

HONOUR KILLINGS UNDER THE RULE OF LAW IN PAKISTAN

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RÉSUMÉ

L' "honneur", une notion imprécise dans une société patriarcale comme le Pakistan, est utilisé comme moyen justifiant la peine capitale. La violence au nom de l'honneur n'est pas un phénomène nouveau. Il s'est développé historiquement dans un cadre culturel, puis s'est répandu avec le temps, la conséquence étant une croissance significative du nombre de victimes. La notion culturelle d'honneur a en fait pour fins de contrôler la sexualité des femmes et de garder celles-ci soumises à l'homme. Le crime d'honneur n'est pas contrôlé légalement, mais dans la société contemporaine pakistanaise, ce genre de pratique est condamné d'une manière ou d'une autre par les juges, l'administration et la société en générale. Dans les régions tribales du Pakistan, le meurtre d'honneur est une peine infligée aux personnes contrevenant au code d'honneur traditionnel, lequel ne considère pas ce type de meurtre comme un crime punissable.

La pratique répandue du meurtre d'honneur a préjudicié les femmes pakistanaises dans l'exercice de leurs droits fondamentaux, incluant les droits de l'Homme, les droits constitutionnels et islamiques. Notre thèse se concentre sur les moyens juridiques utiles à l'encadrement, puis à la condamnation de ces crimes, moyens tels qu'ils pourraient être mis en oeuvre grâce à une bonne administration de la justice. Nous insistons en particulier sur le fait que les mesures législatives ne sont pas suffisantes. Par ailleurs, il est urgent d'éradiquer les obstacles à une bonne administration de la justice. L'Etat pourrait instaurer un ensemble de mécanismes juridiques qui puniraient toutes discriminations ou inégalités imposées aux femmes. Le système judiciaire pourrait également jouer un rôle moteur dans le développement d'une justice satisfaisante et dans le combat contre ces crimes dégradants.

ABSTRACT

'Honour', an undefined notion in a patriarchal society like Pakistan, is used as a tool to justify the crime of murder. Violence in the name of honour is not a new phenomenon. Historically, it has been justified in the name of culture but the scope of this tradition has broadened with time and there is an enormous increase in the number of its victims. This cultural notion is interpreted in a way to control women's sexuality and to keep women subordinate to men. Honour killing is not legally sanctioned but the judiciary, the administration and the society often condone it one way or the other. In the tribal areas of Pakistan where such murder is not considered a crime, honour killing is a punishment for those who contravene against the traditional honour code.

The wide acceptance of honour killing has made women suffer as a whole against their basic rights; human, constitutional and Islamic. This thesis focuses on the judicial redress against the crime of honour killings, which could be achieved by proper administration of justice. It contests that to control the crime in the patriarchal society of Pakistan, legislative measures are not enough. There is a dire need to eliminate the inadequacies of the administration of justice. The State could build a judicial framework to eliminate the inequality and discrimination against women. The judiciary could play an important role in bringing justice to the victims and in curbing this heinous crime.

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ABBREVIATIONS

Cr.P.C: Criminal Procedure Code, 1898

FATA: Federally Administered Tribal Areas.

HRCP: Human Rights Commission of Pakistan.

NWFP: North West Frontier Province

PATA: Provincially Administered Tribal Areas.

P.Cr.L.J: Pakistan Criminal Law Journal

PLD: All Pakistan Legal Decisions.

P.P.C: Pakistan Penal Code, 1860.

SCMR: Supreme Court Monthly Review

GLOSSARY

Afw: Waiver.

Arsh: Compensation to be paid to the victim or his heirs for causing hurt.

Badal-i-sulh: The mutually agreed compensation according to Shari'ah to be paid or given by the offender to a wali in cash or in kind or in the form of movable or immovable property.

Ba-Ghairat: Possessing honour.

Baloch: Resident of the province of Balochistan.

Be-ghairat: Shameless; immodest.

Chadar: Sheet; mantle.

Char devari: Four walls of the house.

Daman: The compensation determined by the court to be paid by the offender to the victim for causing hurt not liable to arsh.

Darul Aman: Shelter home.

Diyat: The compensation payable to the heirs of the victim.

Faislo: Agreement or meeting.

Ghairat: Bashfulness; honour.

Ghairatmand: Bashful; Possessing honour.

Hadd: Punishment ordained Islam's holy book, the Qur'an or the Sunnah, the practice of Islam's Prophet.

Hadith: Sayings of the Holy Prophet (PBUH).

Haveli: Mansion; a big house.

Hudood: Literally means confines; Qur'anic penalties

Izzat: Honour; glory; respect or standing in society

Jahilliah: Ignorance; illiteracy.

Jirgas: Meetings or councils of tribal elders.

Kala: 'A black man' in Punjab.

Kali: 'A black woman' in Punjab.

Kari: 'A black woman' in Sindh.

Karo: 'A black man' in Sindh.

Khula: Divorce sought by a woman.

Li'an: The procedure where wife denies the accusation of zina levelled by her husband.

Majlis-e-Shoora: The parliament; legislative assembly.

Mor: Literally means 'white'.

Nikahnama: The marriage contract or the instrument containing terms and conditions of a marriage.

Panchayat: Meetings or councils of tribal elders.

Pashtoon or Pukhtuns: A common ethnic designation for people on both sides of the Pakistan-Afghanistan border. The Pashtoons or Pukhtuns are the resistant tribal peoples of the famous Khyber Pass region of Pakistan and Afghanistan. The homeland of the Pukhtuns covers approximately one third of the Afghanistan's 250,000 square miles territory, and a little more than 39,000 square miles of Pakistan, North West Frontier Province.

The majority of Pakistani Pukhtuns live in the North West Frontier Province (NWFP) of Pakistan.

Purdah: Veil.

Qanun-e-Shahadat: Islamic law of evidence.

Qatl-e-amd: Intentional Murder.

Qawwam: Qayyam or qayyim is a person responsible for administering or supervising the affairs of either an individual or an organisation, for protecting and safeguarding them and taking care of their needs.

Qazf: The slanderous accusation of illicit intercourse.

Qisas: Punishment by causing a similar hurt at the same part of the body of the convict as he or she has caused to the victim or by causing his death if he has committed qatl-i-amd.

Qur'an: Primary material source of the word of God as revealed to the Prophet (PBUH) and most revered source of Islamic guidance.

Razinama: A legal document in which a compromise is effected in pursuance of which complaints are formally withdrawn.

Riwaj: Tradition; custom.

Sardar: Tribal leader

Sarkari: Official.

Siyahkari: 'A black woman' in Balochistan.

Shariah: Islamic law as drawn from the Qur'an and Sunnah.

Sunnah: Traditions of the Holy Prophet (PBUH).

Surah: Chapters of the Holy Qur'an.

Sulh: Compromise.

Swara: handing over a woman in compensation

Tano: Tease.

Talaq: Divorce, especially by husband.

Ta'zir: Punishments enforced at the discretion of rulers and their agents to reform and discipline citizens in accordance with the Sharia

Tor: 'A black man' in N.W.F.P.

Tora: 'A black woman' in N.W.F.P.

Ulema: Islamic scholars

Vani: Marriage of women without their consent in compensation for the crime committed by their male family members to settle a dispute.

Wadero: Feudal in Sindh.

Wali: A person entitled to claim qisas, i.e. legal heir of the victim

Zun: Woman

Zar: Gold / wealth

Zamin: Land

Zina: A man and a woman are said to commit 'Zina' if they wilfully have sexual intercourse without being validly married to each other.

Honour Killings under the Rule of Law

Introduction

On April 6, 1999, a 29-year-old woman named Samia Sarwar, mother of two young sons, was murdered at her lawyer's office in Lahore by an assassin hired by her family. Her mother, father and paternal uncle were all accomplices to her murder. She was murdered for seeking a divorce from her estranged husband, who would abuse her physically as well as mentally. For ten years of her marriage Samia suffered violence at the hands of her husband and separated from him to live with her parents. Her parents never agreed to her seeking a divorce as it was against the family honour. Ironically, it was not her battering by her husband but her act of filing for divorce to get out of a violent relationship which her family deemed 'dishonouring' and, hence, warranting death.¹

Samia was murdered in the name of a tradition under which a woman is not allowed to use her constitutional and Islamic right to seek a divorce. Her act of seeking a divorce was deemed as defiling family honour and tribal traditions. A charge of murder² was filed in the Court, and the accused filed an application to make a compromise according to the provisions laid down in the law of Qisas and Diyat³ (provisions of criminal law based on Islamic principle of retribution and compensation applicable in cases of murder and bodily hurt). The judge, who could reject this application, agreed to the compromise between the parties, i.e. the accused and Samia's legal heirs including her abusive husband and two children. An amount was fixed to be paid to the legal heirs and the murder was settled between the parties. This is one case of honour killing adjudicated under the formal legal system of Pakistan which presents a stark example of violence

¹ Human Rights Watch, *Crime or Custom? Violence Against Women in Pakistan* (New York: Human Rights Watch, August 1999) at 1 [Crime or Custom].

² *The State vs. Mohammad Younas*, 1999 Additional Session Judge Lahore, unreported case. Discussed in detail below in chapter 2 [Samia's case].

³ In 1989, during General Zia's regime, Pakistan criminal law was amended to bring its provisions, related to murder and bodily hurt, in accordance with Islamic injunctions. This law is discussed in detail in chapter 2.

inflicted upon women in the name of customs and traditions upholding patriarchal norms of the Pakistani society.

In Pakistan, violence against women is widely perceived as acceptable. It is inflicted upon women by the state officials or by the citizens acting under a dispensation granted by law, and sometimes by persons whose violent act is deemed acceptable⁴. Women are viewed inferior to be “reined in” by men for the better or, in the majority of cases, for the worse. They cannot raise their voice against violence by men, i.e. fathers, brothers and, after marriage, husbands and their male relatives, who are in control of their physical being. The most common form of violence against women is domestic. However, barring certain exceptions (such as high-profile incidents), domestic violence cases are virtually never reported and, therefore, never investigated or prosecuted. The Pakistani legal system fails to criminalise a quite common but highly serious form of domestic violence: marital rape⁵. Even complaints against acts of domestic violence that fall under the criminal law, such as assault⁶, battery⁷, acid throwing⁸ or attempted murder⁹, are routinely ignored or condoned by the state officials and often go unreported by police.

⁴ Austin Sarat, “Situating Law Between the Realities of Violence and the Claims of Justice: An Introduction” in Austin Sarat, ed., *Law, Violence, and The Possibility of Justice* (Princeton: Princeton University Press, 2001) 3 at 3.

⁵ s. 375 of *The Pakistan Penal Code, 1860 (Act No. XLV of 1860)* [PPC] exempts a man’s sexual intercourse with his wife (provided she is more than 13 years of age) from the definition of rape. This section has been amended by s. 19 of *The Offences of Zina (Enforcement of Hadd) Ordinance, 1979* [Zina Ordinance] which now defines rape under s. 4 of Zina Ordinance as “A man and a woman are said to have committed ‘Zina’ if they wilfully have sexual intercourse without being validly married to each other”. There is no provision now in criminal law for the offence of marital rape no matter what is the age of wife.

⁶ S. 351 of PPC defines assault as “whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.”

⁷ Crime of attacking somebody physically.

