Rights and the Law* (2006) (1) 72.

[144] Contrary to this assumption, history tells us that some of the most racist societies indulged in sever discriminatory practices were western. Such as the Nazi Germany, the treatment of aborigines in Australia, the crimes of apartheid in South Africa, or the treatment of African-Americans in America. On the other hand, ignoring the contribution of non-western states to the creation of the international human rights system and associating it only with the West will be based on the bias of associating all the good to the west. Throughout human history, many non-western societies acknowledged the vital nature of human dignity, equality, and human freedoms which are the foundations of the contemporary international human rights system. Such as the Quran as well as Buddha advanced the idea that all humans are equal. Similarly, freedom of religion was guaranteed by the king of ancient Persia to the population of newly conquered regions.

no major changes within the core ingredients of this principles from one to another state. Discrimination perpetrated against a person in Islamic states cannot be justified on the ground of tradition, which are centuries old and revered greatly. In the same fashion, torture cannot be justified under the guise of tradition or culture in any state. However, not all kinds of differential treatments would amount to discrimination.[145]

While deciding if a situation qualify as discrimination or not, all the relevant and prevailing factors and circumstances must be considered, these factors can be economic, social, religious and cultural. The most important factor, ignored mostly, is that international law does not obligate for a completely similar outcome and impact within conditions, cultures and economies that are different from others. Obligating the state for similar impacts and outcomes as exists within Europe, which is mostly expected or demanded, amounts to shaping the international human rights legal system in compliance to western standards instead of universal. In varying cultures and traditions, the application of principle of non-discrimination, while keeping in view the factors of public morality, health and order, will come up with different outcomes.

It should be considered, moreover, that not all human rights are absolute. Limitations can be placed on some of the human rights on the basis of particular needs of the states, such as public security, health and morals, whereas the religious and cultural factors in some cases can be considered.

4. Reservations at the face of cultural relativism: fitting escape from human rights obligations

4.1. Permissibility of reservations to human rights treaties

The success of an international regime can be measured by the number of its state parties. In this framework, reservations may facilitate the widespread and universal participation within international human rights treaty regimes, providing states with the opportunity to become a party of a specific treaty even if they do not accept all the provisions included therein.

[145] *Willis v. United Kingdom,* ECHR, 36042/97 judgment of I1 June 2002; The European Court of Human Rights maintains the following position on the issue: “A difference of treatment is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be realised.”

Article 19 of Vienna Convention on the Law of Treaties (VCLT) provides that a State may, when signing, ratifying, accepting, approving, or acceding to a treaty, formulate a reservation unless:

a) the reservation is prohibited by the treaty;

b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.[146]

Article 20 (2) VCLT provides further conditionality for the admissibility of the reservation by adding that the existing state parties to the treaty regime in question must accept such reservation:

> When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

Whereas para 3 and 4 of the same article provide for the following:

3. When a treaty is a constituent instrument of an international organization and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

> (a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those states;

[146] United Nations, *Vienna Convention on the Law of Treaties*, article 19, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: https://www.refworld.org/docid/3ae6b3a10.html [accessed 25 July 2020].

> (b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
>
> (c) an act expressing a state's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.[147]

Article 28 of CEDAW provides for the possibility of reservations to the Convention. However, it maintains that the reservation must not be against the very purpose and object of the convention. In the case concerning the Genocide Convention, ICJ held that the reservation to the international law treaty must not undermine the very object and purpose of the treaty in question for the purpose of preserving the integrity of the treaty.[148] The reservation compatibility rule determines the permissibility of the reservation to the Convention. The reservation thus, must be compatible to the very object and purpose and the treaty and not compromising to its traits.

The CEDAW Committee urges the state parties to gradually discourage, prohibit and eliminate the discrimination against women that persist on any ground, such as religion and culture through appropriate measures required. Subsequently such measures will lead to the state party's ability and willingness to withdraw their reservation to the CEDAW. With respect to article 16 of CEDAW, the Committee specifically maintains in this respect that:

> Neither traditional, religious, or cultural practice nor incompatible domestic laws and policies can justify violations of the CEDAW. The Committee also remains convinced that reservations to article 16, whether lodged for national, traditional, religious or

[147] VCLT, article 20, Acceptance of and objection to reservations.

[148] Advisory Opinion, International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro*, 1951. In this case, ICJ addressed the issue of reservation.

> cultural reasons, are incompatible with the CEDAW and therefore impermissible and should be reviewed and modified or withdrawn.[149]

Similarly, article 20 (2) of CERD states:

> A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed.. <u>A reservation shall be considered incompatible or inhibitive if at least two thirds of the States Parties to this Convention object to it.</u>

4.2. Islamic reservations and the Shariah legal system:

Islam is the most widespread official state religion of the world.[150] According to Yadh Ben Achour, there exist fault lines between international human rights treaty regimes and the domestic legislations of Islamic countries. These fault lines result in reservations to international human rights treaty regimes. The Special Rapporteur on Freedom of Religion and Belief, while tackling the complexities of state and religion maintains that "*there is no consensus as to either how the relationships between state and religion should be classified, or on the terminology for characterizing their nature*".[151] Muslim states can be divided into four categories: the 'States of Religion', 'Islamic Republics', 'State Religion States' and 'Secular Systems.'

The states which consider Shariah law as the law of the land can be termed as "States of Religion." For instance, Saudi Arabia and Iran possess systems that recognise the full

[149] *General Recommendation No. 21: Equality in Marriage and Family Relations*, para. 44. Also article 7, 8 and CEDAW Committee, *General Recommendation No. 35* para. 13.

[150] Islam is the official state religion of 41 countries. Out of these 41 countries, 25 countries follow Sunni Islamic legal system of, which amount to 60 percent of total of Islam as official state religion. Whereas 16 countries follow Shia Islamic system that amounts to 40 percent of the total official state religion of Islam.

[151] Report of Special Rapporteur on Freedom of Religion and Belief, A/HRC/3749, Para 14; qouted in Yadh Ben Achour, *The Islamic Question before the United Nations Human Rights Committee* (Ferrara: Jovene editore, 2021), 6.

implementation of Islamic Shariah legal system. These states consider the Quran and Sunnah as its constitution and disregards any other form of law.

'Islamic republics' espouses republican form of governance including elections, democratic institutions such as legislature, executive and judiciary. Islamic republics declare themselves "Islamic" within their constitutions. For instance, the constitutions of Pakistan, Afghanistan and Mauritania declare their names as Islamic republics. At the face of Islamic foundations and nature, these states have little to do with republican form of governance despite claiming to be.

Pakistan can be placed within the category of Islamic republic as article 2 of the constitution 1973's Pakistani constitution declares Islam as the state religion. "The Objective Resolution" which was passed and adopted on March 12, 1949, forms an integral part of the constitution. Objective resolution contains a number of principles based on Islamic law. It provides for divine sovereignty over the entire universe which has been delegated to humans by God as his chosen representatives elected by people. It provides for the implementation of principles of democracy, equality, freedom, tolerance and social justice in accordance with the spirit of Shariah. It further provides that the Muslims of Pakistan shall be enabled to organize their individual as well as collective life "in accordance with eh teachings of Qur'an and the Sunnah". In the light of these objective principles, Pakistan has adopted domestic legislation relating to evidence, family law, and criminal legislation that firmly adhere to the Shariah legal system.

The states which declare Islam as the state religion can be classified as 'state religion' states. These countries include Algeria, Bangladesh, Jordan, and Egypt. Due to the ambiguous and general nature, the concept of state religion is prone to numerous varying interpretations. Consequently, the impact of 'state religion' varies from country to country. Some Muslim majority state due to number of reasons declare themselves "secular" states through their constitutions. These are Turkey, Azerbaijan, Turkmenistan, Kazakhstan, and Kyrgyzstan.

This classification on the basis of how the constitution of the state treats religion should be considered with great amount of care. The 'Islamity' of a state cannot be evaluated only by taking into account the constitutional structure and provisions of the constitution only. For instance, Turkey may constitutionally proclaim itself a secular state, however, for the last couple decades Turkish state's re-bent towards religion is enormous if not unprecedented.

International human rights law is overwhelmed with reservations by the state parties, CEDAW is no exception to this behavior and practice, despite the fact that CEDAW can be claimed to be the International Bill of Women Rights. Out of all the international human rights instruments CEDAW possesses the highest number of reservations and declarations. Mostly based on religious and cultural incompatibilities, states have used arguments for the preservation of religious and cultural norms to justify their reservations to particular articles of CEDAW upon ratification. This highest number of reservations and declarations demonstrate the level of state parties' commitment and seriousness for abiding by the international human rights law obligations. In this respect, marriage and divorce are issues at the very heart of controversy between contemporary international human rights standards and domestic laws based on religion and cultural practices.

The commonest form of reservation is that made by Islamic states to exclude the application in their respect of a particular article of the CEDAW unless it conforms to the requirements of Islamic law. Some Islamic states have entered reservations against Articles 2 and 16 of the CEDAW, which is its most important and substantial clauses, dealing with recognition of the equality of men and women and the outlawing of discrimination against women, including the taking of measures to 'modify or abolish' customs and practices that discriminate against women.[152]

Though the possibility of reservations to international human rights law treaty regimes facilitated the participation to the international human rights regimes at the face of cultural relativism, it proved to be a huge challenge to achieve the universality of international human rights standards. Such reservations according to CEDAW Committee can have double effects on the rights of women. With the placement of reservation, the state implies that she is not willing to that specific norm of international human rights, and that the human rights violation existing within national laws policies and practices will remain entrenched. The promise made within the convention is thus undermined at the very outset.[153]

[152] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women*, 1 March 2010, CEDAW/SP/2010/2.

[153] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Statements on reservations to the Convention on the Elimination of All Forms of Discrimination against Women adopted by the Committee on the Elimination of Discrimination against Women*, 14 May 1998, No. 38 (A/53/38/Rev.1), 47-50.

In fact, the fatality of the damage caused by reservations is such serious that reservations can be termed as the negation of the universality of international human rights standards. The reservations to the international human rights treaties can be based on financial, political, Social, cultural, and religious factors. The reservations based on religious, social and cultural values are more prevailing, more rigid, as well as more opposed and more controversial within the international community. Capacity, political will, security, welfare of people; religious and cultural systems are the determinative factors of the supremacy of either the national or international human rights laws over the other.

From the perspective of place and authority of Shariah moral conditions within politics, within the Islamic states, the Islamic imperative plays a very important role. The state parties, alongside being parties to the international human rights treaty regimes, also want to protect the place of religion as an element of national interest. Invoking the Islamic religious law against the international human rights standards poses serious implications to the claim of the universality of human rights standards.[154] These reservations often are very general in nature, loosely formulated and mostly there is no specification of the provisions of the human rights treaties that has been subjected to the reservation by the Shariah legal system prevailing states at the time of ratification. The structural and philosophical reasons that lead to the placement of reservation by the Shariah law prevailing state parties to the international human rights law regimes are the following:

The first reason has to do with the equal application of the international human rights laws to both the public and private aspects of national laws. International human rights law requires that there must be separation between public and private aspects of laws and that the international human rights law shall be applied and observed equally within both the private and public spheres of the legal systems. Public domains are the constitutional orders and criminal justice systems. While the private spheres of the legal system are the laws that regulate and govern the religious and personal aspects of human life. However, with respect to the uniform application of the international human rights laws within Shariah prevailing systems, the challenge is that there exists no clear distinction between the private and public legal spheres. At the face of such non-distinction between the private and public legal spheres, the

[154] CRC and CEDAW have the highest number of reservations that are based on Shariah, 19/204, and 14/132 respectively.

application of the international human rights law is very challenging to the private spheres in comparison to public spheres, because especially within the personal status spheres, the Shariah legal system prevailing states follow the immutable and unchangeable Shariah laws.

Here it seems important to have a brief introduction to the Shariah legal system. Shariah Law consists of four main sources: the Quran, Sunnah, Qiyas and Ijma (the last two sources together form Ijtihad). Quran and Sunnah (the Practices of Prophet Muhammad) are considered to be the divine sources of the Islamic laws. The Quran, the primary source of the Shariah legal system, is considered to be the very words of God, containing moral prescriptions, consisting of 6219 verses. Out of these verses 500-600 contain legal elements and only 80 verses can be classified as containing legal injunctions. The most comprehensive legal issue that has been tackled within the Quran is the law of inheritance and succession. Secondly, the issue of marriage and family matters has also been addressed comprehensively within the Quran. Second source of the Shariah system is Sunnah. Sunnah are the deeds and the sayings of Prophet Muhammad.

The ultimate purpose of the Islamic laws were the reformation of the existing laws and practices that were prevailing at that time in Arabia. For instance, in the matters of laws and practices of marriage, Islam constrained the existing unlimited number of marriages, to four marriages only. However, this permission was conditional to somewhat unattainable criteria. The Islamic laws forbids men to marry more than once in case he is unable to treat his wives with justice and equality.

> *"Marry women of your choice, two, three or four. But if ye fear that ye shall not be able to deal justly [with them] then only one."*[155]

While this verse is often interpreted as "sanctioning" polygamy, a lesser-cited verse lends a different perspective:

[155] 4/Surah An-Nisa (The Women), verse 3, the interpretation given by Mufti Taqi Usmani is as following: "If you fear that you will not do justice to the orphans, then, marry the women you like, in twos, in threes and in fours. But, if you fear that you will not maintain equity, then (keep to) one woman, or bondwomen you own. It will be closer to abstaining from injustice."

"Ye are never able to be fair and just as between women, even if that were your ardent desire."[156]

The rational interpretation and analysis of the Quranic principle suggest that it not only discourage the polygamy, but it also turns it forbidden as it is not possible to maintain justice within the two wives.

The second area of the reforms was the area of inheritance and succession, where in the pre-Islamic society the right to inheritance was granted only to men and the women was deprived of this right. However, Islam changed this practice. Shariah in this respect introduced the novel and pro-women rules of inheritance, dividing the certain categories of persons entitled to the share within inherited properties. In this way Shariah introduced progressive changes to the areas of family and inheritance laws, in accordance with the prevailing circumstance and the needs of the society at that time.

Up until one hundred and fifty years after the emergence of Islam, there was complete freedom for the juristic reasoning (Ijtihad in other words) to resolve the challenges arising within Muslim societies for which there was no express solution given. In this respect, Qiyas (Analogy) is the third source of Shariah Law, developed by Sha'afi jurists that provides for reasoning by analogy from Quran and Sunnah. Qiyas is not the rule or the direction that is coming directly from the Quran or Sunnah, rather it is the equivalence of something to others derived by the human mind. Thus, Qiyas is a practice, practiced by humans for the divine rules. The principle of Qiyas facilitated the application of the Islamic rules to the contemporary Islamic society's modern needs and challenges.[157]

Ijma is the fourth source of the shariah legal system which together with Qiyas forms Ijtihad. Ijma mean the unanimous agreement of Muslim jurists on the particular question of law in a

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[156] 4/Surah An-Nisa (The Women), verse 3. Imam Iskender Ali Mihr gives the following interpretation: "*And you will never be able to be just between wives, even if you should strive, so do not incline too much to one of them so as to leave the other hanging, and if you reconcile and have piety, then surely Allah is Oft-Forgiving, Most Merciful.*"

[157] The example of the Qiays is the analogy that has been drawn from the Quranic penalty for theft and the theft of a bride's virginity. The sum for a minimum dower or mahr, the minimum amount to which a bride is entitled from her husband at the time of marriage was fixed according to a scaled version of the penalty for theft.

particular age. According to Shariah concept, Ijam is infallible as the Prophet Muhammad once said that *"my community will never agree on an error."*[158]

To some extent, the practice of ijtihad provided an operational window to bridge the gap. The interpretation of the Islamic rules and provision according to the changing circumstance continued until the regimes of companions of the prophet, successors of the companions, and successors of the successors through the doctrine of Ijtihad. However, in the contemporary Islamic world, it is firmly believed that the doors of Ijtihad are closed now with the passage of those four stages of Islamic history. Since the doors of Ijtihad are closed now and the practice of Taqleed was supposed to be practiced and followed.[159] Taqleed means to follow a predefined path rather than exploring new ways for solving the contemporary challenges.[160] Consequently, the system was unable to keep up to the modern pace, challenges, and contemporary needs of the Islamic society. Thus, the system once the agent of reformations became obsolete and outdated to meet the contemporary needs of Muslim society.[161]

Very relevant to our discussion are the schools of thought within Shariah legal system. The main schools within the Shariah law are four. Maliki, Hanafi, Hanbali and Sha'afi treats different legal matters differently. For instance, in comparison to the Hanafi law (which is practiced in Pakistan), Hanbali school of Shariah system (which is practiced in Tunisia and Egypt) is more pro-women in the matters relating to marriage as it provides more rights and freedoms to the women within the matters of marriage. Similarly, the Maliki School in

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[158] The binding force of ijma is based on a hadith in which the Prophet Muhammad is reported to have said, "*My community will never agree on an error*." Quoted in Ahmad Hassan, "The argument for the authority of Ijma," *Islamic Research Institute, International Islamic University Islamabad,* 10, no 1, (1970), 43.

[159] "*Taqlid"* is an Islamic terminology denoting the conformity of one person to the teaching of another. The person who performs taqlid is termed muqallid(follower). The definite meaning of the term varies depending on context and age.

[160] Anna Jenefsky, "Permissibility of Egypt's reservations to the Convention on the Elimination of Discrimination Against Women", *Md. J. of Int'l.*, 15, 199 (1991).

[161] The original progressive nature of the Islamic Shariah system can be derived from the fact that within the pre-Islamic Arab Society, the status of women was not more than material objects, which can be sold and dispositioned. Islamic rules in such an atmosphere provided the best protection system, where they were treated humanely giving them right to life, property, and above all, recognition as human beings. In the pre-Islamic society, they were used to be sold for material considerations, while in Islam, husband was obliged to pay consideration in exchange for marriage to women, a rule and requirement totally opposite to the pre-Islamic Arab's treatment of women.

comparison to Hanafi school of thought provides for more liberties and rights to women within legal matters relating to divorce. Here, it is important to keep in mind that, within the Islamic legal system it is also permissible to switch between the schools relating to legal matters.

International human rights law recommends the state parties to take into consideration the experience of withdrawal of the reservation of the other state parties from similar legal setup, and that they shall benefit from their experience. As the CEDAW's committee maintains that the state parties in the process of reservations withdrawal, should take *"into consideration the experiences of countries with similar religious backgrounds and legal systems that have successfully accommodated domestic legislation to commitments emanating from international legally binding instruments, with a view to"* withdrawing reservations.[162] For the purpose of our current study, we may take into consideration the examples of the Shariah legal system following/prevailing countries that are state parties to the international human rights treaty regimes.

a) The participation of Egypt to CEDAW:

Within the community of the Shariah law prevailing states, Egypt is one of the prominent and leading states. Egypt firstly ratified CEDAW in 1980, initially placing four reservations to its articles 2, 16, 19 and 29 (1). These articles provide for combating discrimination, the child rights to nationality, rights and equality to, and within marriage, and the elimination of discrimination within family matters. Presently, Egypt had narrowed down the reservations to articles 2, 16 and 29 of CEDAW. The text of the Egyptian reservation to Article 16 states, in part, that provisions of Article 16 that mandate equal rights for women in the realms of marriage and family relations;

> [.....] be without prejudice to the Islamic Sharia provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sanctity deriving from firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an

[162] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 27 on older women and protection of their human rights*, 16 December 2010, CEDAW/C/GC/27. Also the General Recommendation No.4 of CEDAW treaty body is specifically related to the reservations placed by the state parties.

> equivalency of rights and duties so as to ensure complementarity which guarantees true equality between the spouses and not quasi-equality that renders the marriage a burden on the wife. This is because the provisions of the Islamic Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully out of his own funds and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. The Sharia therefore restricts the wife's rights to divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband.[163]

The reservation placed by Egypt is greatly detailed and formulated very clearly in comparison to the other Islamic states. In placing this reservation, Egypt applied the principle of conduciveness.[164] Article 23 of CEDAW provides that where the provisions of domestic laws of the state parties are more conducive than that of protection and rights given by the provisions of the CEDAW, then the protection and rights given by domestic laws must be extended to the women in the light of the object and purpose of the CEDAW.[165]

The logic and doctrine employed by Egypt for the justification of the reservations to article 16 of the same convention relating to marriage and family matters is the same, where the marriage and family matters of Egypt are administered by the Shariah law. The women have been given the right to dower in the matters of marriage for giving up on her right to divorce at the same footing as that of husband.[166] Egypt claims that in the matters of marriage and family, the domestic laws of Egypt which are based on the Shari'ah Law, are more conducive and pro-women in comparison to the CEDAW provisions and protections. This is the indirect

[163] Text of the reservation is taken from UN Treaties repository online available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec.

[164] Anna Jenefsky, "Permissibility of Egypt's reservations to the Convention on the Elimination of Discrimination Against Women", *Md. J. of Int'l.*, 15, 199 (1991).

[165] Article 23 CEDAW: *"Nothing in the present Convention shall affect any provisions that are more conducive to the achievement of equality between men and women which may be contained: (a) In the legislation of a State Party; or (b) In any other international convention, treaty or agreement in force for that State."*

[166] Ibid., 207. Within Shariah law women's right to divorce has been made contingent on the judge's ruling, while it does not provide for any such rule making the men's right to divorce contingent on the judge's ruling. In the Shariah legal system, Dower is the sum of money or other material objects which is the right of the wife to be paid by the husband as a consideration for the contract of marriage.

invocation of the article 23 of CEDAW by ascertaining equivalency and complementarity of the rights guaranteed within domestic laws.[167]

As we have discussed in the earlier part of this work, the present Shariah legal system is mainly based on the practice of taqleed. The most influential and notable Egyptian scholar in this respect was Rifah Badavi Al Tahtanvi, who emphasized on the interpretation of Islamic rules in accordance with the contemporary and changing needs of the present day Islamic society. Badavi introduced the doctrine of the *Takhayyur* within the fabric of the Shariah legal system. Through the principle of Takhayyur, a Muslim can interpret the Shairah rules in most favourable way by borrowing the principles of other Sunni school of Shariah legal system applicable within similar circumstances. This doctrine played a decisive role in facilitating the pro-women interpretation of the Islamic laws in the case of Egypt.[168]

Moreover, within the Egyptian legal history, Muhammad Abduh is considered to be the father of Muslim modernism. To Abduh, "*the Muslims must do once more, what they should always have done: that is to say to reinterpret the law and make it adaptable to the contemporary needs and challenges of muslim society.*" Abduh argues that Polygamy is contrary to Quran.

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[167] The substantive provisions of the Egyptian family law no. 25 which is based on the Hanafi school of thought, provides for the grounds on which a wife can get divorce from husband. This law limits the husband's rights to divorce at any time without assigning any specific reason for doing so, by mere pronunciation of three words *"I divorce you"* as previously these words were supposed to be effective even if these words were pronounced without real intention, in jest, drunkenness, or under compulsion. The Maliki and Sha'afi school of thoughts maintains that pronouncement of divorce without intention will not be considered as valid. Because such divorce lacks the true intention on the behalf of the pronouncer.

Subsequent law that was enacted in Egypt in this respect was the Law No. 44, simply known as the "*Jehan's Law of 1979.*" This law obligates the husband to get a notarized certificate of divorce in order for the divorce to be considered as valid. Through this law, the wife has also been given the right to get divorce from the husband in case the husband conducts a second marriage without the permission of his first wife. The permission right of the wife which is obligatory on the husband for getting a second marriage has been given within the Sha'afi and Maliki School of thoughts. However, through this law husband retained the rights to polygamy as it was not prohibited through this law, rather it was only regulated. Divorce from the husband by the wife was made conditional to the judicial approval.

However, the reforms undertaken through Law No. 44 of 1979 were reverted through the enactment of Law No. 100, which was adopted in 1985. This law made the women's right to Khula conditional to the approval of the Qadi (Judge) instead of the wife by herself. Further, the reforms that were undertaken through the law no. 44 were struck down by the Egyptian Supreme Court that were actually enacted by President Sadat. Law No. 100 is still in force in Egypt and acts as a legislative base for the marital rights in Egypt.

[168] For instance, within the matters of the divorce, the Maliki School of law is more pro-women in comparison to the Hanafi school of law, because the Maliki school in this matter gives women more rights and freedoms.

Because according to Abduh, within the meaning of IV: 3 and IV: 129 of Quran *"more than one wife was only permissible when equal justice and impartiality was guaranteed."* The Shariah legal system's this obligation is not humanly possible to maintain justice between two or more wives, therefore, the Quranic ideal was monogamy.[169]

b) Tunisia's reservation to CEDAW:

Initially at the time of ratification, Tunisia placed reservations to articles 9(2), 16 (c), (d), (f), (g), (h) and 29(1) of CEDAW. Tunisia decided to withdraw all its reservations to CEDAW in October 2011, which took effect on April 17, 2014.[170] After the withdrawal of reservations,

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[169] *"The Egyptian reforms were cloaked under the veil of the "acceptable" reform mechanism of takhayyur."* Islamic states and the United Nations Convention on the Elimination of all forms of Discrimination Against Women. Baharathi Anandhi Venkatraman. 1991. P. 1987

[170] The initial declarations and reservations of Tunisia to CEDAW were as following:

1. General declaration:

The Tunisian Government declares that it shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of chapter I of the Tunisian Constitution.

2. Reservation concerning article 9, paragraph 2:

The Tunisian Government expresses its reservation with regard to the provisions in article 9, paragraph 2 of the Convention, which must not conflict with the provisions of chapter VI of the Tunisian Nationality Code.

3. Reservation concerning article 16, paragraphs (c), (d), (f), (g) and (h):

The Tunisian Government considers itself not bound by article 16, paragraphs (c), (d) and (f) of the Convention and declares that paragraphs (g) and (h) of that article must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance.

4. Reservation concerning article 29, paragraph 1:

The Tunisian Government declares, in conformity with the requirements of article 29, paragraph 2 of the Convention, that it shall not be bound by the provisions of paragraph 1 of that article which specify that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall be referred to the International Court of Justice at the request of any one of those parties.

The Tunisian Government considers that such disputes should be submitted for arbitration or consideration by the International Court of Justice only with the consent of all parties to the dispute.

5. Declaration concerning article 15, paragraph 4:

In accordance with the provisions of the Vienna Convention on the Law of Treaties, dated 23 May 1969, the Tunisian Government emphasizes that the requirements of article 15, paragraph 4, of the Convention on the Elimination of All forms of Discrimination against Women, and particularly that part relating to the right of women to choose their residence and domicile, must not be interpreted in a manner which conflicts with the provisions of the Personal Status Code on this subject, as set forth in chapters 23 and 61 of the Code.

Tunisia is obliged to take all the measures to bring its domestic laws, policies and practices in conformity with indiscriminate realization of human rights standards enshrined within CEDAW.

On the subject of polygamy, the argument of Tunisia is relevant as well as helpful for the reservations made on this basis to CEDAW:

> *The government argued that (1) polygamy, like slavery, was an institution whose past purpose was no longer acceptable to most people; and (2) the ideal of the Quran was monogamy. Here [a reformist position] was espoused, namely, that the Quranic permission to take up to four wives (IV:3) was seriously qualified by verse 129: 'Ye are never able to be fair and just between women even if that were your ardent desire' (IV:129). Thus, while polygamy was permitted, the Quranic ideal is monogamy.*

The argument of Tunisia demonstrates that reservations to international human rights on the basis of polygamy under Shariah law are irrelevant. According to Tunisian argument the ideal of the Shariah is monogamy. From the case study of Tunisia, the most important understanding is that for the reforms to be successful, it needs to be backed by the popular social support, societal legitimacy, parallel mobilization of the socialist forces, educating the general masses about the reforms, the education about the benefits and fruits of these reforms and that the reforms must be sufficiently backed by forcing elements, such as financial and economic considerations. Further, the example of Tunisia indicates accomplishing as much reforms as possible while remaining Muslim state in the light of the Shariah and Islamic traditions.

c) the participation of Morocco to CEDAW:

Morocco maintains two declarations and one reservation to CEDAW. The first declaration of Morocco about article 2 is as follows:

The Government of the Kingdom of Morocco express its readiness to apply the provisions of this article provided that:

> - They are without prejudice to the constitutional requirement that regulate the rules of succession to the throne of the Kingdom of Morocco;

Online accessible at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec.

- They do not conflict with the provisions of the Islamic Shariah. It should be noted that certain of the provisions contained in the Moroccan Code of Personal Status according women rights that differ from the rights conferred on men may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.

The second declaration of Morocco regarding article 15, paragraph 4 is as following:

> The Government of the Kingdom of Morocco declares that it can only be bound by the provisions of this paragraph, in particular those relating to the right of women to choose their residence and domicile, to the extent that they are not incompatible with articles 34 and 36 of the Moroccan Code of Personal Status.

The reservation of Morocco to CEDAW with regards to article 29 is as following:

> The Government of the Kingdom of Morocco does not consider itself bound by the first paragraph of this article, which provides that any dispute between two or more States Parties concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of one of them, be submitted to arbitration.
> The Government of the Kingdom of Morocco is of the view that any dispute of this kind can only be referred to arbitration by agreement of all the parties to the dispute.[171]

Morocco follows the Maliki school of thought of the Shariah system. As we have stated earlier, the Miliki school of thought provides for more liberal rights and freedoms to women with respect to marriage in comparison to the Hanafi School of thought. However, in the other aspects of women rights, the Maliki school of thought is more conservative than the other school of thoughts of Shariah legal system. For instance, the Maliki school of thought provides that the minimum age for marriage is 15 years.[172] Same way as Egypt and Tunisia, the domestic

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[171] The declarations and reservation of Morocco can be accessed online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec.

[172] *"no adult woman may be contracted in marriage without her consent unless the court accepts the guardian's application to marry her on the grounds that he is concerned about her moral welfare."* This "*moral welfare*" provision illustrates that, while the possibility that a woman is given in marriage against her will is substantially curtailed, loopholes in the law exist, as there is substantial room for discretion in determining what constitutes

legal system of Morocco rather than completely prohibiting the practice of polygamy, it gives the wife the right to seek judicial divorce in the cases where the husband contracts second marriage without the approval and consent of the first wife concerned. This principle has been taken from the Hanabli school of thought which recognizes such contractual stipulations.

Morocco is the best example for positively modifying and reforming its domestic laws and practices by borrowing from all the Shariah schools of thoughts that are protective of women rights in one or more areas of their daily lives. However, the application and the realization of these laws yet pose a challenge at the face of its judicial subjectivity in the interpretation of these laws, which impedes the application of these reforms. The substantial legislative reforms taken by Morocco are indicative of the fact that Shariah can be applied in flexible manners.[173]

This flexibility is however not without its demerits. Such flexibility can be used and has been used as a "legal hazard" to the protection and indiscriminate realization of human rights. Because if considered flexible, Shariah can be used in a way what is in contrast with human rights principles. For instance, while deciding upon certain aspects of women rights, Iran may not feel itself bound to apply and interpret shariah law the same way as it has been applied and interpreted in Tunisia because shariah is considered to be flexible. Therefore, the flexibility must relate to the universal contemporary needs and welfare of the women.

d) Islamic reservations to the ICCPR

Islamic reservations are not only an issue within the CEDAW, they affect also other human rights treaties. The total number of ratifications to the ICCPR are 173.[174] The total number of Muslim states as per the membership of Organization of Islamic Cooperation (OIC) amounts to 57.[175] Out of these 57 Muslim states, the overwhelming majority had ratified the Covenant.

"*concern about moral welfare.*" The so-called doctrine of the protection of moral welfare can be and has been misused by the Wali (guardian).

[173] Similarly, with respect to the discriminatory treatment of women in inheritance, the Libyan Government justified its reservation through the following argument. *"Women acquire that part of the inheritance without commitments, whereas men had to take over all the concomitant obligations."*

[174] UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6. State parties' ratification status, reservations and declaration can be accessed at: https://indicators.ohchr.org/.

