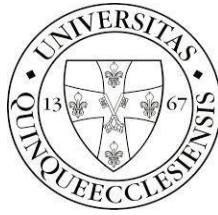


UNIVERSITY OF PÉCS



SUMMARY OF THESES

Developing Pakistani Contract Law Regarding Gender Equality Issues

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

by
HASSAN, Amna

Supervisor:
Dr. BENKE, József Zoltán

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Abstract

The legal provisions of a contract vary from one country to another, therefore, forming a contract between parties from various legal systems runs the risk of a fault or imperfection in the formation of a contract, which might affect one party's rights in the event of a contractual dispute. Although both the continental and Anglo-Saxon legal systems employ similar legal theoretical techniques with regards to the interpretation of a contract, yet they differ in their meaning and applicability. Therefore, this study aims to develop a comparative analysis relating to the role of contractual legal techniques between the Contract law of Pakistan – an Anglo-Saxon country, and the European (EU) countries – continental law countries, especially Germany and France. Not only this, but the study also aims at comparing women's general as well as the contractual status between the two different legal systems for the purpose of addressing issues of gender equality and proposing suitable recommendations.

The thesis consists of four major chapters. Chapter 1 provides insight into the reasons for comparing contract law between two different legal systems. Chapter 2 focuses on the prevailing Shariah law and women's rights in Pakistan at length. Chapter 3 highlights the need for a uniform European contract law and analyses several contractual theoretical legal techniques between Pakistan and the EU in a comparative method. Chapter 4 comprehensively compares the legal and contractual status of women in Pakistan and the EU to propose reforms in the existing unequal treatment of the female gender in Pakistan. Finally, Chapter 5 summarizes the entire thesis work compactly, providing solutions to existing problems in Pakistan either by proposing reforms and governmental initiatives.

Keywords

Comparative Contract Law; Pakistan v. EU; Continental v. Anglo-Saxon law; Theoretical Legal Techniques; Gender Equality Issues.

Comparative Contract Law: Pakistani v. 'European' Contract Law

Contracts have existed since the dawn of time, and their importance in social life cannot be questioned. When striking an agreement or a bargain among its members, every culture relies on the concept of a contract. As a result, it has become an unavoidable evil in everyone's life, whether in the shape of a barter system or modern-day commitments. The necessity to govern such agreements grew as society advanced, and this need was supplied by the introduction of Contract law into national legislation in every country. Even though contract law is a branch of domestic civil law, the comparative law method allowed the subject to find a parallel in the international arena.

In Chapter 1 of my thesis, I set out to compare contract law in Pakistan — an Anglo-Saxon law regime, and Europe — a continental law regime, to enhance the international character of contract law, because they both belong to different legal systems and, as a result, constitute different contract laws in several ways. According to my study, this legal distinction may be used to solve current difficulties in both systems, particularly in Pakistani contract law and women's contractual rights. For that purpose, it is occasionally advised that we look out for sources of law that do not refer to a certain legal system. These can be authoritative sources of international law, such as international conventions like the Vienna Convention on Contracts for the International Sale of Goods (CISG), or non-authoritative sources, such as generally accepted principles of international trade, international contract practice, trade usages, as well as private codifications of contract terms, standard negotiating clauses, and standard negotiating clauses. As a result of the exchange and application of such foreign legal concepts into the domestic legal system of either Pakistan or the EU, international acceptance of those imported legal principles will begin.

Moreover, there are several bases for making a comparison between both the legal systems of Pakistan and Europe. Nevertheless, it is difficult to give preference to anyone system based on any of the above-stated differences. In this chapter, an overview of some key theoretical legal techniques between both the legal systems, along with the issues of gender equality are touched in brevity, which shall form the basis of the fundamental or core of the thesis title. Amongst the key theoretical legal techniques or concepts, I would like to draw attention to a few including the concept of contract, consideration, the frustration of contract, duty to perform, and breach of contract.