⁸ In the Punjab province, specifically in Multan city, punishment for an adulterous woman committing zina is acid throwing. Shirkat Gah & WLUM, *Chart of Customary Practices in Pakistan in Comparison with Statutory Law*, (Lahore: Shirkat Gah, 1995) [Customary Chart] at 80. Acid throwing does not fall under the definition of assault in PPC under s. 351. It is one of the tools of violence against women to punish or to take revenge for inflicting dishonour to the man by disfiguring her face or other body parts permanently; “Information has been received of cases of blinding the facial disfigurement due to acid burning or razor attacks to party to the face.” Commission on Human Rights, *Report of the Special Rapporteur on Violence Against Women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2002/52*, UN. Doc. E/CN.4/2003/75/Add.1 (February, 2003) Para. 1133 at 207 [mimeo.] [Report on violence against women, 2003]; Yasmeen Hassan has discussed in detail how acid throwing stems considering women property and also “woman as honour” that makes her an easy target either to take revenge from her or the male relatives of her family. Husband disfiguring his wife could be out of jealousy or to assert his control over her. See Yasmeen Hassan, “Stove Burning, Acid

In Pakistan, honour killings are decided by two legal forums, i.e., formal judicial institutions and informal legal system called the tribal justice system. The formal legal system comprises a body of law which combines influences of the English common law, prevailing customary law¹⁰ and Islamic law. It has a hierarchical court system established by the Constitution. The informal legal system is based on tribal rules, commonly called the “honour code”, and is administered by quasi-judicial tribunals, generally called “jirgas”¹¹, which are highly biased against women.

Under the formal legal system, honour killing is defined as a murder committed in the name or on the pretext of honour¹². Murder is adjudicated according to the criminal law of Qisas and Diyat which holds that the offence against a person (including hurt, bodily injury and murder) gives complete right of conviction to the victim and his/her legal heirs, i.e. the victim or his/her legal heirs retain control over the matter including the crime and the criminal. They may choose not to report the crime or not to prosecute the criminal. This law provides the legal heirs with the right to agree to a compromise according to the law, as in the case of Samia. Certain other provisions of criminal law used in an honour killing result in lenient punishments. This discrimination amounts to infringement of constitutional rights of women under which the state is obliged to protect all its citizens equally without sex discrimination. Pakistan also has to respect international treaties it is a party to and customary international law to ensure respect for women’s human rights and fundamental freedoms. Pakistan, being a state party to the

Throwing, and Honor killings” in Kelly D. Askin & Doreen M. Koenig, eds., *Women and International Human Rights Law Volume 2* (New York: Transnational Publishers, 1998) 587 at 596-597 [Yasmeen Hassan, “Honor Killings”].

⁹ *Qatl-e-Amd* defined in s. 302 of PPC. Discussed in detail below in chapter 2.

¹⁰ David Pearl, *A text book on Muslim Personal Law* 2nd ed. (London: Croom Helm, 1987) at 20. The author has discussed how Islamic law developed in South Asia (including Pakistan), saying that Islam was not indigenous to South Asia. Sharia has been applied in different manners in South Asia.

¹¹ Traditional quasi judicial tribunals in rural area are deeply rooted especially in the province of North West Frontier Pakistan (NWFP). A jirga usually comprises 5-7 members, tribal chieftains or local men who are elected by the elite class, to act as judges. However, they are not qualified legally for the seat. There is no substantive law or procedure to be followed and no record or written proof of their judgements. This is one of the reasons it is so hard to find primary evidence against these tribunals and their judgements. This forum is used for arbitration, dispute resolution, and in many cases murder trials. Discussed in detail below in chapter 2.

¹² This definition in the criminal law of Pakistan has been inserted on 2nd January, 2005 vide Criminal Amendment Act, 2004. Discussed in detail below in chapter 2.

Convention on the Elimination of All Forms of Discrimination against Women,¹³ is required to take positive steps towards eliminating discrimination, *inter alia*¹⁴, violence against women. State officials, rather than responding actively to the violations of women's right to life, to security, and to being free of discrimination, act through police and judicial system to block access to redress and justice for women victims of violence.¹⁵

The informal judicial system, operating through the jirga, works parallel to the formal judicial institutions. The members of jirga do not respect the laws and principles enshrined in the Constitution, statutes, the Holy Quran and the Sunnah¹⁶. They make decisions according to tribal law, which is not codified.¹⁷ Yet these all-male jirgas, where women have no say, have been provided by the state¹⁸ with *carte blanche*¹⁹ to render whatever verdict they wish entirely at their whims and caprice. Jirga is the highest informal tribunal. There is no revision or appeal to a jirga decision. Constitutional law recognizes the tribal judicial system only in specific areas (including FATA and PATA called special areas) but it is found all over Pakistan. In the special areas formal judicial

¹³ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, UNGAOR, Res.34/180 [Women's Convention]. Pakistan ratified Women's Convention on 12 March 1996, with reservation. Discussed in detail below in chapter 2.

¹⁴ Latin word meaning "amongst others", *Black's Law Dictionary*, 7th ed., s.v. "infra".

¹⁵ Discussed in detail below in chapter 3; See generally Shahla Zia, *Violence Against Women and their Quest for Justice* (Lahore: Simorgh Women's Resource & Publications Centre, 1998) [Shahla Zia]; *Pakistan; Insufficient Protection of Women*, Amnesty International 2002 [Amnesty "Protection of Women"]; *Pakistan; Violence Against Women in the Name of Honour*, Amnesty International 1999 [Amnesty "Violence Against Women"]; Justice (R) Nasir Aslam Zahid, "Women's Access to Judicial Redress" (2003) vol. 8 No. 2 *The Journal*, NIPA Karachi 53 at 57 [Women's Judicial Redress]; Crime or Custom, *supra* note 1; Police role is specifically dealt with in Humaira's case discussed in detail below in chapter 3.

¹⁶ Sharia Law (Islamic law) is based on text of Quran and Sunnah; See also S.S. Bindra, *Politics of Islamisation; with special reference to Pakistan* (New Dehli, Deep & Deep Publications, 1990) at 36, discussed in reference to Islamic Law in Pakistan "The primary source of Islamic legislation is The Quran. The Sunna has tried to explain and elaborate what has been said in the Quran. Undoubtedly, the Sunna is also regarded as an independent source, but for all practical purposes, it is secondary to the Quran."; Preamble and Arts. 2 and 227 of the Constitution of Pakistan, *The Constitution of the Islamic Republic of Pakistan*, 1973, [Constitution of Pakistan].

¹⁷ *Pakistan: The Tribal Justice System*, Amnesty International, 2002 at 7 [Amnesty "Tribal justice system"].

¹⁸ State is an accomplice by inaction to stop these jirgas. Though there has been court decision rendering these jirgas as legal, no effort was made to eradicate them. Recently there has been a debate in the Sindh National Assembly (in Sindh Province) on jirga verdicts a legal cover by making jirga tribunals a legal body protected under the rule of Law in Pakistan.

¹⁹ French word meaning "freedom to do as one wishes" *Webster's New World College Dictionary*, 3rd ed., s.v. "carte blanche".

tribunals have no jurisdiction over a jirga decision and so there are cases where fundamental rights protected under the Constitutional law are infringed. These jirgas are convened and supported by feudals (landlords) and the state is unable to control them in settled areas of Pakistan. These jirgas work against the interest of women and their decisions are mostly based on stark bias and prejudice against women according to their cultural and religious stereotypes of women's status.

Pakistani court system presents its own set of impediments and hurdles for women. The formal judicial institutions of Pakistan have deteriorated over the years²⁰, leading to a decline in the quality of judicial services and to a plethora of related problems²¹. Women who make it to a court of law for redress in mostly cases face Pakistan's pre-dominantly conservative judges. The judges often have discriminatory and sexist assumptions about women that prejudice the few cases that reach the court. Magistrates and judges allow defence counsel to introduce inflammatory evidence²² and launch a character assassination of the victim including questions relating to the victim's sexual history even when it is patently irrelevant.²³

These are some endemic issues in Pakistan. How has the crime of honour killing risen in number and swollen in scope in the presence of Constitutional law which protects the life of all citizens equally? How do honour killings committed in Pakistan make up 25% of

²⁰ This issue is discussed in detail by Bruce B. Lawrence, while comparing the two judicial institutions of India and Pakistan after the British Rule in the sub-continent of India. He has highlighted the single integrated hierarchical system in India, to stress the independence of judiciary and its impact on the judicial redress for women. He emphasized how executive supremacy had overpowered the judicial autonomy in Pakistan, especially since 1971, which is a serious impediment to women seeking judicial redress. Bruce B. Lawrence, *Shattering the Myth; Islam Beyond Violence* (New Jersey: Princeton University Press, 1998) at 140 [Bruce, "Shattering the Myth"]; My personal experience as a lawyer in Pakistan. Further, the failure of judicial system in cases related to violence against women is well known; This issue is discussed below in detail in chapter 3.

²¹ Problems like, conservative interpretation by judges and use of redundant law in the cases of honour killing. Discussed in detail below in chapter 3.

²² Article 151(4) of *Qanun-e-Shahadat Order, 1984*, (Islamic law of evidence) reads as follows "when a man is prosecuted for rape or an attempt to ravish, it may be shown that prosecutrix was of generally immoral character." Under this provision lawyers take leeway to attack the character of women. Relevant case law upholds as "In prosecution for rape, general immoral character of prosecutrix may be shown. Sub-Article (4) of Article 151 refers to such evidence as that her general reputation was that of a prostitute or that she had the general reputation of going about and committing immoral acts with a number of men.

²³ Crime or Custom, *supra* note 1 at 4.

the honour killing in the world²⁴ in the absence of any explicit legal protection under law, like Jordanian law²⁵? What are the loopholes in the criminal law and newly implemented amendments related to the offence of honour killing? What are the flaws in the state administration of justice? What role judiciary is playing and can play to curb this crime? It is in this context the study sees into some court cases to balance abstract legal considerations with contemporary realities of Pakistani society in general and the practice of law in particular. An analysis of the myriad of judicial precedents on the subject reflects personal bias of the majority of judges in cases of honour crimes²⁶. Offenders are often condoned or their sentences are lowered on one pretext or another²⁷. Plain murders are referred to, and shamelessly glorified as acts of honour²⁸; reduced penalties are awarded on the pretext that the alleged offence was committed on 'grave and sudden provocation'²⁹; permitted or condoned as honour killings "by the community and the law in certain places."³⁰

In Chapter 1, the author provides a general historical and cultural background of "honour killings" in the patriarchal society of Pakistan as well as an analysis of its broadening scope. Previously, honour crimes were cases in which women were murdered on the suspicion or allegation of committing adultery, but in recent years they include cases of women marrying their choice or merely seeking a divorce to get out of a violent

²⁴ 'In the year 2000 nearly 1000 women were killed in Pakistan out of a total world figure of 5000 honour killings. If this figure is correct then nearly 25 percent of the women killed for honour were killed in Pakistan.' Aftab Nabi, "Perceptions on Honour Killings" *You* (Magazine) at 1, *The News* Islamabad 20 February 2001; For further discussion read Rashida Patel, *Woman Versus Man: Socio-Legal Gender Inequality in Pakistan* (Oxford: Oxford University Press, 2003) at 140 [Rashida Patel, "Woman versus Man"]; See also Rabia Ali, *The Dark Side of 'Honour': Women Victims in Pakistan* (Shirkat Gah: Lahore, 2001) at 9 [Rabia, "Dark Side of Honour"].

²⁵ Article 340 of *Jordanian Penal Code, No. 16, 1960* states: "1) He who catches his wife or one of his female unfaithfuls committing adultery with another, and he kills, wounds, or injures one or both of them, is exempt from any penalty. 2) He who catches his wife, or one of his female ascendants or descendants or sisters with another in an unlawful bed and he kills or wounds or injures one or both of them, benefits from a reduction in penalty."