[175] The list of OIC members states can be accessed at: https://www.oic-oci.org/states/?lan=en.

Some states are reluctant to ratify the Covenant while others have entered reservations to Covenant upon ratification.[176] Countries placing reservations to Covenant are Bahrain, Kuwait, Pakistan, and Mauritania.[177]

As stated earlier, the interpretation of the Shariah legal system varies, as do the challenges to the implementation of the Covenant. For instance, according to the unpublished declaration Egypt made at the time of ratification on August 4th, 1976, which maintains that "…. *Taking into consideration the provisions of Islamic Shariah and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it…*"[178] The Declaration of Egypt implies that there is no contradiction between Covenant and Islamic legal system. Bahrain places reservations to articles 3, 18 and 23 of the Covenant. It states that "*the government of the Kingdom of Bahrain interprets the provisions of article 3, (18) and (23) as not affecting in any way the prescription of Islamic Shariah*".[179]

The reservation of Pakistan to the Covenant were many and divulge in nature, indicative of inclination to follow the shariah legal system in case of controversy between the two and evocative of the religious and cultural relativist challenge to the universalist conception of human rights. The reservations of Pakistan were initially against articles 3, 6, 7, 12, 13, 18, 19 and 25.[180] These reservations of Pakistan attracted huge and severe criticism from the existing

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[176] Out of the total members of Organization of Islamic Cooperation, Saudi Arabia, United Arab Emirates, and Oman have nor ratified the Covenant.

[177] The reservation placed by Kuwait and Pakistan are indicative of the existing fault lines between Covenant and Islamic legal system.

[178] The text of Egyptian declaration has been taken from the United Nations treaty collection website, https://treaties.un.org/Pages/Home.aspx?clang=_fr, cited in *The Islamic Question before the United Nations Human Rights Committee,* 17.

[179] Bahrain's Reservation: "1. The Government of the Kingdom of Bahrain interprets the Provisions of Article 3, (18) and (23) as not affecting in any way the prescriptions of the Islamic Shariah. 2. The Government of the Kingdom of Bahrain interprets the provisions of Article (9), Paragraph (5) as not detracting from its right to lay out the basis and rules of obtaining the compensation mentioned in this Paragraph. 3. The Government of the Kingdom of Bahrain interprets Article (14) Paragraph (7) as no obligation arise from it further those set out in Article (10) of the Criminal Law of Bahrain which provides: 'Legal Proceedings cannot be initiated against a person who has been acquitted by Foreign Courts from offenses of which he is accused or a final judgement has been delivered against him and the said person fulfilled the punishment or the punishment has been abolished by prescription.' "

[180] The reservation of Pakistan made in 2010 was as following: "The Islamic Republic of Pakistan declares that the provisions of articles 3, 6, 7, 12, 13, 18, 19 and 25 shall be so applied to the extent that they are not repugnant to the Constitution of Pakistan and Shariah Law". "The Government of Islamic Republic of Pakistan declares that the provisions of article 3 of the International Covenant on Civil and Political Rights Shall be so applied as to be

state parties to the Covenant, forcing Pakistan to partially withdraw its reservations to articles 2,6,12,13,18, 19 25, and 40 of the Covenant. The present reservation of Pakistan to the covenant is…

> "*The Government of the Islamic Republic of Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in respect of various provisions of the Covenant at the time of ratification.*"[181]

The reservation is vague and general in nature making it hard to assess the level of states' obligations and responsibilities in cases of violations. Overall Muslim states rely on domestic law in order to escape its obligations within the Covenant.

The standing of the Human Rights Committee is clear on the challenge of reservations placed by state parties to the Covenant. It confirms substantial incompatibility between the Covenant and Islamic influenced constitutional legal orders of the state parties. According to the Covenant's Human Rights Committee, the reservations made by some states are incompatible with the object and purpose of the Covenant. The Committee highlights that in some of the Islamic state parties to the Covenant, Shariah is the main and irrefutable divine source of domestic legal system. In such state parties, limiting through reservation the application of Covenant to its compatibility with the domestic constitution leads to sever contradiction of domestic legal system to the provisions of the Covenant.

The consequences of filing a reservation that is at odds with the object and purpose the treaty should be considered as void and the state party should be bound by the treaty without the

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in conformity with the personal laws of citizens and *Qanoon-e-Shahadat ".* "The Islamic Republic of Pakistan declares that the provisions of article 12 shall be so applied as to be in conformity with the provisions of the Constitution of the Islamic Republic of Pakistan". "With respect to article 13, the Government of the Islamic Republic of Pakistan reserves its right to apply its law relating to foreigners". "The Government of Islamic Republic of Pakistan states that the application of article 25 of the international Covenant on Civil and Political Rights shall be subject to the principles laid down in Article 41 (2) and Article 91 (3) of the Constitution of Pakistan ". "The Government of Islamic Republic of Pakistan hereby declares that it does not recognize the competence of the Committee provided for in Article 40 of the Covenant ".

[181] Source: https://indicators.ohchr.org/.

benefit of the reservation.[182] The Committee obligate the state parties that reference to the Islam within constitutions must not prevent the full implementation of the Convention's provisions within domestic laws, policies and practices. Nor the Islamic legal order should be interpreted in a way that could impede the full enjoyment of rights guaranteed within the Covenant. The Committee further encourages the states parties to withdraw its reservations to article 2, 3,9, 14 18 and 23 of the Covenant and recall that state parties should draw a clear timeline for the withdrawal of reservations in cases it has placed reservations to the Covenant.[183]

5. Employing and engaging external means and methods available: International Cooperation

The existing human rights compliance monitoring mechanisms produce a comprehensive amount of findings, cases and recommendations, on a country-by-country basis.[184] The problems and the challenges highlighted by all these bodies and forums, however, do not commend sufficient actions and addressal from either the UN system or the international community at large.[185] Ensuring compliance to international law requires the engagement of new and more effective venues and tools. This is so because with the time we have experienced and understood the shortcomings and grey areas of these international forums and tools when it comes to the application and realization of international law within domestic legal systems of the states.

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[182] UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6.

[183] This position of the Committee has been deduced from para 6 and 7 of its Concluding Observations on the second Periodic Report of Mauritania of July 19, 2019, and the Concluding Observations on the Periodic Report of Bahrain, July 19, 2018.

[184] At the UN level, there exist a number of human rights monitoring tools and mechanisms. Ten of the international human rights treaties provide for the implementation-monitoring bodies. These tools are based either on the treaties or on the UN Charter. Within those based on Charter, comes the Human Rights Council, and the special procedures such as the Universal Periodic Review. The review of the human rights records of a member state of the United Nations is called the Universal Periodic Review. The main motive of Universal Periodic Review is to ensure the equal evaluation of the human rights situation by the Council.

[185] Alongside the negligible presence of the OHCHR, the share for human rights with the regular budget of the UN amounts only to 3 percent, allocated to monitor, and champion human rights internationally, whereas there is the need for the increased financial and budgetary resources.

Here we may take an example how the proper and meaningful application and realization of international law standards requires more effective forums and tools. In search for effective domestic implementation means and venues of international human rights standards, we should bear in mind that there is the institutional paradigm shift which is very much relevant to the present subject. After the collapse of the Soviet Union and especially after 9/11, the mandate of the United Nations within different areas has been overtaken by entities other than the United Nations. For instance, the European Union is largely covering the vacuum created by the ineffectiveness of the United Nations, to promote the human rights standards internationally. Similarly, the Financial Action Task Force (FATF) places financial sanctions against states and entities for curbing terrorism and maintaining peace. It is composed of seven main members of Britain, USA, France, Germany, Italy, Canada, Japan. The European Union as a single entity also participates within the meetings of the FATF. Notably, Pakistan is presently within the grey list of FATF's sanctions list, and it is required to implement 29 recommendations of FATF. Since the matter is that of financial interests for Pakistan, it is doing its best to meet the errands assigned by FATF, and so far, it has implemented 28 out of 29 recommendations as of June 2021.

The question may arise that why is there the need for FATF when the United Nations' Security Council exists and the three members of the FATF are the permanent members of the UN Security Council? Especially at the face of the fact that decisions adopted under the UN Charter have more legal value than the decisions adopted by the FATF on the same subject. The question can possibly be answered that it has now been realized that there is a vacuum within the UN system's policies and its realization, and that it is the time to abridge this gap through the participation of other institutions mandated with the eradication of international terrorism.[186]

5.1. Associating human rights compliance to International Monetary Organizations and trade agreements:

On the same lines discussed above, recently, linking human rights compliance to trade agreements and financial incentives is becoming an effective tool, a potential means to improve sates' compliance to international human rights standards by making it an essential element of policy making process. Associating human rights compliance to trade also provides a

[186] It also gives us the indication that, same as the League of Nations, the United Nations may also be going to be the story of the past.

substantive flatform for the participation of all the relevant stakeholders to negotiate various aspects of domestic implementation and realization of international human rights standards. At such platforms, contemporary challenges to human rights domestic implementation can be identified, and a mechanism can be envisaged for the addressal of those challenges faced by the beneficiary states.[187]

International human rights law provides for seeking and developing cooperation between the states intended for the effective domestic implementation and meaningful realization of the international human right standards. An example is article 28 (3) CRC, providing for international cooperation within matters relating to education. It obligates the state parties to seek, encourage and promote the international cooperation in the matters relating to education, especially with respect to combating and eliminating the ignorance and discrimination prevailing within the sector of education.[188] The said legal provisions maintain that experience and the resources of the developed states shall be utilized by the developing countries, keeping in view the needs and requirements of the developing and least developed states with respect to the meaningful realization of the international human rights standards.[189]

Firstly, ILO, CEDAW, and the Covenants (ICCPR and ICESCR) provides for associating and making conditional the domestic treatment of women within laws, policies and practices with the agreement between the states concerned and international monetary organizations for bringing those domestic laws, policies and practices in agreement with relevant international standards envisaged by those international regimes of rights. In this respect the international monetary organizations and financial institutions such as the World Bank, International

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[187] Jennifer Zerk, *Human Rights Impact Assessment of Trade Agreements*, Cheetham House, The Royal Institute of International Affairs, (2019) 3.

[188] Articles 28 and 29 are the relevant provisions of the CRC with respect to the right to education without discrimination.

[189] Article 28(3) of the CRC maintains that the state parties to the Convention shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods.

Monetary Fund and Asian Development Bank have integrated some aspects of the labour and employment standards adopted by the ILO into many of their agreements with states.[190]

Secondly, in employing the external means for ensuring the indiscriminate application and realization of international human rights legal standards, the International Labor Organization advocates for associating the state obligations of application and realization of the international standards to the free trade agreements as conditional requirements for the beneficiary states. This legal trend can effectively work within both the bilateral and multilateral treaties.[191]

The European Union for more than 20 years has been including human rights compliance clauses within trade agreements which makes the European Union most protuberant follower of human rights clause employer in trade agreements. Trade agreements concluded by the European Union in general language bind the contracting parties to respect human rights as articulated in the Universal Declaration of Human Rights, which forms “an essential element” of EU agreements.[192] The free trade agreements of the EU vary from case to case.

5.2. The Generalized Scheme of Preferences:

The European Union interacts with the non-EU or third states within the areas of trade through common commercial policy, assistance, development cooperation and by providing other economic incentives for developing countries through its mandate of external relations and actions. Within the WTO's framework, in order to address the human rights concerns through trade, the status of Generalized Scheme of Preferences is awarded to developing and least developed countries. Originally, the Generalized Scheme of Preferences was coined in 1968 on the occasion of the United *Nations Conference on Trade and Development* otherwise known as UNCTAD. In order to lend more favourably differential treatment to developing countries,

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[190] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, 14 July 2017, CEDAW/C/GC/35, Para 35.

[191] International Institute for Labour Studies, *Studies on growth with equity*: *Social dimensions of free-trade agreements* (Geneva: ILO Press, 2015). If we look at the records, 70 agreements that were concluded in 2016 contain provisions relating to labor rights, which grew from 58 such agreements of 2013.

[192] The earlier agreements of the EU were missing the operational tune and language that could provide for particular implementation measures aimed at the insurance of human rights, nor did it provide for enforcement mechanisms in cases of human rights violations. However, in contemporary EU trade agreements, execution provisions are incorporated in order to obligate, guide and enable the parties for taking all the measures required for the implementation of obligations conditional to free trade.

in 1979, GATT contracting parties adopted 'Enabling Clause.'[193] Enabling Clause empowers the present WTO signatory states to further preferential trade treatment under GSP to developing countries without furthering that preferential treatment to the other members of WTO on the basis of MFN principle.[194] According to WTO rules, there is an exception for GSP within MFN principle. For granting GSP preferential status a uniform and neutral criterion is followed for determining the eligible countries.

The EU applies and develops the Generalised System of Preferences within its own Generalised Scheme of Preference, offering: a Standard Generalized Scheme of Preference (Standard GSP) for low and lower-middle income countries, a Generalized Scheme of Preferences Plus (GSP-Plus), and a special arrangement for least developed countries called Everything But Arms (EBA).

Most effective of all these three is GSP-Plus, which is a preferential status granted to the developing countries to export to the EU with nominal or no tariffs. These agreements with the preferential status given to the developing states are intended for sustainable development and good governance. The conditionality of attaining and retaining such beneficiary status is the ratification of 27 core international labour and human rights treaty regimes. Therefore, respecting, ensuring and promoting the international labour and human rights standards by ratifying the core ILO labour rights conventions and international human rights law instruments and fulfilling the obligations stemming from such ratifications are the conditional obligations of beneficiary states for acquiring and retaining such beneficiary statuses with the possibility of restrictive measures in case of violation. The free trade agreements with respect to the conditionality of human rights practices are also prevalent with agreements and treaties between the United States and other countries.[195]

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[193] Decision of 28 November 1979, GATT Doc. L/4903; quoted in Meredith Kolsky Lewis *Human Rights Provisions in Free Trade Agreements: Do the Ends Justify the Means?*, 12 Loy. U. Chi. Int'l L. Rev. 1 (2014). Available at: http://lawecommons.luc.edu/lucilr/vol12/iss1/2

[194] Gerhard Erasmus, *Accommodating Developing Countries in the WTO: From Mega-Debates to Economic Partnership Agreements,* in *Redesigning the World Trade Organization Redesigning the World Trade Organization for the Twenty-first Century,* Debra Steger (Ed.) (Ottawa: Wilfrid Laurier University Press, 2010), 364-388.

[195] Such as the North American Free Trade Agreement (NAFTA) that was signed in 1992 and was supplemented in 1994 by the North American Agreement on Labor Cooperation (NAALC). This and other similar agreements are conditional and refer to observation of international human rights standards and particularly to rights at work.

If FATF can be an effective venue by imposing economic sanctions in order to abridge the existing vacuum within the UN's mandate to maintain peace and security, then EU through its free-trade and other economic incentives may also prove an effective tool for bridging the gap between human rights obligations of the state parties and their domestic legal systems. Specifically, as it will be explored in Chapter III, Common Commercial Policy has the potential to abridge the loophole of the UN human rights system to indiscriminately promote human rights standards within the domestic laws, policies and practices of Pakistan by providing financial and economic incentives through GSP plus tool. FATF or the GSP status can be considered smaller parts of the larger picture, that is the utilization of the EU's role for the promotion of international human rights standards. Freedom of expression, conscience, religion and thought, protecting the rights of children, minorities and immigrants can be the future parts from this broader picture.[196]

5.3. Human Rights Impact Assessment: a tool that can be used in case of EU Pakistan Trade engagements:

In order to determine positive and negative effects of trade on the protection and realization of international human rights standards and enjoyment of those rights by the rights holders, the practice of Human Rights Impact Assessment can be employed. With the use of this tool human rights conditionality to trade is aligned and adjusted according to the needs of a particular country's needs and circumstances. This tool/strategy is instrumental in lessening the vainness of trade incentives conditional to human rights compliance.

Human Rights Impact Assessments can be used in various situations in a variety of ways according to the needs of a particular case. It can be used for instance for predicting the effects of a specific trade measure on the enjoyment of a specific human right. Since this tool can be employed for anticipating a human rights challenge's arousal, this tool is also beneficial for international financial institutions as part of their due diligence obligation of identifying and addressing contemporary challenges to human rights.

The UN High Commissioner for Human Rights (OHCHR) called for the assessment of the human rights impact of the trade agreements. The High Commissioner for Human Rights in a

[196] Similar to the standards prescribed by Oppenheim for becoming a member of the comity of nations, in order to benefit from the economic and financial incentives through GSP, a state must have acquired a specified level of civilization. Here, for GSP benefits, the parameter is the ratification of core 27 international human rights treaty regimes.

number of instances called for the use of human impact rights assessment to measure the amount of influence the trade agreements can have on the promotion and protection of human rights.[197]

6. The Jewish example of progressive transition from polygamy to monogamy and the role of external elements:

From the perspective of relativist challenge to the Universalist concept of human rights as well as the role of external factors within the progressive reformation of the domestic laws, policies and practices, here within last part of the chapter we may analyze the Jewish transition from polygamy to monogamy.

Judaism and Islam are the two religions that allows for Polygamy. The analysis of Jewish progressive transition from polygamy to monogamy can therefore serve a good reforming example for prohibiting the practice of polygamy in Shariah influenced domestic legal system of Pakistan in order to mediate the relativist challenge to the Universalist concept of human rights.

As defined in the prohibition of polygamy from international human rights law perspective, Polygamy is the practice of having more than one intimate relationship at one time with the knowledge and consent of everyone involved and allowed by law.

Within early days of Judaism, polygamy was an important part and parcel of the Jewish community, where the word for the co-wife in Hebrew is "*Tzara*," which literally mean trouble.[198] In the Old Testament, there are numerous instances suggesting the permission of polygamy. For instance, the very first commandment of the bible reads as *pru u 'rvu* (be fruitful, and multiply).[199] However, in accordance with the changing needs and circumstances

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[197] Introduction to this tool is available at: https://globalnaps.org/issue/human-rights-impact-assessments/.

[198] Mark goldfeder, "The story of Jewish polygamy," *Columbia Journal of Gender and Law*, 26, no. 2 (2014): 234.

[199] Initially polygamy was considered as the religious obligation, where the Rabbis of the Mishna in Yevamot 6:6 holded that:

"No man may abstain from keeping the law "Be fruitful and multiply," (as cited in Mark goldfeder's "the story of Jewish polygamy). Polygamy was taken are religious obligation, where in order to fulfill the requirement of having certain children, the husband and wife must have a specific number of kids, by the virtue of the biblical obligation of "*be fruitful and multiply.*"

of the Jewish society, these legal principles and norms kept on improving, demonstrating that the Jewish legal system is not impermeable to progress. There are three stages of Jewish journey from polygamy to monogamy:

1. In the initial Jewish legal rules and practices, polygamy was absolutely allowed. The only restriction in this respect was the satisfaction to prove the ability to afford maintaining two or more wives. Financial affordability thus was required in this respect.[200]
2. In the second phase of Jewish journey from polygamy to monogamy, it was realized and considered that the advantages of monogamy overweigh the benefits of polygamy, therefore, for centuries polygamy was not practiced within the Jewish society. Though, commonly polygamy was no more practiced, however it was not prohibited or criminalized by Jewish law and it was kept legal on the statute books. Consequently, though the freedom of polygamy was available in the law for the Jewish men, however generally this right was not availed. This concept of polygamy being legally valid but socially frowned upon, which was a shift from 'could' to 'should' and a shift from legality to morality continued within Jewish societies throughout the Talmudic period. Initially, this attitude was followed after the Rabbis introduction of the requirement for the man that he must satisfy that he can maintain and ensure justice between two or more wives, coupled with the first stage's requirement of the financial ability to afford more than one wife. The insertion of the difficult legal requirement that the husband must ensure for each wife both adequate maintenance and equal non-discriminatory conjugal rights tended to make polygamy harder than it had been in the past, while keeping it legal on the books.[201]
3. The third phase of this journey is a calculus shift. The external/outside pressure of secular and Christian setup grew with respect to its emphasis on maintaining and ensuring

[200] The main reasons for polygamy within the Jewish society were the high value of having more children, the role of women in keeping the husband away from extra-marital intimate relations, the spiritual protection that a wife can give to her husband from straying sexually, the concept that during the pregnancy of one wife polygamy can ensure keeping the chastity of husband indicted and within Jewish society more wives were considered as the sign of economic prosperity.

Also, polygamous marriages provided certain benefits in return as well. According to the ancient Jewish society, the following were the benefits of polygamy; having more offspring, manpower to carry out different functions of daily life, such as more people to work on the fields and tend the flocks, polygamy provided protection to women against spinsterhood, or living under the supervision of father or brother.

[201] Moreover, it is interesting to note that exactly similar to that of Jewish legal system, within the Shariah legal system there are also stipulated the same two main requirements of man's affordability and ability of maintaining justice between two or more wives.

monogamy. These external factors were combined with few internal developments of the Jewish society and legal system, that forced the Jewish society for addressing the issue of gender equality and so as the polygamy within Jewish legal system. These developments led to the reformation of the Jewish family law. At this third stage it was realized that the advantages of outlawing polygamy within the books of laws overweighs the advantages of keeping polygamy on the books of laws. In this respect, specifically two decrees were adopted, called *"Bans of Rabbeinu Gershom."* Out of the two decrees of the Bans of Rabbeinu Gershom, one is directed at banning the unilateral divorce while the second at the ban of polygamy.[202] This was an attempt to legalize the Jewish family laws within the eyes of both the external and internal actors associated.

From the example of the journey of Jewish legal system from polygamy to monogamy, we can understand that religious or culturally based legal systems must provide for adaptive modalities in changing circumstances, where there must be enough leeway and flexibility to provide answers to any questions that may arise. Polygamy at a specific period of time was allowed within Jewish legal system and society because it was considered useful, but as time passed by, Jewish society departed from this man-centric marriage model. With the passage of time, the involvement of different factors aroused questions on the practice of polygamy. These external and internal factors demanded a more just and equitable family legal system, more in line with the European society and standards. This change was big but slow to come. However, once the tipping point was reached, polygamy never really made a comeback.

This example shows how religious morality can serve as a progressive force in reshaping legal and social institutions to improve conditions for women over time. Apart from marriage, this progressivism touched other subjects of Jewish family law, such as divorce, prohibition of marital rape, certain property rights, alimony (post-divorce maintenance) in the event of divorce. The Jewish example reveals that in the debate between law, religion, and culture, the religious doctrines can be employed progressively in order to balance and protect the equal

[202] The Bans of Rabbeinu Gershom consists of the following:

- The prohibition of polygamy;
- The prohibition of divorcing a woman against her will;
- The modification of the rules concerning those who became apostates under compulsion;
- The prohibition of reading another person's private mail.

rights of the different members of the society and especially that of women, keeping in view the particular needs of certain groups of people at particular times.[203]

For the Shariah legal system the second and third stage of transition from polygamy to monogamy similar to that of Jewish transition may come at once. In the Jewish legal journey, we saw that polygamy was initially abandoned as a practice because its disadvantages were perceived as overweighing its benefits, and it was declared illegal only later, at the face of pressure from external and internal elements. In the case of Shariah, the enforcement of a legal provision prohibiting polygamy might be necessary in order for the practice to be abandoned, but it is also necessary to educate the population so as to allow them to realize the pop and corns of this practice. The use of external means and tools might be beneficial in this respect in order to make the transition of the Shariah legal systems from polygamy to monogamy possible.

7. Conclusion to chapter I:

This first chapter of this work endeavoured to present a picture of prevailing international human rights legal standards on the subjects of the right to education, employment and the rights within the institution of marriage and how these rights are intertwined to each other, alongside highlighting the relationship of Pakistan to these relevant international laws.

With respect to the right to education, all the aspects of the right to education, such as the accessibility of education, rights within education, and rights through education shall be ensured by the state parties. Similarly, the domestic laws, policies, and practices on the right to work shall be brought by the state parties in line with international labour and human rights standards by adopting the mechanisms and procedures that have been provided by the

[203] With legally banning the polygamy within Jewish society, though the practice of polygamy was gone for good within Jewish communities living alongside Christian societies, such as in the thirteenth century's Christianity dominant Italy and France, however, this ban of polygamy was not effective to be observed by Jewish societies living within those countries where polygamy was permitted by the dominant religion of Islam. Within those communities the only legal requirement for polygamy were the factors of affordability and the husband's ability to maintain justice between wives. Here within Islamic and Christian world, subjective and objective disapproval of this practice was the main point of difference. In Hilchot Ishut, 14:3, Maimonides states:

> A man may marry several wives, even one hundred, either at the same time or one after the other, and his wife may not prevent him, provided he can supply each one with the food, clothing, and conjugal rights that are due to her. But he may not compel them to dwell in one courtyard, but rather each one [must be allowed to reside] by herself.

international human rights and the international labour laws in order to meet the international standards. The right to marriage, the minimum age for marriage, the freedom of spouse selection, prohibition of forced marriages, violence and polygamy, the matters of divorce and its economic faces shall also be brought in conformity with international human rights laws by the state parties. In this respect the state parties are burdened both with negative and with positive obligations.

These human rights obligations shall be implemented by the state parties within domestic laws, policies, and practices together with the crosscutting obligation of non-discrimination as provided by CEDAW and other bodies of international human rights laws. The state parties are required to employ all the means and methods provided within international human rights treaty regimes for indiscriminate implementation and effective realization of the international human rights standards substantively within domestic laws, policies, and practices. This requires condemning discrimination, providing an appropriate legal and policy framework to ensure non-discrimination, effectively implementing without delay human rights obligations in a non-discriminatory manner and monitoring compliance with these standards.

However, the universalist concept of international human rights standards faces cultural and religious relativist challenges. These challenges are triggered and perpetuated by two main factors, namely, the possibility of introducing reservations to the international human rights treaty regimes by the state parties at the event of ratification, and the lack of effective enforcement mechanisms.

In order to tackle this challenge, alongside the incorporation of the international human rights standards within the domestic legal system, there is the need for reformation through education of the social attitudes, behaviours and practices that are based on religious and cultural norms and values both at micro as well as macro level. Because apart from the legislative measures, it must be the social behaviours and institutions rather than relegated individuals or a group to change and accommodate accordingly. For this purpose, the state parties should take into account the progressive experiences of the similar legal setup prevailing state parties, as well as, there is the need to assess what short and long term role the trade, economic incentives and other financial considerations can play in the promotion, effective enforcement and meaningful realization of international human rights standards, and whether trade could actually be a means to mediate the relativist challenge to the universalist concept of human rights, as the adage "*trade brings the enemies together*" would suggest.

CHAPTER II

TREATMENT OF WOMEN WITHIN DOMESTIC LAWS POLICIES AND PRACTICES OF PAKISTAN

1. Introduction:

In Pakistan, women comprise 48.6 percent for the total population.[204] Pakistan is under an international obligation to take all the legislative and administrative measures for the purpose of indiscriminate realization the range of human rights prescribed in the first chapter of this work. Here in this chapter, we will investigate the historical development of municipal laws of Pakistan up until its present posture. The misconceived departure from Ijtihad to Taqleed, leading to the stagnation of overall Shariah legal system and present day's Pakistani legal system and the colonial legacies will be critically analysed.

The treatment and place of women within the contemporary municipal laws, policies, and practice of Pakistan at the face of the continuous disagreement between traditionalist and modernist stakeholders will be discussed subsequently. In this respect the Muslim Family Law Ordinance 1961 and the laws adopted within the Islamization of Pakistani Laws process of 1979 will be examined. The parallel institutions of Parliament versus the Islamic Ideology Council and the Superior Judiciary versus Federal Shariat Court will be the point of discussion, followed by the comparatively positive and encouraging rule played by the judiciary of Pakistan with respect to the protection of women rights.

We will focus on the aspects of Pakistani law which are more daunting from the perspective of international human rights standards and which need to be modified in order to bring them in compliance with international human rights standards. The analysis will start from the historical development and transition of the Pakistani legal system.[205]

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[204] World Bank 2016 World Development Indicators, accessed at: http://wdi.worldbank.org/table, [accessed 13 January 2019].

[205] Shaheen Sardar Ali, *Gender and human rights in Islam and international law: equal before Allah, unequal before man?* (Hague: Kluwer Law International, 2012), 140. The foundations of Pakistan's family law are the following: *Hedaya* of Burhanuddin Marghinani, *Fatawa Alamgiri, Shara'i' Al-Islam* of Nizamuddin Hali, and the *Al-Sirajiyah*. Moreover, Fatawa Alamgiri to Muslim law, as the Institutes of Justinian was to Roman law.

2. Historical development of the Pakistani legal system

The first relevant development of the legislative history of Pakistan can be linked with departure from Ijtihad to Taqleed leading to the stagnation of the Shariah legal system. Within Islamic legislative history, the Umayyads reign was the peak time for the juristic thoughts. It started with the death of the last Sahabah (Companion) of the Prophet Muhammad and continued throughout the Umayyad and subsequent Abbasid reign. Jurists devoted their lives to the promotion of the shariah legal system by recording the general rules of that system. Their recordings were derived from the Quran and Sunnah.

During this time various schools of thought flourished. Notable among these schools was the Sunni sect consisting of four schools, Hanafi, Sha'afi, Maliki, Hanbali. These schools developed systematic doctrines and these doctrines were different to each other because the founding fathers of these schools and doctrines used to interpret the sources of Islamic law in accordance with their customs, social, political, and economic background. It is important to keep in mind that the founders of these Islamic schools always presented their doctrines as plausible and non-binding. They insisted their doctrines should not be fanatically and blindly followed, but should rather be interpreted in accordance with varying circumstances.

However, unfortunately, these specific guidelines of the founding fathers did not attract much heed and in the time that followed. Imitation (Taqleed in Arabic) was preferred against interpretation by consensus (Ijtihad) which led to the rigidity and stagnation (Jamud) of shariah legal system. Juristic thought was discouraged by saying that the doors of Ijtihad are closed. The blind imitation was considered as obligatory and it was not even permitted to even switch between the different schools of thoughts.

History produced some the progressive jurists as well. Such as Jamal Uddin Al Afghani (1838-98) and his disciple from Egypt, Muhammad Abdu (1849-1906) (discussed above), who denounced the stagnation of the shariah legal system and asked for the reforms of this legal system both in terms of legal as well as social standards. Such progressive jurists challenged the so-called paramount or exclusive authority of the basic doctrines of taqleed. They stressed the right to independently interpret the original divine texts in accordance with the contemporary circumstances of the Muslims.[206]

[206] A new school of pluralistic eclectic jurists emerged which advocated choosing from various schools of thoughts in accordance with best matching needs of the contemporary Islamic society. One such example of this

During the colonial periods in India, two paradoxical developments took place. On one hand, the application of Islamic law narrowed down to private life and within other areas such as criminal, commercial and procedural law, the application of the Islamic law was replaced by the extensive legal codes that were based on English doctrines. On the other hand, even though the application of Islamic law was restricted to private life, and it was applied as state law.

We may keep in mind that during pre-colonial India, even though the state used to play an important role in the implementation of Islamic law, the rulers possessed no central and prominent role in the Islamic law-making process. Muslim jurists through their private efforts endeavoured to preserve and develop Islamic law, one example of such individual efforts was the compilation of Al-Fatawa al-Alamgiriya. The edicts issued by rulers or qadi possessed no normative legal value.

With the introduction of the modern nation state in India by Britain, the legal authority of the Muslim jurist in Muslim society was challenged and state monopoly over legislation was established. The colonial era in this perspective is considered as transformation of Shriah from Jurists' law into 'state law.'