These theoretical legal techniques are used as tools to describe the existing inequality between males and females in Pakistan with regard to contractual capacities or rights. These contractual rights are so-called based on their derivation from the notions of equality and contractual freedom granted to all citizens of Pakistan under the Contract Act, 1872. Although these concepts belong to the branch of personal or family law, yet they contain elements of contract law in the sense of matrimonial or maintenance agreements, property or inheritance contracts etc. For the purpose of my thesis, I would like to draw attention to this unique concept of contractual freedom or right regarding the existing family law concepts (e.g. marital rights, divorce, maintenance etc). The otherwise provided equality, both as citizens as well as freedom to contract, females in Pakistan suffer from great discrimination. Therefore, a comparative approach for current gender issues have been focused between Pakistan and the EU to recommend reforms via legal amendment or legal transplants etc.

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

Moving forward, Chapter 2 of the thesis explores several important topics that form the basis of comparative analysis at a greater length. The chapter begins with explaining Shariah law, which has been there for a long time, as well as certain other cultural traditions. Traditionally, autonomous muftis (also known as jurists) interpreted Shariah law based on Islamic teachings and numerous legal sources. However, in the majority of Muslim nations, these Shariah laws have been superseded by European Statutes or Codes, but the traditional Shariah norms have been preserved in the field of family law. In essence, a comprehensive summary of Shariah law's existence, history, and contemporary implementation have been covered. The thesis then considers Pakistan's hybrid legal system, which combines Shariah and Anglo-Saxon law. English laws remained in effect after Pakistan gained independence in 1947 until a new constitution was drafted. Muhammad Ali Jinnah, Pakistan's founder and father, envisioned a legal system for the country that was completely consistent with Islamic principles, but this vision was never realized during his lifetime. However, his idea was carried on for a long time and had a lasting influence on Pakistani legislators. General Zia-ul-government Haq's bears evidence to Jinnah's vision since Shariah law was included in Pakistan's Constitution, opening the path for the country's Islamization process. From the time of independence till now, the whole process of creating a constitution and enforcing it in the country has been analysed.

The chapter then goes on to discuss the general and contractual position of Pakistani women, who are often subjected to gender subordination according to their social

class and area. The fundamental explanation for this is that socio-economic growth has been unequal, and religion and feudal institutions have had an influence on their lives. Since its origin, Islam has been (and continues to be) fully male-dominated, with extensive legislation favouring males over women in subjects like marriage, divorce, property rights, inheritance, and so on. This legislation lies at the heart of Shariah law's family rules, which are regarded to be one of the most sensitive problems in modern Islamic nations like Pakistan. However, specific Islamic teachings make it apparent that Islam grants males' primacy over women in issues of the heart. This is discussed in detail in Chapter 4 under the title of women's contractual rights in terms of marriage, divorce, property, inheritance, and so on. Several religious groups and ulamas who gained political influence during and after the Zia-ul-Haq era encourage and support women's subordination in Pakistan in various areas, as can be shown.

We can see that Pakistan was founded based on Islam, and it is upsetting to see how religious and Quranic principles are frequently overlooked and perverted, especially when it comes to women's roles. Interestingly, the societal problems that Prophet Muhammad struggled against during his life remain firmly established in Pakistani culture, and the so-called custodians of the religion regard them as ordinary punishment and ostracization of women. It is necessary to discourage the present mentality of supporting cruelty and injustice in the name of Islam. Religion has not been able to eliminate decades of un-Islamic and even barbaric societal problems in Pakistan, which has been a source of grave concern. In Pakistan, illiterate behaviours, often known as Jahiliyyah, are still prevalent. Worse, in the guise of Islam, religious clerics and preachers are sanctifying and promoting 'customary rules.' Furthermore, widespread ignorance and fear contribute to violence against women, since women are incorrectly trained from infancy not to "question the scriptures." They are taught to be ignorant not merely of legal rights, but also Islam's fundamental values.