²⁶ Until recently there was no legal definition of the term honour crimes. Discussed in detail *infra* under sub-heading "Definition of Honour Killing" chapter 1.

²⁷ See Shahla Zia *supra* note 15 and also the case law discussed in detail in chapter 3.

²⁸ Discussed in *Ameer Bux vs. The State*, 2000 YLR 867.

²⁹ An exception, which was provided under PPC until it was amended in 1991. Later there was no provision of grave and sudden provocation under the criminal law of Pakistan. Discussed in detail below in Chapter 2.

³⁰ Rashida Patel, "Woman versus Man", *supra* note 24 at 148.

relationship.³¹ In the name of controlling women's sexuality, fake honour killings have been used for "monetary gains"³² or a woman is alleged to be adulterous with male member of a rival group in tribal areas to level as vendetta³³, or a woman is murdered to camouflage another murder to get away with lenient sentence. Religion³⁴ is often used to protect the perpetrator from being convicted of the crime and to present him as a hero and saviour of the family honour. To ascertain whether these honour crimes emanate from Islamic dictates or reflect a customary practice, this chapter scans the relevant provisions of Islamic law in the light of verses of the Holy Quran and its interpretation, especially those favourably disposed toward women, e.g. to protect women from false allegations of adultery³⁵. To highlight what the evidential requirements under Islamic law if a man convicts his wife of adultery, if no clear proof is provided according to requirement under Islamic law, the procedure of Lian³⁶ is applicable³⁷. The chapter provides a cultural background to the honour perspective in the patriarchal society of Pakistan.

Chapter 2 discusses the substantive and procedural laws applicable in the cases of honour killing and the rights guaranteed by the Constitution to women as citizens of Pakistan. To support the arguments of criminal injustice and discrimination against women, the chapter sets out an analysis of the laws applicable under criminal jurisdiction in the cases of honour killing and the amendments to the laws³⁸ brought by General Zia-ul-Haq (a military dictator in Pakistan) under the garb of Islamic reformation of criminal justice. It

³¹ *Samia's case supra* note 2.

³² Rachel A. Ruane, "Murder in The Name of Honor: Violence Against Women In Jordan and Pakistan" (2000) 14 Emory Int'l L. Rev. 1523 at 1537 [Rachel, "Murder in The Name of Honor"].

³³ *Report of the Commission of Inquiry for Women; Pakistan: August 1997*, (Lahore: Commission of Inquiry, 1997) [1997 Commission's Report] at 88.

³⁴ Case where the court referred to ahadeeth (the sayings of prophets) and guided by the injunctions of Islam held that Qatl (murder) committed on account of ghariat was not the same as Qatl-e-Amd (intentional murder) and pure and simple people deserved concession. The punishment of 25 years for committing murder was converted to 5 years. *Ghulam Yaseen and others vs. The State*, PLD 1994 Lahore 392; See Shahla Zia *supra* note 15 at 66.

³⁵ Abdullah Yusuf Ali, (trans.) *The Qur'an* (Istanbul: ASIR Media, 2002) Surah Al Nur XXIV [Ali "The Quran"].

³⁶ Under the PPC as when a husband accuses before a Court his wife of committing Zina (adultery) and the wife does not accept the accusation as true, the procedure of Li'an is applied and the marriage is dissolved. The man cannot retract his statement to avoid the divorce. This provision of law is discussed in detail below in chapter 2.

³⁷ Nicholas Awde, ed., *Women in Islam: an anthology from the Qur'an and Hadith*, (Richmond: Curzon, 2000) at 80 [Nicholas "Women in Islam"].

³⁸ See chapter 2.

includes a critical analysis of the most recent amendments made to the criminal law on crimes of honour. The amendments are tested on the touchstone of Samia's case. The chapter analyses the validity of the "jirga system" under the Constitution. It discusses the responsibility of the state as signatory to international human rights treaties and under customary international law to protect human rights, and in particular women's rights. It also discusses the state obligation to investigate and eradicate the cultural violence on women by state agents or private actors.

Chapter 3 discusses the inadequacies of the administration of criminal justice and the bias in the protection of women's rights. It includes the judicial interpretation of the amendments to criminal law (i.e. Qisas and Diyat law) during General Zia's regime and the changes brought in the criminal justice vis-à-vis women. This chapter analyses the case law to analyse judicial pronouncements to see whether they are based on substantive law or are driven by customary law and rules of interpretation employed by judges in the cases of honour killing. The chapter further sets out an analysis of judicial precedents bearing out the judges' personal bias and prejudice in to cases of honour crimes. The conclusion, the chapter highlights the cases in which the same pleas, on which the perpetrators usually get away with the heinous crime of honour killings, were rejected by some judges who rose above bias and prejudice and followed the true spirit of the law and justice.

Chapter 1: Honour Killings in Pakistan

“Killing” in the name of “honour” is not a new phenomenon³⁹. Honour killings have been pervasive in traditional societies where woman symbolizes the “honour” of the family.⁴⁰ Generally, a woman is killed by male relative (usually her father, brother or husband) for engaging in or being suspected of committing illicit sexual acts.⁴¹ Though family honour rests upon the behaviour of family members⁴², women provide a convenient scapegoat in the face of such subjective qualifications as ‘public morality’, ‘decency’ and ‘religion’. In Pakistan, religion is broadly used⁴³ to support and promote social prejudices against women.

Socio-economic culture, religion, laws, and societal norms envelope woman in Pakistan as soon as she is born.⁴⁴ And so when she undergoes any suffering or is killed for ‘honour’, the rule of law remains in the books and its application is greatly influenced by non-legislative economic or social norms.⁴⁵

Cultural and social norms do not rate honour killing as abnormal. Samia’s parents⁴⁶ were educated and enjoyed a respectable place in the society⁴⁷; her mother a gynaecologist, and

³⁹ Presence of this crime predates Islam. Cited in case titled *Ashiq Hussain vs. Abdul Hameed & others*, 2002 P.Cr.L.J. 859 (DB); Also discussed *infra* under sub-heading of ‘Historical Overview of Honour Killings Background’ chapter 1.

⁴⁰ Yasmeen Hassan, “Honor Killings”, *supra* note 8 at 588.

⁴¹ Lama Abu Odeh, “Crimes of Honour and the Construction of Gender in Arab Societies” in Mai Yamani, ed., *Feminism and Islam: Legal and Literary Perspectives* (New York: NYU Press, 1996) at 141 cited in Stefanie Eileen Nanes, “Fighting Honor Crimes: Evidence of Civil Society in Jordan” (2003) 57 *The Middle East Journal* 112 at 117 [Stefanie “Fighting Honor Crimes”].

⁴² *Ibid.*

⁴³ Honour killings are linked to the religion of Islam because of the enforcement of morality and chastity or women. But it has more to do with the concept of men as guardians of women’s chastity which serves as a justification for the killings of women at the hands of men in Pakistani society. See further Yasmeen Hassan, “Honor Killings” *supra* note 8 at 604.

⁴⁴ Shaheen Sardar Ali, *Gender and Human Rights in Islam and International Law: Equal before Allah, Unequal before Man* (The Hague: Kluwer Law International, 2000) at 89 [Shaheen Ali, “Equal Before Allah”].

⁴⁵ Nagla Nassar, Hashem, Ibrahim and Tawfik Law Office, Cairo “Legal Plurality: Reflection on the Status of Women in Egypt” in Baudouin Dupret, Maurits Berenger & Laila al-Zwaini, eds., *Legal Pluralism in the Arab World* (The Hague: Kluwer Law International, 1999) at 191.

⁴⁶ Discussed in the ‘Introduction’ of the thesis; See also *supra* note 2 Samia’s case.

her father the president of the North West Frontier Province (NWFP)⁴⁸ Chamber of Commerce and Industry. They arranged their daughter's murder considering her decision to file for divorce as against family honour. In the NWFP's patriarchal set-up women have a low status. They are at the mercy of the male members of the family and are not allowed to raise their voice against any violence.

Social attitudes often condone the murderers.⁴⁹ Honour killing aims to cultivate fear in women to ensure that they blindly and obediently observe the rules set by male members of their family do not raise their voice against marital violence and abstain from pursuing their Islamic and legal rights. This chapter shows the cultural notion of honour in the patriarchal society of Pakistan and how its scope has broadened from controlling women's sexuality up to their subjugation by males. Also discussed are Islamic injunctions, which protect women against false accusation of adultery and condemn honour killing.

1.1 Defining the term of "Honour Killing"

The Criminal Law (Amendment Act, 2004)⁵⁰ defines the crime of honour killing in section 299 of Pakistan Penal Code⁵¹ as an "offence committed in name or on the pretext of honour means an offence committed in name or on the pretext of karo kari⁵², siyah kari⁵³ or similar other customs or practices;"⁵⁴ This section has been introduced by amending criminal law to legally define the crimes of honour on the pretext of customary

⁴⁷ Samia's father, Sarwar Khan Momand, was invited to a conference by United Nations Development Programme in Islamabad as a representative of NWFP and as a member of civil society to discuss the position of women in Pakistan. Ardeshtir Cowasjee, "Shameless" (2003) 23rd March *Dawn*, online <<http://www.dawn.com/weekly/cowas/20030302.htm>>.

⁴⁸ The Islamic Republic of Pakistan [Pakistan] is a federal republic consisting of four provinces: the Punjab, Sindh, North-West Frontier Province [NWFP], Baluchistan, the federally administered tribal areas [FATA], and the provincially administered tribal areas [PATA]. The federal capital of Pakistan is Islamabad. Lahore, Karachi, Peshawar and Quetta are the provincial capitals of the Punjab, Sindh, NWFP and Baluchistan respectively.

⁴⁹ 1997 Commission's Report, *supra* note 33 at 88.

⁵⁰ This *Criminal Law (Amendment) Act, 2004* was enacted on January 2, 2005 to amend the *Pakistan Penal Code, 1860 [PPC]* and *Criminal Procedure Code, 1898 [Cr.PC]*.

⁵¹ *PPC, Ibid.*

⁵² Colloquial name of honour killing tradition in Sindh (province of Pakistan).

⁵³ Colloquial name of honour killing tradition in Balochistan (province of Pakistan).

⁵⁴ *PPC* s. 299 (ii) An amendment introduced vide Amendment Act, 2004.

practices. Before the Amendment Act, 2004 there was no definition of honour crimes in the criminal law of Pakistan.

Broadly speaking for Pakistan, 'honour killing' refers to the *murder of women* and sometimes men under the pretext of restoring and/or *reviving the 'lost honour'* of a family.⁵⁵ UNICEF⁵⁶ defines honour killing as an ancient practice in which men kill female relatives in the name of family 'honour' for forced or suspected sexual activity outside marriage, even when they are the victims of rape.⁵⁷

According to the dictionary⁵⁸ the word "honour", is not gender specific and has a neutral meaning. Every society ascribes its own meaning to the word "honour" according to its socio-economic and cultural practices. Patriarchal societies manipulated and contorted the meaning into making honour the sole responsibility of males. They have reached such a notion as "men are the sole possessors and defenders of honour."⁵⁹ This customary practice is upheld to maintain the social control over women and to keep their status subordinate to men.⁶⁰ Other than Pakistan, these killings are reported in Afghanistan, Jordan, Yemen, Lebanon, Egypt, Israel, United Kingdom, Middle Eastern countries, India, Turkey, Brazil⁶¹ and Canada⁶² as well.