In the beginning, the English judges were ignorant of the Islamic legal systems therefore, local clerics were appointed to assist the judges. In the second phase in order to eliminate reliance on the clerics, the codes of Islamic laws were translated to English. The English judges treated these translations as 'codes of Islamic laws.' They adjudicated legal disputes on the basis of these codes and promoted the legal principle of precedents. In India, Britain introduced the hierarchical judicial system that operated in the legal doctrine of precedent in the nineteenth century. The superior judiciary was not only adjudicating the legal disputes, but they were also creating legal principles on the basis of their decisions.[207]

The creation of a separate state for the Muslims of India gave, both directly and indirectly, the impression that Pakistan, from the very outset, was meant to be a theocratic state. The Islamic modernist, Muhammad Ali Jinnah, was the influential leader within the movement of getting independence from Britain and acquiring independent state for Muslims. On one hand Mr.

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trend/development was the compilation and enactment of the *Mejelle* of AH 1293, AD1876, which was the Civil Code of the Ottoman Empire. This *Mejelle* consisted of 1851 articles and according to the needs of Muslims of that time, doctrines were borrowed from all the schools of thoughts.

[207] Muhammad Zabair Abbasi and Shahbaz Ahmad Cheema, Family laws in Pakistan (Karachi: Oxford University Press, 2018).

Jinnah in itself was a modernist, whereas on the other hand he used the religious card in order to gain the determinative support from the majority traditionalist population, as such support was the essential prerequisite for the demand of a Muslims' separate state to meet with success. Such a double stance of Jannah led to confusion for the future governance of religion, culture and human rights within Pakistan.

The standing of Muhammad Ali Jinnah with respect to the protection of human rights of everyone indiscriminately can be seen in his speech of 1944 at Aligarh, in which he said, "*It is a sin against humanity that our women are shut up within the four walls of the houses as prisoners. There is no sanction anywhere for the deplorable conditions in which our women have to live. You should take your women along with you as comrades in every sphere of life.*"[208]

Even though the Pakistan movement was on the basis of a separate homeland for the Muslims of the Indian subcontinent, the renowned Islamic scholars opposed the creation of Pakistan. However, when Pakistan came into being despite the opposition of those radical scholars, those scholars settled in Pakistan and started to work for the Islamization of Pakistan. Maulana Abul Ala Maudidi was one such example. Strong opponent in the beginning, later migrated to Pakistan and established a radical right-wing political party named Jamat – e – Islami. While the fledgling state was in the process of institutional, administrative machinery building, these radical elements got strong footing in the social and political say. Since then, these radical fictions are black-mailing the governments by labelling them anti-Islamic in cases where the governments propose any reforms especially within the areas of family laws. However, as a matter of fact, despite the overwhelming struggle of the right-wing political parties, after the independence, the Islamization of laws for the first three decades remained on the backburner.[209]

In today's Pakistan there exist the traditionalists, modernists, and Islamic modernists. Modernists believe in the reformation of the existing religious nature of Islamic legal system

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[208] Aisha Anees Malik, "Gender and Nationalism" *Institute of Strategic Studies Islamabad*, 37, No. 2 (2017), 1-16. online: https://www.jstor.org/stable/10.2307/48537543: citing Khawar Mumtaz and Fareeda Shaheed, *Women of Pakistan: Two Steps Forward, One Step Back?* (London: Zed Books Ltd., 1987), 48.

[209] Moeen H. Cheema, "Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law," *The American Journal of Comparative Law*, Vol. 60, No. 4, (2012), 875-917. Stable URL: https://www.jstor.org/stable/41721691

prevailing in Pakistan. The Islamic modernists, however, criticize the traditionalist interpretations of the prevailing Islamic legal system as immutable, and they advocate the use of Ijtihad for the interpretation of Islamic rules for the issues arising in contemporary Pakistani society. Specially, there exist severe tension between traditionalists and modernists in Pakistan on the issue of personal statuses within the political and legal arena. For instance, Islamic modernists on the issue of prohibition of polygamy interprets the following verse, "*but if ye fear that ye shall not be able to deal justly, then only one*" (Qur'an 4:3) and "*Ye are never able to be fair and just as between women, even if it is your ardent desire.*" However, Islam in Pakistan at number of instances has been used as a proven bulwark against the proposed or intended reforms within the family and personal status laws.[210]

Politically, fragile coalitions of governments and the required accommodation, more of a kind of appeasement, of various ideological views, mentioned above, is the main tendency of the political structure of Pakistan. The regimes in power in Pakistan are required to maintain the precarious balance between these differing and wide ideological views in order to remain in power. These factors severely undermine the capacity of the political regimes to bring substantive legal reforms. In such a situation the legislation and policies adopted are merely the child of compromise instead of bringing any real and substantial reforms and changes.

Moreover, it is said in Pakistan that, Islamic law is "*a divinely ordained system preceding and not preceded by the Muslim state, controlling and not controlled by Muslim society.*" There exists a unidirectional relationship between law and the society in Pakistan. Islamic law is seen as having the potential of making a far-reaching social change. The important fact that law in itself is the product of the complicated social process which cannot be dominated or guided by religion or state is mostly neglected or cannot be understood in Pakistan.[211]

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[210] Keeping in view this appraisal and appeal of the general public for religion the Hudood Ordinances 1979 were adopted. The adoption and the application of Hudood Laws emanated disproportionate adverse effects on the rights of women in Pakistan. The main purpose of these laws was giving legitimacy to the illegitimate regime/dictatorship from the population proponents of Islamic hard-line legal system. Hudood and the Tazir Punishments were equally anti-women.

[211] Ibid, 72, quoting Coulson, *A history of Islamic Law*, 1-2. In the Shariah legal system, the law is divinely imposed from above for eternal purposes obligatory both on the states as well as the society. Whereas modernism demands that the laws must be adopted and shaped according to the needs of the society and state to answer to social problems.

In order to maintain the status quo of above-mentioned facts and that of Islamic principles, the constitution of Pakistan prescribes admissibility rules and requirements for the existing as well as future laws. This criterion has been settled out in the article 227 of the constitution that provides as following:

> *All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, this part was referred to, as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.*[212]

In furtherance to this provision of the Constitution, the Islamic Ideology Council was established in 1962 also known as the Advisory Council with the mandate of examining all the existing laws for its compatibility with Quran and Sunnah.[213] The Advisory Council provides for two interpretations of the above-mentioned article of the constitution. It provides that no law shall be repugnant to Quran and Sunnah and that the existing laws must conform to fiqh.[214]

The structure of the constitution is somehow confusing in terms of the standing and treatment of the Islamic legal standards. Within the constitution of 1973, gender equality has been guaranteed, however, the constitution in itself, as well as the family laws of Pakistan undermine this guarantee. As stated earlier, article 2-A of 1973's Pakistani constitution declares Islam as the state religion, and article 227 sets the Islamic laws and values on high positions, while the Constitution also provides for religious freedom, as well as there are several constitutional articles that prohibit discrimination on numerous grounds.[215]

Moreover, "The Objective Resolution" which was passed and adopted on March 12, 1949 forms an integral part of the 1973 Constitution. This resolution contains a number of principles based on Islamic law. It provides for divine sovereignty over the entire universe, delegated to humans by God as his chosen representatives elected by people. It provides for the

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[212] Article 227, Constitution of Islamic Republic of Pakistan 1973.

[213] Article 228, ibid.

[214] In the light of this interpretation of the advisory council, an explanation was provided to article 227 of the constitution which is as following:

> [*Explanation: - In the application of this clause to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect.*]

[215] Such as article 20 of the Constitution of Pakistan 1973, which at least theoretically provides for religious freedom.

implementation of principles of democracy, equality, freedom, tolerance, and social justice in accordance with the spirit of Shariah. It further provides that the Muslims of Pakistan shall be enabled to organize their individual as well as collective life "in accordance with eh teachings of Qur'an and the Sunnah".[216] In the light of these objective principles, Pakistan has adopted domestic legislation relating to evidence, family law, and criminal legislation that firmly adhere to the Shariah legal system.

3. Muslim Family Law Ordinance 1961 and Hudood Ordinances 1979:

3.1. Muslim Family Law Ordinance:

In the process of the legislation making since the inception of Pakistan relevant to the subject of equal rights of women, two important pieces of legislations were adopted, namely the Muslim Family Law Ordinance of 1961 otherwise known as (and hereinafter) MFLO and Hudood Ordinances of 1979.

With respect to the women's equal rights in Pakistan, MFLO is the focal point between the traditionalist and modernist forces' struggle. MFLO was based on the 1956 report of the Marriage and Family law commission. Several recommendations were made within this report by the commission for the protection of women rights. Such as increasing the marriage age, regularizing polygamy, adopting the requirement of registration of the marriages, contract, and the obligation for the husband to obtain the permission and consent of the first wife to enter into a second marriage contract.[217] It was the first legislative measure that challenged the status quo of women treatment, to a very nominal extent though, within the domestic laws, policies and practices prevailing in Pakistan.

It is important to note the fact that MFLO provides for the regulation of polygamy and it does not prohibit polygamy nor it give women equal right of divorce to men. Moreover, MFLO was not a genuine public demand, as it was recommended by Commission and not by the Parliament, the commission was composed mainly of the modernists and no representation was made for the traditionalist segment of Pakistani society, an important part of the society the participation of which was instrumental for any reforms to be acceptable to the public at large

[216] "The Objective Resolution." *Islamic Studies* 48, no. 1 (2009):89–118. http://www.jstor.org/stable/20839154.

[217] Muhammad Zabair Abbasi and Shahbaz Ahmad Cheema, *Family laws in Pakistan* (Karachi: Oxford University Press, 2018) 1-12.

and thus enforceable domestically.[218] The proposal was ultimately met by strong opposition from the majority forming traditionalist segment of the society. The reforming approach adopted by the modernists for the Shariah legal system to keep up with the contemporary needs of the society through the doctrine of Ijtihad was thus strongly opposed against the practice of taqleed.[219]

3.2.The Islamization process of Pakistani laws and Hudood Ordinances:

Subsequent to the adoption of the MFLO, the Islamization process of the Pakistani laws took place during the Zia regime (1977-1988). This era focused on the Islamization of entire legal system of Pakistan. Hudood Ordinances were adopted in 1979 which were counterintuitive of weak reforms introduced through MFLO.[220] The Council of Islamic Ideology was directed in 1978 to review MFLO. The Council of Islamic Ideology in its recommendation qualified MFLO as 'utterly un-Islamic.' According to the Council MFLO was against the holy Quran and Sunnah, the effort made in MFLO to alter the meaning of the Quran and Sunnah was equal to "*Irtidad"* (apostasy). The feeble protections of women rights through the adoption of MFLO, were therefore declared as un-Islamic during the 'Islamization of Pakistani Law's' reign by the Islamic Ideology Council. Hudood Ordinances was an attempt to bring the penal laws of Pakistan into conformity with the Shariah principles in line with the above-mentioned article 227 of the constitution.[221]

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[218] Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Oxford University Press, 1966). This is the assumption and speculation of Schacht. He, however, missed the important fact that though this law was initially passed through ordinance due to the absence of the parliament in session, however, this law was later indemnified by the Parliament.

[219] Muhammad Khalid Masud, "Modernizing Islamic Law in Pakistan: Reform or Reconstruction?" *Journal of South Asian and Middle Eastern Studies*, Vol. 42, No. 2 (2019), 73.

[220] Hudood Ordinances are composed of the following five ordinances: Prohibition of intoxicants; theft and robbery; Zina, adultery, rape and fornication; Qazf, false accusation and whipping. Later in 1996 the whipping ordinances was abolished, and the adultery, rape and fornication ordinances were amended by Women Protection Act of 2006. Hudood or Hudud literally mean the punishments that are ordained by God and the Prophet Muhammad.

[221] By the amendments of the sections of Pakistan Penal Code 1947 which was the continuation of the Indian Penal Code of 1860. Hudood Ordinances 1979 also replaced the Criminal Procedure Code with the traditional law of evidence.

The Council and the ministry of religious affairs both agreed to repeal the MFLO, however, some members of the Council (female members) proposed to amend the Ordinance rather than completely repealing it. Thus, the articles 12 and 13 were repealed which were relating to the compulsory minimum age for marriage. Under the child marriage restraint act 1929, the minimum age for the marriage was sixteen years. Through repealing section 12 of the MFLO, the minimum age of 16 years for marriage was restored. Section 13 provided that the second marriage of the husband without the permission of first wife will give the first wife the right of dissolution of marriage under the Dissolution of the Muslim Marriage Act 1939. Also, section 488 of the Criminal Procedure Act 1898 was repealed. This section provided for the maintenance of the wives and children in the cases of the dissolution of marriage.

Hudood Laws were adopted with the support of the traditionalists and right-wing political parties during the Islamization process of Pakistan's domestic laws. In this process Islamic criminal provisions were also incorporated into the corpus juris of Pakistan. The statutory provisions of these laws heavily discriminated against women and religious minorities. These laws made those women, who defy the conservative position of women within the society, vulnerable to prosecution. It provides for punishments for the acts of sexual offences, theft, robbery, and consumption of alcohol in accordance with the Shariah principles. The punishments are stoning to death otherwise known as *rajam*, whipping and the imputation of limbs. Out of all the Hudood ordinances Zina Ordinance is the most controversial, as it provides for the punishments of whipping and rajam (stoning) for the acts of extra marital sex.[222]

Most importantly, in 1985 Zia regime amended the Constitution of 1973 and the Objective Resolution was made a substantive part of the constitution by making it the preamble of the constitution and with the addition of article 2-A within the constitution Islam was made the state religion.[223] This development entrusted and mandated automatically the Shariat Courts to re-interpret the entire constitutional framework of Pakistan for its compatibility with its preamble and article 2–A.

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[222] This ordinance provides for two kinds of sexual crimes, that are zina - extra-marital consensual sexual intercourse, adultery or fornication, and zina bil jabr, otherwise known as rape. Zina ordinances are highly discriminative, it makes the zina cognizable and non-bailable. Thus, once a complaint is lodged, despite the truthfulness and authenticity of the complaint the police have the power to investigate and arrest the accused.

[223] The founders of Pakistan in 1949 represented constitutional principles by introducing Objective Resolution 1949. This resolution provides that Islam, democracy and social justice shall be the founding principle of the state of Pakistan.

The most effective tool of the Islamization of Pakistan laws process was adjudication alongside legislation. The Federal Shariat Court was assigned the task to analyse if any law or provision was against the injunctions of Islam, Quran, and Sunnah. The Federal Shariat Court scrutinized various provisions of the MFLO in the case of *Allah Rakha*.[224] The provisions that are relating to polygamy, and the provisions that regulates talaq survived judicial scrutiny.

Dictator Parveez Musharraf's regime, to achieve international support and legality for its military regime, introduced important pieces of legislations and provided procedural remedies with the main intention of minimising the legal controversies evolving around the Islamization processes of dictator Zia. In this respect, a statute was adopted in 2005, paving the way for the Protection of Women Act 2006. Protection of Women Act brought about significant changes to the prosecution of the crimes of adultery and rape cases.

The controversies and miscarriages of justices caused by the Islamization of the law were to some extent reformed by the de-Islamization of statutes. However, at this stage the substantial controversies and conflicts that exist between contemporary human rights standards and the present municipal laws were avoided to be brought up for addressal. Most of the Islamized laws remained on the statute books with little change in their substance that continue to remain a challenge both in theory as well as in practice.

3.3. Islamic Ideology Council v. Parliament – Federal Shariat Court v. Superior Judiciary:

The most important legacy of the Islamization process that exists till this day is the establishment of parallel state institutions. Zia's regime established the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court. These judicial forums were considered to be the guardians of the Islamic laws. Within these courts, Ulema (religious scholars) are appointed as judges with the far-reaching mandate of judicial review of the decisions of the superior judiciary and of the domestic laws for its compatibility with the injunctions of Islam. A jurisdictional conflict began when the powers of the Shariat Court and appellate benches were dramatically increased in 1990's for the purpose of the Islamization of the legal system, casting a stake on the judicial powers of the existing judicial system.[225]

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[224] *Allah Rakha v. The Federation of Pakistan*, PLD 2000 FSC 1.

[225] A thorough review of all the existing laws was conducted by the Federal Shariat Court in 1983 and 1984. During this process, the Court in an attempt to enhance its jurisdiction tried to interpret the term "injunctions of Islam" in the possibly most expensive fashion. The in order for the domestic laws to be in accordance with the

4. Islamic law of inheritance: the foundation of Pakistan's municipal law of inheritance:

The inheritance laws of Pakistan are in line with the Islamic law of inheritance. The main objective of Islamic law of inheritance was reforming the existing Arab customs and practices. The Islamic law introduced radical changes to the pre-Islamic customary law rather than completely abolishing it. Within pre-Islamic setup women were excluded from the inheritance. In case of no successor, a stepson or brother of the deceased used to take the possession of the deceased's widow, property, chattels, and other goods. As a first reforming measure, Islam strictly prohibited the practice of ceasing the deceased's widow, property, chattels, and other goods at his death in the following words of Quran… *O ye who believe! it is not lawful for you forcibly to inherit the women (of your deceased kinsmen)*.[226]

Provision for the share rights to those who were previously not entitled to shares in the property were introduced. The Quran in the following verse provides for the right to inheritance for the relatives;

> It is prescribed for you, when death approcheth one of you, if he leaves wealth, that he bequeath unto parents and near relatives in kindness. (This is) a duty for all of those who ward off (evil). And whoso changeth (the will) and the hath heard it the sin thereof is only upon those who changeth it.[227]

This Qur'anic verse provides for the share of parents within property of a deceased. As parents include both the mother and father, this was the first instance of departure from pre-Islamic customary law which denied the women and children rights to inheritance. The famous and important surah of the Quran which provides for the inheritance rights of the women is Surah An Nisa. In verse 7 of the said Surah, it is stated that,

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injunctions of Islam, it must not only be tested for any repugnancy against the Quran and Sunnah, but also it will be tested for its repugnancy with other broader principles of Shariah legal system.

[226] The Quran, Surah An Nisa: 4: 19. Hamid Khan, *The Islamic law of inheritance*, 2nd Ed. (Karachi: Oxford University Press, 2021).

[227] The Quran, Surah Al Baqarah:2:180:181. Ibid.

> *"unto the men (of a family) belongth a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave, whether it be little or much - a legal determinate share."*

The further details regarding the distribution of property are given within the same surah. This is the most important provision as the present Pakistani municipal law of inheritance is mainly based on this provision:

> 'Allah chargeth you concerning (the provision for) your children: to the male the equivalent of two females, and if there be more than two, then theirs is two-thirds of the inheritance and if there be one (only) then the half. And to his parents a sixth share of the inheritance to each if he has a son; and if he have no son and his parents are his heirs, then to his mother appertainth the third, and he have brethren, then to his mother appertainth the sixth, after any legacy he may have bequeathed, or debt (hath been paid). Your parents or your children: Ye know not of which of them is nearer unto you in usefulness. It is an injunction from Allah. Lo! Allah is knower; wise.[228]
>
> And unto you belongeth a half of that which your wives leave, if they have no child; but if they have a child then unto you the fourth of that what they leave, after any legacy they may have bequeathed, or debt (they may have contracted, hath been paid). And unto them belongeth the fourth of that which ye leave if ye have no child, but if ye have a child then the eighth of which ye leave, after any legacy ye may have bequeathed, or a debt (ye may have contracted, hath been paid). And if a man or a woman have a distant heir (having neither parent not child), and he (or she) have a brother or a sister (only on mother's side) then to each of them twain (the brother and the sister) the sixth, and if they be more than two, then they shall be sharers in the third, after any legacy that may have been bequeathed or debt (contracted) not injuring the (heirs by willing away more than a third of the heritage) hath been paid. A commandment from Allah. Allah is knower, indulgent'.[229]

Islamic law did not abrogate the existing Arab laws of inheritance, rather it made the necessary required amendments to those laws. Therefore, Islamic law of inheritance consists of legal rules laid down by Quran and Sunnah, and the customs and practices that were prevailing in Mecca

[228] The Quran, An-Nisa (The Women), Verse 11.

[229] Ibid, Verse 12.

and Medina at the time of the Prophet Muhammad with the exception of those aspects that were abrogated by Islamic law of inheritance. The Qur'anic principles with respect to the legal system of inheritance are therefore more as amending the existing principles than that of introducing a completely new set of principles.

4.1.The principle of representation

Islamic law does not recognise the principle of representation. For instance, if a Muslim had two sons and one of his sons dies before his child(ren), the child(ren) of the deceased cannot represent their father within the property/estate of their grandfather, and therefore, they are not entitled to the shares of their grandfather's property. The non-recognition of principle of representation is based on the principle whereby of the nearest in the degree of relationship excludes the more remote relatives. Therefore, the property of the deceased will devolve over the nearer hairs at his death.

The principle of representation has been made further complicated by the legal rule that if a person dies leaving a son who by birth or through apostacy denies the principles of Islam will be excluded by the other hair who follow and obey the cardinal principles of Islam. Those professing a religion different than Islam will have no entitlement to inheritance within the Islamic inheritance law.[230] For instance, if a person dies leaving behind a non-Muslim son and a Muslim grandson. The non-Muslim son will be evicted from inheritance and the Muslim grandson will take the inheritance with the exclusion of his father. Here, Islam as a faith will take precedence over the nearer in relationship rule, which is usually followed.

4.2.Inheritance law in Pakistan

The Muslim Family Law Ordinance 1961 and the West Pakistan Muslim Personal Law Shariat Application Act 1962 govern the legal system of inheritance in Pakistan which is based on Islamic law of inheritance. For the Sunni Muslims of Pakistan, there are 12 sharers in the property of a deceased person whereas in Shia law these sharers are 9. The share of females is the same for Shia and Sunni Muslims. Pakistani law of inheritance according to MFLO is based on the following principles of Islamic law of inheritance:

[230] Rahmatullah v. Maqsood Ahmad, AIR 1952 Allahabad 640.

- Shares within the property of deceased are distributed in accordance with principle of intestate succession;
- Amount of inheritance share depends on the relationship of legal heirs to the deceased person. Blood relatives are considered the closest. Within blood relations, the shares are distributed according to the number of children, sisters and brothers. As the number of such relative vary, amount of shares will vary as well from case to case;
- The daughter(s) of the deceased receives half of the inheritance to that of son(s);
- Son(s) of the deceased receives double of the share to that of daughter(s);
- Wife/wives inherit 1/8 of husband's property;
- In case the deceased has no child or a child of a son, then the share of deceased wife/wives will be ¼;
- If there is no son to the ancestor then the daughter gets ½ of the inheritance and in case there are more than one daughter with no son, then daughters collectively receive 2/3 of the share;
- The mother of the deceased receives 1/3 of share if there is no son to the deceased, otherwise 1/6.

Within the applicable inheritance laws of Pakistan, the principle of direct representation has attracted severe criticism for its incompatibility with international human rights law standards as it deprives the orphaned grandchildren whose father dies in the lifetime of the grandfather of their rights. Although in MFLO the principle of representation is not recognised, the Islamic principle of vested interest is recognized according to which the heirs' right of inheritance within the estate/property of their ancestor is absolute even before the property has been distributed. This is due to the vested nature of inheritance. If the heir dies before the distribution of the property and after the death of the ancestor, he will be entitled to share in the property.

In all these instances women in the form of wife or daughter are discriminated against. This gets worse in practice, a survey conducted by AGHS Legal Aid Cell in 2017 demonstrates that 80 percent of women in Pakistan are deprived of their inheritance.[231] The procrastination of the judicial process further adds fuel to this problem. Very minute amount of these cases where women are deprived of their shares are brought to courts for seeking justice. These cases meant

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[231] Survey is online accessible at: https://www.aghslaw.net/ngos-are-becoming-victim-of-self-censorship-2-2-3-2-2-2/.

for seeking justice lingered in the judicial process for decades. As an example, we may investigate the case of Noor Jan.[232]

In *Farhan Aslam and others V. Nuzba Shaheen and another* the dispute on inheritance between brothers and a sister, Noor Jaan, started in 1990-91 with the death of their father. Inheritance property was a house, four commercial shops and agricultural land. The son claimed that the entire property was gifted to him by his father during his lifetime, and that his father owned no property where his sister can have inheritance share.

The case was decided by the Supreme Court of Pakistan in the favour of Noor Jaan. The Court held that Noor Jaan was the equitable sharer within the property of her father. The irony of the case was that the Court decided the case in 2016 while Noor Jaan passed away in 2006. It took the Judicial System of Pakistan 25 years to deliver justice. In this case it can aptly be said that "*justice delayed is justice denied*."

5. The participation of Pakistan to the relevant international law treaties; particularly to CEDAW:

Out of all the international human rights treaty regimes, nine are considered as the core international human rights treaty regimes, as these regimes cover all kinds of human rights. These core human rights treaty regimes provide for the receipt of individual complaints.[233] Out of these nine treaty regimes, the individual complaint mechanisms of ICCPR and CEDAW holds the greatest number of ratifications as 116 and 114 respectively.[234] Out of these nine core human rights treaty regimes, four are particularly relevant to this study. Namely the ICCPR, ICESCR, CRC and CEDAW. Here in this section, we will analyze the relationship of Pakistan

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[232] Farhan Aslam and others *V.* Nuzba Shaheen and another, C.R No 391-M2019, Supreme Court of Pakistan.

[233] The following nine core international human rights treaty regimes provides for the receipt of individual complaints: Convention on the Rights of the Child, International Convention on the Elimination of all Forms of Racial Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Elimination of All Forms of Discrimination against Women, the complaints procedure of the Convention on the Rights of Persons with Disabilities, the International Convention on the protection of the Rights of All Migrant Workers and Members of Their Families, and the International Convention for the Protection of All Persons from Enforced Disappearance.

[234] Geir Ulfstein *Individual complaints* in *UN Human Rights Treaty Bodies: Law and Legitimacy,* Helen Keller and Geir Ulgstein (Eds.) (Cambridge: Cambridge University Press 2012) 73-115.

to the said international human rights treaty regimes with its crosscutting character of the application and realization of international human rights standards indiscriminately.

Pakistan is a state party to the ICCPR since June 2010. With respect to ICCPR, Pakistan maintains a general reservation which is as following:

> *"The Government of the Islamic Republic of Pakistan reserves its right to attach appropriate reservations, make declarations and state its understanding in respect of various provisions of the Covenant at the time of ratification."*[235]

Article 3 of ICCPR provides for the indiscriminate realization of international human rights standards relating to civil and political rights,[236] whereas article 25 provides for equal rights and opportunities without distinction, equal right to vote and equal access to the public services.[237]

Two Optional protocols have been adopted to the Covenant. The first optional protocol is related to the competence of the Covenant's Committee to receive and consider communications in the form of individual complaints against the violation of civil and political rights guaranteed within the Covenant.[238] The Second Optional Protocol deals with abolishment of death penalty.[239]

Pakistan has not ratified the first optional protocol which consequently will give Covenant's Committee the mandate to receive and consider individual complaints against Pakistan for the violation of obligations stemming from the provisions of the Covenant. It has ratified the

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[235] The application of these provisions is made conditional to its consistency with the Constitution of Pakistan and Sharia Laws. https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec. Accessed online on September 13, 2020.

[236] Article 3: *"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."*

[237] Article 25: "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
c) To have access, in general terms of equality, to public service in his country."

[238] The text of the First Optional Protocol to ICCPR and member states' list is accessible online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en.

[239] The text of the Second Optional Protocol to ICCPR and member states' list is accessible online at: https://www.ohchr.org/en/professionalinterest/pages/2ndopccpr.aspx

Second Optional Protocol prohibiting capital punishment. However, death penalty still exists within the statute books and awarded by the courts of Pakistan. In fact, Pakistan is among one of the countries awarding the most death sentences in the world. However, there has been a moratorium on the execution of death penalties since 2008, leading to a spontaneous number of prisoners lingering on death row for years.[240]

Pakistan is also a state party to the International Covenant on Economic, Social and Cultural Rights since April 2008 with one reservation:

> *"Pakistan, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, shall use all appropriate means to the maximum of its available resources."* [241]

Pakistan has not ratified the Optional protocol to the International Covenant on Economic Social and Cultural Rights which provides for the competence of the Committee to receive and consider communications concerning individuals' complaints against the violation of economic social and cultural rights as guaranteed within the provisions of the Covenant. Therefore, the Committee cannot receive individual complaints regarding Pakistan.[242]

Pakistan ratified the Convention on the Rights of Child on 12 November 1990 with a reservation, which was withdrawn on 23 July 1997, according to which: "*Provisions of the Convention shall be interpreted in the light of the principles of Islamic laws and values*."

Pakistan has also ratified the first two optional protocols to CRC. Optional Protocol to CRC on the involvement of children in armed conflict adopted on 25 May 2000 and entered into force on 12 February 2002. Pakistan ratified this Optional Protocol on November 17, 2016, with one

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[240] Human Rights Commission of Pakistan, *Slow March to the Gallows, death penalty in Pakistan*, Report of the Human Rights Commission of Pakistan, No 464/2 - January 2007.

[241] Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&clang=_en#EndDec Accessed online on September 13, 2020.

[242] The text of the Optional Protocol and member states' list is accessible online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&clang=_en.

declaration under article 3 (2).[243] The second Optional protocol to CRC relates to the sale of children, child prostitution and child pornography, ratified by Pakistan on July 5th, 2011.[244]

Three more conventions provide for the receipt of individual complaints, but their procedures have not yet entered into force. Such as Optional Protocol to CRC on communications procedure was adopted on 19 December 2011. This protocol provides for the Committee's competence of receipt of individual complaints; however, this protocol is yet to enter into force. With respect to individual complaints to CRC Committee as well, Pakistan has maintained the same pattern of not ratifying that part of the human rights treaties (protocols) which may establish the forum for individual complaints mechanism and give CRC Committee the mandate to receive Communications from individuals or group of individuals against the violation of rights guaranteed within CRC's provisions.

As part of her pledge, "*as the first woman ever elected to head an Islamic nation, I feel a special responsibility towards all women*" made by Benazir Bhutto at the fourth world conference on women,[245] the ratification of CEDAW took place during the Government of Benazir Bhutto in 1996 with prime intention of indiscriminately realizing the international human rights standards within the domestic law policies and practices of Pakistan. Benazir Bhutto was the first female prime minister of Pakistan, as well as the first female head of the government in the Muslim world. In a country where still the women are not allowed to leave the house, Benazir Bhutto campaigned for women empowerment.

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[243] Which is as following:

"The Islamic Republic of Pakistan, pursuant to article 3 (2) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, declares that:

i. The minimum age of recruitment of personnel into the armed forces of Pakistan is 16 years.
ii. The armed forces personnel are sent to combatant areas only after they attain eighteen years of age.
iii. The recruitment into the armed forces of Pakistan is purely voluntary and made through open competition on merit without any force or coercion.

The recruit is required to present B-Form issued by the National Database and Registration Authority as a token of proof of having attained minimum age prescribed under the law for recruitment."

[244] The text and list of state parties to second Optional protocol to CRC relates to the sale of children, child prostitution and child pornography can be accessed online at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&clang=_en.

[245] United Nations Fourth World Conference, Beijing, 1995

Pakistan submitted its combined initial, first, second and third periodic reports on August 3rd, 2005,[246] fourth on June 16, 2011[247] and fifth on October 09, 2018.[248] Back in 1984 when there were the discussions of accession to the CEDAW the initial reservation that was proposed and submitted to CEDAW Committee by Pakistan to be placed against the CEDAW provisions was as following:

> The Government of the Islamic Republic of Pakistan agrees to ratify the CEDAW to the extent that articles and sub-clauses are not repugnant to the teachings of the Holy Quran and the Government of Pakistan shall be the sole judge of the question whether such repugnancy exists.[249]

Subsequent to the heavy criticism and rejection of the text of the Pakistan's reservation by the existing state parties to CEDAW of that time, especially Austria, Norway and Sweden, the following modified text of reservation to CEDAW was proposed and submitted by Pakistan to CEDAW Committee:

"The accession by [the] Government of the Islamic Republic of Pakistan to the [said CEDAW] is subject to the provisions of the Constitution of the Islamic Republic of Pakistan."