Recent developments, on the other hand, suggest that the situation in Pakistan has improved in some areas, including the issue of establishing their rape using DNA evidence, which is accepted as convincing proof in Pakistani courts. Furthermore, there are various examples of women who have occupied high-ranking posts in Pakistan's government, the most notable of which being twice-elected Prime Minister Benazir Bhutto. Improved law appears to be an essential instrument in bringing the position of women in the context of social, economic, and political elements, in light of the foregoing debate regarding women's status in Pakistan. For this reason, the Supreme Court of Pakistan has consistently supported and protected women's rights within the constitutional framework by using a progressive interpretation of

Shariah law. However, despite the courts' progressive stance toward women's position and rights in Pakistan, there is still more work to be done in this area. To discover answers to the current laws of inequality and subjugation of women in Pakistan, it is critical to identify a common core between the rulings/rules of both legal systems. As a result, it is critical to hold frequent training and awareness programs to educate women about their rights and empower them to make only legitimate demands. Furthermore, existing laws must be updated and amended. In a dogmatic culture like Pakistan, competent law enforcement is important to provide women with a safe and secure environment in which to flourish. In addition, a national and district-level women's legal aid centre is required.

Furthermore, while considering women's rights in Pakistan, it is clear that Pakistan is torn between traditional Shariah law and a contemporary common law system. This contemporary legal system was imposed on Pakistan, as it was on every other post-colonial country, but the culture has not transformed completely from inside. As a result, the ongoing squabble between the two is affecting the female population, culminating in women subjugation. To summarize, Pakistan must handle the issue of women's position with intelligence by narrowing the existing gap between theory and reality about women's empowerment. The government of Pakistan must bridge this gap by adopting effective actions to empower women, who have become a symbol of injustice and inequity not only in Pakistan but also globally. It should give women equal opportunity to compete with males on an equal playing field so that they can achieve the same status as women in other industrialized nations. Finally, the chapter outlines the legal safeguards offered to women in Pakistan throughout history in the form of constitutions and legal instruments, including rights guaranteed to women under constitutional law, criminal law, civil law, and family law. These are some of the safeguards put in place by recent administrations to protect and empower Pakistani women after years of persecution.

Comparative Analysis of Theoretical Legal Techniques (TLT) between EU and Pakistan

Chapter 3 of the thesis addresses two distinct but equally important issues: a) unifying contract law throughout the EU into a single, uniform Civil Code, and b) applying EU contract law to current practical difficulties of theoretical legal approaches in Pakistan. Several academics and practitioners are progressive on the problem of harmonization of the EU Civil Code, looking at any potential measures to promote harmonization among the EU's various legal systems. Exploring these current mechanisms to combine EU civil law into a unified code is a time-consuming and difficult task. The challenge of conducting a comparative study of contract law in the multiple

Member States necessitates a detailed and complete examination of not just two, but several. Because, for one simple reason, the law of every country evolves into a system, which, if poorly altered, leads to the destruction of such a system. The UNIDROIT instrument — Principles of International Commercial Contracts — is an explicit example of such a work. It took over twenty years, from 1971 to 1994, to make these UNIDROIT Principles a reality, although they are still regarded as scholarly suggestions. This is due to the Member States' unwillingness to alter their national laws in conformity with the UNIDROIT Principles or to accept that the laws of another Member State are superior to their own. The proponents of harmonization have had some success, for example, in efforts to unify EU legislation through a few directives, especially those pertaining to consumer protection and corporation law, among others. Although these directives allow for some latitude in how they are implemented, actual progress toward harmonization of Member States' laws has been achieved. In 1995, Latvia (together with other Central and Eastern European nations) and the EU signed an Association Agreement. Latvia and other nations had a basic obligation under that agreement to bring their domestic legislation into compliance with EU Directives.

My research does not evaluate thoroughly the possible benefits of the current process in Europe to create and implement new bodies of law influencing the contractual activity of firms and individuals. Also, I will not analyse the draft CFR in-depth to remark on the benefits of the various normative remedies presented. I did restrict myself to a cursory review of the positive effects that, in theory, could result from a process like the current one, rather than committing to a normative assessment of the current enterprise's already available outcomes — even if still in draft form — and whether it has fully exploited all available opportunities to maximize those potentially positive effects. I will posit three examples to that effect: 1) to enhance the way current Contract Law affects the efficiency of contractual contacts, 2) to minimize transaction costs caused by variety in contract law, and 3) to realize economies of scale in legal change. Given the extensive extent of application of Contract Law, and the wide disparities among nations in the factors impacting the outcomes of such policies, I do not include any form of redistributive ideal in this section.