Men define the parameters of honour according to the moral values of their clan or based upon their perceptions and concepts of honour or a combination of the two.⁶³ In Pakistan

⁵⁵ H. Qadir Shah, *There is no 'honour' in killing; Don't let them get away with murder* (Lahore: Shirkat Gah Women's Resource Centre, 2002) [Qadir Shah, "No honour in killing"] at 1 [emphasis added].

⁵⁶ United Nations Children's Fund: an organization within the United Nations that helps to look after the health and education of children all over the world.

⁵⁷ Online <<http://www.iifhr.com/womens>>.

⁵⁸ *Supra* note 19.

⁵⁹ Sindh Journalists Network for Children & UNICEF Sindh, *Violence Against Women in Sindh: Study Report (1998)*, Chapter 2 "Honour killing (karo kari) and its causes" at 1 [UNICEF study report].

⁶⁰ Rachel, "Murder in the Name of Honor", *supra* note 32 at 1523.

⁶¹ *Ibid.*

⁶² Jassi Singh, a 24 year old girl, belonging to a Sikh family of British Columbia was killed by assassins hired by her mother and Uncle (who are still in British Columbia). Jassi had secretly married a man of her choice without the family's consent. Online <http://www.cbc.ca/fifth/main_bride.html>.

⁶³ David Arthur DeSilva, *Honour, Patronage, Kinship & Purity, Unlocking New Testament Culture* (Downers Grove, Ill.: InterVarsity Press, 2000) at 25 [David, "Testament Culture"]. 'Honour', in Pakistan is a dynamic concept; it is individual as well as collective (i.e. being part of a larger group). Each individual has his own idea and perception of honour based largely on actions committed by him or his kin, which are

the cultural practices and decisions made upon the society's moral values are highly biased against women⁶⁴ as is evident by many cases of honour killing. In Sindh a woman accused of honour crime is murdered to regain the honour of the family or at times sold⁶⁵ but, the man who is an equal partner in the allegation of committing the crime, is often pardoned after paying 'blood money'⁶⁶ to the family of woman murdered or by giving a girl of his family to the victim's family in compensation (badl-e-sulh⁶⁷). This practice is colloquially known as 'Swara' in NWFP.⁶⁸ Whereas in the case of tribal areas of Pakistan regulated under Frontier Crimes Regulation, 1901 (FCR⁶⁹) "adultery is defined only as a crime committed by women."⁷⁰

This practice of honour killing in Pakistan stems from the dual conception of women; women as repositories of honour and women as property.⁷¹ In cases of honour killing, if a woman is accused of having an illicit relationship or if she seeks to choose her own partner, which is considered against her tribe's custom and tradition, she loses her objective value.⁷² It is considered that the family has lost its control and possession on the woman and hence has dishonoured her family and tribe. Thus in many cases the perception of the society also leads to killing⁷³.

affirmed and considered 'honourable values' by the group the individual is a part of. Such an individual concept is placed on a par with the person's self-respect. Interestingly, the collective concept of honour is in addition to the individual concept, i.e. a group formulates collectively its own set of honour values which each individual has to follow.

⁶⁴ See generally Saima Jasam, *Violence in the Name of Honour (A case study of Pakistan)* (1999) [unpublished, The Hague] [Samia Jasam, "Violence in name of honour"].

⁶⁵ According to the tradition a woman who is labelled a kari, if not murdered, cannot be married into her ancestral family because she has become a "polluted breed" and if, she remains with the ancestral family, she will produce "bad breed". So, for this reason she is sold to other tribe. Manzoor Solangi, "The Economics of Karo Kari" *The Review, Dawn*, April 4, 2002 [Manzoor, Economics of karo kari] at 24.

⁶⁶ Discussed below in chapter 2.

⁶⁷ Traditional name of the custom of exchanging women to settle disputes.

⁶⁸ 1997 Commission's Report, *supra* note 33 at 87.

⁶⁹ Discussed in detail below in Chapter 2 & 3.

⁷⁰ Customary Chart, *supra* note 8 at 81.

⁷¹ Yasmeen, "Honor Killings" *supra* note 8 at 596.

⁷² Rachel, "Murder in the Name of Honor", *supra* note 32 at 1523.

⁷³ "Tano" term used in Sindh province in Pakistan literally meaning taunting, UNICEF study report *supra* note 59.

These killings take different forms under the cultural and patriarchal perception of ownership of women and a woman's body being the repository of family honour.⁷⁴ It is committed publicly with the sanction of the jirga or in private and the perpetrator surrenders himself to the police. In certain cases murder in name of honour is guised as an accident. The weapon generally used to carry out these killings is a gun or an axe.⁷⁵

Honour killings can be divided into tribal and urban. Tribal killings are legalized according to the honour code of the tribe and executed on the orders of jirga⁷⁶ (quasi-judicial tribunals). Urban killings are dealt with by the police and national courts.⁷⁷ Honour killing is given different names depending mainly on the colloquial language of different areas. In Sindh it is known as karo kari, in Baluchistan as siyah kari, in Punjab as kala kali and in NWFP as tor tora.⁷⁸ Karo, Siya, Kala and Tora means the male and Kari, Kali, Tor the female offender in adultery. All these words mean 'black' indicating that it is an offence punishable by death.⁷⁹

1.2 Nature and Scope of Honour Killing

Honour killing in Pakistan exists in a rather unique combination of conflict-unity. It is an unspeakable tragedy in which fathers, brothers and husbands kill their beloved, daughters, sisters and wives. What makes the situation even more complicated and worrisome is that the honour crimes are sometimes committed with the connivance of female members of the family (such as in the case of Samia's murder in which her mother was an accessory to her own daughter's murder).

⁷⁴ 1997 Commission's Report, *supra* note 33 at 88.

⁷⁵ Samantha Lamb, "Addressing Domestic Violence" Report for the Human Rights Commission of Pakistan, Summer 2003, at 11 [unpublished]. Using axe for murder connotes the idea of a spontaneous and powerful rage the frequency with which perpetrators confess, sometimes even providing police with the murder weapon, implies it is more likely that the perpetrator is confident that a murder claimed to be done for "honour" will be treated leniently. Using an axe also upholds the contention that perpetrators do not fear legal consequence.

⁷⁶ Defined above in 'Introduction' of the thesis; Further discussed in detail below in chapter 2.

⁷⁷ Yasmeen Hassan, "Honor Killings" *supra* note 8 at 598.

⁷⁸ Qadir Shah, "No honour in killing", *supra* note 55 at 2.

⁷⁹ Rashida Patel, "Woman versus Man", *supra* note 24 at 149.

Nevertheless, killing in the name of honour occurs in a family system where members are closely tied to each other in bonds of affection, compassion and love. This is a strange yet unique combination where affection and brutality coexist in conflict as well as unity. This concept of a combination of affection and brutality in close family members exists as the two opposite models residing in women. Studying the differences between the two models of women in Pakhtoons family (mostly residing in NWFP province of Pakistan), explains the two categories of Tor (literally means black) and Mor (literally means white and pure). Mor is the symbol of respect and chastity residing in a women like as a mother holding honour of the family. On the other hand, when her chastity is compromised and the honour of her close male kin is at stake, she is considered a Tor⁸⁰. The moment a woman is alleged to have dishonoured her family she falls into the opposite category of Tor which allows the closest male kin to retrieve the lost honour of family by killing the woman. Various reasons could explain why a woman is a tor but the mode of retrieving honour is the same almost everywhere. These two models of Pakhtun concept (of honour⁸¹) are contradictory with the Islamic concepts on the rights of women.⁸²

According to Hina Jilani, a renowned lawyer and human rights activist in Pakistan, a woman's right to life in Pakistan is conditional to her obeying the social norms and traditions.⁸³ Women are negated their "core rights"⁸⁴. For example, a woman has a right to divorce her husband under Islamic law, yet in practice this is a social impossibility among the Pukhtuns. If she gets a divorce legally and marries another man, she would be considered as having become 'tor' and would run the risk of being murdered.⁸⁵

⁸⁰ 'Tor' means black. Black colour is a symbol of death, evil and negativity. Akbar S. & Zeenat Ahmed, "'Mor' and 'Tor': Binary and Opposing Models of Pukhtun Womanhood" in T. Scarlett Epstein and Rosemary A. Watts, eds., *The Endless day: Some case material on Asian Rural Women* (School of African and Asian Studies University of Sussex, Pergamon Press, 1981) 31 at 31-32 [Akbar & Zeenat 'Mor' and 'Tor'].

⁸¹ *Ibid.* at 37.

⁸² *Ibid.* at 36.

⁸³ Amnesty "Violence Against Women" *supra* note 15 at 1.

⁸⁴ "Core rights are those, without which human existence is impossible, both physically and mentally, such as the right to life, personal liberty and the prohibition of torture and ill-treatment". F. Braun, *Cultural Diversity in International Standards for Criminal Sentences* (Montreal: McGill University, 2001) at 97 [Braun, "Cultural Diversity"].

⁸⁵ Akbar & Zeenat 'Mor' and 'Tor', *supra* note 80 at 38.

Based on statistical evidence, the number of honour killings has increased manifold in the past few years. Its scope too has broadened in a rise in the number of reasons provided originally. Once women and men who committed adultery were killed for honour, but now women are murdered for many reasons including rape to the rejection of a marriage proposal from the perpetrator.⁸⁶

1.2.1 Reasons for Honour Killing

All over Pakistan hundreds of women of all ages are killed for a variety of reasons connected to the varying interpretations of honour.⁸⁷ The reasons include the customs, religious misinterpretations, tribal laws, taunting by community members (called tano⁸⁸), marriage or divorce against the will of family, settling debts, family enmity, camouflaging murder as honour killings to get lenient punishment under statutory law and failing judicial system.⁸⁹ These are not mean the only instances where honour crimes are justified in Pakistan.⁹⁰ This uncontrolled increase in the practice of this tradition is a mockery of law and humanity. The victims of honour killings are 3-90 year old females, both married and unmarried. An important reason behind the perpetration of and increase in this heinous crime is the impunity a perpetrator enjoys. Even if the crime is reported and the perpetrator appears before a court of law (which is quite rare) Pakistan's male-dominated judicial system protects him or her instead of giving exemplary punishment.⁹¹

⁸⁶ See "Shahla Zia report" *supra* note 15.

⁸⁷ Samia Jasam, *Honour Shame & Resistance* (Lahore: ASR Publications, 2001) at 9 [Samia "Honour Shame & Resistance"].

⁸⁸ The rumour is spread around with the intention to ultimately reach the male member of woman's family, in such a taunting way to incite him to an extent to kill the woman to restore the honour of the family. This is called 'Tano' in Sindh province. The number of women convicted as Kari by tano amounts to 80% of the killings. This number is based on the study report conducted by Sindh Journalist Network for Children & UNICEF Sindh in its chapter 2. UNICEF study report, *supra* note 59 at 4.

⁸⁹ Rashida Patel, "Woman versus Man", *supra* note 24 at 152.

⁹⁰ *Ibid.* at 150.

⁹¹ Discussed in detail below in chapter 3; See also *Mohammad Ayub v. State* 1997 PCr.L.J. 2056.