According to Pakistan, this reservation facilitated the accession of Pakistan to the international human rights laws. With the main motive of not going against the object and purpose of these treaty, while assuaging and pacifying the concerns of those domestic stakeholders who were having misconceptions about human rights laws. Thus, according to Pakistan, the subjection of the international human rights law provisions to the constitution of Pakistan was a sensible action that was required.[250]

There exist a very complicated, yet interesting link between the conditionality of the human rights law provisions to be incorporated and observed within the domestic laws, policies and

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246 CEDAW/C/PAK/1-3.

247 Ibid, p. 4.

248 Ibid. p. 5.

249 Shaheen Sardar, *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* (Hague: Kluwer Law International, 2000) 269.

250 This was the statement of Pakistan provided within the *Combined initial, second, and third periodic report of Pakistan submitted on 3 August 2005, UN Doc. CEDAW/C/PAK/1-3.*

national practices of Pakistan from the perspective of reservation placed by Pakistan to those international laws and its interaction with above-mentioned article 2-A and the 227 of the constitution of Pakistan. Article 2 and 227 of Constitution of Pakistan respectively state that "*Islam will be the state religion*" and "*No law shall be passed which are repugnant to Quran and Sunnah*."[251]

The application of the human rights law provisions has been made conditional to its compatibility with the provisions and spirit of the Constitution by indirectly making the religion a reference point. The reservation is very broad and vague, and it has been used as a justification for the failure of Pakistan to bring the domestic laws policies and practices in conformity with international human rights laws in line with non-discrimination principle of CEDAW, especially at the face of Article 2 and 227 as mentioned earlier.

In this respect the reservations of Islamic states, such as Egypt and Morocco analyzed above are precisely and narrowly formulated. With respect to the modified reservations placed by Pakistan to CEDAW, the governments of Austria, Norway and Sweden have placed objections, which read as follows:

> The reservation placed by Pakistan creates doubts about the seriousness to its commitments that are contained within the international human rights laws and that of CEDAW. It undermines CEDAW in itself. This is obligatory on the part of Pakistan to

[251] *Constitution of the Islamic Republic of Pakistan* [Pakistan], 10 April 1973, available at: https://www.refworld.org/docid/47558c422.html [accessed 25 July 2019]. Article 2 and 227, read with objective resolution and section 4 of the Enforcement of the Shariat Act 1991 places the Islamic Laws at a higher level than other general laws of the country as well as international law, such as international human rights law obligations. The full text of the Constitution of Pakistan 1973's article 2, 227 and objective resolution is as following:

Article 2:

"Islam shall be the State religion of Pakistan."

Article 2 A. "*The principles and provisions set out in the Objectives Resolution…. are hereby made substantive part of the Constitution and shall have effect accordingly. The Objectives Resolution to form part of substantive provisions."*

While Objective Resolution 1949 reads as following:

4. "*The principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed."*

Article 227: (1) "*All existing laws shall be brought in conformity with the Inunctions of Islam as laid down in the Holy Qur'an and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions."*

honour the obligations that are binding upon Pakistan, especially not to undermine the object and purpose of the CEDAW.

The objecting state parties to the reservation of Pakistan maintains that according to the VCLT, the reservation to a treaty shall not be general in nature. In other words, the reservations placed by state parties to a treaty must be sufficiently specified and a precise reference shall be given to the provision of both the said treaty as well as to the national law(s) in question that will be affected as a consequence of such reservation. According to the objecting state parties the reservation of Pakistan is of general character that makes a general reference to national law.

The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, adopted on 6 October 1999, mandates CEDAW Committee to receive and consider communications in form of complaints against human rights violations guaranteed within CEDAW submitted by individual or a group of individuals.[252] Though Pakistan is a state party to CEDAW, it has not ratified the Optional Protocol to CEDAW to authorise the Committee to receive and consider communication from individual or groups of individuals against the violation of their rights guaranteed within CEDAW and legally binding on Pakistan.

The above analysis shows that Pakistan for face saving purposes always ratifies those parts of international human rights treaty regimes that do not require substantial efforts to honour the legal obligations stemming from treaty. When it comes to more robust and effective implementation means and methods, it always avoids its legal obligations either by placing general and vague reservations to the international human rights treaty regimes, or altogether abandoning the ratification of the protocols that could hold it responsible for the human rights violation before the Committees concerned through individual complaint communications.

6. The compatibility of Pakistan municipal laws with the mentioned standards on the protection of women rights

With coming into being of Pakistan in 1947, the Government of India Act 1935 was adopted as an interim Constitution which remained in force for 9 years until the adoption of 1956's Constitution.

[252] Article 2 of the Optional Protocol provides as follows: "Communications may be submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the rights set forth in the Convention by that State Party. Where a communication is submitted on behalf of individuals or groups of individuals, this shall be with their consent unless the author can justify acting on their behalf without such consent." The text and list of state parties can be accessed at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8-b&chapter=4&clang=_en.

The Government of India Act 1935 envisages a federal structure. The Act provided for separate legislative powers for federal and provincial governments by envisaging federal legislative list, the concurrent legislative list and provincial legislative list.

The first constitution of Pakistan was adopted in 1957. Article 1 of the Constitution of Pakistan 1956 provided for a federal, parliamentary form of government. The legislature was unicameral and the number of seats at the legislature were 300, divided equally between east and west Pakistan. Out of 300 total seats, 10 were reserved for women. Legislative subjects were divided between the federal government and state units by three legislative lists, the federal, concurrent, and units' legislative lists.[253]

The Constitution of 1956 was abrogated after only two years in 1958 by Ayub Khan and a new Constitution was adopted in 1962. The Constitution of 1962 was a mixture between the Government of India Act 1935 and the 1956's Constitution as it provided for unicameral legislature and the word "Federal" was removed from the name of Pakistan. The number of seats in legislature were 156 divided between two provinces, out of which 6 seats were reserved for women.

Subsequently, the Constitution of 1972 was adopted following the abrogation of the Constitution of 1962 by a military dictator in 1968. The new interim Constitution declared Pakistan as a federal republic.[254] It provides for a bicameral legislature composed by the national assembly and the senate. The system of governance was divided into three tiers: federal, provincial, and local. Two legislative lists were provided, federal legislative list and concurrent legislative list. The federal legislative list was divided into further two lists consisting of fifty-nine and eight subjects while the concurrent list consisted of forty-nine legislative subjects. The rest of legislative subjects were conferred upon provinces. In the cases of conflict between federal and the provincial government on a legislative subject in concurrent list, according to article 143 of the constitution, the federal law will prevail over provincial law.

The Constitution of 1973 was amended several times through democratic as well as autocratic processes. The most notable were the 8th amendment and 17th amendment which were made by the military dictators, and which distorted the whole of constitutional structure. With the end of military dictator General Parvez Musharraf rule in Pakistan in 2008, all the powers were vested in the central government due to Musharraf's ambition for absolute power and control over the entire state. All the powers of the state were concentrated in the executive branch while Parliament and the

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[253] Article 106 of the Constitution of Pakistan, 1956.

[254] Article 1 of the Constitution of Islamic Republic of Pakistan 1973.

Judiciary were undermined and made subdued. Legal Framework Order was passed in 2002,[255] and an amendment to the Constitution of Pakistan was made (known as Seventeenth Amendment) with main motive of legitimising his illegal actions, the abrogation of the constitution was one such manoeuvre, to control the state institutions, and emasculate the provincial assemblies. Most importantly, article 58 2 (b) was introduced to the Constitution of 1973 which empowered the president (the then president Musharraf) to dissolve the National Assembly at his discretion.

This regime was tangled with blunt violations of human rights and a political demise for the state of Pakistan. With the end of his regime an important question for the legislature was ascertaining the founding values and constitutional structure of Pakistan. A constitutional amendment was therefore necessary.

A Parliamentary Committee consisting of 27 members was envisaged with the mandate to revisit the entire Constitution and propose the rehab of the damage done. The main task of the Committee was proposing reforms which would strengthen the institutions, ensure the independence of Judiciary, minimise the discretion of an individual as was in the case of Musharraf, improve the transparency, strengthen the parliament and the provincial assemblies, and increase provincial autonomy. The 18th Amendment came into force after receiving presidential assent on April 19th, 2010.[256]

The 18th Amendment was a political move to decentralize the power from non-elected to elected forums and powers from federal state to provincial governments in three ways. First, by reinstating the parliamentary nature of the constitution and providing for parliamentary form of government; secondly, it redrew the relationship between Parliament and the Judiciary, by creating certain parliamentary oversights at judiciary; it devolved several powers to the Provincial Government by abolishing the Concurrent Legislative List as well as amending the Federal Legislative List.[257] Devolution of powers to provincial governments empowered various institutions to negotiate their roles, amend the provincial laws, envisage new institutional frameworks, and most importantly, to

[255] Online available at: https://www.hostnezt.com/cssfiles/pakistanaffairs/LFO%202002.pdf: also accessible at National Archives of Pakistan on https://archives.gov.pk/GoveronmentPublications.php.

[256] For this purpose, the Committee met 77 times and revisited the entire Constitution which is composed of 280 articles.

[257] Before the 18th amendment, there used to be three legislative lists in Pakistan. The Federal Legislative List, Provincial Legislative List, and Concurrent Legislative List. In the case of conflict between the Federal and Provincial Government on issue listed in the Concurrent Legislative List, the decision of the Federal Government used to prevail.

disagree with the newly assumed international responsibility of the Federal Government.[258] With the abolishment of concurrent list the following relevant subjects to present study came under provincial jurisdiction: criminal law, criminal procedure, civil procedure, evidence and oath, marriages and divorces, adoption, contracts, transfer of property, preventive detention, , Islamic education.[259]

The legislative setup which to some extent provides for the Elimination of Discrimination Against Women is weakened by the eighteenth constitutional amendment. The provincial autonomy and the devolution of powers disturbs the uniform and indiscriminate application and realization of international human rights standards. Further, with respect to the human rights standard's uniform application, there is lack of effective coordination and harmonization mechanism and machinery between the federation and the federating units, that could ensure the implementation of the women related human rights standards obligatory on the part of Pakistan in coherent and consistent manners to whole territory and its population.

Though several human rights implementation and monitoring institutions have been established domestically, however, these institutions severely lack the financial and human resources and coordination between these various bodies, with limited mandate, financial and human resources and ambiguous status turned them into ineffective institutions. For instance, at federal and provincial levels, there exist treaty implementation cells, however these treaty implementation cells lack competence, coordination, infrastructure, and human resources of treaty implementation cells.

Against the above-mentioned structural and constitutional landscape, the present domestic laws and practices of Pakistan presents several incompatibilities and challenges to the obligatory international human rights standards:

6.1. Marriages:

i. The Constitution of Pakistan provides for the respect of fundamental rights. Though the principles of equality and non-discrimination are enshrined in article 25 of the 1973's

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[258] Muhammad Ahsan Rana, *Decentralization Experience in Pakistan: The 18th Constitutional Amendment,* "Asian Journal of Management Cases" 17(1) (2020), 62.

[259] The other among the subjects are bankruptcy, arbitration, arms and firearms, explosives, opium, drugs and medicines, poisons and dangerous drugs, mental illness, environmental illness and pollution, population planning and social welfare, labour welfare, trade unions, shipping and navigation on inland waterways, newspaper, books and printing presses, evacuee property zakat, tourism and *auqaf.*

Constitution,[260] no definition of discrimination has been provided within the domestic laws of Pakistan. The legislative and judicial dimension and system of Pakistan being dualist, no direct reliance can be made on CEDAW Convention, nor any legal guideline as to the implementation of CEDAW are provided within the domestic laws in itself. In some cases, reliance has been made on the definition provided by CEDAW, however such reliance is neither binding nor uniformly applied in all the cases. It depends more on the discretion of the Court whether or not to make a resort to the definition provided by CEDAW.[261]

ii. As discussed above, though international law does not set a minimum age standard for marriage, however, the majority of the states set the legal age for marriage as 18 years. Since this standard is followed by most of the states, it has become an international standard. Marriage before 18 years of age is prohibited in the majority of the states. [262] In Pakistan the minimum legal age for marriage was uniformly increased to 18 years for both male and female in Pakistan through a bill passed in the Senate of Pakistan.[263] However, in Pakistan 21% of the girls are marrying before the age of 18 year and 3% of the total girls are marrying before the age of 15 years. These numbers amount to a huge chunk of the total population in Pakistan and arise serious questions on the effectiveness of the existing laws.[264]

iii. International human rights law, based on the principle of gender equality, prohibits polygamous marriages. At the same time, the right and freedom to profess and practice any

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[260] Article 25-A Equality of citizens.

(1) All citizens are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination on the basis of sex.

(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.

[261] This reference has been made by the judiciary in some cases. For example, the Saima Waheed case before the Supreme Court of Pakistan was decided by the Court in the light of the freedom of marriage with free and full consent standard of international human rights law.

[262] The Senate on April 15, 2019 passed the Child Marriage Restraint (Amendment) Bill, 2018 which proposes that the legal minimum age of marriage in the country be set at 18.

[263] The Senate on April 15, 2019, passed the Child Marriage Restraint (Amendment) Bill, 2018 which proposes that the legal minimum age of marriage in the country be set at 18.

[264] High Representative of the Union for Foreign Affairs and Security Policy, Joint Staff Working Document, The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') assessment of Pakistan covering the period 2018 – 2019, SWD(2020) 22 final, Brussels, 10.02.2020, 12.

religion is an important norm of the international human rights law specifically enshrined within the Universal Declaration of Human Rights and International Covenant on Civil and Political Rights. Legally polygamous marriages in Pakistan are regularized through MFLO, and such marriages are not completely prohibited. The polygamous marriages in most cases are even justified on the pretext of human rights principle of the right to profess and practice any religion freely.

iv. International human rights laws provide for freedom of spouse selection and freedom to marry a person of one's own free choice, there is no justification for force, coercion, violence or torture in this respect. The obligation of the state parties to prohibit and eliminate such practices extends both for the acts and omissions of the state as well as non-state actors through the due diligence obligation of the states.

In some parts of Pakistan such as the Sindh Province, minority girls are abducted, and they are forcefully converted to Islam against leaving their minority religion, mostly the Hinduism or Christianity. Upon conversion, they are further forced and threated to enter into marriage contract with Muslim male who abducts them in the first place. The number of such incidence amounts to more than 1000 per year.[265]

The perpetrators of the forced religious conversions and subsequent forced marriages often get away with their crimes without being prosecuted. On the other hand, it is very much

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[265] This practice is very much prevalent against women within the Sindh province of Pakistan. The case of Ravita Meghwar and Rinkle Kumari in thar district of Sindh. There are no verified numbers but according to the NGO, *South Asia Partnership Pakistan,* at least 1,000 girls, mostly Hindus, are forcibly converted to Islam in Pakistan every year. In 2019 there occurred many cases such as the recent case of 16-year old Hindu girl Anusha Kumari has been forced into marriage after her 'conversion' to Islam in January 2019. Also, on April 2nd, 2019 "Two girls-Reena, Raveena had filed petition before the High Court seeking protection. Chief Justice Athar Minallah: within the most recent report of the commission to the high court, it has been mentioned that there exist no municipal law that criminalize the forced conversion of the minority women into Islam and then forcefully making them entering into contract of marriage. The commission members are Sherian Mazari, Taqi Usmani, Mehdi Hasan, Khawar Mumtaz, and EA Rahman. The current Bill aimed at the prohibition of the child marriages that has been present within the Senate Pakistan now have been referred to the senate standing committee for further discussion. The role of the Islamic Ideology Council has also been discussed above, and it is very much probable that the Islamic Ideology council will strike down this bill, should it be present before the legislature. Other such incidents are the cases of Maira Shahbaz's forced conversion, Arzoo Masih and many more. https://nation.com.pk/25-Oct-2020/another-minor-girl-goes-missing-in-karachi.

unlikely for the victims to get the compensation and reparation, which is required to be ensured by the state.[266]

Such practices are in contravention to Section 498-B of Pakistan Penal Code which prohibits force marriages and makes it a punishable offence. It highlights the failure of the state to implement the municipal law. Moreover, states are responsible at the international arena for all the acts and omissions of all its organs and branches as well as for the acts and omissions of non-state actors by the virtue of article 2 CEDAW. The constant forceful religious conversions and forced marriage with the failure of Pakistan to put an end to such practices constitute the violation of its obligation of due diligence under international human rights law. Also, the obligation of the states to ensure religious freedom, and prohibit torture and other cruel, inhuman, or degrading treatment or punishment. Putting a girl in eminent fear of her death or the death of her family members in case she refuses religious conversion or where she refuses to enter into a contract of marriage will meet the threshold of torture.[267] Because, as discussed above, the term "*torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed…*"[268]

v. The relevant international rules obligate state parties to legislatively prohibit the sexual trafficking of women. Such as sexual trafficking, or recruitment from the developing countries to work in developed countries under servile conditions, or organized marriages from the women of developing countries with the males of developed countries. Due to the Pak – China economic corridor project (part of Chinese Silk Road Initiative), Chinese

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[266] The CEDAW treaty body recommend that state parties to maintain a database relating to the cases occurred, judicial proceedings the punishments and remedies granted, so as by Pakistan.

[267] As recently as April 2021, A Christian girl, Arzoo Raja, 13 years old, was kidnaped and converted to Islam forcefully. Arzoo was then forcibly married to 44-year-old man Ali Azhar in Sindh province of Pakistan. This is one instance out of thousands that takes place each year. It prompted the government to bring a bill in the legislature on the prohibition of forced religious conversion and force marriages of minority girls to Muslim male in Pakistan. Religious clerics severely protested the bill, putting the whole of Pakistan at lockdown for more than two weeks successfully forcing the state to withdraw the proposed legislative bill from the Senate of Pakistan.

[268] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, Art. 1 (1).

citizens are getting married to Pakistani nationals. Most of these marriages are fraud marriages where Pakistani national women are trafficked into China for various purposes. However, the domestic laws of Pakistan do not provide any redressal or remedy to the women that gets married to Chinese citizens and afterwards they are trafficked to China for sexual business. There is a gap within the domestic laws that can prohibit and criminalize such incidents.

vi. As discussed in chapter one, international human rights law prohibits marriage against payment of consideration in the shape of any financial or economic consideration. State parties to those relevant international human rights laws are bound to prohibit and eliminate practices of marriage through payment of consideration legislatively and executively.

The practice of marriages through payment is prevalent within many parts of Pakistan. Through prevailing practice of marriages with/through payment to the bride in Pakistan, the consideration is paid as a price of the bride to her family. On provincial level, laws have been adopted to prevent this practice, however the implementation of these laws is yet a challenge. Secondly on the Federal level there is no such law that could effectively prevent the prevalent practices of marriages through payments.

vii. The principles of equality and non-discrimination offers equal rights to women within matters relating to their marriage and divorce. In the prevailing laws and practices of Pakistan, women have been given the right to khula[269] through the involvement of judicial forums, by the payment of consideration to the husband. Whereas the husband's right to divorce is absolute with no requirement of assigning any reason for doing so, and neither the involvement of judicial forums is mandatory nor the payment of any consideration to the wife. The woman's right to Khula is similar in nature to fault-based divorce as she has to pay consideration to husband for release from the marital tie. Equality in this matter as per the CEDAW standards will require equal rights to both the husband and the wife.[270]

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[269] Khula is a form of divorce at the instance of a wife where in exchange of getting judicial divorce she relinquishes her dower or other considerations. This is the wife's right to put an end to the marriage contract, similar to husband's divorce right. It is equal to a single irrevocable divorce where the wife can remarry her ex-husband without going through an intervening marriage, otherwise known as halala.

[270] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation on article 16 of the Convention on the Elimination of All Forms of Discrimination against Women (Economic consequences of marriage, family relations and their dissolution)*, 30 October 2013, CEDAW/C/GC/29.

viii. Relevant international rules maintains that along with the social and religious construct, marriage shall be an economic construct as well. In Pakistan marriage is considered as a social and religious construct, but this agreement is not taken as an economic construct. Due to economic dependence, in cases of dissolution, the loss to the women is comparatively greater than that to the man. This is so because women have been systematically deprived of their rights thus making them heavily dependent on men. They have no social security and welfare rights, mostly they have low paid jobs and often the households headed by women in Pakistan are poor.

ix. International human rights standards obligate the states to make sure that in the case of divorce between husband and wife, the financial and economic burden must be shared equally between both the husband and the wife and neither of the parties shall be unequally subjected to financial burden against the other.

Related to the above, post-divorce maintenance of the divorced-women is a sever challenge that has been faced many women in Pakistan. As it will be discussed in the section analyzing case law, the women right to post divorce maintenance by husband extends only till her iddat period (which is four months and ten days). A woman economically dependent, with no social security protection, after the dissolution of marriage is vulnerable to go through many hardships. This is in violation of the obligation of the state parties to CEDAW to prevent and prohibit the discrimination against women within their old age.[271]

x. In Pakistan the other prevalent practices are marriages with Kuran (Quran), the Karo-Kari,[272] Honour Killing, and Stove Burning. Internationally Pakistan has the highest number of honour-killings documented cases per year. Out of 50 thousand cases of honour killing, 10 thousand of such cases are taking place in Pakistan which is one fifth of the total cases globally. In the case of honour killing the victim is killed by the member of the family

[271] As provided and protected within the article 21 and general recommendation no 27 of the CEDAW Treaty body.

[272] An intentional killing of those women who are thought to have brought dishonour to the family by getting involved in extra-marital relations. This practice is prevalent in the rural and tribal parts of Sindh province of Pakistan.

or that of a social group who believe that the victim has brought dishonour to the family. The killing of the victim is therefore considered as the restoration of the honour of family.[273] In order to criminalize Honor Killing, the Criminal Law Amendment Act of 2004,[274] and the Criminal Law Offences Bill of 2015 were adopted, however these legal provisions fail to bring an end to this prevalent practice due to two reasons. First, there is a loophole within this domestic law, that is the Islamic concepts of *Diyat* instead of *Qisas*. Through the practice of Diyat the perpetrator escapes the punishment of honour killing, as being pardoned by his own family members. The very recent case in this respect was that of famous Pakistani model, Qandeel Baloch who was murdered by her brother for bringing so called dishonour to the family. The murderer was then pardoned by his father in accordance with Qisas and Diyat laws of Pakistan.

Secondly, this is due to the illiteracy, strong cultural relativism, and reluctance of the responsible state organs to execute the relevant domestic laws that prohibit such practices. As we have seen from the example of state's attempt to legally prohibit forced religious conversions and the reaction of the majority traditionalist population, the responsible organs of the state, in cases of honour killings, are always reluctant to touch upon the sensitivities of the population based on religion or culture relativism.

In this respect, the Global Gender Gap Index 2021 Insight Report indicates that women and girls are exposed to serious human rights violation such as murder, violence, rape, forced marriage, forced conversions and discrimination in almost every aspect of their life.

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[273] Ammaz Khan and Rabia Manzoor, *Women's Access to Justice in Pakistan* in *Corridors of Knowledge for Peace and Development* Sustainable Development Policy Institute (2020). With respect to the realization of international human rights indiscriminately, currently, Pakistan ranks second-worst out of 149 countries in the World Economic Forum (WEF) Global Gender Gap report that measures gender equality. The above statistics relating to honour killings relates Punjab province of Pakistan, which is comparatively the most developed province and therefore it maintains the database of honour killings, demonstrating the gravity of this challenge: https://punjabpolice.gov.pk/honour-killings.

[274] The Criminal Law (Amendment) Act amends Sections 299, 302, 305, 308, 310, 311, 316, 324, 337, 338 of the Pakistan Penal Code (PPC) and Sections 345, 401 of the Code of Criminal Procedure (CrPC) to ensure more effective prosecution of cases of the so-called honour killings. The Act also inserts a new section (310A), which punishes giving of females in marriage as part of a compromise to settle a dispute between two families or clans with rigorous punishment may extend to 10 years but shall not be less than three years.

According to the report of Global Gender Gap Index in 2021, Pakistan is the fourth worst country for women rights following Afghanistan, Yemen and Iraq.[275]

6.2. Education:

The right to education has been guaranteed within two articles of the Constitution of Pakistan. According to article 24-A of the Constitution of Islamic Republic of Pakistan 1973, "*The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.* Article 37-B states that "*The State shall remove illiteracy and provide free and compulsory secondary education within the minimum possible period.*" [276]

As we have discussed, the right to education entails both positive and negative obligations for the state parties from the perspective of legally binding international human rights standards. In this respect there are three aspects of the right to education. First, one the accessibility to education; second, rights and freedoms within education; and third is rights through Education, in other words instrumentalization of education for the enjoyment of all other human rights.[277]

Pakistan is still crammed with access to education. Alongside making education accessible through providing infrastructural and human resources, the removal of the cultural and religious barrier to access to education is also an obligation of the states. These barriers still exist in Pakistan with respect to the right to education. The obligation of Pakistan to discourage and eliminate the religious, social and cultural prejudices and attitudes that constitutes a barrier to the right of access to education is far from realization.

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[275] World Economic Forum's *Global Gender Gap Index 2021,* Insight Report March 2021. *Generating Data on Women's Economic and Social Wellbeing in Punjab.* A Joint Survey conducted by the United Nations Population Fund with the Punjab Bureau of Statistics and United Kingdom's Department for International Development.

[276] *Constitution of the Islamic Republic of Pakistan* [Pakistan], 10 April 1973.

[277] The CEDAW Committee *General Recommendation No. 36* elaborates the right to education and the requirements of the right to education:

- Availability of sufficient educational facilities;
- accessibility of education in both law and practice;
- acceptable substance of education (cultural, societally and religiously) to be of good quality; and
- education must be flexible and adaptable to changing needs of society and students.

The case of ‘Lar–Sparye’ is illustrative. It is a village, three hours away from Khaar, which is the headquarter of District Bajur. Out of 1.4 million total population, the literacy rate within women of district Bajur is only 7 %. According to estimates, in Bajur, there are 160,000 girls out of school. 63,000 of which are those which do not get even primary education. 160,000 girls out of school is the story of one district only. What would be the number of girls out of the schools for the whole population which is above 220 million. Between 2008 and 2015 a total of 111 school buildings were destroyed, the majority of which were the non-functional schools for girls. These schools for girls were non-functional due to the lack of either teachers, students, or resources

Mostly the girls are taken out of schools and assigned routine domestic work responsibilities. The elders within those areas prevent the girls from going to schools, because of the fear of such people the girls are afraid to go to schools and so are their parents. Within district Bajur there are 18 villages, and every village population strength requires a middle and high school. Middle schools in Pakistan provide education up to eight grade, whereas high school provides education up to ten grade. From an infrastructural perspective, in most of the villages the schools are non-existent, and where the schools exist, there is no teaching staff. Where the teachers and resources are available, there are no students as the people are unwilling to send the girls to schools. Especially for girls, within the whole district, there is no high school, middle school, or college, but only primary schools.

This is the example of the state's failure to ensure access to education by providing necessary infrastructure and human resources on one hand, and to remove the cultural and religious stereotypes which is a hurdle in the way of education.

Moreover, within the right to education in Pakistan one generation of human rights are misused and pitted against the other generation of rights. The women are deprived on the pretext that the right to practice any religion is the freedom that has been given by the contemporary international human rights laws. However, as discussed in chapter one, from the perspective of religious freedom the state cannot be exonerated of its positive obligation to ensure the right to education indiscriminately. In Pakistan there is also an issue with the educational curricula. Specially the minority women and girls are forced to study Islamic studies is the violation of the rights within education.

Moreover, education shall be the vehicle to individual’s personal, social, economic and political empowerment leading to their positive contribution within the national life of the state.

The educational process of Pakistan is not meaningful enough to train the common masses for the practical challenges of life as per the obligations of international human rights law, specially CEDAW. To participate and contribute positively within the civil, political, economic, social and cultural life as well as for various positions and roles within the society they are part of.

6.3. Right to work without discrimination

i. According to UNICEF, in Pakistan children are subjected to violence in a number of ways, i.e. physical, sexual, as well as psychological. Also, women and children in Pakistan are facing exploitation in many forms including economic exploitation. Though, Pakistan has ratified the Convention on the Rights of Child more than 30 years ago, there exist no child protection case management and referral system coordinated publicly in accordance with the international human rights standards binding on Pakistan.[278]

ii. With respect to the International Covenant on economic social and cultural rights Global Gender Gap Index 2021 Insight Report maintains that challenges exist for Pakistan in the realization of economic and social rights as enshrined in ICESCR. Since the ability of the state to succeed largely depends on the economic condition of that state, the GDP of Pakistan shrinks to around 3% in 2020 which was 5.8% in 2018. This poses a serious challenge for Pakistan to meet its obligations within the Covenant.[279] Job creation is a challenge as well as half of the children are victims of stunting. [280]

iii. The above-mentioned Global Gender Gap Index 2021 insight report which covers the period of 2018-2019 for Pakistan, highlights that the labour protection system of Pakistan is very weak. Number of initiatives have been adopted on the provincial level on various aspects, such as minimum age of work and hazardous occupation.[281] However, at the federal level there exists no comprehensive legislation that could effectively prohibit domestic child work and ensure a minimum age of 18 years specially for the domestic workers industry as well as those working brick kilns. There exists no legal provision

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[278] The situation of children in Pakistan case be accessed at UNICEF website online at: https://www.unicef.org/pakistan/child-protection-0#_ftn1

[279] The projected annual economic growth of Pakistan as predicted by the World Bank was around 3% during the financial years of 2019 and 2020.

[280] UN tables of poverty and malnutrition: https://data.unicef.org/country/pak/.

[281] In Khyber Pakhtunkhwa there exists a provincial legislation relating to the prohibition of debt bondage labour. However, the enforcement of the provincial laws remains a challenge, this legislation was entirely based on the complaint, and there was only one complaint received in 2018.

guaranteeing equal pay for the equal value of work. There exists no national policy on home-based workers, or women working in informal sectors such as agriculture and domestic work.

iv. The practice of child labour in Pakistan is a culturally determined and socio-economically encouraged. The minimum age requirement for labour of the ILO Conventions, to which Pakistan is a state party, is violated. Minor/underage girls working especially at houses are consequently deprived of their right to education as provided for in the international human rights standards. In this respect the laws adopted relating to child labour and domestic workers are both insufficient as well as ineffective.[282]

v. Pakistan ratified the ILO Conventions related to child labour.[283] The minimum required age for work is 18 years.[284] Also international human rights law and international labour laws provides for the freedom aspect of the right to work. In Pakistan, there exist laws relating to child rights, such as the Bonded Labour System (Abolition) Act 1992. The latest law has been passed on August 06, 2020 which prohibits child domestic labour for the first time. However, according to the estimates of UNICEF, in Pakistan around 3.3 million children are engaged in domestic as well as agricultural labour work.[285] Moreover, there are no uniform and coordinated laws and mechanisms. For instance, the minimum age for hazardous work in Balochistan Province is 14 years, while the minimum age for the same is 18 years in Khyber Pakhtunkhwa, Sindh and Punjab. In Pakistan the children are working in carpet industries, brick kilns industry, agriculture, and automobile sector.

vi. The protection of the domestic workers within the domestic laws, policies and practices of Pakistan is a challenge from the perspective of international law. For the protection of the domestic workers, there exists no specific legislation that can protect and ensure the rights

[282] For instance, Pakistan is a state party to the ILO's Minimum Age Convention No. 138 of 1973 and its Minimum Age Recommendation No.146 of 1973, ILO Worst Forms of Child Labour Convention, 1999 (No. 182) and its Recommendation No. 190. The full list of the relevant ILO conventions and recommendation to which Pakistan is a state party are the following: https://www.ilo.org/ipec/facts/ILOconventionsonchildlabour/lang--en/index.htm, Last accessed on February 3rd, 2021.