The critical barriers to cross-border commerce and contracting would thus largely be demand driven, that is, those that consumers perceive, albeit incorrectly, as negatively impacting their decision to contract cross-border. In all probability, harmonized Contract Law regulations would contribute to a decrease in complexity and discrepancy, resulting in some advantages for the internal market and hence for its players — the European consumers as the ultimate beneficiaries. These benefits would manifest themselves both statically and dynamically. In other words, to reap

the genuine, not fictitious, benefits of harmonized rules in Contract Law, the reduced diversity and increased certainty must be internalized by the agents subject to the rules, i.e. the potential contracting parties. Otherwise, transaction costs may endure long after the underlying foundation for them has completely vanished.

Concerning the second issue at hand, I made a comparative analysis of a few theoretical legal techniques between the contract law of Pakistan and Europe, especially German and French Contract law. It may be stated that while studying or comparatively analysing the law, circumstances may develop in which a single legal phrase has many meanings, or several distinct legal terms have the same legal impact. Such circumstances may cause legal practitioners and their clients to become perplexed. The reason for this misunderstanding is that when a civil lawyer encounters common law concerns or vice versa, it confuses. Although both legal systems have comparable answers to some issues, they cannot be said to be identical in terms of legal structure, categorization, fundamental principles, language, and so on. All of these disparities are too many to be handled in a single research paper or even a book of comparative law. Furthermore, any attempt to assign superiority to these distinctions between the legal systems based on their relevance would be a difficult endeavour. To be more precise, a comparison of two contract law systems — Pakistan and the European Union — exposes many discrepancies because the two legal systems have distinct histories and traditions.

However, the relevance of these disparities is most likely determined by their ability to pave the way for solutions to current issues. These distinctions are not always clear to the Pakistani or EU lawyer. They may be surprised to learn that certain fundamental phrases, such as the definition of a contract, do not have the same meaning in their legal systems. The existence of these distinctions, on the other hand, opens the door to discovering shared solutions or common ground for harmonizing laws across legal jurisdictions. Such initiatives are beneficial for a variety of reasons. To begin with, such initiatives give a forum for attorneys and academics to discuss the differences in legal terminology through discussions or consultations to clear up any ambiguities. Second, these activities bring attorneys and academics together to discuss innovative approaches to dealing with a similar problem and finding a common solution. Finally, these initiatives lead toward the eventual objective of bringing these two legal systems closer together in some areas. As a result, Chapter 3 provides a unified account of the differences between the Anglo-Saxon and continental legal systems' contract law, including the definition of contract, consideration, the doctrine of privity of contract, duty to perform and good faith, the frustration of contract/force majeure, breach of contract, and remedies. In this Chapter, I would like to briefly provide an insight into the existing differences in the

aforementioned theoretical legal techniques and the results of comparative methodology leading to the solutions for existing issues as follows:

- Defining Contract law
- Form of Contract/Consideration
- Rights of Third Parties
- Performance
- Good-Faith
- Force majeure/Frustration
- Breach and Remedies

When researching or interpreting the law from a comparative perspective, circumstances may occur in which the same legal phrase has many interpretations, or several distinct legal expressions have the same legal consequence. In other cases, the differences can be used or imported into one another's legal systems to discover a better solution to the current problems. Because the two legal systems have distinct histories and traditions, an analysis of two different systems of contract law – EU and Pakistan – exposes many disparities. However, the relevance of these disparities is most likely determined by their ability to pave the way for solutions to current issues. These distinctions are not often clear to Pakistani or European attorneys. They may be surprised to learn that their legal systems do not give the same interpretation for key essential phrases, such as the definition of a contract, as previously stated. The existence of these discrepancies, however, opens the door to identifying shared solutions or common ground for harmonizing the laws of different legal jurisdictions. Such initiatives are beneficial for a variety of reasons. To begin with, such initiatives give a forum for attorneys and academics to grasp the differences in legal terminology through discussions or consultations to eliminate any confusion or misconceptions. Second, these activities bring attorneys and academics together to discuss novel approaches to dealing with a similar problem and finding a common solution to that problem. Finally, these initiatives lead to the objective of bringing these two legal systems closer together in certain ways.