Rape victims also become victims of honour killings. After the amendments brought in 1979 by General Zia-ul-Haq⁹² to the Criminal Law, there is no difference between the cases of rape, adultery and fornication and so they implicitly recognize woman as equal partner in sex crimes. In the patriarchal culture where women are the embodiment of familial honour, such directives work to encourage rather than deter violence against them. Too often such reporting becomes another form of violation against the victim rather than focusing on the perpetrator.⁹³ An example is the case of Lal Jamila Mandokhel, a 16-year-old mentally retarded girl, who was killed on the orders of jirga held “guilty” of dishonouring her tribe and family as a rape victim.⁹⁴

Honour killings are also used to camouflage a murder to get away with the crime altogether or receive a lighter punishment.⁹⁵ The murder could be for personal reasons or to seek revenge as well. Many cases published in newspapers are not formally reported by police or other law enforcing agencies. A newspaper published an unreported case of honour where a girl named Shamshad was stoned to death by her uncle and a mob of villagers in front of her parents in the name of ‘honour’. Her crime was to dance at her cousin’s marriage; a normal occurrence at Pakistani weddings but not considered moral by her uncle.⁹⁶

⁹² General Zia was a military dictator who with a military coup overthrew the democratic government of Zulfikar Ali Bhutto and imposed martial law in 1977. He brought many amendments to the Constitution in the name of Islamization, which effected especially women’s rights and liberties. These laws are discussed in detail below in chapter 2.

⁹³ Afiya Shehrbano Zia, “Sex crime in Islamic context: Rape, Class and Gender in Pakistan” in Nighat Said Khan, Rubina Saigol, Afiya Shehrbano Zia, eds., *A Celebration of Women: Essays and abstracts from the Women’s studies conference March 94* (Lahore: ASR Publications, 1995) at 183 [Afiya, “Sex crime”].

⁹⁴ Amnesty “Violence Against Women” *supra* note 15 at 24.

⁹⁵ Twenty-five-year old Rashida’s husband Zahid had a land dispute with Rizwan’s family. ‘To resolve the issue, Zahid and his brothers called Rizwan over to their house. When he got there, Zahid shot and killed Rizwan right outside his house. Then picking up an axe, he rushed inside his house saying that Rizwan was karo with his wife, and hacked his wife to death. At the police station, an FIR (First Information Report) was registered and post mortem performed on the bodies but the local wadero (feudal) arranged for a razinama (agreement) between aggrieved parties leading to Zahid’s acquittal. Special Bulletin 2002, *Karo Kari, Tor Tora, Siyahkari, Kala Kali: “There is no Honour in Killing”* National Seminar Report (Lahore: Shirkat Gah, November 2001) at 8 [Special Bulletin 2002].

⁹⁶ Muhammad Shehzad, “Honour Killings Continue”, in *Dawn* January, 2003 online: <<http://www.dawn.com>>.

Some honour killings are committed for monetary gains, property and inheritance. The lesser the number of inheritors, the smaller the prospects of sharing the ancestral property. Sometimes women are killed as alleged kari⁹⁷ with some rich man of the tribe to receive the monetary compensation for pardoning the alleged Karo. Kari is killed by her family and then karo has to pay the fine under the tradition to spare his life, no matter the charge is true or false.⁹⁸

1.2.2 Increase in Honour Killings: Statistical Evidence

Statistical data collected for the incidents of honour killings in the past five years shows an increase in the number of killings. More than 1,200 women are killed in 2004⁹⁹, a rise from 938 murdered in 2003. The 2003 data of 1,261 cases of honour killings included 323 men.¹⁰⁰

In 2002, the total number of women killed was around 823.¹⁰¹ The Human Rights Commission of Pakistan (HRCP), reported 376 cases of karo kari where 206 women, 134 men and 26 minor girls were killed in Sindh alone¹⁰². In 2001, 758 women died and Sindh had the highest count with 453 women.¹⁰³

⁹⁷ A woman accused of having illicit relationship. *Kari, Kali, Tor* are the local name used for the female accused in honour crimes. All these words mean 'black'.

⁹⁸ Sunder Khan Sundurani, the chief Sardar of Jacobabad (a city in Sindh Province), admitted that most of the karo kari cases were false accusations. Karo kari cases are registered either to extort payment of the fine or to get rid of a loan. The tradition is also used to occupy one's land or property. Manzoor, Economics of karo kari, *supra* note 65.

⁹⁹ This figure is reported by Prime Minister's advisor on Women Development in published article in daily English newspaper. Staff reporter "Over 1,200 women killed in the name of honour in 2004: advisor" *Dawn*, January 7, 2005 online: <<http://www.dawn.com/2005/01/07/nat27.htm>>.

¹⁰⁰ Commission on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women (Written statement submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization in general consultative status)*, UN Doc. E/CN.4/2004/NGO/21 (February, 2004) [mimeo. provisional] at Para 1 [Report by ALRC].

¹⁰¹ Data collected with the help of HRCP and NGO Madadgar, UN office for the Coordination of Humanitarian Affairs, Tuesday 2 November 2004. *Pakistan: New "honour killing" law does not go far enough-rights group*, online: <<http://www.irinnews.org>> [Data collected by HRCP and NGO Madadgar].

¹⁰² These killing are legalized under the tribal law by jirgas. Further discussed *infra* in chapter 2 under sub-heading of jirga system, it is also highlighted that the Government of Pakistan is debating legalizing the jirga system in Sindh, which is a crucial step towards the infringement of women's rights.

¹⁰³ Data collected by HRCP and NGO Madadgar, *supra* note 101.

The actual number of the cases could be significantly higher as many incidents go unreported in the press. In eighty percent of the reported cases, a man is stated to have murdered his wife. In Punjab 278 cases of honour killings are known to have occurred in 2002 with 271 adult women and 19 minor girls as victims. A total of 772 women were killed in Punjab in 2002.¹⁰⁴ They might be victims of honour killings, but the motive was not mentioned in the press reports. In urban areas, where a murderer would surrender himself to the police holding his head high, now a murder is concealed so as not to proclaim the real reason (honour).¹⁰⁵

In the NWFP, between 1990 and July 2002, 1,844 women killed by their fathers or brothers in the name of honour, 461 of them in the 24 settled districts of the province. In areas other than Punjab and Sindh, between 1999 and July 2002, police reports said that honour killings made up 30 percent of crimes against women.¹⁰⁶

According to the Director of HRCP, the number of karos has decreased from the one in 2001 because of the increasing trend of killing women for money or assets and to extort money from the karo's family.¹⁰⁷ A marked difference emerged in the statistics of violence suffered by women as opposed to men. It is reported in 2001 that on an average, two women are killed every day in Pakistan for what they deem as 'defiling the family honour'.¹⁰⁸ This number raised in 2002 where HRCP reported that three to five women on average, fell victim to karo-kari murders in Sindh alone.¹⁰⁹ The Punjab statistics for first 6 months of 2004 gathered by the HRCP of murders recorded that out of 312 cases of honour killings and karo kari, there were 292 women and 22 two men. 305 female and 76 male victims made up the total 381 murders.¹¹⁰

¹⁰⁴ Report on violence against women, 2003, *supra* note 8 at para. 1133.

¹⁰⁵ Meeting with HRCP director, I. A. Rehman, in January 2003.

¹⁰⁶ *State of Human Rights in 2002*, (Lahore: HRCP, 2003) at 240-241 [HRCP report 2002].

¹⁰⁷ *Ibid.* at 240.

¹⁰⁸ Murtaza Razvi, *Violence Against Women, July 2001-June 2002* (Lahore: AGHS Legal Aid Cell, 2002) at 18.

¹⁰⁹ HRCP report 2002, *supra* note 106 at 248.

¹¹⁰ Human Rights Commission Pakistan, statistics available online: <<http://www.hrcp-web.org/pdf/killings.pdf>>.

The number of killings rises with the broadening scope and perception of what defines family honour. The more the reasons the more the killings. This higher number of honour killings could be attributed to social and economic reasons. The failure to punish the perpetrator or even condemn such behaviour has encouraged violence against women¹¹¹ and contributed to 'fake' honour killings, with the real motive being property, tribal dispute or camouflaging murder for any other reason.

1.3 Historical Overview of Honour Killing

Killing in the name of honour is an ancient practice. Many authors find its roots in the tribal days of the Hammurabi and Assyrian tribes of 1200 B.C.¹¹² This practice predates Islam¹¹³; a time when women were not considered full members of society. They did not have any social, political and legal rights. They were treated as a commodity rather than a human being, like the family property: first of her father and brothers and then person she was married or sold to.¹¹⁴

This practice is claimed to be linked to the emergence of patriarchal social structures across Europe and Asia where women's chastity was considered her family's property. Women's reproductive biology was a fundamental survival instrument of the agrarian and tribal societies along with livestock and occupation of land.¹¹⁵ It was imperative for them to control the sexuality of women for maintaining an accurate lineage and paternity of children. This practice was strictly observed to keep a precise account of the right of

¹¹¹ *Pakistan NGO Review; Beijing+5*, (Lahore: Shirkat Gah, 2000) at 48-49.

¹¹² Laura Jamison, "Killing for 'Honor': Legalized Murder" in Amnesty International USA. Norma Khouri struggling against honour crimes in Jordan was interviewed for this article, online: <<http://www.amnestyusa.org/amnestynow/legalizedmurder.html>>.

¹¹³ David, "Testament Culture" *supra* note 63 at 33-35.

¹¹⁴ An informal meeting with Justice Tasadaq Hussain, High Court Judge Lahore, on 3rd January 2004; Also discussed in *Ashiq Hussain vs. Abdul Hameed & others* 2002 PCr.L.J. 859 (DB). Excerpts from the translation, Pir Karam Ullah Shah, *Zia-ul-Quran* vol. 5 at 500. "The background of this custom was that once 'Rabia' tribe was invaded by the rival tribe and the daughter of the tribal Chief was taken away by the said tribe. When war ended and they brokered peace, the girl was restored to the Rabia tribe, but in terms of the peace she was given choice to return to her tribe or to join rival tribe. The girl decided to live with the latter tribe. The tribal Chief was so unhappy about it that he commanded henceforth all baby girls born in the tribe should be buried alive, so that they do not bring such an ignominy in future".

¹¹⁵ Rabia, "Dark Side of Honour", *supra* note 24 at 15.

ownership to property. Men were considered as having the right to kill to protect their land and to kill to protect their women.¹¹⁶

The notion of killing women for honour has not been confined to Arabs only. It has been practiced in many countries all over the world in one way or the other. In English common law women were perceived as chattel and adultery was defined as a crime against property¹¹⁷. Furthermore, a 1991 investigation conducted by Human Rights Watch in Brazil shows that in wife-murder cases, the accused said that he acted spontaneously in legitimate self-defence against an attack on his honour.¹¹⁸

This tradition spread from Middle East¹¹⁹ and made, inroads into Pakistan through Baloch and Pashton tribes.¹²⁰ These tribes, settled in Balochistan and NWFP,¹²¹ and they had their own tribal code called "honour code"¹²². Honour Code, an eminent part of the tribal culture, is not a codified law and is created by men who have a higher status in the tribes. There was no representation of women in the formation of these laws. Although honour killings are associated with tribal customs and laws, they do occur all over Pakistan. However, honour crimes are not wholly dependant on the existence of an 'honour code'. In the province of Punjab, honour killings are carried out under the same 'notion of family honour' lying with women.

¹¹⁶ *Ibid.*

¹¹⁷ Ian Leader-Elliott, "passion and insurrection in the law of sexual provocation" in Ngaire Naffine & Rosemary J. Owens, eds., *Sexing the subject of law* (New Zealand: LBC Information Services, 1997) 149 at 154 [Elliott, "Passion and Insurrection"]. Ian discusses essential identity perceived by Chief Justice Holt between adultery and wrong to property, as for killing an adulterous rival was killing a robber. Murder in these circumstances was described as self-defence. Chief Justice Holt made his conclusion that "adultery is highest invasion of property"; See also Rabia, "Dark Side of Honour" *supra* note 24 at 15; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124 (P.C.) (the "Persons" case) p.134 (Lord Sanky held that it was centuries ago that 'persons' would only include men).