[283] Minimum Age Convention, 1973 (No. 138); Worst Forms of Child Labour Convention, 1999 (No. 182).

[284] Alongside ILO Conventions, article 32 of Convention on the Rights of Child which sets the minimum age for employment as 18 years.

[285] The situation of children in Pakistan case be accessed at UNICEF website online at: https://www.unicef.org/pakistan/child-protection-0#_ftn1.

of the domestic workers, despite the fact that domestic workers are facing numerous challenges related to their work, as severe as threat to their lives. The violation of the rights of the domestic workers is an issue of everyday practice. The very recent case of violence against domestic workers is the death of Zohra Shah, who was 8-years old and was brutally beaten to death by the owners of the house where she was working. The other recent cases are the cases of 16 years old Uzma Bibi and 10 years old Tayyaba Quein.[286]

vii. Women are allocated with only 10 percent of total seats within the civil services employment. In addition, even the devolution of power from Federation to provinces has put these allocations into uncertainty. As well as the quota allocated to the minorities, that amounts to 5 percent of the total seats even further discriminate between the minority women from that of majority women.[287]

6.4. Compatibility situation with international huma rights standards from administrative and structural perspective:

The preceding lines will discuss the existing administrative and structural situations that pose a compatibility challenge to international human rights standards.

The Treaty Implementation Cells

The Treaty Implementation Cells (TICs) have mainly established at federal and provincial level for the purpose of monitoring the implementation of Human Rights obligations of Pakistan across the country. They are supervised by the Attorney General of Pakistan and provide for reporting and follow up. Apart from Punjab, TICs face capacity challenges at provincial and lack of coordination between provincial and central level. These challenges relate to the lack of financial, human, infrastructural resources as well as to lack of coordination.

Merger of federally administered tribal areas into Khyber Pakhtunkhwa Province

Previously Federally Administered Tribal Areas (FATA) were merged into Khyber Pakhtunkhwa through a reform process on June 1st, 2018, through 25th constitutional amendment. The jurisdictions of the Supreme Court of Pakistan and that of the High Court of Khyber Pakhtunkhwa were extended into these parts of Pakistan. Through 26th Constitutional

[286] These reported cases can be accessed here: https://borgenproject.org/child-labor-in-pakistan-3/ last accessed May 24, 2021.

[287] Which is in conflict with article 4, paragraph 1, of the Convention and general recommendation No. 25 (2004).

Amendment Bill 2019, a boosted representation was given to the inhabitants of former FATA within the National Parliament and Provincial Assembly. These developments are progressive; however, Khyber Pakhtunkhwa Action (in Aid of civil power) Ordinance 2019 was further adopted that extends military role within the merged areas by giving the military the power to detain without any reason and without producing the accused before the court of law. In 2019, this Ordinance was declared by the Peshawar High Court in violation to the fundamental rights guaranteed within the Constitution of Pakistan. However, the decision of the Peshawar High Court was suspended by the Supreme Court of Pakistan.

Access to justice and right to fair trial

As we have seen, making sure the access to justice for the protection and against the violation of human rights is the obligation of the state parties. However, access to justice for women, especially for minority women, is challenging. In Pakistan six inter-related aspects of access to justice are violated in Pakistan which are instrumental and essential to the realization of right to access the justice: justiciability, availability, accessibility, good quality, provisions of remedies for victims and accountability of justice system.

International human rights law prohibits the plural justice system which is existing and prevailing in Pakistan.[288] Non–Judicial conduits and methods, such as pardons, apologies, public memorials, guarantees of non-repetition, justice and the reconciliation commissions are employed as the substitutes of the investigations and the prosecutions of the perpetrators of the human rights violations which is in contravention to international human rights standards.

The existing plural justice system of Pakistan, alternate dispute resolution mechanisms, off court settlements add to the problems for women in accessing their right to justice. Such a situation that causes hindrances and obstacles to the women's right to access to justice is the violation of obligatory international human rights standards and specifically that of article 2 and 15 of CEDAW.

The penal laws of Pakistan (Pakistan penal code of 1860) provides for broad and vague definitions of the offences against the religion that severely undermine the freedom of

[288] The Jirga system in the Khyber Pakhtunkhwa and the Panchayat in the Punjab Province of Pakistan disseminate justice and decide the cases and disseminate the so called swift justice based on the religious, customary, indigenous and/or community laws and practices, thus a hindrance to the access to justice.

expression.[289] The case law is evident that these laws have been frequently misused against women falsely accusing them of blasphemy.[290] Further, no punishment has been provided for false accusations of blasphemy against women, which results with number of false accusations against women that put innocent lives at risk of being prosecuted or at least it take them years to prove their innocence due to the procrastination of the cases within overburdened judicial system of Pakistan. There is neither any remedy for the victim of false accusation within the cases of the blasphemy, nor any punishment for the act of false accusations.

7. Role of Judiciary in the interpretation of Pakistani law with approach of protecting human rights indiscriminately:

After the independence, the judicial system of Pakistan was faced with a challenge, where it was required to establish its legitimacy in a predominant Muslim society where the whole judicial system was considered as colonial legacy. The judicial system was required to ensure its effective functioning as a state institution, and to deliver what is expected of a state organ. The approach of the Courts while coping with this challenge was more of balancing between the modern and classical legal rules and principles. The modern were some principles and provisions of the contemporary state law, whereas the classical was the uncodified shariah legal system to which the general public possess great affection.

As analyzed above, CEDAW in article's 2 subparagraph (c), maintains that states parties must ensure that judiciary is bound to apply the principle of equality as embodied in the applicable international human rights law and to interpret the law to the maximum extent possible, in line with the obligations of states parties under international law. However, where it is not possible to do so, courts should signpost any inconsistency between national law and practices (including national religious and customary laws) and the state party's obligations under the international law to the attention of the appropriate authorities to be improved accordingly,

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[289] The penal laws of Pakistan (Pakistan penal code of 1860) provide for broad and vague definitions of the offences against the religion that severely undermine the freedom of expression. The case law is evident that these kinds of accusations are used against women in line with sections 295, 295-A, 295-B, 295-C, 298-A, 298-B, 298-C of Pakistan Penal Code of 1860.

[290] *Aisa Bib v. The State etc*. Appeal to the Supreme Court (In the Supreme Court of Pakistan (Appellate Jurisdiction)) Against the judgment dated 16.10.2014 of the Lahore High Court, Lahore passed in Crl.A.No.2509/2010 and M.R.No.614/2010. The very recent case of Asia Bibi, decided by the Pakistan supreme court in the favour of Asia Bibi

since domestic laws may never be used as justification for failure of states parties to fulfill their international obligations. The judiciary's role in this regard is encouraging, however, it is a failure on the part of the legislature and executive to come up with required legislation and implement it without discrimination.

After highlighting the challenges to the effective implementation and realization of international human rights standards within the domestic laws and policies of Pakistan, it is important to analyse the role of judiciary in interpreting the domestic laws in the best possible way to promote human rights of women. Legal disputes relating to family matters amount to the highest in number out of the total legal disputes brought before the courts in Pakistan. According to a survey conducted by "*European Union Punjab Access to Justice Project,*" family disputes amount to 30 % out of all the cases brought before the courts in Punjab province of Pakistan.[291] Therefore, the case laws analysed will be mostly that from family laws as the case law on this matter in Pakistan is rich and extensive and gives us comprehensive representation about the attitude of the Pakistani judiciary with respect to women rights. Case law relating to the right to education and employment will not be analyzed extensively as this will make the present chapter burdensome.

7.1.Undermining the nominal protection of women rights by MFLO:

Section 4 of MFLO made an attempt to eradicate the deficiency of an orphan's grandchildren to be sharer in the inheritance of his grandfather in case where his/her mother/father predeceased during the lifetime of his grandfather.[292] This legal provision drew enormous criticism from the traditionalist segment of Pakistan and resulted in a petition before the Shariah Bench of Peshawar High Court challenging Section 4 of MFLO for its repugnancy to the rules as laid down by Shariah Law of Inheritance discussed above. The ostensible

[291] European Union's Punjab Access to Justice Project (March 2015), *Public Knowledge, attitudes and perceptions of Justice: Report of a Household Survey in southern Punjab district*.

[292] Lucy Carroll, "Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan" *Islamic Law and Society,* 5 (1998) 410.

protections offered by MFLO were further undermined when Peshawar High Court in *Farishta case* declared the section 4 of MFLO as un-Islamic and repugnant to the injunction of Islam.[293]

- *Women freedoms within marriage:*

Marriage in Muslim law is a contract entered into with free consent by both the man and women. According to the Quran, marriage is a sacrosanct, '*mithaw ghaliz.'* This implies that marriage according to the Quran is not only a civil contract but also it has religious aspects as well. It is a sunnah and an important part of the completion of the Muslims' faith. Marriage is therefore considered as the combination of *ibadat* (worship) and *muamalat* (worldly affairs), a sacrosanct as well as civil contract.

In the *Shahida Parveen v. Samiullah* case the wife left the husband's house because she disliked her husband.[294] She filed a petition for the dissolution of marriage through her right to khula and the Court passed a decree in favour of the wife. Ironically, the husband in this case filed a suit for damages. The damages were relating to the expenses that were made by the husband for the marriage and for the defamation caused to the husband. The damages sought in this respect by husband were PKR. 2,400,000 (equivalent of 12,000 euros), a huge amount for the common inhabitant of Pakistan. The trial court awarded him PKR. 1,000,000 (equivalent to 5,000 euros). Both the parties approached Lahore High Court.

The High Court found the damages of PKR. 1,000,000 were punitive in nature, therefore, the Court reduced the damages amount to PKR. 100,000 (equivalent to 500 euros). The Court held that though that marriage in Islam is a civil contract, however this civil contract must not be equated with normal civil contracts because of which either of the party to the contract of marriage may unjustly suffer.[295] According to our understanding, demanding the wife for the payment of expenses incurred for the marriage arrangements is unjust even if the wife is seeking no-fault based divorce.

In *Muhammad Masood Abbasi, V. Mamona Abbasi* case, the question for the court to be answered was, whether the husband's right to divorce can be restricted within the contract of

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[293] *Farishta V. Federation of Pakistan*, 1980, PLD- 47 PLD 1980 Peshawar High Court (Shariat Bench); as cited within Muhammad Zabair Abbasi and Shahbaz Ahmad Cheema, Family laws in Pakistan (Karachi: Oxford University Press, 2018).

[294] *Shahida Parveen v. Sami Ullah Malik*, 2006, PLD Lah. 401.

[295] Shahida Parveen V. Samiullah PLJ 2006 Lah 1215.

marriage. The husband expelled the wife from his house and then later divorced her without any justification. On the basis of nikahnama stipulation which restricted husband's right to divorce or in case if husband contracted a second marriage the husband was legally bound to pay the amount of PKR 100,000 (equivalent of 5,000 euros), the wife prayed for the execution of the contract stipulations.

The Trial Court dismissed the wife's suit. The Appellate Court set aside the decision of the Trial Court and decided the case in the favour of the wife. The husband approached High Court against the decision of the appellate court, claiming that restricting the husband's right to divorce was against the injunctions of Islam as well as against the public policy and morals.

The High Court however also dismissed the petition *in limine,* and it declared the restriction on the husband's right to divorce as valid. The court held that if there are any stipulation within the contract of marriage that are intended for the protection of the contract of marriage and for the protection of the wife against despotic dissolution of marriage without any justification, such stipulation is not against the injunctions of Islam. According to the Court, if Islam on the one hand provides for the dissolution of marriage by husband without assigning any reason or justification, the same Islam stresses on the preservation and protection of marriage.[296]

Though within the Nikah the husband's freedom to second marriage can be restricted, this is not a legal rule binding on the husband. Only binding legal provisions that prohibits polygamy can be effective for the purpose of restricting and ultimately eliminating the discriminatory practice of polygamy will serve the purpose. Here in this case not every Nikahnam (marriage certificate) will contain such stipulations/restrictions as the common women of Pakistan are not aware of her rights. Even if every Nikahnama will contain such provisions, this will be the discretion of the Court to give the decision in the favour of the husband or wife.

In *Muhammad Zaman v Mst Irshad Begum* case, an agreement was concluded between husband and wife to the effect that if the husband concluded a second marriage, the present wife will be entitled to maintenance either at separate house or at her parental house as she may wish. The husband pleaded to the trial court for the restitution of the conjugal rights upon the wife leaving

[296] Muhammad Masood Abbasi, V. Mamona Abbasi 2004 YRL 482 (Lah).

the husband's house as he contracted a second marriage. The wife maintained that the husband did not pay her the prompt dower, he failed to maintain her as well as he had mistreated her.[297]

The central debate of the case was the contract of maintenance concluded between the two. The Court in this case concluded that within the marriage contract, the husband unconditionally bound himself for not contracting a second marriage and if such is the case then the wife was entitled to live separately from husband according to her wish. The plaintiff's suit for the restitution of the conjugal rights was therefore dismissed. The district court held the same decision of the trial court. Aggrieved against these decisions the plaintiff reached the High Court, taking the stance that the stipulations of the agreement were against the public policy. The High Court however also upheld the decisions of the subordinate courts.

Free consent to a marriage is one of the most essential elements for the validity of the marriage. In Pakistan however, especially in the rural areas, it is the elders of the family and the guardians who have the final say for the marriage which more often disregard the willingness and consent of the parties to the contract of marriage. The superior judiciary on the other hand stressed on the principle of mandatory free consent of the parties to the marriage.

In the case of *Issa Khan v. Mst Razman*,[298] the Supreme Court of Pakistan held that the free consent of the parties to the contract of marriage is an essential requirement. If free consent to a marriage contract is missing, the contract of engagement will be invalid. The court in this case dismissed the contention that the consent of the guardian is sufficient for the marriage contract to be valid. Rather the court held that the absence of the consent of the wali (guardian) will not invalidate the contract of marriage. The agreement of engagement concluded by the Wali without the consent of the husband will not be binding on the parties. Therefore, in this case the Supreme Court dismissed the suit of the petitioner for the restitution of the conjugal rights.

In *Muhammad Aslam v. the State* case the consent for marriage was acquired through coercion and causing fear.[299] In this case, Ayesha Bibi, mother of the victim Parveen Akhtar, lodged a complaint. Parveen Akhtar was under the Nikah (marriage contract) of Muhammad Zaheer. According to the complainant, her daughter was abducted by Muhammad Tanvir, Muhammad

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[297] Muhammad Zaman v Mst Irshad Begum PLD 1967 Lah 1104.

[298] Issa Khan v. Mst Ramza 1991 SCMR 2454.

[299] Muhammad Aslam v. the State 2012 PCrLJ 11 (FSC).

Aslam and others. The Court summoned Parveen Akhtar to confirm whether she was forcefully abducted or she went with the alleged abductor with her free consent. The abductee stated in court that she was forcefully abducted and subjected to rape several times by Tanvir Ahmad. The accused claimed that he is in valid contract of marriage with Parveen Bibi. However, the victim contended that she was forced to sign on a blank paper which was later claimed by the accused as Nikahnama, the marriage deed.

The court convicted the accused under sections 10(3) and 11 of the offences of Zina (Enforcement of Hudood) Ordinance 1979. Secondly, at the time of abduction and alleged Nikah, the age of the victim was below 16 years. This was against the legal provisions of the Child Marriage Restraint Act 1929. Keeping in view the fact that the age of the accused was 44 years whereas the age of the abductee was below 16 years, there seemingly can be no probability that the abductee had consented to marriage with her own free will. Therefore, the court reached the conclusion that it was *Zina bil Jabr*, rape or forced sex. The court held that for giving free will, it is in the first place necessary to have the capacity to give free will and the capability to use such capacity.

The *Hafiz Abdul Waheed V. Asma Jahangir*, famously known as *Saima Waheed case* was concerning a common question of law that whether the consent of the wali is an essential element for the validity of the marriage of an adult female Muslim?[300] In this case the appellant, Saima Waheed, with her own free will, contracted a marriage without her father's consent. She left her father's house and started to live in a women's protection centre. The father of Saima Waheed was forcing her to enter into a marriage contract with a much older man. She contracted marriage with a person of her own liking. Lahore High Court held that marriage without the consent of Wali is valid.

Aggrieved against the decision of the Lahore High Court, the father of Saima Waheed approached the Supreme Court of Pakistan. The Supreme Court, while deciding the case, took into consideration the standing of the Federal Shariat Court regarding this legal subject. The standing of the Federal Shariat Court was that a *sui juris* girl can contract a marriage with her own free will without the consent of her parents. The Court observed that relying on the *Mauj Ali v. Safdar Hussain Shah* case it had previously decided, the Lahore High Court was bound to follow its decision. Therefore, the Supreme Court upheld the decision of the Lahore High

[300] *Hafiz Abdul Waheed V. Asma Jahangir*, PLD 2004.

Court and the appeal of the father regarding the custody of the girl to her father was therefore refused by the Supreme Court.

The Courts in Pakistan also dealt with the validity of a marriage that is contracted during iddat period;[301] a tool used against divorced or widowed women who contract marriage with their own free will. In the Allah *Dad v. Mukhtar* case, the petitioner Allah Dad, filed a complaint against the respondents, Mukhtar and Rashida Akhtar, under section 10 and 16 of the offences of zina (Enforcement of Hudood) Ordinance 1979.[302] The complainant alleged that Rashida Akhtar was his lawfully wedded wife. On the persuasion of Mr. Mukhtar, Rashida Akhtar fled from her house. According to the petitioner, the respondents therefore had committed the offences of Zina/adultery. The trial and the appellate courts dismissed the petition and acquitted the respondents based on the fact that they contracted marriage after the wife was divorced by her former husband, the complainant Allah Dad.

The complainant in its appeal to Supreme Court argued that since he failed to give notice of talaq to the chairman of the union council, which is an important condition for the validity of divorce under section 7 of MFLO, therefore even if the complainant proved that she was divorced by the complainant, such divorce in itself cannot be considered as complete and legally effective. According to the counsel of the complainant, the subsequent marriage contract between the respondents was therefore invalid.

Justice Taqi Usmani, a renowned Islamic jurist, observed that zina/adultery has not been defined within the Ordinance. Therefore, the term zina has to be defined in accordance with the injunctions of Quran and sunnah. In case of the controversy between the injunctions of Islam and the state law, then it is the shariah law or the injunctions of Islam which will prevail over the state law (Hudood Ordinance and MFLO in the present case). Therefore, if a marriage contracted subsequent to divorce from the first marriage, the subsequent marriage is valid under the shariah legal system, and thus within the Pakistani legal system.

Interestingly, the counsel of the petitioner further argued that even if the contracted marriage is valid from other aspects, it is not valid from the perspective of the fact that it was contracted

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[301] In case of divorce between husband and wife, or in case of the death of the husband, the wife must observe the Islamic obligation not to marry another person for a specified time. In case of husband's death, the wife must observe iddat for four lunar months and ten days. In cases where the wife is pregnant, she must observe iddat until she give birth.

[302] *Allah Dad V. Mukhtar* 1992 SCMR 1273, Shariat appellate bench.

earlier than the minimum duration four lunar months and ten days which is a condition for the validity of second valid marriage under the shariah legal system. The purpose of observing the iddat period is to ascertain if the woman is pregnant or not so that the issue of parentage may not arise at a later stage.

Justice Taqi Usmani observed that the iddat period laid down in the Quran consists of three menstrual periods, which could possibly occur within a minimum of 39 days, and the maximum duration of three menstrual periods can be 90 days or four months and ten days. In the present case, since the marriage of the respondents was contracted after 79 days of the divorce, therefore, the marriage was legally valid in the light of Quran and Sunnah. The petition was therefore dismissed by the Supreme Court.

In *Ameer Bakhsh vs. Additional Sessions Judge, etc.* case, as recently as January 8th, 2022, the husband aggrieved against the dismissal of his case before the Session Court, approached the Lahore High Court complained that his former wife, Amna contracted a second marriage after getting judicial khula without observing the iddat period. According to the complainant, since the iddat period was not observed, the dependent was legally not allowed to enter into a second marriage. According to the complainant, the subsequent marriage of Amna is void and she has committed the offence of *Zina* (extramarital sex). The Lahore High Court held in this case that if a woman contracts a subsequent marriage without observing iddat after getting khula will not amount to *Zina* and the subsequent marriage is not void, rather irregular.[303]

The issue of the validity of the husband's second marriage in contravention of MFLO was addressed in *Muhammad Aslam v. Ghulam Muhammad Tasleem*, filed under section 491 of the Code of Criminal Procedure 1898 by a family friend for the recovery of the girl who was detained by her father in house as she was unwilling to marry the person of her father's liking.[304] That person with whom the father was forcing her daughter to marry, happened to be much older than the girl. It was revealed during the Court proceedings that the detainee intended to marry another person of her liking which was already married. The respondent/father raised two objections against her marriage to the person of her liking. The first was that she was less than 18 years old. Secondly, the person she wishes to marry was

[303] *Ameer Bakhsh vs. Additional Sessions Judge, etc*. Writ Petition No.16880/2021

[304] *Muhammad Aslam v. Ghulam Muhammad Tasleem* PLD 1971 Lah 139.

already married and polygamy, according to the counsel of the respondent, was prohibited under MFLO.

The Court held that since the girl has attained the age of majority as per the Pakistani law, she was at freedom to contract her marriage with the person of her liking. Secondly, MFLO do not prohibits polygamy, it rather regularizes the polygamy by making it conditional to the permission of the first wife and that of the Arbitration Council. According to the Court, the absence of these two elements will not invalidate the marriage, rather it will attract penal actions against the husband.[305]

This case revealed two flaws within Muslim Family Law Ordinance 1962. Firstly, the mandatory age for marriage as per MFLO is 16 years for females, while for male the minimum age is 18 years. Secondly, as highlighted before, that MFLO do not prohibit polygamy, it only regularizes it.

In the cases of *Azra Bibi v. S.H.O, Police Station district vehari*,[306] *Hira Mahmood v. The State*,[307] and *Farzana Siddique v. the State through Advocate General Azad Jammu and Kashmir*,[308] the respective Courts held that in the cases where the husband and wife are accused by the family for having committed adultery or extra marital sex, due to the fact that the women entered into marriage without the consent of parents or guardians, a simple statement of the spouse will be sufficient to prove the validity of the marriage. The statement of the woman specially will be of vital importance for the court in deciding the case. For a Nikahnama to be considered valid, it must be confirmed and acknowledged by the spouse, if such will not be the case, the nikahnama will not be considered as valid.

- *Maintenance of wife and children:*

Section 2 (ii) of Dissolution of Muslim Marriage Act 1939 provides that in those cases where a judicial divorce is sought by wife from husband, the wife is entitled to maintenance from her husband for two years. By virtue of section 9 of MFLO, the wife can seek maintenance from her husband through the Arbitration Council in cases where the husband fails to maintain her

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[305] Relying on the case of *Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf*.

[306] *Azra Bibi v. S.H.O, police station district vehari* 2005 YLR 1859 (Lah).

[307] *Hira Mahmood v. The State* PLD 1999 Lah 494.

[308] *Farzana Siddique v. The State through Advocate General Azad Jammu and Kashmir* 2014, CrLJ 897.

or where the husband has more than one wife and he fails to maintain them adequately. The wife's right to maintenance can also be realized through section 7 of the Family Courts Act 1964, before family Courts. The maintenance is to be determined by the courts in accordance with needs of the maintenance and the financial position of the maintainer. The courts therefore are required to take into account all the factual circumstances of each individual case.

The wife's right to maintenance is however not an absolute right. This right can be denied in some cases. It can also be suspended/denied in the cases where husband acquires the restitution of conjugal rights decree from the Court, or if wife refuses to join her husband, without justified and valid reason. The liability of husband to maintain his wife also extinguishes upon giving her divorce, as divorce under shariah legal system is the unilateral right of the husband, which he can use without giving any justification of his action. In the case of talaq, the husband is under the obligation to maintain his wife during her period of iddat. Therefore, in the cases where the Court ordered the husband to maintain his wife, the husband in a number of instances escaped this obligation by simply divorcing his wife.

In the cases of no-fault divorce cases, the wife alongside deferred dower and maintenance is entitled to mata'a. Mata'a is a parting gift given as consolation to the wife by husband. Mata'a is intended to lessen the hardships of a wife after divorce, and it is different from maintenance. In the Quran the concept of mata'a has been referred to in numerous instances, such as Q. 2:235, 2:240-41 and 33:49. The mata'a is to be paid in accordance with the financial status of the husband.[309]

In *Shazia v. Muhammad Nasir* case, however, the Peshawar Court held that maintenance is neither gift nor benefit, rather this is a justified right of wife and an obligation of husband which is enforceable by law. The Court in this case decided that the wife was entitled to be maintained by the husband.[310]

Similarly, *Ghazala Sadia v. Muhammad Sajjad* case was related to the legal question of wife's right to maintenance in the cases where she exercises her right to khula. The question was, can

[309] In many Muslim countries, mata'a is paid to the wife alongside maintenance and dower. These countries are Egypt, Jorden, Algeria, Libya, Morrocco, Syria, and Tunisia. The Law and Justice Commission of Pakistan in its 2009 report proposed the same kind of reforms by adding additional section 2(bb) to MFLO. This proposed section provided for the obligation of the husband to pay mata'a to the wife at the time of divorce according to his means. The mata'a can be either cash, movable or immovable property. The proposal however is yet to make its way to the statute books.

[310] *Shazia v. Muhammad Nasir* 2014 YLR 1563 (Pesh).

khula deprive wife from her right to be maintained during the iddat period?[311] In this case the Court held that not only to maintenance, but the wife was also entitled to dowry. And the maintenance right of the wife was to be in effect from the date of Nikah, the date on which the marriage contract was made. The decision was challenged in the Appellate and High Courts, the Appellate Court modified the decision of the family court, however, the High court restored the decision of the family court and ordered the husband to maintain the wife during her iddat period as this was the legal right of the wife and an obligation of the husband. Similarly, *Syed Abu Talib Shah v. Bibi Rukhsar Zahra* case provides for the right to maintenance of a wife who was residing separately from husband due to justified reason.[312]

- *Dissolution of marriage:*

Within the shariah legal system, both the spouses have the right to divorce. The husband has the right to pronounce talaq (divorce) unilaterally and without assigning any reason or fault which is called no-fault based divorce. Literal meaning of the term Talaq is 'freedom from bondage'. The wife has the right to dissolve the marriage through khula. There exists a procedural difference between khula by wife and divorce by husband. In cases where husbands do not agree to khula, the wife can get khula through judicial intervention. Whereas for the husband the agreement of the wife or accessing the court and engagement of judicial forums is not mandatory. The husband can pronounce effective divorce unilaterally. Third possibility for the termination of the marriage contract is dissolution of marriage through mutual agreement of spouses. This kind of dissolution is called *mubarat.* In *mubarat*, the spouses can agree to the dissolution of marriage without judicial intervention.

Moreover, under certain circumstances, either of the spouses can reach the court for the dissolution of marriage. Since the husband's right to divorce is absolute, therefore it is mostly the wife who approaches the judicial forums for the dissolution of marriage under section 2 of the Dissolution of Muslim Marriage Act 1939. This section provides for the dissolution of marriage on the following grounds: disappearance of husband for four years; failure of the husband to maintain his wife and to perform marital obligations for three years; husband's impotence; insanity for two years; where the husband is imprisoned for more than seven years; where the wife is given within marriage without her free consent before attaining puberty, she

[311] *Ghazala Sadia v. Muhammad Sajjad* 2012 YLR 2841 (Lah).

[312] *Syed Abu Talib Shah v. Bibi Rukhsar Zahra* 2012 CLC 1272 (Pesh).

can repudiate her marriage upon getting majority age; in case of *Li'an*, where the husband accuses wife of *zina* and wife do not accept the accusation; and cruel treatment of wife by husband.

In the *Malik Tanveer Khan v. Amber Liaqat* case, a wife filed a case for the dissolution of marriage on the ground that her husband was homosexual, relying on the principle of the cruelty of husband as justified ground for the dissolution of marriage.[313] The Court in this case held that the dissolution of marriage can be ordered by the court on the basis of the homosexuality of husband. The wife's suit for the dissolution of marriage alongside the recovery of the dower and dowry articles and maintenance was accepted by the trial court and sustained by the High Court at the appeal of the husband.

Section 8 of Muslim Family Law Ordinance 1961 provides that the husband can delegate to the wife the right of divorce (*Tafwid Al-Talaq*). Through delegation, this right can be used by the wife or authorised third person on the wife's behalf. This right to divorce can be delegated absolutely or conditionally, permanently or for a specific period of time.

In *Khawar Iqbal v. the Federation of Pakistan*, the Federal Shariat Court ruled that the delegated right to divorce is recognized within Islamic Law.[314] This case was contested against section 8 of MFLO for its inconsistency with the Shariah Law and legal principles. It contested the legality of Column No. 18 of the standard nikahnama form on the ground of its inconsistency with Islamic legal system. Column No.18 of standard nikahnama provides for the option of delegated right of wife for divorce.

In this case the litigant husband delegated the right of divorce to the wife which was later on used by her. The use of delegated right to divorce was contested before the High Court, however the lawsuit was dismissed by the High Court and then by the Supreme Court subsequently. The petitioner filed a petition before the Federal Shariat Court on the ground that the delegation of talaq right and its use is repugnant to the injunctions of Islam, Quran and sunnah. The Federal Shariat Court observed that the talaq al tafwid is a check on the husband's obligation not to be cruel to the wife and children and the obligation of the husband to maintain his children and wife. If the husband does not fulfil these obligations as well as refuse the wife's

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[313] *Malik Tanveer Khan v. Amber Liaqat* 2009 CLC 1210 (Pesh).

[314] *Khawar Iqbal v. the Federation of Pakistan* 2013 MLD 1711 FSC.

right to khula the wife should have this option. This position according to the Federal Shariat Court was agreed upon by all the Sunni Schools.

In the Ali *Abbas Khan v. Palwasha Khan* case, the Court ruled that the delegation of the right to divorce to the wife must be made in clear terms and there must be no ambiguity.[315] In this case within column 18 of the standard nikahnama a statement was made that the wife will have all the Sharia rights available to her (written as: Shary haqooq hasil hy). In this case the Court held these words do not imply that the wife has been delegated with the right to *talaq al tafwid* because generally in the shariah legal system, the wife is not entitled to the right to divorce. The court further held therefore that only in cases where it is explicitly stated in the column 18 of the standard nikahnama that the wife is delegated with the right of talaq e tafwid, the wife will be considered entitled to the right to divorce. Otherwise, whatever is incorporated within column 18 will be presumed as the right of the wife to delegated divorce. We can see from the case law that the wife can only have the delegated right to divorce in the cases where it is explicitly mentioned within the nikahnama at the time of the marriage.

7.2.Domestication of CEDAW standards within Superior Judiciary

Since CEDAW is the most relevant human rights treaty regime to our present study we may analyse to what extent the Superior Judiciary has referred to CEDAW at the face of dualist legislative and judicial dimensions of Pakistan. The Superior Judiciary of Pakistan is composed of five High Courts at provincial level and a Supreme Court at federal level.[316] As discussed above, Pakistan has ratified CEDAW in 1996 and up until 2010 the Superior Judiciary of Pakistan referred to CEDAW only within four of its judgements. Out of these four judgements where references were made to CEDAW, two judgements were given by Justice Tassadaq Hussian Jilani of Lahore High Court. Third judgement was given by the High Court of Azad Jammu and Kashmir by making a reference to the judgement of Tassadaq Hussain Jilani. The Federal Shariat Court in its Judgement of 2007 in a *suo moto* declared article 10 of Pakistan

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[315] *Ali Abbas Khan v. Palwasha Khan* 2010 YLR 1632 Islamabad.