Comparison of Contract Law Between Pakistani and ‘European’ (‘EU’-) Laws Regarding the Rights of Women Concerning Contractual Issues

Moving on, Chapter 4 of the thesis aims to examine the reasons and results of comparing contractual rights of women between Pakistan and the EU, by employing the theoretical legal techniques as tools for achieving gender equality concerning contractual rights. Through this comparative technique, it is clear that there is still much opportunity for change in Pakistan's mindset, cultural traditions, and national

legislation to empower and uplift women's legal standing in terms of contractual freedom (or rights) as well as general rights. Because women in the EU have a far higher legal standing in their society, the model of EU civil legislation providing safeguards for women must be followed in Pakistan. This can be accomplished either by amending current Pakistani laws or by incorporating EU-wide safeguards for women into local legislation. While explaining the contractual rights of women, several case laws have been stated side by side to represent the court's practice in the EU as well as Pakistan. The differences in judicial interpretation and implementation of legislation can be considered as an in-sight into the workings of both systems and used in the other direction when necessary.

So far, it has been demonstrated that women's legal and socio-economic position have significant implications in areas such as marriage, family decision-making, property rights, divorce, and inheritance. As a result, these factors influence women's efforts to achieve independence and empowerment. It may be claimed that initiatives have been made in Pakistan over time to promote equality between men and women, such as the incorporation of the notion of mutual consent in marriage based on recent judicial interpretations. Several additional laws, notably those dealing with polygamy and divorce, have been amended. Gender differences in family and divorce decision-making continue to exist. Furthermore, the rules governing marriage, divorce, custody, support, property, and inheritance are still in violation of international accords as well as the law of the land, the Pakistani Constitution of 1973.

Suggestions de lege ferenda: **Reforms and Recommendations**

Chapter 5 of the thesis reflects upon the issues discussed at length in Chapters 1 to 4 in a compact manner. Not only this, Chapter 5 also justifies the need for future reforms with respect to women rights in Pakistan. For that purpose, it calls for governmental initiatives to be taken in due time. The Chapter also provides some valuable recommendations that can be adhered to in instances of necessity.

Based on the aforementioned position of women in Pakistan and the EU in Chapter 4, it may be argued that there is an urgent need to establish a few yet significant improvements in Pakistani legislation by adopting EU laws or policies relating to women. However, the lack of measures to increase women's position and autonomy in Pakistan has resulted in damage and unwelcome limits on their economic advancement. As a result, a few key areas have been identified to kick-start the reform process in Pakistan.