¹¹⁸ Dorothy Q. Thomas & Robin S. Levi, "Common Abuses Against Women" in Kelly D. Askin & Doreen M. Koenig, eds., *Women and International Human Rights Law, Volume 1* (New York: Transnational Publishers, Inc., 1998) 139 at 146 [Dorothy, "Common Abuses Against Women"].

¹¹⁹ Yasmeen Hassan, "Honor Killings" *supra* note 8 at 598.

¹²⁰ The border area of Balochistan is used for economic purposes having high a commutation of people belonging to different areas and tribes in the vicinity. In winters, Balochistan used to become a hub of people coming from various cold regions in search of protection from harsh weather. Special Bulletin 2002, *supra* note 95 at 16.

¹²¹ UNICEF study report, *supra* note 59 at 3.

¹²² David, "Testament Culture", *supra* note 63 at 36. David describes honour and shaming as the dominant means of enforcing those values that were not actually legislated by written law, so is the case of honour code prevailing in NWFP and tribal areas in Pakistan.

Historically, this tradition gave right to the community or the male relatives, including husband, father or brother to kill the woman found in an illicit relationship outside marriage. He may also kill the man she is found with. Over the years this tradition has become even more gruesome and senseless. Now murder of a woman is justified even if it is committed on mere suspicion of illicit relation.¹²³

1.4 Women as 'Honour' and Women as 'Property'

Two main factors that contribute to violence against women in the name of honour are women's 'commodification'¹²⁴ and 'women being repositories of family honour' in a patriarchal society like Pakistan. The possession and control of desirable commodities, especially *zan* (woman), *zar* (wealth), *zamin* (land/estate) is closely linked to the perception of man's honour. These objects are worthy of possession and need to be controlled on account of their inherent value. If a woman is "damaged" in some way, the father or the husband has a right to compensation for the loss of his "commodity."¹²⁵ Women's physical chastity is of utmost importance and by the merest hint of illicit sexual interest, a woman loses her inherent value as an object worthy of possession¹²⁶ and, therefore, her right to life. Women have always been categorised as a commodity equivalent to other livestock. The only advantage a woman enjoyed over other livestock was her utility of reproduction, i.e. the ability to give birth to a child for (and on the wishes of) her (male) master. And hence, the concept of honour (in addition to

¹²³ Rachel, "Murder in the Name of Honor", *supra* note 32 at 1523.

¹²⁴ Alice Bettencourt, "Violence Against Women in Pakistan" Human Rights Advocacy Clinic Litigation Report Spring 2000, at 4 [Alice Bettencourt, "Violence Against Women"]. Term 'Commodification' is used by the author to express the notion of women being relegated to the level of property owned by the male member of her family that can be bought and sold whenever the owner wills to do so. The concept of women as an object or commodity, not a human being endowed with dignity and rights equal to those of men, is deeply rooted in Pakistani culture. Women are considered the property of the males in their family irrespective of their class, ethnic or religious groups. The owner of the property has the right to decide its fate. The concept of ownership has turned women into a commodity which can be exchanged, bought and even sold.

¹²⁵ Rachel, "Murder in the Name of Honor", *supra* note 32 (This issue is discussed in detail at ft. note 44 of the article).

¹²⁶ Rachel, "Murder in the Name of Honor", *supra* note 32 at 1523.

commodification). Nevertheless, women's commodification has resulted in customs like sale of girls in marriage, exchange or barter of girls to settle disputes.¹²⁷

Women as repositories of honour hold value for the standing of male family members in the society. Ghairat (honour) is closely linked with Izzat (respect) or standing in the society. Izzat bases itself on the possession of wealth and property. A man's property, wealth and all that is linked with these is the sum total of his "honour value". A woman is nothing but an object of value in this equation of "honour value" and so, an integral part of the dignity of the man. Therefore, when the rights of a woman are transferred from her father to the man she marries, the guardianship of honour shifts as well. This tribal concept of male ownership produces an atmosphere in which a woman's right to life is conditional upon her obeying social norms and traditions.¹²⁸ Ownership rights are at stake when women are to be married (almost always in Pakistan by arrangement of their parents). A major consideration is the young woman's future inheritance rights over family property or assets.

The logic of tradition turns concepts of victim and perpetrator on their head. Women who are killed (or flee a killing) are not considered victims but are the guilty party in the tribal setting. The man to whom a woman, whether wife, sister or daughter, belongs has to kill her to restore his honour. He is a victim as he has suffered two losses first to his honour and second, to the woman whom he now has to kill. Consequently, he is the aggrieved person with whom sympathies lie, not the possibly innocent woman he kills.

In Pakistan, violence is a powerful tool used to control women in society.¹²⁹ A man whose honour has been damaged must publicly demonstrate his authority to safeguard it by killing those who did so. Traditionally, honour killing is not a crime but a legitimate action, seen as the appropriate punishment for those who contravene the honour code. A man's ability to protect his honour is judged by his family and neighbours. He may be

¹²⁷ 1997 Commission's Report, *supra* note 33 at 87.

¹²⁸ Rachel, "Murder in the Name of Honor", *supra* note 32 (This issue is discussed in foot note 45 of the article).

¹²⁹ Nighat S. Khan, Rubina Saigol, Afiya S. Zia, eds., *A Celebration of Women; Essays and Abstracts from the women's studies conference March '94*, (Lahore: ASR publications, 1995) at 211.

taunted by society if he fails to kill a woman of his household who has compromised his honour.

1.5 Upholding Patriarchy

Violence inflicted upon women is a consequence of buttressing patriarchal structure in Pakistani society¹³⁰. Under customary law women are perpetual legal minors under the guardianship of male relations¹³¹, making them susceptible to violence by disempowerment in patriarchal family system.¹³² This violence goes unrestrained in the presence of oppressive social, cultural or religious traditions¹³³ assigning gender specific roles to women¹³⁴ which relegate them subordinate to men. These are the vicissitudes of women's everyday life. Any measure that seems to give women more independence and control over their lives is considered a threat to the family system and to patriarchy.

Male chauvinism and patriarchal discourse is present in every sphere of life in Pakistani society. During General Zia's¹³⁵ regime violence, purdah (veil) and religion were the coercive strategies to acquire domination and control of women by men. Especially, in

¹³⁰ I agree to this point with Radhika Coomaraswamy and Lisa M. Kois that "women are subjected to violence because of some from of tradition of cultural practice. It could be argued that violence against women *per se* is inherent in patriarchal traditions and culture. The way in which such violence manifests itself, however, are particularized within the community and generally overtly sanctioned at some level as a product of tradition or culture." Radhika Coomaraswamy and Lisa M. Kois, "Violence Against Women" in Kelly D. Askin & Dorean M. Koenig, eds., *Women and International Human Rights Law*, vol. 1, (New York: Transnational Publishers, Inc., 1998) 177 at 190 [Radhika and Lisa, "Violence Against Women"].

¹³¹ Shaheen Ali, "Equal Before Allah" *supra* note 44 at 175.

¹³² Yasmeen Hassan, "Honor Killings" *supra* note 8 at 587.

¹³³ Document: "Conclusions of Asia/South Pacific Regional Judicial Colloquium for Senior Judges on the Domestic Application of International Human Rights Norms Relevant to Women's Human Rights" in Kirstine Adams and Andrew Byrnes, eds., *Gender Equality and Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level*, (London: Commonwealth Secretariat, 1999) 4 at 4 [Document, "Judicial Colloquium"].

¹³⁴ Cited in Shaheen Ali, "Equal Before Allah" *supra* note 44 at 101-102. "the regime of General Zia-ul-Haq combined political struggle with cultural phenomena in a bid to seek a return to values and structures of the past, including traditional sex roles" These traditional sex roles confined women to the four walls of house and they were not allowed to participate in the political and economic arenas of national development.

¹³⁵ General Zia was a military dictator who with a military coup overthrew the democratic government of Mr Bhutto and imposed marshal law in 1977. He made many amendments to the Constitution in the name of his Islamization policy, which affected especially women's rights and liberties. These laws are discussed in detail below in chapter 2.

the matters of controlling the sexuality of women, the patriarchal institution of family constructs the boundaries for women.¹³⁶ If a woman tries to cross these boundaries she is considered to have brought dishonour to family and must be punished. This gender-based violence helps keep women in subordinate roles.¹³⁷ Men feel weak in the face of her right to make decisions for herself.¹³⁸ Use of two most common rights punished very often and considered against the moral of the society includes a woman choosing a partner for marriage or seeking divorce.¹³⁹ Besides cultural notions, the socio-economic dependence of women on male member of their family also contributes to the violence inflicted on women.¹⁴⁰

1.5.1 Purdah as a Tool to confine Women

One of the most common and pervasive tools to control women is the purdah (veiling) which is connoted as a symbol of a woman's chastity and good moral character. Purdah is also used to restrict women from social, economical and political participation.¹⁴¹ The extent or strictness of adhering to purdah varies from one region to another within Pakistan. This purdah is also made the basis for division of labour rather than relying on the mental faculties, thus demarcating the boundaries for women. Honour killings occur to rectify women's alleged immorality. Her coming into public is considered as a move against the social norms and tantamount to immorality "justified on the grounds that they are entering into the public arena by which they violate the norms of seclusion and veiling."¹⁴² Purdah is another custom that is sanctified by religion claiming it to indicate

¹³⁶ UNICEF study report, *supra* note 59 at 1.

¹³⁷ Jan Bauer, *"Only silence will protect you": Women, Freedom of expression and the language of human rights* (Montreal: International Center for Human Rights and economic development, 1996) at 48 [Jan, "Silence will protect you"].

¹³⁸ Samia "Honour Shame & Resistance", *supra* note 87 at 4.

¹³⁹ Rabia, "Dark Side of Honour", *supra* note 24 at 31.

¹⁴⁰ In some cases of domestic violence, women are income earners of the family but they are tortured by their husbands or fathers. It is not to say that economic dependence is not the real factor behind domestic violence incurred on women, but these cases show how the social status of women rather than just her economical dependence on male members becomes the reason for her subordination. This supports that economical dependence of women is also an aspect to look into. But on the whole it is rather an interplay of socio-cultural status of women in the society.

¹⁴¹ Women in NWFP are not allowed to vote or participate in political arena of the country. There is no participation and representation of women in the tribal judicial bodies (jirgas).

¹⁴² Saima Jasam, "Violence in the name of honour", *supra* note 64 at 21.

the honour of women in the culture.¹⁴³ It suggests that women once unveiled, cannot think properly and becomes a potential source of evil. In all these cases, however, women in large parts of the country are confined almost entirely to the 'Char Devari' (literally means the four walls of the house/room).

1.6 Honour Killings condemned in Islamic Teachings

Islam does not sanction honour killings. These killings are linked with religion on the basis of moral standards upheld by the patriarchal structure in Pakistan.¹⁴⁴ In Quranic interpretation of sexual equality, both men and women have to be judged on the same touchstone, as they carry the same moral responsibilities and face similar accountability.¹⁴⁵ Islam holds both men and women equally responsible to guard their chastity¹⁴⁶ and there is no hierarchal difference. Yet in practice, Pakistani men hold themselves as sole guardians of their women to support their brutal actions. The Quranic verses¹⁴⁷ often quoted to justify male dominance are:

Men are the *protectors and maintainers (qawwam)* of women, because Allah has given the one more (strength) than the other, and because they support them from their means.¹⁴⁸

¹⁴³ Shaheen Sarder Ali, "Culture, custom and Women s' Human Rights: CEDAW Convention Article Five", IWRAW Publications, IWRAW consultations Reports: 1999, at 4. Theory and Actions Using Article 5, Panelist Shaheen Sarder Ali, online: <<http://www.igc.org/iwraw/pulications/cr/1999.html>> [IWRAW reports, 1999].