[316] Judiciary has the potential to implement to some extent the international human rights standards. The use of international human rights standards within judicial context to some extent would be the domestication of international human rights standards.

Citizenship Act 1951, in violation of Article 2-A and 25 of the Constitution of Pakistan 1973, against Shariah law, and international commitments of Pakistan, particularly CEDAW.[317]

In the first case before the Lahore High Court, *Mst. Humaira Mehmood* v. *The State,*[318] the husband and wife were lawfully married with their free consent but without the consent of the girl's father. The father of the girl, a sitting member of Punjab provincial assembly, filed a case of abduction and *zina* against the husband of his daughter, despite being aware of the fact that his daughter and her husband were lawfully married. The girl and boy fled, were caught by police, and forcefully taken aback home. Girl's family claimed in the Court that the girl was already married and as evidence produced videos of the girl's marriage, which were contested by the girl for being faked.

The Court in this case passed a landmark decision in the favour of the girl, against her father. The decision was based on plural legal rules and norms of Islamic, constitutional, and international human rights. The Court emphasised on the protection of fundamental rights of every individual that are enshrined in Islamic legal system as well as enjoining upon Pakistan by the virtue of Pakistan's ratified international human rights treaty regimes. The Court specifically made a reference to article 16 of CEDAW which ensures women rights and freedoms within marriage and family institution. Reference was also made to article 5 of Cairo Declaration on Human Rights in Islam.

Mst. Saima and 4 others v. *The State* was the second case where the Superior Judiciary made a reference to CEDAW.[319] In this case, the marriage of a Christian couple was contested by the mother of the girl on the ground that the Methodist minister who performed the marriage was not in the position of a valid licence to do so, despite the fact that the couple were both willing to get married. The couple was accused of *zina* within the Hudood Ordinance 1979. According to Justice Tassadaq Hussian Jilani, if the couple in good faith believed themselves to be married, the case of *zina* does not arise even from the perspective of Hudood Ordinance. Justice Jilani referring to article 16 of CEDAW stated that protection to the marriage and institution of family is given within the Constitution of Islamic Republic of Pakistan as well as within

[317] Shaheen Sardar Ali, *From ratification to implementation: 'domesticating' the CEDAW in state, government, and society. a case study of Pakistan* in *Women's Human Rights: CEDAW in international, Regional, and national law,* Anne Hellum and Henriette Sinding Aasen (Eds.) (Cambridge, Cambridge University Press, 2013) 448.

[318] *Mst. Humaira Mehmood* v. *The State,* PLD 1999 Lah 494.

[319] *Mst. Saima and 4 others* v. *The State,* PLD 2003 Lah 747.

CEDAW. Article 16 and 25 of CEDAW and the Constitution of Islamic Republic of Pakistan respectively enjoins the state for the protection of marriage and family. [320]

In *Mst. Sarwar Jan* v. *Abdur Rehman,* the wife Sarwar Jan, applied for the dissolution of marriage based on her husband's cruel treatment. While giving a reference to above given *Humaira* case the Court ruled that from the perspective of Cairo Declaration on Human Rights in Islam and CEDAW, the government of Pakistan is under an obligation to ensure and protect the rights of women within the lifetime of marriage as well as upon its dissolution.[321]

In a Suo Moto case, the Federal Shariat Court dealt with article 10 of Citizenship Act 1951, which provides that a Pakistani man can acquire citizenship for his foreign wives but not vice versa. The Court considered this a discrimination against women.[322] Here in this case the court adopted an interesting approach by stating that Pakistan has made international human rights law commitments which are legally and morally binding upon Pakistan, Namely, the obligation under UDHR and CEDAW. By referring to the relevant part of the Quran, *"O you who believe! fulfill the obligations"* the Court stated Shariah law clearly obligates us to satisfy the promise that we make.[323] The Court also held that gender inequality is in contravention with the Quran as well Sunnah. Building on Justice Jilani's approach the Court endeavoured to draw its decision upon plural legal systems, Islamic Law, Constitution of Pakistan and international human rights law.[324] The Court very articulately used the Islamic norm to support the CEDAW in reaching a pro-women decision.

In these four cases CEDAW was explicitly mentioned to arrive at a women friendly decision. Though there are some other cases where a general reference has been made to human rights. Due to the dualist nature judges in Pakistan tend to apply the most relevant law and legal norms in reaching a judgement. The hierarchy of laws plays an important role where Islamic law, constitutional provision, statutory laws are the first to be relied upon instead of human rights

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[320] Ibid, 751–2.

[321] *Mst. Sarwar Jan* v. *abdur Rehman,* 2004 CLC 17

[322] Suo Moto No. 1/K of 2006

[323] Al-Quran, Surat al-Ma'ida, 5: 1.

[324] These articles of constitution relate to the objective resolution and equality of citizens respectively. The Court went on further stating that article 10 of Pakistan Citizenship is in violation of international human rights law obligations of Pakistan.

law. The judgement in accordance with international human rights standards of Justice Jilani, though receiving a great amount of support abroad, receives no passionate following at home.

7.3. The approach of the courts while dealing with women rights

Despite the fact that there exist numerous conflicts within the domestic laws, the judiciary had tried its best to interpret any inconsistency with the spirit of the women protection principle so as to advance the rights of women. Interestingly, in some cases where the judiciary has reached a pro-women decision, it has relied on the Shariah Law and negated the application of contemporary Pakistan family law.[325] It is our understanding that the common trends within the examples we have analysed is that the attitude of Pakistani courts, especially the superior judiciary, is to abide by the Women Protection Principle. Women Protection Principle means that whenever the Courts come across conflicting provisions of law, an attempt has been made to interpret it in a way that better protects the interests of women. This principle is however not codified, rather, we have drawn this principle after carefully analysing the case laws.

The judiciary in Pakistan has acknowledged and protected women rights related to maintenance, their consent to the contract of marriage, and their right to divorce. It has negated the conditionality of guardian's consent to the marriage, as according to the courts it is the consent of the parties to the marriage which is mandatory and decisive and not the consent of the parents or guardian. The judiciary had also provided protection to the women in cases where the validity of subsequent marriage by women is challenged based on its irregularity on the ground that the second marriage by women contracted while the first marriage was not legally dissolved due to the failure of the husband to comply with legal requirements, or where the *iddat* period was not observed. The judiciary had tried its best to protect maintenance of the wife neither as a privilege nor as a benefit to the wife, but as a legal right of the wife. However, the quantity and the duration of the maintenance awarded in majority of the cases is nominal which leaves the wife economically destitute.[326]

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[325] For example, in the Allah *Dad Case* the Court preferred Hudood Ordinance over MFLO, as a lacuna existing in MFLO was constituting danger to the protection of women. In MFLO it is required for the husband to give the notice of Talaq to the Chairman of the Union Council, whereas In Hudood Ordinance it is not the requirement for divorce to be effective. Based on the husband's failure to give notice of divorce to the Chairman of the Union Council the husband used to take the position that since the marriage was intact the wife in the lifetime of first marriage is accused of committing Zina. The Judiciary in such cases used to rely on hudood ordinances rather than MFLO.

[326] The plethora of the case law suggests that the wife has the right to maintenance during her iddat period which is four months and ten days. From the perspective of international human rights law, this is meagre consideration

The Courts also ensured the wife's right to divorce on the ground of the husband's cruelty. Moreover, the delegated right of the women to divorce in some cases was accepted while rejected in others. This signifies that delegated right to divorce is not a right available to every woman in all the cases. It is only available when it has been expressly provided for within the marriage contract (*nikahnama*). Still, this right of the wife is conditional to the discretion of the Court.[327]

The above analysed examples also give us the understanding that it is a trend within the judicial processes relating to family matters that in almost every case of maintenance, divorce, khula and custody of children, the husband responds by filing a lawsuit for restitution of conjugal rights. Marriage in the Shariah legal system is wrongly considered as sacrosanct, where the husband has the right to the restitution of conjugal rights. As a matter of fact, principle of marriage as a sacrosanct and resultant emphasis on the restitution of conjugal rights is not local to the Shariah legal system, rather, it was introduced to the Muslim world and shariah legal system by the influence of the western colonialism. The principle of restitution of conjugal rights is indeed based on canon law which renders marriage a sacrosanct that cannot be easily terminated.

The Federal Shariat Court had the opportunities on many occasions to get rid of this misconceived principle. However, the Court upheld the principle of restitution of conjugal rights against the wife's right to maintenance, khula and divorce. According to Federal Shariat Court, the prevailing mechanism for the restitution of conjugal rights, which involves the attachment of wife's property, and paradoxical payments by wife to husband, was not repugnant to the injunctions of Islam.[328] The Court here missed that though the principle of restitution of conjugal rights is not repugnant to the injunctions of Islam, however it is not even local to the Shariah principles which must be adhered to.

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for the maintenance of a wife. While fixing the amount of maintenance, the courts held that it should be in accordance with the needs of the wife and the financial status of the husband, however, the amount of the maintenance is nominal, which can not sufficiently support women.

[327] The right to divorce can be delegated to the wife by the husband within Nikahnama (marriage contract deed). The delegated right to divorce is recognized under the shariah law but it is not a mandatory ingredient by law to be included within every contract of marriage. Ali Abbas Khan v. Palwasha Khan case made it clear that the talaq e tafwid is not an absolute right to every woman, it is only available to those women where it is explicitly mentioned with the marriage contract. Generally, in the shariah legal system, the wife is not entitled to the right to divorce.

[328] *Naseem Siddique v. Islamic Republic of Pakistan* PLD 2016 FSC 4.

This judicial activism is encouraging for women rights; however, has its downsides and shortcomings. Judicial activism is not the sole satisfactory solution to the challenge faced by women with respect to their rights. The subjects of polygamy, women right to divorce, maintenance, equal inheritance rights, equality before the law, maintenance, educational and economic rights of Pakistani women shall be unconditionally and visibly protected by law, otherwise the attitude of the judicial system will be encouraging, but still fluctuating and discretionary.

The patriarchal mindset also does exist within the judiciary of Pakistan. though the Supreme Court delivered a pro women decision in Saima Waheed Caws, however, in the same case at an earlier instance, the Lahore High Court was naive of women's right to freely choose with their free consent a spouse of their liking. The attitude of the Court towards women's freedoms relating to marriage were evident in the judgement of the Court:

> *"The concept of young girls for that matter venturing out in search of spouse is alien to the teachings of Islam and even otherwise this scheme of husband-shopping which obviously involves testing and trail of the desired…"*[329]

It indicates that though judicial system is progressive in nature, it is also true that some segment of this institution maintains a patriarchal mindset. The case law suggests that the courts in a number of occasions have not adopted approach protective of human rights of women despite the fact that the courts were having the room and the discretion to do so. The comparatively liberal appellate courts did not hesitated to use the overarching Islamic principles of morality for the expansion of its judicial review powers in 1990s. This activism was evident in the public interest cases, human rights petitions, and writ petitions. Pakistani courts applied the shariah legal principles as the bedrock while dealing with human rights and rule of law, where the substance of these subjects was required to be examined for its accordance and consistency with Shariah principles. This attitude of the superior judiciary, to decide the cases under the banner of Shariah law principles, validated the cultural practices that were gender discriminatory. Illustrative of this is the *Zaheeruddin v. State* case, where the Supreme Court held that religious freedom enshrined in 1973's constitution were to be interpreted in

[329] Zainab Sohail, *Rising Again*, Courting the Law, 30/09/2016, online accessible at: https://courtingthelaw.com/2016/09/23/commentary/rising-again/.

accordance with the principles of Shariah standards, leading to the severe negation of the religious freedom aspect of human rights standards.[330]

7.4.The role Judiciary can play

The judiciary do not have the jurisdiction under the constitution to declare any law repugnant to the injunctions of Islam, thus invalid. It is the mandate and responsibility of the legislature to take the initiative and repeal the legal provisions that are discriminatory and punitive against women and consider women contemporary rights as contradictory to the injunctions of Islam as well as that of fundamental rights provision of the constitution. The role of the judiciary here can be that of formally signposting existing legal lacunas to the legislature for further legislative measures to be adopted.

To bring the domestic laws of Pakistan in conformity with fundamental rights provision of the constitution as well as to that of international human rights standards, legislature/ parliamentarians must be equally partnering with the Judiciary/judges. Judiciary in some instances is supplemented by the legislature in efforts to modernise the family laws of Pakistan. Muslim Family Law Ordinance 1961 is the prime example of this coordination between the two. However, politicians willing to attain and maintain social legitimacy within the eyes of public at large, at the face of the fact that Pakistani legal system is primarily based on misconceived religious principles, fail to bring substantial reforms and build consensus with the judiciary of the state for the protection of the rights of vulnerable groups of society, women and children for instance.

8. Conclusion to chapter II:

Three factors made the present day Pakistan's domestic laws, policies and practices at least a child of compromise rather than justly ensuring the rights of women. First of all, the conception that Shariah legal system is static rather than adaptable to the changing needs of Muslim society; secondly, the colonial power's lack of understanding of the shariah legal system while forming and adopting the relevant legal codes as well as incorporating English legal doctrines and tools within the fabric of Shariah legal system, such as the doctrine of precedents; and,

[330] Zaheeruddin v. State, 1993 S.C.M.R. 1718; Hafiz Abdul Waheed v. Asma Jehangir, P.L.D. 1997 Lah 301: In Hafiz Abdul Waheed v. Asma Jehangir case, the Lahore High Court held that the consent of the wali was not a necessary precondition for a marriage to be legally considered as valid. In this case, the court reached a correct decision, but through the reflection of judicial attitudes that was detrimental to women's rights in a number of other contexts.

finally, the divide between the traditionalist and modernists elements of Pakistan. If in one instance a legal reform is introduced with the intention of realizing women rights in accordance with binding international human rights standards, the same has been reverted from in the next instance.

The Islamization of the Pakistani laws is an example. Establishment of parallel state institutions during the Islamization of Pakistani laws process had increased this conflict leading to the adoption of the compromised or ineffective women protection laws. The examples are the Islamic Ideology Council with the mandate to analyse the laws adopted for its compatibility with the Quran and Sunnah, a kind of check on the freedom of the parliament to adopt pro-women laws. The second example is the establishment of the Federal Shariat Court against the existing judicial system, in order to analyse the decision of the judiciary for the same purpose of its compatibility with the Quran and Sunnah.

Despite such a challenging environment, the judiciary of Pakistan had tried its best, with few exceptions, to protect the rights of women. Judiciary has played its role by giving interpretations to the provisions of domestic laws aimed at the protection of women rights. However, the judicial activism is not without shortcomings, alongside numerous other challenges, the procrastination of judicial processes is one such challenge. The minority progressive judges and majority traditionalist judges, and the dualist legislative and judicial dimensions of Pakistan, make it hard for the judiciary to give its judgements in accordance with international human rights standards. Also, it is important to note that the judiciary can stretch the domestic laws to some extent in the favour of women rights, however the judiciary has no mandate for adopting pro-women laws.

It is the legislature which is endowed with this mandate. The divide political landscape of Pakistan makes it hard for the legislature to adopt decisive pro-women laws and put an end to the hardships and discrimination faced by women. If the legislature is successful in doing so, it will be for sure supplemented by the judiciary in the realization of women rights in accordance with the international human rights standards. To make it happen, alongside the internal available tools, the external tools should be employed to convince the political stakeholders to adopt the legislative reforms. The available tools and venues required for such reforms will be discussed in the third/subsequent chapter of this work.

Chapter III

The European union's external actions and relations: Trade and human rights in the picture

1. Introduction:

As highlighted in earlier chapters, the domestic laws, policies and practices of Pakistan are hardly in line with the country's international commitments to indiscriminately respect and realize international human rights standards, mainly due to the lack of effective enforcement mechanisms that could urge Pakistan to ensure the indiscriminate realization of international human rights standards within domestic laws policies and practices.

In order to mediate this shortcoming, the international legal system provides for tools of international cooperation for the purpose of implementing and realizing the obligatory international human rights standards within domestic laws, policies and practices. One such tool consists in associating human rights compliance to trade and other economic incentives.

This chapter will analyse the areas where the EU interacts with non-EU states in terms of human rights, trade, cooperation and other economic incentives. Secondly the current nature and level of engagements between EU and Pakistan will be analysed. The last part of this research will attempt to assess what role the EU is presently playing for the promotion and effective enforcement of international human rights standards in Pakistan, to see whether, alongside considering the progressive examples of reservations, trade could actually be a means to mediate the relativist challenge to the universalist concept of human rights, as the adage "*trade brings the enemies together*" would suggest.

2. The EU external relations and actions

Since external relation and actions of the EU are an important aspect of this research, the identification of the legal provisions of the EU instruments that provides for and regulate the external actions of the European Union with third countries is pertinent. Here is this section, the relevant legal provisions supplemented by relevant case studies will be taken into account in order to highlight the areas where the European Union can take actions externally and enter into relations with non-EU countries as well as the procedures that should be adopted in this respect. In the light of such understanding, the last section of this chapter will look at the EU

Pakistan human rights conditional economic relations for the promotion and protection and indiscriminate realization of human rights within domestic laws, policies and practices of Pakistan.

2.1. EU Legal basis

The Union is composed of three layers, an inner, a middle and an outer layer. The EU member states can themselves be placed in the 'inner layer' as the EU institutions will be meaningless without this inner layer. Within their individual capacities, the member states form the core of the Union, where the member states voluntarily consent to be wrapped up within the laws and policies of the Union. However, this should not give the impression that they fully surrender all the aspects of sovereignty in this respect, rather, they nevertheless do retain a number of external competences which ensure their active and visible role internationally.[331]

Matters such as the common commercial policy, human rights, development cooperation and environmental issues are placed within the middle layers. The 'middle layers' are composed of those areas of competences of the Union that previously formed part of European Community law and are now contained in the Treaty on the Functioning of the European Union. Common Foreign and Security Policy (CFSP) is the outer layer or skin of the EU External policy. Through CFSP the Union represents the policies of the Union to the outer world. CFSP encompasses all the actions and foreign policies of the EU on the international scene, through which the Union manifests itself to international partners.[332]

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[331] Three layers of the EU Eternal Relations and Actions and provided within "Henri de Waele, *Legal dynamics of EU External Relations: Dissecting a Layered Global Player*, 2nd Ed. (Antwerp: Springer Publishers, 2017) 80, citing "Communication from the Commission: *Trade for All – Towards a More Responsible Trade and Investment Policy*, COM 2015(497) final." Alongside Common Foreign and Security Policy (CFSP), the member states remain at freedom to a certain limit to conduct their national foreign policy keeping in view their national interests. Moreover, the diplomatic relations with the non-EU states are by and large maintained by the member states of the Union within individual capacity, as long as it does not fall within the collective structure of the Union as provided within relevant EU laws. For instance, the enlargement process, where unified official steps are adopted by the Union with the acceding countries. This area is the 'hard core' of the Union as a layered global player.

[332] CFSP is comparatively a new addition, through the Treaty of Maastricht it became part of the EU legal system in 1993. However, in legal terms, CFSP is not an all-across-the-board policy medium of the Union.

Relevant to the above, within the following six domains and policy areas namely, Common Foreign and Security Policy,[333] Development Cooperation,[334] Humanitarian Aid,[335] Assistance,[336] Trade[337] and Solidarity, the Union is presented as one block and single voice before the rest of the world from the perspective of middle and outer layers of the Union. For the regulation of external actions and relations of the Union with non-EU countries, the main two primary instruments that determine the legal layout of all the aspects and dimensions of the EU external relations and actions are the Treaty on the European Union (TEU) and the Treaty on the Functioning of European Union (TFEU). These legal instruments determine the legal competence and mandate of the Community in the establishment of external relations of the Union with the third countries.[338]

The mandates of the European Union are exercised under the principles of conferral of competences. According to article 5 of TEU, the European Union must act within the limits conferred to it by the EU member states within the treaties for the achievement of the common objectives of the Union. These conferred competences are specified within articles 2-6 of the TFEU. Competence which are not provided for, and which are not defined within these articles must remain with the member states of the Union. According to the Treaty of Lisbon, these competences are divided into three following categories:

- exclusive competences;
- shared competences; and

[333] Administered and regulated by the High Representative and assisted by the European External Action Service — Articles 23-46 TEU.

[334] The main purpose and objective of the development cooperation is to eradicate poverty in the world — Articles 208-211 TFEU.

[335] EU humanitarian aid operations for victims of natural or man-made disasters — Article 214 TFEU; The humanitarian aid aspect of the EU external actions has been provided within part five under title III of the Treaty on the Functioning of the European Union.

[336] Financial assistance, to non-EU Countries, other than Developing Countries — Articles 212-213 TFEU.

[337] The EU's common trade policy is an exclusive EU competence — European Parliament is co-legislator with the Council — the harmonious development of world trade — Articles 205-207 TFEU

[338] For instance, article 210 TFEU provides for the legal personality of the EU Community.

- supporting competences.

The exclusive competences are provided for in article 3 of TFEU. Within the area of exclusive competences, the EU alone has the mandate to adopt legislation and binding Acts. EU member states can do so only in case authorised and empowered by the EU. The following are the Exclusive competence areas of the Union: customs union, the establishing of competition rules necessary for the functioning of the internal market; monetary policy for euro area countries; conservation of marine biological resources under the common fisheries policy; common commercial policy; conclusion of international agreements under certain conditions.

With respect to shared competence, the EU and member states of EU are entitled to adopt relevant legislation and binding Acts. The subject of shared competences has been dealt with in article 4 of TFEU. In case the Union does not exercise or decide not to exercise its competence within a specific area, then that competence is exercised by EU member states. Shared competences of EU and EU states applies in the following areas: internal market; social policy;[339] economic, social and territorial cohesion (regional policy); agriculture and fisheries;[340] environment; consumer protection; transport; trans-European networks; energy; area of freedom, security and justice; shared safety concerns in public health matters, limited to the aspects defined in the TFEU; research, technological development, space; development cooperation and humanitarian aid.

In order to support, coordinate or complement the actions of EU member states, the Union can intervene through its supporting competence. The subject of supporting competences has been dealt with in article 6 of TFEU which relates to the following policy areas: protection and improvement of human health; industry; culture; tourism; education, vocational training, youth and sport; civil protection; administrative cooperation.[341]

Apart from these three competences there exist "*Special Competences*." For the purpose of coordinating the economic, social, and employment policies of EU Countries, the EU has the mandate to take certain relevant measures within the mandate of special competences. For

[339] But only for aspects specifically defined in the Treaty.

[340] Except conservation of marine biological resources.

[341] Anu Bradford, *The Brussels effect, how the European Union rules the world* (New York: Oxford University Press 2020) 237.

example, the Common Foreign and Security Policy of the European Union is associated with various institutions in terms of defining, decision-making, implementation, and representation. In this respect, decision making procedures is prerogative of European Commission and European Parliament, the policy is defined and implemented by European Council[342] and Council,[343] while the EU is represented by the President of the European Council and High Representative for Foreign and Security Policy. All the competences of the European Union are subject to the principles of proportionality and subsidiarity as provided in article 5 TEU.

By virtue of article 216 TFEU, moreover, the Union has been empowered to conclude agreements with one or more of the third countries or international organizations where the treaty so provides, and where the conclusion of the treaty is so required for the achievement, within the framework of the Union policies, of the objectives referred to in the treaty.[344]

The relevant legal provisions of the TUE and the TFUE relating to the external relations and actions are the following:

- Articles 21-47 TEU — the Union's external action and the Common Foreign and Security Policy;
- Articles 205-222 TFEU — Union's External Action deals with external issues such as Common Commercial Policy, Development Cooperation, etcetera.

These specific legal provisions provide the legal basis of the Union's external relations and actions for entering into and maintaining relations and partnership with Non-EU states and organizations through international agreements.[345] In this respect, the subject matter of the treaty is the main determinative factor in order to ascertain the legal basis, required procedures

[342] Composed of Heads of States of heads of Governments of EU member states.

[343] Representatives of each EU member state at ministerial level.

[344] Article 216(1) contains general rules of the external competence of the Union without specifying which competences are exclusive and which ones are shared.

[345] Article 218 of the Treaty on the Functioning of the European Union provides for the treaty making competence of the EU with third states. The example of this is the partnership agreement between EU and US 2014. The nature and scope of this agreement is the trade related areas between the parties based on the common values, including the protection and promotion of human rights.

and the relevant institutions and bodies of the Union that are responsible and mandated to conclude the treaties.[346]

All the aspects of the Union External actions and relations were brought together in part V of the TFEU under the title of 'External Action by the Union' which previously were scattered in TEU and TEC. However, CFSP is not part of this title, as it retains its different position within the scheme of EU treaties. Thus, there is legal duality between CFSP and Non-CFSP aspects of Union's external actions. In order to overcome this duality, the post of High Representative for Foreign Affairs and Security Policy was created through the Lisbon Treaty. High Representative is simultaneously the vice president of the Commission, mandated with the regulation and insurance of consistency within the entirety of Union's external actions and relations be that CFSP or Non-CFSP matters.[347] Apart from its pivotal role within the CFSP matters to adopt restrictive measures, the High Representative and the Commission may submit joint proposals in Non-CFSP matters.

2.2. The Union: A formidable economic powerhouse from commercial perspective:

Trade has contributed considerably to the Union achieving the highest profile on the world stage.[348] The Union as standing united on the subject of trade to the outer world considerably increases the bargaining powers of the Union, where favourable and desirable trading conditions can conveniently be negotiated with external trading partners keeping in view the objectives of the Union, which have been settled within relevant legal instruments.[349]

The EU is the single largest market of the world with more than 500 million consumers. Single set of rules are required to be followed. Thus, it is an attractive economic venue for third countries. The EU constitutes an economic powerhouse that has more strength than that of, say

[346] For instance, article 207 TFEU on Common Commercial Policy and article 209 on Development Cooperation are connected to special provisions that provide for a single negotiation procedure. Whereas the agreements based on monetary policies are specifically addressed within article 219 TFEU. The same way articles 216 and 217 TFEU provides for mechanisms within different scenarios relating to the treaty making competences of the Union.

[347] Articles 18(4) and 26(2) TEU)

[348] Steven P. McGiffen, External Economic Relations (London: Pluto Press, 2005) 92.

[349] Christian Burckhardt, *The European Union as an Actor in International Trade Relations* in *Global Power Europe – Policies, Actions and Influence of the EU's External Relations* Vol. 2, Eds. Astrid Boening and Jan-Frederik Kremer (Berlin: Springer, 2013) 272.

for instance, China, US or Japan for that matter, because the EU as a single entity is the largest exporter and importer of goods and services across the world alongside the largest dispenser as well as destination of foreign direct investment. Being trading partner with 80 countries of the world from all the continents, whereas it stands at second most important trading partner of other 40 countries, these characteristics and attributes qualify it as world's biggest trading partner for third countries.[350]

2.3.Next Generation Trade Agreements of the Union with third Countries:

Within external actions and relations of the Union, promotion and protection of human rights occupies the status of overarching objective of the Union. Within Common Commercial Policy, there comes the Generalized Scheme of Preferences (GSP). Starting from 1971, the present in force regulation relating to GSP was adopted in 2012 and came into force in 2014.

As mentioned above,[351] GSP is a comprehensive and elaborated mechanism for the promotion of international standards relating mainly to labour rights, in exchange of economic and financial incentives that has been provided within the framework of the common commercial policy of the Union. The beneficiary status is not required to be reciprocal between the third state and the Union or with EU's member states, as GSP gives unilateral preferential status to the beneficiary developing countries in line with the World Trade Organization classification of low- or middle-income economies or least developed countries.

Relating the Common Commercial Policy in general and to Common Customs Tariff (CCT) specifically, the Generalized Scheme of Preferences comes within the middle layer competence of the Union that is the most relevant from the perspective of this research. The rules of the tariff preferences can be found in the Regulation on the Generalized Tariff Preferences, which is otherwise known as the GSP Regulation. The aim of the GSP is to lower, to the possible extent the barriers to free trade in order to facilitate and encourage the export of the developing or least developed countries to European Union with the objective of eradication of poverty,

[350] The Three layers of the EU External Relations and Actions and provided within "Henri de Waele, *Legal dynamics of EU External Relations: Dissecting a Layered Global Player*, 2nd Ed. (Antwerp: Springer Publishers, 2017) 78.

[351] See above, Chapter I, para.5.2.

sustainable development and ensuring the good governance in Non-European least developed or developing countries.[352]

The above-mentioned regulation provides for a three-layered structure of GSP. Through the tool of GSP under Common Commercial Policy, a non-EU state is given full or partial exemption from tariffs and customs duties. Within 'Everything But Arms' (EBA) a special status is given to the beneficiary state. For the least developed countries this beneficiary status eliminates all the quota restrictions, customs, and tariff duties on all their import products except weaponry and arms. The countries listed by the World Bank as low income or lower middle-income countries but not least developed countries can be granted the status of Standards GSP, which provides for the reduction of 60% of all the EU tariffs. Duty free access for 66% of tariff lines for the countries lacking economic diversification, in order to integrate these countries to the world economy. Vulnerable low and lower-middle income can be granted GSP+ status, reducing these same tariffs to 0%, if they implement 27 international conventions related to human rights, labour rights, protection of the environment and good governance [353].

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[352] Regulation 978/2012 applying a scheme of generalised tariff preferences and repealing Council Regulation 732/2008, OJ [2012] L 303/1.

[353] The following 27 conventions are required to be ratified by developing country in order to gain and retain GSP+ status from EU:

1) Convention on the Prevention and Punishment of the Crime of Genocide (1948)

2) International Convention on the Elimination of All Forms of Racial Discrimination (1965)

3) International Convention on Civil and Political Rights (1966)

4) International Convention on Economic Social and Cultural Rights (1966)

5) Convention on the Elimination of All Forms of Discrimination Against Women (1979)

6) Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984)

7) Convention on the Rights of the Child (1989)

8) Convention concerning Forced or Compulsory Labour, No.29 (1930)

9) Convention concerning Freedom of Association and Protection of the Right to Organize, No.87 (1948)

10) Convention concerning the Application of the Principles of the Right to Organize and to Bargain Collectively, No.98 (1949)

11) Convention concerning Equal Remuneration of Men and Women Workers for Work for Equal Value, No.100 (1951)

12) Convention concerning the Abolition of Forced Labor, No.105 (1957)

These twenty-seven Conventions have been divided into two groups. The first group refers to the main UN and ILO Conventions that codify the core human rights and labour standards. The second group on the other hand are the conventions related to the environmental and governance principles. These conventions are mainly related to environmental, narcotics, drugs and corruption issues. These are the main two conditional groups, which are mainly based on the economic interests of the countries involved. As it will be discussed later, the suspension/termination of this preferential status has been mainly used in the cases of international labour standards violations and not in the cases where the states failed to indiscriminately realize and protect international human rights standards.

The GSP beneficiary states are under obligation to cooperate with the European Commission by providing all the necessary information with respect to its binding commitments related to human rights. The Commission is mandated with the competence to monitor the compliance of GSP beneficiary states to international human rights conventions, as well as the recommendations and conclusions adopted by the relevant treaty bodies with respect to the

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13) Convention concerning Discrimination in Respect of Employment and Occupation, No.111 (1958)

14) Convention concerning Minimum Age for Admission to Employment, No.138 (1973)

15) Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, No.182 (1999)

16) Convention on International Trade in Endangered Species of Wild Fauna and Flora

(1973)

17) Montreal Protocol on Substances that Deplete the Ozone Layer (1987)

18) Basel Convention on the Control of Trans boundary Movements of Hazardous Wastes and their disposal (1989)

19) Convention on Biological Diversity (1992)

20) The United Nations Framework Convention on Climate Change (1992)

21) Cartagena Protocol on Bio-safety (2000)

22) Stockholm Convention on persistent Organic Pollutants (2001)

23) Kyoto Protocol to be United Nations Framework Convention on Climate Change (1998)

24) United Nations Single Convention on Narcotic Drugs (1961)

25) United Nations Convention on Psychotropic Substances (1971)

26) United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988)

27) United Nations Convention against Corruption (2004)

state in question. The GSP tool helps the developing and least developed countries to create value-based economies thus to trade out of poverty by increasing exports, creating jobs and making possible the integration within global value chains. GSP links trade with good governance and human rights, development and human rights are always required to be relevant in order to capitalize GSP, leading to the diversification of the economy of the beneficiary state concerned.