- Reducing the current gender gap in work possibilities: In Pakistan, women and men are always at odds when it comes to pursuing and obtaining career opportunities. The current disparity in work chances between men and women is around 21.9 per cent for women and 80.3 per cent for males. This vast disparity serves as the foundation for women's economic insecurity in Pakistan, and as a result, women continue to rely on their male relatives, such as fathers, husbands, or sons. To increase women's independence, new legislation aimed at offering equal chances to both men and women at work must be enacted.
- Eliminating existing pay or salary disparities caused by gender bias: Pakistani women also experience wage or salary disparities with males. The various nature of the jobs that women conduct is the major cause of such issues. They regularly abandon their professions or alter their work schedules to meet the requirements of their families, particularly in terms of childcare and household tasks. Furthermore, women are disproportionately engaged by industries that provide low-paying, part-time work. As a result, they are once again subjected to the wrath of males, who earn more than women for the same type of work. As a result, closing pay inequities is critical, and policies requiring equal pay for men and women must be implemented.
- Creating a balance in outside-of-the-home life: For both genders to have equal employment possibilities, they must strike a balance between their work and home lives. This can only be accomplished by sharing duties at home and work. As the number of women in Pakistan gains greater access to job opportunities, they continue to bear an enormous burden of household responsibilities, as men rarely assist in household chores. As a result of this, women are unable to maintain a sense of balance in their life and are forced to leave their employment, which has a detrimental influence on their economic progress.
- Autonomy in family decision-making: Pakistani women are severely limited in their ability to make decisions on family affairs since the patriarchal society of Pakistan places this authority solely in the hands of males. Women are under-represented in practically every element of their life, be it socio-economic, political, or legal, no matter how hard they fight to achieve equality with males. As a result, measures aimed at giving women autonomy in making their own decisions at all levels, including family affairs, are actively encouraged.
- Promoting gender equality in contractual rights: Furthermore, Pakistani women will be treated equally to males as a result of reforms affecting their contractual rights, including marriage, divorce, custody, maintenance, employment, property, and inheritance rights, as detailed above.

- Getting rid of existing preconceptions based on gender: Existing gender stereotypes or roles in connection to unequal distribution of rights and responsibilities can cause chaos for Pakistani women and their professions. They frequently wind up working part-time, which has an influence on their income for the rest of their lives, including their pension. Similarly, due to societal preconceptions about masculinity, gender-based stereotypes create barriers for males to help women in home and parenting chores. There is a need for change/reform to encourage both men and women to share or assist each other in their obligations.

Pakistan's current and future governments must take all necessary steps for women's emancipation and independence. The Committee on the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW) has recommended that Pakistan create a legal framework for marriage, divorce, custody, and inheritance that is fully compliant with international traditions and standards. This framework is proposed to give all women in Pakistan successful and equitable legal security. The statutory framework must be translated into an actual enforcement strategy by putting in all efforts and raising public awareness on the advancement of women's status in Pakistan after it has been enacted. The CEDAW Committee further demands that Pakistan take all necessary steps to eradicate discrimination against women in family issues, including ensuring gender equality in property ownership, acquisition, management, administration, enjoyment, and disposal. In light of CEDAW's guidelines, the following recommendations might be made to the Pakistani government to improve the situation of women in general. The Pakistani government should:

- Ensure that women's contractual rights are consistent with the philosophies specified in international accords and the Pakistani Constitution of 1973 and provide for gender equality in terms of non-discriminatory personal law codes.
- Promote the equitable distribution of rights and responsibilities between men and women in areas such as family tasks and the workplace, and/or the inclusion of favourable terms in marriage contracts for women.
- Implement legislation that allows for post-divorce maintenance as a means of financial security for Muslim women.
- Implement regulatory reform to document the properties and earning sources of husband and wife to promote the assessment of the direct and indirect share of wife in assets made by the family after marriage independent of the title deed of any acquired land.

- Authorize statutory amendment to provide for the right to matrimonial property and to establish an equal share in the calculation of women's contributions in cash or kind during the time of marriage.
- Review inheritance rules to protect gender equality ideals and encourage endowments between spouses or their legal heirs.
- Educate the public on the challenges women experience under Pakistan's current legal frameworks, particularly in the case of divorce, and efforts to better defend their rights, such as allowing mothers to carry the title of "head of the family" or developing enforcement mechanisms.
- Establish a competent panel to assess the financial effect of civil law rules and to garner support for legislative changes that would enable women to engage more fully in the economy.

In the end, a few proposals are suggested that may be used by a variety of stakeholders, including intergovernmental organizations such as the United Nations, government agencies, local and international non-profit organizations, and human rights and women's rights advocates. These include engaging in political activism, empowering, and supporting local non-profits, encouraging an active civil society, and educating women. However, the patriarchal attitudes of Pakistanis are the most significant constraints to the proposals.

- Engage in Political Activism and Judicial Reform
- Encourage an Active Civil Society
- Empower and Support Local Non-Profits
- Educate Women

Thesis related Publications

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