¹⁴⁴ Yasmeen Hassan, "Honor Killings" *supra* note 8 at 604.

¹⁴⁵ Anis Ahmed, *Women and Social Justice: An Islamic Paradigm* Second Revised Edition (Islamabad: Institute of Policy Studies, 1996) at 7.

¹⁴⁶ Ali "The Quran", *supra* note 35 at Surah Al Ahzab, 33:35.

¹⁴⁷ Ayat, verses of Quran.

¹⁴⁸ Ali "The Quran", *supra* note 35 at Surah Nisa 4:34.

Cultural notions of patriarchy influence the interpretations of Quranic text.¹⁴⁹ Azizah al-Hibri, a Muslim feminist, has examined the Arabic word 'qawwam' and its different meanings available in historical Arabic dictionary. She says the meanings are not hierarchal as holding one superior to another but are interpreted accordingly to societal interpretations. She says that where societies were authoritarian, they interpreted the meaning with their own authoritarian perspective.¹⁵⁰ So the patriarchal version of history is "responsible for subordinating women and infecting them with the belief that they are to be guided and guarded."¹⁵¹

Along with these traditions or patriarchal interpretation of Quranic verses, fundamentalists bring in the false dichotomy of public and private sphere, based on the traditional gender specific roles. This has led to women's subordination economically, socially and politically. Islam has tried to break down this barrier of public and private sphere¹⁵², maintained in Pakistan by the state and the religious leaders to retain power and control over women's lives. It is believed in Pakistan that "Islam relegates women to an inferior status; it confines them inside the four walls of their homes and restrains them from taking up employment outside their homes..."¹⁵³ But Muslim scholars agree that Islam accords women with the equal rights as men, i.e., right to property, right to choose a spouse and right to divorce etc.

¹⁴⁹ Uzma Jamil, "Women and Sharia", Lecture, Concordia University, 8 November, 2004. Uzma has quoted Amina Wadud, a Muslim feminist, who has interpreted the ayah in Surah Nisa 4:34 as "Men are the protectors and maintainers of women, [on the basis of] of what Allah has [preferred] some of them over others, and [on the basis] of what they spend of their property (for the support of women)". This also leads to the gender specific roles appointed to men and women as house keepers and breadwinners, which lead to ultimate dichotomy of public and private sphere of life based on gender. Uzma holds that this interpretation does not indicate absolute superiority of *all* men over *all* women, as a class. The preference referred to is not unconditional. Some men might be better able to financially support women by virtue of their jobs, while others may not. The social role of men as "protectors and maintainers" is conditional upon their financial and material support of women. It does not mean that all of mankind is superior to all of womankind, inherently. In both the cases text remain the same but the interpretation changes.

¹⁵⁰ Azizah al-Hibri, "Islam, Law, and Custom: Redefining Muslim Women's Rights" in Kelly D. Askin & Doreen M. Koenig, eds., *Women and International Human Rights Law, Volume 2* (New York: transnational Publishers, Inc., 1998) 379 at 406 [Hibri, "Islam, Law and Custom"].

¹⁵¹ Asma Mohammad Abdel Halim, "Challenges to the Application of International Women's Human Rights in the Sudan" in Rebecca J. Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 397 at 408 [Asma, "Rights in Sudan"].

¹⁵² Shaheen Ali, "Equal Before Allah" *supra* note 44 at 92-93.

¹⁵³ 1997 Commission's Report, *supra* note 33 at ii.

Interpretation of Islamic teachings has changed historically, in the course of dynamic interaction with different cultures.¹⁵⁴ An interpretation of Islamic law commonly known as Shariah¹⁵⁵ is different in many Islamic countries. The development of Shariah law is greatly influenced by customary law and in the Pakistani context, Islam has imbibed many elements of tribal and feudal culture.¹⁵⁶ Historically, derivation of moral law on sex offences, according to Islamic sources, was intended to safeguard women. But contorted interpretations of religious decree introduced a new form of control over women and their sexuality in the form of Zina Laws¹⁵⁷. Not to forget their position in the current patriarchy, women become the victims of familial violence for 'dishonouring the family honour' as equal partner in sex crime of rape cases.¹⁵⁸ This resulted in inflicting violence on women to control them as being the guardians of family honour.

Cultural practices discriminatory to women have been shrouded in religious beliefs whereas religious norms favouring women are all too conveniently ignored.¹⁵⁹ Under Islamic law, every male and female has the right to enter into marriage by exercising full and free consent, but many Muslim families deny their children, particularly female children this right due to constraints of cultural norms.

Rafiullah Shahab, a religious scholar, referring to verses of the Holy Quran¹⁶⁰, has opined that man cannot even divorce his wife on the charge of immorality. He has to prove the charge in a court of law. If someone accuses his spouse without having witnesses other

¹⁵⁴ Nighat Said Khan, "Reflection on the Question of Islam and Modernity" in Nighat Said Khan, Rubina Saigol, Afiya Shehrbano Zia, eds., *A Celebration of Women: Essays and abstracts from the Women's studies conference March; 94* (Lahore: ASR Publications, 1995) at 163 [Nighat, "Islam and Modernity"].

¹⁵⁵ Islamic law, commonly known as Shari'a, is based on the Holy Quran, which Muslims believe to be the literal and final word of God, and on Sunna, or traditions of the Prophet Muhammad. Using these sources as well as pre-Islamic customary practices of the Middle East (which were not explicitly repudiated by Quran and Sunna), Muslim jurists develop Shari'a as a comprehensive ethical and legal system between the seventh and ninth centuries A.D. Abdullahi A. An Naim, "Towards a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment" in Abdullahi A. An Naim, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1995) 19 at 33 [An-Naim, "Cross Cultural Approach"].

¹⁵⁶ Nighat, "Islam and Modernity" *supra* note 154 at 163.

¹⁵⁷ 1979 Hudood laws implanted by Zia in name of Islamization. Discussed in detail below in chapter 2.

¹⁵⁸ Afiya, "Sex crime", *supra* note 93 at 183.

¹⁵⁹ Shaheen Ali, "Equal Before Allah", *supra* note 44 at 5.

¹⁶⁰ Surah Al-Ahzab, Surah Al-Baqrah and Surah Al-Noor in Ali "The Quran", *supra* note 35, cited in Qadir Shah, "No honour in killing", *supra* note 55 at 8-9.

than him, the testimony in denial renders the accusation null and void. It would be highly instructive to reproduce verses 4 to 9 of Surah Al- Noor (XXIV) of the Holy Quran:

And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation) flog them with eighty stripes and reject their evidence ever after, for such men are wicked transgressors.

Unless they repent thereafter and mend (their conduct) for Allah is Oft-Forgiving, Most Merciful.

And for those who launch a charge against their spouses, and have (in support) no evidence but their own – their solitary evidence (can be received) if they bear witness four times (with an oath) by Allah that they are solemnly telling the truth.

And the fifth (oath) (should be) that they solemnly invoke the curse of Allah on themselves if they tell a lie.

But it would avert the punishment from the wife, if she bears witness four times (with an oath) by Allah, that (her husband) is telling a lie;

And the fifth (oath) should be that she solemnly invokes the wrath of Allah on herself if (her accuser) is telling the truth.¹⁶¹

But in an Islamic country like Pakistan, Islamic injunctions about the rights of women are altogether ignored. Many innocent women are killed in the name of ‘honour’. Shahab says that “God has eliminated the evil of the Jahilliah period, and thus, no case of so-called ‘honour’ killing was reported in the early period of Islam”.¹⁶²

Islam has provided an equal status to both man and woman. In a few reported cases¹⁶³ Islamic provisions favourably disposed toward women have been quoted to negate the support of honour killings in the name of Islam and pre-conceived notions of pseudo-religiosity. On the contrary, judges often justified honour killings in the name of fulfilling moral and religious duty. In the case of *Ameer Bux v. The State*¹⁶⁴, the judge legitimized the murder saying that it was in the true spirit of Islam and the moral duty of a true Muslim. The judge held that “in our Islamic society the moral of the society has always been given the weight.” Thus the murderer shall not be liable to maximum punishment even if convicted and is entitled to the discretion of the court so that male persons remain

¹⁶¹ Ali, “The Quran”, *supra* note 35 Surah Al Nur XXIV verses 4-9 at 243.

¹⁶² Qadir Shah, “No honour in killing”, *supra* note 55 at 10 [emphasis added].

¹⁶³ *Abdul Zahir v. The State*, 2000 SCMR 406; See generally Qadir Shah, “No honour in killing”, *supra* note 55 at 9.

¹⁶⁴ *Ameer Bux v. The State*, 2000 YLR 867.

“Ba-Ghairat” (with honour) instead of becoming “Be-Ghairat” (without honour) in the society.

1.7 Culture – A pretext for Human Rights Violation

Every culture¹⁶⁵ has a different concept of human rights, which is the most common challenge faced by human rights and their universality.¹⁶⁶ Some believe in universality of human rights¹⁶⁷ while others uphold culture relativism to be of extreme importance in determining rights and freedom in a society.¹⁶⁸ A culture provides an individual and community with certain values to be pursued in life, “as well as the legitimate means for pursuing them.” It also sets up methods of individual and collective struggles for power within a society.¹⁶⁹ In the case of Pakistani society, culture is used to only benefit men in society and making them powerful over women to maintain a patriarchy. This culture preserves the power only to male individuals of the community and suits their interests.¹⁷⁰ Further, by characterizing discriminatory practices as custom or tradition like honour killings, males may obscure power and economic gains.

Every human being has certain rights and especially the right to life. Culture is important but in Pakistan traditions are not observed voluntarily by women but rather imposed on

¹⁶⁵ Culture can be defined as the values, institutions and forms of behaviour transmitted within a society. An-Naim, “Introduction” in Abdullahi A. An-Naim, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1995) 1 at 2 [An-Naim, “Introduction”].

¹⁶⁶ Peter Leuprecht, “Culture Against Human Rights?” Lecture delivered at National Arts Centre, Ottawa, 9th July, 1998, at 7 [“Leuprecht, “Culture Against Human Rights”].

¹⁶⁷ “Universalism” - Interpretation of human rights and their application should not vary according to the cultural values of the community applying them. All human rights should be independent of cultural context. Braun, “Cultural Diversity”, *supra* note 84 at 49.

¹⁶⁸ The idea of rights applicable to every human rights by virtue of being human has been opposed from the very beginning. Even if it recognized that all humans share some biological feature, it is claimed that the element of culture is such a determinant factor that the consideration of human as an abstract category devoid of cultural context is arbitrary and does not have much significance. As for considering the importance of culture for the realization of human rights was of such an importance that it could be left out of consideration when interpreting the scope of such human rights. “Man is free only when he lives as his society defines freedom” this opinion is referred to as cultural relativism. Cited in *ibid.* at 58.

¹⁶⁹ An Naim, “Cross Cultural Approach”, *supra* note 155 at 23.

¹⁷⁰ Jill McCalla Vickers, “Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Reserch” in Angela Miles and Geraldine Finn, eds., *Femisinsm-From Pressure to Politcs* (2ed.) (Montreal: Black Rose Books, 1989) 37 at 49; See also Vrinda Narain, *Negotiating the Boundaries: Gender and Community in India* (Montreal, McGill University, 1997) at 100 [Vrinda, “Gender and community”].

them (in the name of culture) by males. How can a tradition be of merit if it is observed with the use of force by authorities?¹⁷¹ A feminist view is that cultural norms and practices are an outcome of gender system which is “substantially a product of culture rather than divine will, human biology or natural selection.”¹⁷² These cultural norms function as a source of control within a society.