With respect to the beneficiary GSP+ states, every two years the Commission submits a report to the European Council and the Parliament giving detailed account of the status of ratification to core 27 international treaty regimes, the compliance to the reporting obligations of the GSP+ states with respect to the international treaty regimes in question and the overall level of compliance within the domestic laws, policies and practices of the beneficiary state.

The Council and the Parliament evaluate the GSP state compliance to the relevant international labour and human rights obligations. Based on this evaluation the shortcomings and failures are highlighted and effort is made to address such shortcomings and failures through regular dialogues with the GSP beneficiary state. The Council and the Parliament can object to the withdrawal of the GSP status by the Commission. In the case of no objection, since 2014, the working party on the Generalised Scheme of Preferences can issue a confirmation through the delegated acts of the Commission.[354]

The present GSP regime will expire at the end of 2023 and a new proposed GSP will enter into force from the beginning of 2024.[355] The new proposal for GSP Regulation aims at the continuation of features and goals of the present GSP Regulation framework with improved efficiency and effectiveness in the light of contemporary challenges faced by GSP beneficiary states. Within the new GSP proposal several issues and areas are highlighted for further improvements.[356] These recommendations are related to the environmental challenges alongside core labour and human rights issues; to facilitate and encourage the transition of the

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[354] Article 14(3). Similar to the shadow reporting within the international human rights monitoring mechanism, the shadow reports of the civil society are also taken into consideration by the working party.

[355] Proposal for a Regulation of the European Parliament and of the Council on applying a generalised scheme of tariff preferences and repealing Regulation (EU) No 978/2012 of the European Parliament and of the Council, COM/2021/579 final, 22 September 2021.

[356] These improvements are suggested in the light of *2018 Mid-Term Evaluation (MTE) of GSP*, and the *External Study supporting the Impact Assessment and the 2020 Open Public Consultation*.

least developed countries to avail GSP+. The existing GSP+ beneficiary states will be facilitated regarding their transitional arrangements to the new GSP+ status which will require the ratification of newly added legal treaty regimes. From the perspective of the proposed GSP Regulation, the states must provide a plan of action determining how the newly ratified treaty regimes will be domestically implemented. Within this proposed GSP Regulation, in total the following six new international treaty regimes conventions are proposed to be included:

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)
- Convention on the Rights of Persons with Disabilities (2007)
- Convention on Labour Inspection No. 81 (1947)
- Convention on Tripartite Consultations No. 144 (1976)
- The Paris Agreement on climate change (2015) [Note: it replaces the Kyoto Protocol]
- United Nations Convention against Transnational Organised Crime (2000)

Within the proposed regulation, there are certain improvements proposed to the monitoring and implementation of GSP+ obligations. The proposed GSP Regulation provides for the amendment of GSP Compliance Reporting Period from two to three years with the main intention to bring it in accordance with the reporting period of UN treaty bodies. To strengthen the implementation and realization of trade related commitments, the Chief Trade Enforcement Officer (CTEO) which was earlier appointed by the Commission came up with a complaint mechanism known as Single Entry Point (SEP) where complaints can be brought on a variety of issues related to trade policy, and non-compliance to GSP commitments. Within the proposed GSP Regulation, a SEP compliant system has been incorporated. Urgent procedure for temporary withdrawal is proposed through which the usual withdrawal of 18 months will be reduce to 7 months. The monitoring and evaluation procedure, which is six months in prevailing procedures, will be shortened resultantly.

This proposal will come into force after its adoption by the European Parliament and the Council which possibly will take place in the last quarter of 2022. Should this be the case, the new GSP Regulation will come into force on January 1st, 2024. The present GSP+ beneficiaries, including Pakistan, will have to reapply for the overhauled GSP+ status subsequent to the ratification of the required six international treaty regimes relating to environmental and human rights standards.

We understand that providing three years for reporting instead of two, rather than beneficial, will slow down the state efforts in implementing suggestions and recommendations. As stated earlier, Pakistan is also on the grey sanction list of FATF. FATF binds the states for reporting every six months. Since the compliance monitoring mechanism is robust and rigorous, Pakistan has implemented most of the recommendations within less than two years.

2.4.Internal and external human rights conditionality for the EU

From the Common Commercial Policy's perspective, the objectives of the Union are sustainability, economic independence, environmental goals, as well as the insurance of social standards, labour and human rights that in fact further enhances the social and ethical dimensions of Common Commercial Policy.[357]

The EU and its member states both internally and externally are obliged to promote and ensure the compliance to the international human rights standards within all of its instances. From an external dimension, the EU member states are parties to the UN Charter, thus bound by its articles 55 and 56 which obligate member states to 'promote…. Universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race, sex, language or religion.' Similarly, the UN Charter takes precedence over EU laws by the virtue of article 103 of the UN charter that provides for the hierarchical order of international and regional laws. Therefore, from the perspective of external obligation, within all the internal and external instances of the actions and relations, the Union and its member states are under an obligation to promote and protect human rights internationally as set out in the UN Charter.

The Union has been actively promoting the respect for human rights within every possible extent from the perspective of its obligation within the UN Charter. The 2012 Action Plan of the Union pledged to assist through every possible way the UN Human Rights Council within its efforts of ensuring human rights compliance and addressing the human rights violation cases. The Union further pledged through the said Action Plan, to contribute continuously and vigorously to the effective functioning of the Human Rights Council, through every possible way that could achieve the effective implementation and meaningful realization of international

[357] The EU in a number of other ways is integrating and stipulating such policy subjects into trade policies and agreements, and the common commercial policy is also one such area where EU endeavours for promoting sustainable development worldwide.

human rights standards internationally within the framework of the UN.[358]

Apart from external obligations stemming from the UN Charter, contributing to the cause of the universality of human rights standards is the basis and main motive of the Union's human rights policies. The analytical framework of present work is respect of human rights in Pakistan. EU is bound by its internal legal framework to respect/ promote human rights within all its external engagements with non-EU states. Though this is not very much relevant to the mentioned framework but for sure it will add to the role of EU in the promotion of human rights in Pakistan. The starting point of this policy can be found within the declaration adopted by the European Council in 1991:

> The Community and its Member States undertake to pursue their policy of promoting and safeguarding human rights and fundamental freedoms throughout the world. This is the legitimate duty of the world community and of all States acting individually or collectively. […] The European Community and its Member States seek universal respect for human rights.[359]

By virtue of article 21 TEU, in the adoption of the measures and decisions with respect to the Union's engagement with non-EU states, the European Council is required to ensure the realization of the interests and objectives of the Union as provided within article 2 TEU. Article 2 TEU maintains that:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[360]

Article 21 TEU provides for the guiding principles and goals of these external actions and relations, in the light of the above-mentioned article 2 TEU, that are safeguarding its values,

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[358] According to the same Action Plan of the Union, the Human Rights Council is the suitable forum for the promotion and protection of economic, social and cultural rights, and that the Union shall encourage and assist it in every possible way.

[359] Declaration on human rights, adopted by the European Council. 1991.

[360] TEU – Title I Common Provisions - Article 2, *OJ C 236, 7.8.2012, p. 17.*

fundamental interests, security, independence and integrity; consolidating and supporting democracy, the rule of law, human rights and the principles of international law; preserving peace, preventing conflicts and strengthening international security:

> The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development, and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.
>
> The Union shall seek to develop relations and build partnerships with third countries […],
>
> (a) safeguard its values, fundamental interests, security, independence and integrity;
> (b) consolidate and support democracy, the rule of law, human rights and the principles of international law;
> […]
> (e) encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade; […]

4. The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and by Part five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.[361]

2.5.EU's Human Rights policy towards third States

The Union is taking a number of measures required such as the development and promotion of coherent policies and in relation and actions with non-EU countries, a higher priority and more pro-active strategic approach towards human rights is adopted that could further the cause of human rights and democratization. The initiatives adopted in this respect are the Strategic

[361] TEU – Title V – General Provisions on the Union's External Action and specific provisions on the Common Foreign and Security Policy, Chapter 1 – General provisions on the Union's External Action, Article 21, *OJ C 202, 7.6.2016, p. 28–29.*

Framework and Action Plan for Human Rights and Democracy,[362] and the appointment of the first Special Representative of the EU for Human Rights in 2012.[363] '*Trade for All,*' an initiative adopted by the commission in 2015 signifying the intention of the Union of attaching special and horizontal significance to sustainability. The prime objective was that trade, economic growth go hand in hand with social justice and respect for human rights.[364]

In the pursuance of the said policy and in order to facilitate the Union in determining that the issues of human rights is to be taken care of in dialogues with non-EU countries, the EU Guidelines on Human Rights with third Countries were adopted by the Council of the European Union in 2001.[365] These dialogues are highly structured and institutionalized, and are mainly devoted to the issues of human rights, based either on treaties, agreements and conventions, or exclusively structured on a specific human rights topic. Currently, the Union conducts dialogues with more than 40 non-EU countries, including China, Pakistan, India and Iran. These human rights dialogue guidelines are not specific to the GSP dialogues as the Union carry out different genres of dialogues with respect to human rights.[366]

Apart from legal obligations, the EU can politically convince the third countries to ensure compliance with international human rights standards. The Current case of Asia Bibi in Pakistan is an example of how the Union positively influenced human rights compliance in this case. Asia Bibi, a Christian minority woman, was sentenced with death penalty by Pakistani Judiciary on the accusations of blasphemy. The Supreme Court of Pakistan acquitted her in

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[362] This plan set out certain priority thematic areas, such as the eradication of torture, ensuring the freedom of expression, abolishing the death penalty, etcetera. p. 121. Joint Communication by the European Commission and EU High Representative, *Human Rights and Democracy at the Heart of EU External Action —Towards a more Effective Approach*, COM (2011) 886; *Human Rights and Democracy: EU Strategic Framework and EU Action Plan*, Council Doc. No. 11855/12, 25 June 2012.

[363] Through Decision 2012/440/CFSP, EU's Special Representative for Human Rights, was appointed.

[364] Regulation No 235/2014 of the European Parliament and of the Council, 11 March 2014, Promoting democracy and human rights in Non-EU countries: Regulation: 2014-2020

[365] The Working Party on Human Rights (COHOM) undertook the initiative to develop and establish guidelines on the issue of human rights for the third countries.

[366] Member state dialogues: Apart from human rights, conditional trade and development cooperation dialogues with third countries at the level of the European Union, usually the member states of EU also hold dialogues with the third countries within their national capacity. However, these dialogues are carried out within the national capacity, all the external engagements of the member states in this respect will be equally guided by the EU's principle of democracy, human rights and fundamental freedoms.

2018 on the basis of insufficient evidence.[367] Asia Bibi was accused of blasphemy in 2009 and it took her more than nine years to get justice against false charges.

All the relevant aspects of international human rights standards must be integrated and complied with within all the facets of the Union's external relations. Laws, policies and all the practices of external actions and relations must, both, directly and indirectly compliment democracy and human rights.[368] Not only the Union is obliged to the relevant international human rights standards, but also the third states which will have engagements with the Union through external relations and actions, must comply with international human rights standards which is a vital condition for the initiation and maintaining such relations with the Union.[369]

Similarly, the external actions of the Union relating to bilateral and multilateral agreements of the Union with the third countries or international organizations from the perspective of common commercial policy must also be predicated on the full respect of human rights. With respect to the Union's agreement with third countries, special human rights clauses are inserted into such agreements that mainly state that the agreement in question is based on respect for human rights, fundamental freedoms and democratic principles.[370]

2.6. The possibility to adopt restrictive measures against third countries in cases of violation of the conditionality clause

The protection of labour/human rights through GSP conditionality within Non EU states are somehow more sophisticated and more effective than the ones that we have in the UN system. One possible such tool can be the suspension and/or termination of the trade agreements and withdrawal of preferential status.[371] The restrictive measures of the Union against the

[367] Asia Bibi v. the State, 2018, Crl.A._39_L_2015.

[368] Päivi Leino, *The Journey Towards All that is Good and Beautiful: Human Rights and 'Common Values' as Guiding Principles of EU Foreign Relations Law* in *EU Foreign Relations Law Constitutional Fundamentals*, Ed. Marise Cremona and Bruno de Witte (Oxford: Hart Publishing, 2008) 259-83.

[369] By virtue of article 209 TFEU, the Union may conclude any agreement with third countries or international organizations in line with article 2, 21 of the TEU and article 208 of TFEU. The example is the agreement between the EU and the state of Philippines 2011.

[370] Päivi Leino, p. 119.

[371] Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21st Century: A Living Document in a Changing World*, Ed. Brown Gordon (Cambridge: Open Book Publishers, 2016).

beneficiary countries is the interaction of the trade, foreign and human rights policy of the Union. GSP arrangements can be withdrawn if the beneficiary state is involved in violation of international human rights standards settled in the UN, ILO and other core human rights conventions and instruments.[372]

Upon the violation of human rights, the GSP beneficiary country is notified by the Commission about the initiation of withdrawal procedure. Initially the GSP country is given six months to clarify its position and submit its clarifications regarding their human rights practices and reservations regarding the withdrawal procedure, if any. If within further six months no remedial actions are taken by the GSP beneficiary country in question, then the Commission through a delegated act can withdraw the trade preferential status from that country. Withdrawal is a gradual process, giving the GSP country sufficient time for answering and correcting the wrongs related to its human rights commitment. This process will however change within proposed future GSP Regulation that expectedly will come into force in January 2024.

Within the framework of GSP the preferential status to the beneficiary state under GSP has been suspended in numerous cases, however, in the cases of violation, the EU is more prone to incentivising improvement through dialogue strategies rather than immediately withdrawing the preferential status of the state in question. For instance, in June 1995 a complaint was received against Myanmar which was a GSP preferential status holding country. In the beginning of 1996 investigations were launched against Myanmar and at the end of 1996 withdrawal of the beneficiary status of GSP was proposed by the Commission, the proposal was adopted by the Council in March 1997. In the second case, the suspension procedure was initiated against Belarus in December 2003 upon receiving a complaint in January 2003 against its beneficiary status under GSP. After the report of the Commission in 2005 and its proposal of withdrawal in 2006, the Council adopted the measures of suspension of GSP status of Belarus in 2006. In all these cases, the violation of the labour and workers' rights were the main cause of action.[373]

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[372] That is mentioned in part A of Annex VII, GSP Regulation.

[373] Shad, M. R. (2021). The GSP+ Status of Pakistan in the European Union: Challenges and Prospects. Global Political Review, VI(II), 1-8.

Apart from withdrawal measures, in the case of Sri Lanka, its beneficiary status was demoted by the Council from GSP+ to GSP in 2010 upon launching investigations in October 2008 and submission of the Commission's report in October 2009. The demotion of Sri Lanka was based on the violation of binding human rights obligations. Initially Sri Lanka was given six months to come up with compliance measures required and to take corrective actions, so that the Commission may reconsider its recommendation to the Council.[374] However, Sri Lanka failed to fulfil such an obligation, thus, in 2010 it was demoted to GSP tariffs from GSP+. The GSP+ status for Sri Lanka can be reinstated once the circumstances because of which it was imposed no longer prevail.[375]

The Commission in 2008 launched an investigation against El Salvador, which was a GSP+ beneficiary by then, for non-compliance with ILO principle of freedom of association. The beneficiary status of El Salvador was however not withdrawn. Similarly, in the case of Bolivia for non-compliance with the UN Single Convention on narcotics drugs an investigation against Bolivia was launched in 2012 but its beneficiary status was upheld.

2.7.Is the GSP human rights conditionality effective?

Since the number of states granted with such beneficiary status and the suspension or withdrawal of the beneficiary status is very limited, therefore it will be very early to comment on the success or failure of this scheme of the EU. However, based on the present facts and figures we may analyse the effectiveness of this system. As we have discussed above, there exist three types of tools at the EU disposal within the GSP system, namely, EBA, standard GSP and GSP+. The economic and financial considerations within standard GSP are limited, therefore the beneficiary states are not always politically willing to honour the human rights conditionality of such beneficiary status. However, the benefits emanating from GSP+ are broader than the former two beneficiary statuses, and therefore, the GSP+ beneficiary states are more careful about their such status to be withdrawn or suspended. The most effective leverage of this scheme especially within GSP+ is the potential loss of trade and economic incentives that act as a deterrent for the beneficiary state to ensure human rights standards and

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[374] These included the cancellation of the state of emergency, the abolishment of the 'Prevention of Terrorism Act', and the implementation of the 17th Amendment to the Constitution. However, the government of Sri Lanka denounced these proposals as a breach of national sovereignty.

[375] Henri de Waele, *Legal dynamics of EU External Relations: Dissecting a Layered Global Player*, 2nd Ed. (Antwerp: Springer Publishers, 2017) 81.

compliance and refrain from its violation. Consequently, the influence of the EU with respect to the promotion of labour and human rights is more significant when it comes to GSP+.[376]

With respect to the promotion, demotion, suspension, or withdrawal of the beneficiary status of beneficiary states, the Union adopts the actions in the pursuance of the position taken by the relevant international labour rights monitoring bodies. The Commission is of the view that incentives being more effective should be applied in the majority of the cases, whereas the sanctions should be applied only in extreme cases. The beneficiary status given under this tool is aimed for two-fold benefits of maintaining market access and addressing the labour and human rights standards compliance of the beneficiary states. Therefore, the system stands on the principle that monitoring and dialogue will be the first stage, and only in the cases of grave violation, restrictive measures should be applied.[377]

3. The engagements of EU with Pakistan

Three countries, Pakistan, Bangladesh and Sri Lanka, contribute a significant portion of the total exports to the EU under the GSP Scheme. Being major contributors and beneficiary to GSP+ free trade status, the EU has more leverage over these countries for garnering the trade preferences for the promotion of labour and human rights. As we saw above, through its conditionality, GSP, from the broader perspective of Common Commercial Policy, should contribute to the improvement of human rights both directly and indirectly.

Two times, Pakistan had availed the GSP+ status, and as of March 07, 2020, Pakistan has been granted with GSP status for its third term. The main aim of this status is Pakistan's integration to the world economy, sustainable economic development, as well as enabling Pakistan to diversify its export basket. Pakistani imports almost doubled from 3.6 to 6.8 billion euros between 2008 and 2018 with a sharp rise between 2014 and 2016. The second acquisition of GSP+ beneficiary status led to a 30% rise of Pakistani exports to the EU. Presently Pakistan

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[376] Steven P. McGiffen, *External Economic Relations* (Pluto Press, 2005) 92. The wealthier economies are also obliged to allocate at least 0.7 percent of their GDP to the development of the poor countries by virtue of the MDG-2015.

[377] Other restrictive measures that can be adopted in the cases of human rights violation by third states. Apart from this scheme, the EU however can adopt trade restrictions within the Common Foreign and Security Policy framework on the grounds of grave human rights violations. The example of such measures is the trade restrictions against Syria and the arm embargo against China. Apart from CFSP, the EU for the protection of human rights can adopt unilateral trade restrictions within the Common Commercial Policy framework. The trade restrictions under CCP framework have been adopted in several cases while for other cases it is in the process of preparation.

exports to EU amounts to more than one third of its global exports, 34%, making the EU Pakistan's third largest exports destination.[378] However, Pakistan was the EU's 41th largest trading partner in goods accounting for 0.3% of EU trade, which is a very negligible.[379]

Trade relations between Pakistan and EU form an integral part of EU Pakistan engagements and relations. In this respect, a number of initiatives have been undertaken, such as the EU-Pakistan Strategic Engagement Plan entered into force between the two in 2019. This framework between the two is aimed at improving Democracy, Rule of Law, Good Governance, Human Rights, and Trade Investments in Pakistan through the incentives offered by GSP+. The EU-Pakistan Joint Commission, a forum on Human Rights and trade provides for an important mechanism on the monitoring and analysing the progress with respect to GSP implementation. The 2014-2020 EU-Pakistan cooperation volume was 603 million euros. 54% of which was allocated to rural development, 31% to education and vocational training and only 15% to human rights, rule of law, good governance, security, migration and displacement.

As a part of the conditional requirement of the preferential trading position, Pakistan has ratified the relevant international labour and human rights instruments, however, there exist a number of challenges for the actual realization of those standards. For instance, as highlighted above Pakistan is holding reservations general and broad in nature against those treaty regimes and the comprehensive implementation mechanisms, such as individual complaint mechanisms are not accepted by Pakistan. Moreover, the adoption and implementation of the international human rights standards and legal obligations of Pakistan within its domestic laws, policies and practices is yet a challenge. As highlighted within the Joint Committee Document for the year

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[378] High Representative of the Union for Foreign Affairs and Security Policy, Joint Staff Working Document, The EU Special Incentive Arrangement for Sustainable Development and Good Governance ('GSP+') assessment of Pakistan covering the period 2018 – 2019, SWD(2020) 22 final, Brussels, 10.02.2020, 6.

[379] With first GSP+ status in 2014 the exports of Pakistan to the EU increased by almost 1 Billion Euros which was a huge chunk for an economically unstable country. Due to GSP+, more than 78% of Pakistan's total export to EU including textiles and clothing enter the EU with duty and quota free. This represents almost 33% of Pakistan's exports globally. Pakistan's imports from the EU are mainly machinery and transport equipment (40.2% in 2016) as well as chemicals (19.5% in 2016). From 2006 to 2016, EU28 imports from Pakistan have almost doubled from €3,319 to €6,273 million. The growth of imports from Pakistan has been particularly fast since the award of GSP+ (€5,515 million in 2014).

2018-2019 regarding the GSP+ conditionality compliance, there were no improvements, rather the situation has worsened since then.[380]

4. Initiation of suspension procedures against Pakistan

Similar as Sri Lanka and other GSP beneficiary states, the international trade unions filed complaints against Pakistan regarding the child labour practices in Pakistan within different industries. The International Textile, Garment and Leather Workers' Federation mainly filed the complaint in 2014. Though the initial complaint was rejected, the Federation reinitiated the complaint charging Pakistan with the practices of massive forced and child labour especially within the carpet industry. The EU's Economic and Social Committee supported the said complaint, and the Commission initiated the investigations. Pakistan provided all the relevant information such as the relevant laws, policies and prevailing practices. Also, Pakistan requested the assistance of the Commission in the process of addressing the said problem. Within the investigation, the Commission found that the Government of Pakistan made no practical effort to investigate, ascertain the problem and provide penalties for those responsible and remedies/reparations for the victims.[381]

However, a negative decision was adopted with respect to the withdrawal of the beneficiary status of Pakistan.[382] Interestingly the basis of this decision for sure was not the satisfactory performance of Pakistan, rather there was techno-legal hindrance stopping the Commission from withdrawing the beneficiary status of Pakistan. As the article 9 of the relevant GSP regulation referred to 'forced labour' per say and not 'child labour' as such. The complaint received against Pakistan was alleging Pakistan with the use of child labour, and since Pakistan is not state party to the relevant ILO's child labour conventions, thus not bound by it and since the ILO committees had not commented on the observance of the child labour standards by

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[380] Joint report to the European Parliament and the Council, Report on the Generalised Scheme of Preferences covering the period 2018-2019. Brussels, 10.2.2020 Join (2020) 3 final.

[381] Clara Portela & Jan Orbie (2014) Sanctions under the EU Generalised System of Preferences and foreign policy: coherence by accident?, Contemporary Politics, 20:1, 73.

[382] Clara Portela and Jane Orbie, *Sanctions under EU Generalized System of Preferences and Foreign Policy: Coherence by Accident* in *The trade development nexus in the European Union: Differentiation, coherence and norms*, by Maurizo Carbone and Jane Orbie (New York: Routledge Publishers, 2015) 69.

Pakistan. If the complaint would have been with respect to forced labour in general, then most probably Pakistan would have lost its GSP plus status.[383]

The GSP sanctions are mostly based on the formal condemnation of the ILO, and these condemnations are taken as the objective benchmarks. The Commission acts in the follow up of the criticism or recommendation adopted by the relevant treaty body by taking the initiative of starting investigation against a beneficiary country on the account of the formal condemnation made by the specific treaty body to that state party which is a beneficiary state.

For instance, in the case of Burma and Belarus the condemnation of ILO made it easy for the EU to document the violations. However, relevance in the cases of child labour practices in Pakistan against ILO Conventions was not very straightforward and clear-cut. Since in the case of Pakistan as there were not such formal condemnation or criticism by the relevant convention committee because Pakistan was not at that time party to the relevant convention, thus Pakistan was not obliged to the legal obligations of the ILO Convention of the prohibition of child labour. Thus, the existence of the ILO condemnations makes it easier for the trade unions to file complaints within the GSP system in the EU. Only recently, as it will be discussed later, has the EU raised doubts as to the respect by Pakistan of the conditionality clause based on violations of human rights obligations, rather than ILO standards.[384]

5. Conclusion to chapter III:

The EU interacts with non-EU states within the above discussed six expanses from the perspective of middle and outer layers of the Union. Common Commercial Policy of the European Union is one such venue. Within Common Commercial Policy comes the Generalized Scheme of Preference. The GSP is a free-access window for developing and least developed countries to world single largest market, where a single set of rules and regulations are required to be followed. Keeping in view the economic potentials of GSP for developing and least developed countries, it can be a useful venue to overcome the prevailing cultural and religious relativism challenges to the Universalist concept of human rights, by associating indiscriminate realization of international human rights standards domestically to free trade

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[383] Elenora Spaventa, *Fundamental rights and the interface between second and third pillar* in *Law and Practice of EU External Relations: Salient features of a changing landscape,* Eds, Alan Dasheood and Marc Maresceau (Cambridge: Cambridge University Press, 2008) 143.

[384] See below, chapter IV, para 3.2.

and other economic incentives offered by the European Union. The prevailing challenges as highlighted to the domestic implementation of international human rights standards are relativist reservations to international human rights treaty regimes and the lack of effective enforcement and compliance monitoring system.

The indiscriminate realization of international human rights standards is not the main conditionality of GSP preferential status. Keeping in view the interest of the EU's major industrialist states, the main conditionality of the present GSP Regulation are the ILO standards and the addressal of environmental challenges. GSP regimes provide for the withdrawal of the beneficiary status in case the beneficiary state does not comply with core 27 international labour, human rights, and environmental conventions. The history of the withdrawal analysed in this chapter reveals that the withdrawals in almost every case, except that of Sri Lanka, were made on the basis of labour rights violations. Human rights, and specifically women rights are the least area of concern for GSP. The proposed future GSP Regulation that will replace the present GSP Regulation at the beginning of 2024 includes six new international law treaty regimes including the first optional protocol to CRC, however, the treaties providing for enhanced monitoring procedures for compliance with human rights (e.g. ICCPR-OPI, ICESC-OP, CEDAW-OP) are not included in the list.

Pakistan has the privilege to be granted with GSP+ status for the third time. The benefits of GSP+ preferential status to the economy of Pakistan can be deduced from the fact that Pakistani exports to EU amounts to one third of its total international exports, making EU as Pakistan's third largest exports destination. However, the exports of Pakistan to the EU amounts to less than 1% of EU's total international imports. This highlights the feebleness of the Pakistani economy which needs further improvement to fully utilize the trade preferential status given to Pakistan. Apart from GSP, Pakistan interacts with the EU through other forums and venues, such as the EU-Pakistan Strategic Engagement Plans. Within these plans, Pakistan is offered with financial support in the form of trade investments. 15% of the financial resources of such engagements are allocated for human rights, rule of law, good governance, security, migration and displacement.

From a technical perspective, the GSP Regulation has shortcomings which hinders the ability to promptly and aptly withdraw the beneficiary status in case of the violation of the stipulations of the beneficiary status. Such as in the case of initiation of withdrawal procedures against Pakistan for the violation of certain ILO standards, Pakistan escaped the withdrawal due to a

techno-legal loophole concerning the definition of child labour and the definition of minimum age for work according to international standards and its applicability to Pakistan. This techno-legal lacuna made it hard for the Commission to decide upon withdrawal of the beneficiary status for Pakistan. Secondly, since the decision of withdrawal of GSP beneficiary is made on the basis of formal condemnation by core 27 international law regimes' monitoring bodies, in case of Pakistan such condemnation was missing as Pakistan was not a state party to the relevant ILO Convention. This lacuna of reliance on formal condemnation for the violation of conditional core 27 treaty regimes will be removed as the overhauled GSP Regulation that will come into force from 2024 will provide a complaint mechanism known as Single Entry Point (SEP).

CHAPTER IV

SUGGESTIONS AND RECOMMENDATIONS

1. Introduction:

Within this chapter we will discuss the improvements required for removing the lacunas within the available internal as well as external venues and mechanisms for the indiscriminate implementation and realization of international human rights standards within the domestic laws, policies and practices of Pakistan, with special reference to the realisation of women rights.

With respect to the reservations of Pakistan to the relevant human rights treaties, this chapter will be analysing what positive lessons Pakistan can learn from examples of other Shariah legal system prevailing countries, as discussed in the first chapter. How can the rules of Shariah be given modernist interpretations with a non-essentialist approach? The employment of doctrines of Ijtihad (independent legal reasoning) instead of Taqleed, (following a predefined path), Takhayyur and Talfiq, and its potential will be analysed to this purpose.

Moreover, keeping in view the encouraging role of the superior judiciary of Pakistan, it will be proposed that the legislature supplements and partners the judiciary in the process of elimination of discrimination against women within the domestic laws of Pakistan and of the substantive realization of women rights. The internal tools section will conclude with suggestions for the adoptions of new legislations, the laws that are required to be abolished, and the cultural and religious behaviours and practises that the state of Pakistan should discourage and eliminate.

Alongside internal tools, this chapter will also analyse how the external venues can be made more effective by looking into the present limited objective of the Generalized Scheme of Preferences of EU's Common Commercial Policy and how the mandate of GSP tool can be broadened and made more effective by making a departure from the present conditionality of ILO's labour rights standards to indiscriminate realization of human rights standards, especially women rights, within the domestic laws, policies, and practices of Pakistan. As we have discussed in chapter three, the restrictive measures under GSP tool have been used in the cases of ILO standards' violations, and this chapter will propose to enhance the effectiveness of the GSP conditionality system by extending the adoption of restrictive measures to the

violations of the obligation to ensure the elimination of discrimination and the realization of women rights within all the aspects of Pakistan's national life.

2. Internal tools that will ensure the success of reforming the domestic laws process:

The majority of Pakistani population demonstrate admiring reverence for the cultural and religious traditions, values and strictly adhere to it. Keeping in view the strong sense of cultural and religious identity and relativism, engrained within the general public in general and relevant stakeholders as a result, the reformation of domestic laws, policies, practice, and withdrawal of reservations to international human rights treaty regimes must importantly have its legal and moral base grounded in shariah legal system in order to be acceptable to the relevant cultural and religious stakeholders.[385] This will ensure the legitimacy of the measures adopted, which is important for its acceptance and adaptability. Giving modernist interpretations to the shariah legal principles will give a sense of conformity and familiarity and supported by effective external enforcement means and methods will serve the purpose of bringing the domestic laws, policies and national practices of Pakistan in line with international human rights standards and its indiscriminate realization.[386]

As Quran provides for numerous interpretations, Quran can thus be used as a document for equality and indiscriminate realization of international human rights standards within the domestic laws, policies and practices of Pakistan. There is the need of the reinterpretation of Islamic rules and its primary sources, i.e. Quran and sunnah, as presently followed within legal system of Pakistan. Originally Islam revolutionized the place and treatment of the women with

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[385] John Hursh, "*Advancing Women's Rights Through Islamic Law: The Example of Morocco*" Berkeley Journal of Gender, Law and Justice, 2 (6/22/2012) P. 252-306.

[386] It will neither be possible nor justified to make an effort to altogether secularize the legislative such setup within Pakistan. This will require enormous amount of efforts, energy and resources with very little or no chances to be fruitful.A modified version of secular legal reforms backed by convincing implementation forces can be achieved due to couple of reasons: due to its colonial history, Pakistan remains on the cross cultural roads that are not rigidly Islamic, like Iran, despite the fact that its population are overwhelmingly Muslims. Secondly apart from the family laws and some areas of hudoods, the legal system mostly remains secular. Therefore, there is an inbuilt precedent existing for Pakistan to adopt a secular legal system within the area of family laws. In order to bring reforms, the strategy should be less intrusive.

Strengthening women rights through referring to it as Islamic reforms will be a better option than labelling them as international or universal human rights. The will and eagerness of the local actors for the reforms to be meaningful is mandatory, because alongside the external actors it is the internal actors that could ensure the success and effectiveness of any proposed reforms for the indiscriminate realization of human rights.

its first emergence in Arab peninsula which demonstrate its initial progressive nature. Quran contains passages that emphasis gender equality, for instance it calls on men and women equally such as "for men and women who devoted to God – believing men and women – truthful men and women – steadfast men and women – humble men and women – charitable men and women – fasting men and women." For the achievement of the forgiveness of God the qualities of obedience, truthfulness, endurance, humility, piousness applies equally to men and women without any discrimination. In all these calls, nowhere men have been prioritised over women.[387] The egalitarian values of Islam were once the best vehicle for the reforms and social change in the middle east.[388]

In the initial 23 years of the forming of Shariah legal system during the lifetime of Prophet Muhammad, the rules of Shariah kept on changing and improving with changing needs of the Muslim society, and this is a strong indication that Shariah system initially was progressive in nature to adapt to the changing needs of the society.

2.1. Withdrawal of reservations to Human Rights treaty regimes:

As discussed with chapter I of this work, keeping in view the broad and vague reservations of Pakistan to international human rights treaty regimes, and specially that to CEDAW, in order to withdraw or at least narrow down the reservations to international human rights treaty regimes, the international human rights law recommends that the state parties should take *"into consideration the experiences of countries with similar religious backgrounds and legal systems that have successfully accommodated domestic legislation to commitments emanating from international legally binding instruments, with a view to"* withdrawing reservations.[389]

In order for Pakistan to withdraw or narrow down its reservations to international human rights treaty regimes, it must take into consideration the progressive examples of Shariah law

[387] Quran, Translated into English by Abdul Haleem., (London: Oxford University Press, 2004) XXXIII – 35.

[388] The interpretation of the Islamic rules since its inception, throughout the history, remained male mandated and resultantly male dominated. This pattern evolved the Shariah legal system into a sexist legal system despite the fact that these attitudes are nowhere supported by Islamic legal texts. Traditionalists ignore all those progressive instances and seized with those few negative instances.

[389] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 27 on older women and protection of their human rights*, 16 December 2010, CEDAW/C/GC/27. Also, the General Recommendation No.4 of the treaty body specifically and specially related to the reservations placed by the state parties.

prevailing countries, Egypt for example. The principle of conduciveness employed by Egypt can be a guiding tool for Pakistan. The principle of conduciveness can be applied in the cases where the domestic law is more instrumental in achieving the object and purpose of the concerned human rights treaty regime.[390] Indeed there are some aspects of women rights where the domestic laws are more women friendly than the contemporary international human standards. Secondly, through this principle the logic of reservations can be explained which otherwise may look unjustified. This is the tool at the disposal of Pakistan which will be of assistance in narrowing down and explaining its reservations to international human rights treaty regimes.

a) The practice of Taqleed, stern rejection of the new and positive developments foreign to culture:

With respect to the reservations, Pakistan's experience with the reformation of domestic laws from the perspective of international human rights obligations represents the contrast to that of a Shariah law prevailing in nations like Tunisia and Egypt. Where the traditional Islamic teachings were adopted to achieve socially progressive ends.' From the example of both Egypt and Tunisia, we can learn that the interpretation of Islamic rules in accordance with the contemporary and changing needs of the present-day Pakistani society is possible and permissible.[391]

By contrast, in Pakistan, Shariah legal regime is adopted and applied with the spirit of taqleed, resulting in the adoption of socially regressive legislation for politically expedient purposes. With the respect to the relativist reservations placed by Pakistan to the international human rights treaty regimes, the rejection of *Taqleed* and adoption of *Ijtihad* may enable Pakistan to

[390] Article 23 of CEDAW provides that where the provisions of domestic laws of the state parties are more conducive than that of protection and rights given by the provisions of the CEDAW, then the protection and rights given by domestic laws must be extended to the women in the light of the object and purpose of the CEDAW. For instance, it is evident from the experiences of the Shariah prevailing state parties that, in situations where required, to eliminate or at least mitigate the violation of the legal criteria for the reservations to the international human rights regimes, the principles of conduciveness can be applied by the virtue of article 23 CEDAW. This legal principle provides for the application of conducive laws between the international and national laws that are more pro-women in comparison to the other. This principle has been applied by Egypt more effectively, which can be an example for our present case of Pakistan.

[391] To Abduh a renowned Egyptian Jurist, "*the Muslims must do once more, what they should always have done: that is to say to reinterpret the law and make it adaptable to the contemporary needs and challenges of muslim society.*"

meet the obligations of international human rights laws. The modernist interpretation can be made possible by employing the legal tool of Ijtihad. Allama Iqbal, the dreamer of Pakistan, being fully aware of the need of Ijtihad in the future state of Pakistan, had provided us with a comprehensive mechanism for Ijtihad. Iqbal had proposed the reconstruction of the legal system through conception, reasoning, and legislation. The legislation in the parliament, in accordance with the needs of contemporary needs of the Pakistani society, according to Iqbal is Ijtihad which will be based on the principles of Shura (Shariah concept for consultation) with the inclusion of the Islamic scholars in the parliament and the whole process of the legislation. On the same time the practice of Taqleed (to keep following a predefined path for centuries as defined by early Muslim jurists) which is prevailing, must be completely abandoned by giving to the possible extent pro-women and non-essentialist interpretations to the founding rules of Islamic law. Giving pro-women interpretations to founding Shariah rules through Ijtihad, alongside meeting the objective of realizing women rights, will let us remain within the fabric of the Shariah legal system that is important to earn the required social support for the reforms to be acceptable by the common masses.

In Pakistan however, the traditionalists and the cleric segment of the society strongly oppose the possibility of Ijtihad. Though mandating the present Parliament (Shoura) to perform Ijatihad as envisioned by Allama Iqbal will be instrumental in the process of reforming the domestic laws relating to women, this will for sure undermine the monopoly of the religious clerics over the interpretation of the Shariah legal system, therefore, these conservative segments of Pakistani society deny any such possibility of Ijtihad and stress for Taqleed.[392]

In our view one justification for prioritizing Ijtihad over Taqleed is that, considering the Shariah law as a static system is a relative phenomenon, because social norms and customary rules and laws emanate a considerable amount of influence on the legal setup and behaviours of the state. For instance, due to the lack of security, poor judicial structure, and low socio-economic status of women, it is extremely hard for the women of Afghanistan to have their civil, political and economic rights, and here the cause is not the Islamic legal system but the structural

[392] The proponents of taqleed are under the understanding that the practice of taqleed will preserve the original posture of Shariah legal system which will enable the system to counter the western influence. Whereas the Ijtihad supporters are of the view that the practice of Ijtihad will allow for the necessary required reforms that will equip the Shariah legal system to keep up with the modern day needs and remain a viable legal system for the Pakistani society rather than being totally abandoned. Thus, the proponents of taqleed sides with extreme position where there is no possibility for reformation.

deficiencies and socio-economic faintness of Afghanistan. On the other hand, women in Tunisia enjoy a far wider range of civil, political and economic rights due to the freedoms available to them socially and culturally, despite the fact that Tunisia is similarly following the Shariah legal system as that of Afghanistan.

b) Takhayyur

In the Shariah legal system there are four schools of thought, Hanafi, Hanbali, Maliki, and Shafi' school of thought. Pakistan is following the Hanafi school of thought. Usually, it is wrongly perceived that a Shariah law prevailing state may follow one, out of four school of Islamic thought at one time. However, we can learn from the example of Morocco's participation and its reservation to CEDAW that in order to meet the obligations of the international human rights laws, Islamic states can borrow from all the four schools of Shariah legal system. The legal rules of one school of thought that are more suitable can be borrowed, in comparison to the other school of Shariah legal system, for the indiscriminate realization of international human rights standards.[393]

For instance, one school of Shariah system may give more rights and freedoms to women within matters relating to marriage, while the same school in other areas of rights may not be as pro-women in comparison to the other school of Islamic thought. In such a scenario, the state can switch from one to another school of Shariah legal system.[394] This principle is called '*Takhayyur*. *Talfiq* is the other name of *Takhayyur* given to this procedure under Islamic law. Both the tools, procedurally and substantively, are the same with different names as given by their developers. *Talfiq* is defined as "*combining the doctrines of more than one school or to borrow from other schools*," Takhyyur in similar way is a selection.[395] This doctrine played a

[393] The important doctrine of "Takhayyur" developed by Egyptian Jurist Rifah Badavi Al Takhtanvi might be useful, which provides for the progressive interpretation of the Shariah legal system. For instance, this principle implies that the Qur'anic ideal is monogamy and not polygamy. Therefore, it considers the reservation to CEDAW based on polygamy cannot be justified.

[394] Ahamd Ali Sawad "Islamic Reservations' to Human Rights Treaties and Universality of Human Rights within the Cultural Relativists Paradigm" *The Journal of Human Rights,* 24 (2018) pp.101-154.

[395] Muhammad Khalid Masud, "Modernizing Islamic Law in Pakistan: Reform or Reconstruction?" quoting Schacht, *An Introduction to Islamic law*, 104.

decisive role in facilitating the pro-women interpretation of the Islamic laws in the case of Egypt.[396]

Alongside the principle of conduciveness, *Takhayyur* and *Talfiq* can be a helpful internal tool of the Shariah legal system to adopt and repeal domestic laws as required and to reformulate the reservations of Pakistan to international human rights treaty regimes. In present-day Pakistan only Hanafi school of thought is followed, through the principle of Takhayyur, Pakistan can interpret the Shairah rules in the most favourable way by borrowing the principles of other Sunni schools of Shariah legal system applicable within similar circumstances.

c) Interpretation of polygamy permissibility as qualified permission: Quranic ideal is monogamy

At the face of strong religious support in favour of polygamy, in Pakistan the prevailing view is that the Quran provides for polygamy. Moreover, there has not been a serious debate on what are the prerequisite requirements of polygamy under Islamic Law. As per the researcher's understanding, the relativist actors have misunderstood the notion of polygamy being permitted under the Quran. According to the Islamic teaching and practices of Prophet Muhammad, this practice is only permissible where the doer is sure that he can maintain justice in the polygamous relations. This requirement of maintaining justice is easier said than actually done, which turns the practice of polygamy to no less than prohibited. In this respect for instance, the example of Prophet Muhammad is always given as a reference and justification, as his followers take him as the perfect human being. Even taken that way, it is easy to deduce that only a perfect man can maintain justice within the polygamous relations (in this case Muhammad), which is not possible for the rest of the human beings. Therefore, the condition for polygamy to maintain both material and emotional justice is humanely impossible to be achieved. As the very notion of polygamy is based one unfairness against the first wife, thus, while polygamy was permitted, the Quranic ideal is monogamy.[397]

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[396] For instance, within the matters of the divorce, the Maliki School of law is more pro-women in comparison to the Hanafi school of law, because the Maliki school in this matter gives women more rights and freedoms.

[397] *"The Egyptian reforms were cloaked under the veil of the "acceptable" reform mechanism of takhayyur."* Baharathi Anandhi Venkatraman, *Islamic states and the United Nations Convention on the Elimination of all forms of Discrimination Against Women* (1991), 1987.

This is precisely the view adopted by Tunisia, which prohibited polygamy advancing the following logical argument based on Quranic text: within the meaning of IV: 3 and IV: 129 of Quran *"more than one wife is only permissible when equal justice and impartiality was guaranteed."* The Quranic permission for polygamy is a seriously qualified permission in nature. As verse 129: *'Ye are never able to be fair and just between women even if that were your ardent desire' (IV:129).*

It should also be considered that, as the institution of slavery which is provided for within the Shariah legal system is no longer acceptable to the Muslim states, the same way the practice of polygamy has lost its moral and utilitarian significance. Thus, the practice of polygamy is in contravention to the Quranic ideal as well as human rights standards. Also, the reservations of Pakistan to international human rights treaty regimes which is indirectly based on concept of polygamy under Shariah law are irrelevant.[398] Therefore, the reservation of the Pakistan to international human rights treaty regimes based on the permission of the polygamy should be withdrawn and the practice of polygamy should be prohibited on the basis of above-mentioned impossible conditionality.

2.2. Judiciary must be partnered and supplemented by legislature

To bring the domestic laws of Pakistan in conformity with fundamental rights provision of the constitution as well as to that of international human rights standards, legislature/ parliamentarians must be equally partnering with the Judiciary/judges. Judiciary in some instances has been supplemented by the legislature in efforts to modernise the family laws of Pakistan. Muslim Family Law Ordinance 1961 is the prime example of this coordination between the two. MFLO was more of a child of compromise as there was no popular support for this legislation even though in this specific instance the legislature was committed to bring about positive reforms at the face of the cultural and religious hindrances to those intended reforms.

However, politicians, as part of the legislature, in order to attain and maintain social legitimacy within the eyes of common masses, at the face of the fact that Pakistani legal system is strongly based on misconceived religious principles, fail to bring substantial reforms and build

[398] Indirectly in the since that the reservation subjects the application of international human rights standards to the constitution of Pakistan, and the constitution claims the Islam as state religion, no laws against the Quran and Sunnah.

consensus with the judicial organ of the states for the protection of the rights of vulnerable groups of society, women and children for instance.

The Superior Judiciary should nonetheless be given the mandate to signpost any inconsistency between international human rights commitments of Pakistan and the domestic laws, policies and practices of Pakistan to the relevant state institutions, i.e. the legislature. Within the process of partnering judiciary, the legislature through constitutional amendments shall reform the provisions of the constitution, as well as eliminate the parallel judicial forums, that hinders the dissemination of justice and protecting the rights of women as per the international human rights standards. The legislature should not sacrifice the rights of women for earning social legitimacy. Rather, with the assistance of external actors, EU for instance, the general public should be educated about the rights of women that will lead to the elimination of cultural and religious hindrances to the indiscriminate realization of women rights within the domestic laws, policies, and practices of Pakistan.

The participation and acceptance of the general public within this process is utmost important. For the measures to eliminate discrimination against women within the municipal laws, policies and practices of Pakistan, it needs to be backed by the following necessary components: popular social support, societal legitimacy, parallel mobilization of the socialist forces, educating the larger public about the reforms, and about the benefits and fruits of these measures of eliminating discrimination and ensuring the rights of women on substantively on equal footing to that of men rights within the national life of Pakistan.

2.3.Legislative measures to be adopted:

In the pursuance of legally binding international human rights commitments,[399] Pakistan is required and under obligations to adopt within its domestic legislation provisions that may ensure the indiscriminate realization of international human rights standards and prohibit all kinds of discrimination against women. In addition, Pakistan is required to repeal any existing law that provides for any kind of discrimination.[400] In this respect, the following legislative measures should be adopted:

[399] In line with article 1 CEDAW, Article 14 ECHR, and Article 25 of the constitution of Pakistan.

[400] Such as the Hudood Ordinances, the law of evidence and the Citizenship Act (1951).

- The Dissolution of Muslim Marriages Act (1939) should be revised, with the aim to repeal discriminatory provisions against women;
- The Hindu Marriage Bill, the Christian Marriage (Amendment) Bill and the Christian Divorce Amendment Bill should be adopted;
- Polygamy should be prohibited by law;
- The Domestic Violence Bill, which is still pending notwithstanding strong opposition from traditionalist forces, should be adopted without delay;
- Legal provisions to ensure that, upon dissolution of marriage, women have equal rights to property acquired during marriage, in line with article 16, paragraph 1 (h), of the CEDAW Convention and the Committee's general recommendation No. 21 (1994), should be adopted;
- The Prevention and Control of Women Trafficking Bill should also be adopted without delay;
- The Prevention of Anti-Women Practices Act, which is pending since 2011, should also be adopted;
- The judicial system should be unified, and the parallel judicial systems be eliminated;
- The non-judicial family dispute resolution forums should be eliminated and prohibited as these non-judicial conduits are hindrances to women access to justice;
- Treaty implementation Cells both at provincial and federal level must be equipped with capacities, mandate and resources to monitor effectively the implementation of international human rights obligations of Pakistan; and
- In order to augment the cooperation between the Federation and the provinces, a National Mechanism for reporting and follow-up will be a positive step as suggested by the Joint Action Committee document 2018-2019.

3. Improvements of external tools for municipal law reforms:

3.1. From ILO Conventions to Indiscriminate realization of Civil, Political and Economic Rights:

The main objective of the GSP tool of Common Commercial Policy is the harmonious development of international trade and elimination of the restrictions and barriers. As we have discussed in chapter III, the GSP conditional twenty-seven core international treaty regimes can be divided into two groups which are related core labour and human rights standards, and conventions related to environmental and governance standards. These conventions are mainly

related to environmental, narcotics, drugs and corruption issues, which are mainly based on the economic interests of the countries involved.

The suspension or withdrawal procedures of GSP beneficiary status are usually initiated on the formal condemnation of ILO standards. Acting in the follow up of objective benchmark condemnation of ILO standards, the Commission initiates investigations against the concerned beneficiary state. The labour rights were the main cause of action in four out of six suspensions and investigations, whereas the violation of civil and political rights was employed in only one case. Looking into the history of the GSP sanctions and investigations will reveal that in the cases of GSP beneficiary status suspension, the Commission is more drawn towards labour and workers' rights, whereas the rights of vulnerable groups and individuals are not at the priority of the GSP tool, such as the indiscriminate application and realization of all the civil and economic rights to all, be that men or woman due to the economic and trade interests of European industrialist states.

For instance, in the cases of Burma and Belarus, actions were taken on the documented violations of ILO standards. Similarly, the suspensions of the GSP made in the cases of Myanmar and El Salvador were based on the violation of the labour rights and ILO regulations. Investigations for the withdrawal of the GSP beneficiary status of Pakistan were also initiated as Pakistan was suspected of labour rights violations. Only in the case of Sri Lanka, its beneficiary status was demoted on the account of non-compliance with civil and political rights obligations. Whereas investigations were initiated against Bolivia on the basis of the violation of UN Single Convention on Narcotic Drugs.

Keeping in view the significance of the Article 2 and 21 TEU, which sits the foundations of the Union on the values of respect for human dignity, freedom, democracy, equality, the rule of law, respect for human rights and non-discrimination. These values shall be upheld and promoted in all the instances of the Union.

It is our view that protection and indiscriminate realization of civil and political rights is something missing within this scheme and the inclusion of these elements to the present arrangement of GSP tool will add more value and will make it more meaningful with the view that the trade, economic growth shall go hand in hand with the indiscriminate realization of international human rights standards from the perspective of EU Guidelines on Human Rights with third Countries which were adopted by the Council of the European Union in 2001. These

guidelines set out targets and milestones for the Union and world at large, and it provides the actions and commitments required in this respect.

Human rights centred approaches are more beneficial than traditionally labour rights conditional trade agreements. The instances are indiscriminate realization of human rights standards, freedom of expression and privacy. From this perspective, the future GSP+ beneficiary status of Pakistan, which will most probably commence from January 2024, should be made conditional to the realization of women rights within the domestic laws, policies and practices of Pakistan in the pursuance of CEDAW Committee recommendations. Specifically, from the perspective of equal rights of women, the following positions with respect to Pakistan should be adopted from the standpoint of GSP:

- Pakistan should be encouraged for the withdrawal of the reservations to Human Rights treaty regimes, specifically reservation placed against CEDAW;
- Pakistan should be encouraged to ratify the optional protocols to the human rights treaty regimes that mandates the committees concerned to receive and consider communications in the form of complaints by individuals or groups of individuals against the violation of rights guaranteed within the provisions of respective treaty regimes. For instance, the optional protocols to ICCPR, ICESCR, CRC and CEDAW which provides for committees' competence to receive and consider communications;
- It is suggested that Pakistan should ratify the following treaty regimes and the relevant domestic laws should be adopted and amended accordingly:
  i. ILO's Domestic Workers' Convention No. 189 of 2011;[401]
  ii. Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951(C-100);
  iii. Convention concerning Home Work, 1996 (C-177)
- Pakistan should initiate dialogues between the relevant stakeholders concerned and ensure the full involvement of the relevant stakeholders within the development, adoption, implementation, monitoring and the evaluation of the national laws, policies and practice adopted in the pursuance of the international human rights law binding obligations; and

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[401] The present 31 member state parties list and the said convention in detail can be accessed online at: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:255146, Last accessed on February 3rd, 2021.

- Pakistan should be encouraged to make specific commitment for combating discrimination against women which must reflect within the universal periodic reports (UPR) as well as with the reports to EU.[402]

Linking these financial and economic incentives and benefits with the elimination of discrimination against women within municipal laws, policies and national practices may help Pakistan improving its economy in two possible ways. In short-run, it will help Pakistan with free trade and encouragement of exports to the European Union's markets on priority and low tariff bases. Secondly, in longer run, empowering the women within national spheres through elimination of discrimination against them in line with international human rights standards will mean half of population of Pakistan will positively contribute to the progress of country.

3.2. The example of associating GSP with blasphemy laws of Pakistan: Departure of conditionality from ILO standards to human rights standards

So far, the emphasis of the GSP has mainly remained the ILO Conventions. Recently, however, the European Parliament on April 24, 2021, adopted a Resolution relating to Pakistan.[403] The blasphemy laws of Pakistan were the main concern of this resolution, the penalty of which within the domestic laws of Pakistan is death or life imprisonment.[404]

Within this resolution, Pakistan is urged to make certain legislative arrangements. Such as repealing section 295-B, C of PPC, which is in contravention with the rights to freedom of thought, conscience, religion and expression throughout the country. The resolution also urges Pakistan from amending the Anti-Terrorism Act 1997, because presently the accused on the blasphemy can be tried in the anti-terrorism courts which is a lacuna existing within the present legal system.

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[402] Additional measures for combating violence against women: Such as the EEAS can summon the UN Special Rapporteur on the violence against women in the cases of widespread violence against women. Or the EEAS can follow up the recommendation of the Rapporteur made with respect to the widespread violence against women and it can play its role for the implementation of the said recommendations. The EEAS can provide for supporting measures that will combat the existing (if any) impunity of the legal and judicial system.

[403] European Parliament, Resolution on the blasphemy laws in Pakistan, in particular the case of Shagufta Kausar and Shafqat Emmanuel, 2021/2647(RSP), para R; Online available at https://www.europarl.europa.eu/doceo/document/RC-9-2021-0254_EN.html [Last accessed at July 5th, 2021].

[404] The blasphemy laws of Pakistan in most instances are used for false accusations and it incite violence harassment and extra judicial murders. These laws are known as tools used for obtaining personal interests. The lives of the religious minorities are always at stake due to the misuse of these laws.

Through the EU Parliament resolution of June 2021, the Commission and the European External Action Service are called upon to review the eligibility of Pakistan for GSP+. The Parliament calls upon the Commission and EEAS to analyse if these reasons are sufficient for initiating temporary withdrawal of the GSP+ status. Also, the Parliament asks Pakistan to strengthen its cooperation with international human rights monitoring bodies, such as the UN Human Rights Committee, in order to implement all relevant recommendations and improve the monitoring and reporting of progress towards achieving international benchmarks.[405]

This is a good example of the EU's departure from its long-held practice to associate the GSP conditionality primarily to the ILO labour standards. This example suggests that GSP conditionality can be used according to the circumstances and needs rather than static to the ILO standards. In this respect, the first step the EU should adopt is to fully associate the GSP conditionality to the indiscriminate realization of international human rights within the domestic laws and practices of Pakistan. The challenges highlighted within the second chapter of this work should be the areas of concern for the Commission and EEAS.

4. Approaches that must be avoided:

To propose a workable model for safeguarding and ensuring indiscriminate realization of international human rights standards in Pakistan, it will also be important to take into account the strategies that should be avoided.

The political realities of the Pakistan and Islamic states should not be ignored while introducing any reforms, that the external tools shall be used in complementarity with the internal tools available for the measures and reforms to be more effective and fruitful. In Pakistan directly framing the realization of women rights reforms as modern-day rights of women will for sure attract resistance and opposition from the traditionalist stakeholders of the state and society.

Therefore, for the proposed reforms to be implementable and successful, the process must not be the imposition of the external or borrowed reforms, rather it must be the internal reforms backed and guided by effective and modern enforcement tools available. Because internal reforms enjoy greater social legitimacy, which increases the success chances of the reforms, whereas, pure external reforms will always be labelled as western imperialism and intervention.

[405] It also asks the Commission and EEAS to use all the tools at their disposal for ensuring the elimination of misuse of the blasphemy laws in Pakistan through capacity building of the lower judiciary to handle the blasphemy cases in accordance with international human rights standards.

Therefore, imposing external and borrowed reforms, trying to alienate the shariah legal system in Pakistan, or bringing the international human rights law into contrast with Islamic law will make it harder for the proposed reforms to be effective.[406]

5. Conclusions:

To recapitulate, being a party to international human rights treaty regimes, Pakistan is under an obligation to bring its domestic laws, policies, and practices in conformity with binding international human rights standards, including the crosscutting principle of non-discrimination. However, the domestic laws, policies and national practices of Pakistan relating to women, in a number of instances, are hardly in line with those international human rights law standards.

Internally, the following problem causing factors exist within present day Pakistani legal and political setup: strong cultural and religious relativism, misconceived departure of Shariah legal system from Ijtihad to Taqleed, colonial legacies,[407] continuous divide between the majority traditionalist and minority modernist segments of Pakistani society, and the existence of parallel state institutions.[408] The municipal laws adopted for the protection of women rights at the face of such political, religious, and cultural realities are more a child of compromise rather than a real change maker for the meaningful realization of women rights which can fulfil the object and purpose of the international human rights standards. Whenever a legal reform is introduced with the intention of realizing women rights in accordance with binding international human rights standards, it is subsequently repealed.

The main positive force within all these actors and stakeholders is the superior judiciary of Pakistan, which tries to stretch the laws to the possible extent in order to give it women friendly interpretations as much as possible. However, it is important to note that the judiciary can

[406] For example, external legal reforms efforts were made by the US policy makers with the intention of implementing rule of law programs in the Middle East. It was misunderstood that the concept of legalism can be exported, therefore, such exportation failed to succeed. This external/imported rule of law initiatives lacked the knowledge and understanding of the Islamic legal system and the devotion of the general public towards it.

[407] Colonial legacies within present day's Pakistani legal system are for instance the incorporation of English legal doctrines and tools within the fabric of Shariah legal system, such as the doctrine of precedents.

[408] For instance, the existence of Islamic Ideology Council with the mandate to analyse the laws adopted for its compatibility with the Quran and Sunnah, a kind of check on the freedom of the parliament to adopt pro-women laws; or the Federal Shariat Court against the existing Judicial System, in order to analyse the decision of the judiciary for the same purpose of its compatibility with the Quran and Sunnah.

stretch the domestic laws to some extent in the favour of women rights, however the judiciary has no mandate for adopting pro-women laws. This mandate is entrusted in the legislature only.

Externally, two pitfalls of international human rights law perpetuate this problem: the possibility to introduce reservations to human rights treaties and the lack of effective enforcement mechanisms. While allowing a widespread participation in international human rights treaties, reservations undermine the potential of human rights standards to achieve universalist status and may actually lead to cultural and religious relativism. On the other hand, the lack of a coercive enforcement mechanism impinges upon the substantial application and indiscriminate realization at the domestic level of human rights standards, beyond their formal recognition.

As the failure to indiscriminately realize international human rights standards within the domestic laws of Pakistan is due to the drawbacks of both the international human rights law and the domestic legal and political setup, cultural and religious realities of Pakistan, the proposed solution should also be two-dimensional, in order to have the potential to mediate the downsides of the existing international human rights protection system. This can be possible by providing an operative enforcement mechanism which at the same time is effective as well as acceptable to the relevant stakeholders, at the face of strong cultural and religious relativism, which is an important aspect for the success of ensuring the rights of women within the domestic laws, policies and practices of Pakistan.

Internally, from the progressive examples of Tunisia, Egypt and Morocco, Pakistan can learn how the rules of Shariah can be given modernist interpretations with a non-essentialist approach. From these progressive examples Pakistan can learn the employment of doctrines of Ijtihad (independent legal reasoning) instead of Taqleed, (following a predefined path), Takhayyur and Talfiq. These legal tools bear enormous potential for the interpretation of Pakistan legal doctrines with a pro-women approach.

Secondly, from these progressive examples, Pakistan can learn how it can reformulate/narrow down/withdraw its broad and vague reservations to international human rights treaty regimes, and what available tools in this respect can be employed. As the Shariah legal system consists of a uniform set of rules, therefore it is more certain that the attitude adopted by the progressive reservations holding Shariah law prevailing states is not something against the spirit of the Shariah legal system. Rather it is a more logical and saner stance in conformity with international human rights standards, while remaining within the fabric of Shariah boundaries

which is a necessary component for social acceptance of any reforms. Therefore, the progressive examples of the Shariah Law prevailing countries may help Pakistan in the withdrawal of its reservations to international human rights treaty regimes.

Thirdly, keeping in view the encouraging role of the superior judiciary of Pakistan, it is proposed that the legislature should supplement and partner the judiciary in the process of elimination of discrimination against women within the domestic laws of Pakistan and the substantive realization of women rights.

Fourthly, alongside the incorporation of the international human rights standards within domestic legal system and withdrawing/narrowing down reservations to international human rights, there is the need for reformation through education and rehabilitation of the social attitudes, behaviours and practices that are based on religious and cultural norms and values both at micro as well as macro level.

Externally, International human rights law asks the state parties to employ all the means and methods provided within international human rights treaty regimes for indiscriminate implementation and substantive realization of the international human rights standards. Free trade and economic incentives can play an effective role in the promotion, enforcement, and meaningful realization of international human rights standards. The European Union, being the world's single largest market, requires adherence to one single system of rules and regulations in order to be accessed. Free market access, GSP beneficiary status, and other economic incentives makes this international market the most desirable venue for Pakistan from the perspective of trade. In this respect the Free Trade between Pakistan and EU through the Common Commercial Policy's tool of GSP can be a means to mediate the relativist challenge to the universalist concept of human rights, as the adage "*trade brings the enemies together*" would suggest.

Currently, keeping in view the economic interests of the industrialist states, GSP is mainly focusing on ILO's labour standards and rights related to work guaranteed by international human rights law, and not the indiscriminate realization of civil and political rights. From the case law, it is evident that the restrictive measures under the GSP tool have been used in the majority of case as a reaction to ILO standards' violations.

However, the mandate of GSP tool need to be broadened and made more effective by making a departure from the present conditionality of ILO's labour rights standards to indiscriminate

realization of human rights standards, especially the civil, political, and economic rights of women within the domestic laws, policies, and practices of Pakistan. The restrictive measures can be made more effective by extending the GSP conditionality to the elimination of discrimination and realization of women rights within all the aspects of Pakistan's national life. In this respect we have a very recent and refreshing example of the EU's departure from only ILO's standards conditionality in the criticism of the blasphemy laws of Pakistan and the proposed suspension of its GSP plus status.

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