To deprive a person of his/her human rights for the sole reason that he/she belongs to a different culture is not defensible. This is the equivalent of sacrificing individual rights for the sake of the community.¹⁷³ Culture relativism has its importance in determining human rights in a particular society but it does not “necessarily require allowing culture total autonomy in accepting given human rights at culturally legitimate or rejecting it as culturally illegitimate...”¹⁷⁴ Culture is an important factor in the life of every human being, but an individual should not be deprived of his/her basic rights just because of his/her being part of a certain tribe or culture. Within these cultural sub-sets, the moral standards are not based on social justice but are a product of political opportunity and the maintenance of power.¹⁷⁵

In Pakistani patriarchal society, violence is used against women to make their right to life conditional on her obeying social norms and traditions.¹⁷⁶ Women do not possess basic human rights because they are human beings¹⁷⁷ but rather these rights are available upon complying with certain traditional conditions. Their subordinate status subjects them to the moral standards set up for them by the male members of society.¹⁷⁸ Asma Jahangir, a

¹⁷¹ Reza Afshari, “An Essay on Islamic Cultural Relativism in the Discourse of Human Rights” (1994) 16:2 Hum. Rts. Q. 235 at 259 [Afshari, “Discourse of Human Rights”].

¹⁷² Tracy Higgins, “Anti-Essentialism, Relativism, and Human Rights” 19 Harv. Women’s L. J. 89 (1996) in Henry J. Steiner & Philip Alston eds., *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (New York: Oxford University Press, 2000) at 408 [Phillip, “Human Rights in Context”].

¹⁷³ Braun, “Cultural Diversity”, *supra* note 84 at 51.

¹⁷⁴ Abdullahi Ahmed An-Na’im, “Problems of Universal Cultural Legitimacy for Human Rights” in Abdullahi Ahmed An-Na’im & Francis M. Deng eds., *Human Rights in Africa* (Washington: The Brookings Institution, 1990) 331 at 343 [An-Na’im, “Cultural Legitimacy”].

¹⁷⁵ Afshari, “Discourse of Human Rights”, *supra* note 171 at 251.

¹⁷⁶ Amnesty: Violence Against Women *supra* note 15 at 1.

¹⁷⁷ J. Donnelly, *The Concept of Human Rights* (London: Croom Helm, 1985) at 1.

¹⁷⁸ Kwasi Wiredu, “An Akan Perspective on Human Rights” in Abdullah Ahmed An-Na’im, Francis M. Deng, eds., *Human Rights in Africa: Cross Cultural Perspectives* (Washington: The Brookings Institution, 1990) 243 at 243. “A right is a claim that people are entitled to make on others or on society at large by

renowned human rights activist and lawyer in Pakistan, has made women's rights a litmus test to establish the universality of human rights, by saying that "women's right were always there but they have put the universality of human rights on test."¹⁷⁹

The relationship between culture and human rights largely depends on the relationship between culture and power.¹⁸⁰ Culture consists of a series of "constantly contested and negotiated social practices whose meaning[s] are influenced by the power and status of [its] interpreters and participants."¹⁸¹ Cultural norms are susceptible to different interpretations. Powerful individuals and groups in Pakistan are male members of society, who "tend to monopolize the interpretation of cultural norms and manipulate them to their own advantage".¹⁸² This is especially the case in Pakistan where women are murdered in the name of honour killing and men pardoned by paying money.

In Pakistan in 1999, (after Samia's murder) a resolution¹⁸³ was moved in the Senate to condemn honour killings. It was rejected by its members for, to them, the resolution had nothing to do with human rights and that since it was a question of honour there was no room for discussion.¹⁸⁴ They upheld honour killing as a part of cultural traditions. In other words, the Senate agreed with the practice and so women can now be killed in the name

virtue of their status. Human rights are claim that people are entitled to make simply by virtue of their status as human beings."

¹⁷⁹Justice A.R. Gubbay (Chief Justice of Zimbabwe), "International and Regional Standards of Women's Rights: Their Importance and Impact on the Domestic Scene – The Position in Zimbabwe" in Kirstine Adams Andrew Byrens, eds., *Gender Equality and Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level* (London: Commonwealth secretariat, 1999) 112 at 112.

¹⁸⁰ Leuprecht, "Culture Against Human Rights", *supra* note 166 at 12.

¹⁸¹ Arati Rao, "The Politics of Gender and Culture in International Human Rights Discourse" in Julie Peters & Andrea Wolper, eds., *Women's Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) 167 at 173; See also Vrinda, "Gender and community", *supra* note 170 at 116.

¹⁸² An-Naim, "Cross-Cultural Approach", *supra* note 155 at 27-28.

¹⁸³ First Senate resolution proposed in 1999 after Samia's murder to make legislation against the honour killings. It was drafted with the help of women lawyers, women rights activists and local NGOs. Discussed in detail below in chapter 2.

¹⁸⁴ *The Nation*, 3rd August 1999. In this news article Ajmal Khattak, Chair person of Senate Committee, said that the proposed resolution of honour killings has nothing to do with human rights issue, online: <http://www.thenation.com>>.

of honour.¹⁸⁵ Therefore, the Pashtoon community in NWFP held that the murder of Samia was not a crime as it was in accordance with their tradition.¹⁸⁶

In Samia's case culture was used as a pretext for defending human rights violations.¹⁸⁷ It is the entrenched patriarchal tradition which keeps the status quo.¹⁸⁸ This gender violence aims to "maintain women in subordinate roles and contribute to their low level of political participation and to their even lower level of education, skills and work opportunities".¹⁸⁹ It is only men who benefit from these arrangements (of cultural practices) – the same which deprive women.¹⁹⁰

Customs and traditions are not static as they change over time. The tradition of honour has undergone changes and has broadened its scope in the growth of patriarchal structure and violence in the society. The patriarchal system has nourished honour killing the most. Previously witnessing of physical intimacy was a prerequisite for an honour killing. However, now if there is a rumour about any woman having illicit relationship, she has to sacrifice her life to recover the family integrity.¹⁹¹ This tradition could have changed and evolved for the betterment of women as well, but this is not the will of the patriarchal society.

1.8 Conclusion

Customs, traditions and culture are not static. They are evolving practices which a community willingly consents to abide by. They should be acceptable to all segments of

¹⁸⁵ Saima Jasam "Violence in name of honour", *supra* note 64 at 4.

¹⁸⁶ M. Ziauddin, "The legitimacy of honour killings", in *Dawn*, 8 May 1999.

¹⁸⁷ An-Na'im "Introduction", *supra* note 165 at 3.

¹⁸⁸ R. Emerson Dobash and Russell Dobash, *Violence Against Wives: A Case Against Patriarchy* (New York: The Free Press, 1979) at 6-7.

¹⁸⁹ Jan "Silence will protect you", *supra* note 137 at 48.

¹⁹⁰ Catherine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 92; See also Vrinda, "Gender and community", *supra* note 170 at 101.

¹⁹¹ The rumour is spread around with the intention to ultimately reach the male member of woman's family, in such a taunting way to incite him to an extent to kill the woman to restore the honour of the family. This is called 'Tano' in Sindh province. The number of women convicted as Kari by tano is 80% of the killings. This number is based on the study report conducted by Sindh Journalist Network for Children & UNICEF Sindh, UNICEF study report, *supra* note 59 at 4.

society.¹⁹² This tradition of honour killing is an outcome of an unequal power relationship between men and women in the patriarchal society of Pakistan. There is a need for rearticulating the framework within which this gender inequality and violence against women ought to be addressed. It does not require rejection of culture or of group identity but rather, a rejection of those aspects and practices which serve to subordinate women within a cultural context.¹⁹³

One must differentiate between the morals established by Islam and those of the patriarchal establishment in Pakistani society. Islam upholds a woman's right to choose a partner or to seek a divorce as equally as that of a man. Besides marriage, rape victims convicted of defilement of family honour murdered under the traditions of honour killings point again to the need for reconsidering cultural norms and attitude to grant women not only basic respect but protection also.¹⁹⁴

Custom and tradition are the living law. However, if a majority of people is willing to undermine it, the practice does not have the status of living law and cannot be considered a sanctified custom.¹⁹⁵ It is not an easy task but culture is flexible¹⁹⁶ and a change can be brought about by legitimating the value of gender equality through internal discourse, not only within the community but between the community and the state.¹⁹⁷

¹⁹² IWRAW reports, 1999, *supra* note 143.

¹⁹³ Vrinda, "Gender and community", *supra* note 170 at 4.

¹⁹⁴ "Specific Applications: Family Law and the Role of Women" Book Reviews (2000-2001) 15 J. L. & Religion 498.

¹⁹⁵ IWRAW reports, 1999, *supra* note 143 at 4.

¹⁹⁶ An-Naim, "Cross-Cultural Approach", *supra* note 155 at 27.

¹⁹⁷ An Naim, "State Responsibility Under International Human Rights law to change religious and customary laws" in Rebecca Cook, ed., *Human Rights of Women: National and International Perspectives* (Philadelphia: University of Pennsylvania Press, 1994) 167 at 181.

Chapter 2: Rule of Law and Honour Killing

2.1 Introduction

No codified law in Pakistan provides an exemption from punishment for murder or injury in the cases of honour killing, as is the case in Jordanian law,¹⁹⁸ which expressly spares the perpetrator. Honour killing is dealt as a murder crime under the criminal law of Pakistan, *inter alia* Qisas (punishment equal to the offence) and Diyat (compensation) law based on the Islamic injunctions. Recently, special legal provisions have been promulgated amending the criminal law vide Criminal Amendment Act, 2004 to define and enforce punishment for an offence committed in the name or on the pretext of honour. However, the Qisas and Diyat law protects the perpetrator in honour killing cases. Under Qisas and Diyat law, the victims or his/her legal heirs retain control over the matter including the crime and the criminal. The legal heirs can also pardon the murderer or reach some settlement as a compensation in lieu of punishment.

In honour killings, which are often committed by a family member or in connivance with the family, the perpetrator having a relation with the victim and his/her legal heirs also takes advantage of Qisas and Diyat law. There is no substantive provision in the criminal law of Pakistan which legalizes or provides exemption in the cases of honour killing. However, the right provided to the legal heirs of the victims under Qisas and Diyat law has privatized the crime of honour killing. On the contrary, in tribal areas, honour killings are justified and honour crimes are sanctioned by the traditions and the tribal rules.

¹⁹⁸ Kathryn Christine Arnold, "Are the Perpetrators of Honor Killings Getting Away With Murder? Article 340 of the Jordanian Penal Code Analyzed under the Convention on the Elimination of All Forms of Discrimination Against Women" (2001) 16 Am. U. Int'l L. Rev. 1343. In Jordan, a country with the highest rate of honour killings in the world, Article 340 of the Jordan's Penal Code (No. 16, 1960) provides: "He who discovers his wife or one of his female unlawfully, committing adultery with another, and he kills, wounds, or injures one or both of them, is exempt from any penalty. He who catches his wife, or one of his female ascendants or descendants or sisters with another in an unlawful bed and he kills or wounds or injures one or both of them, benefits from a reduction in penalty."

In the previous chapter we discussed the nature and scope of the tradition of honour killings in Pakistan. This chapter sees how honour killings are dealt with under criminal law and the impact of the recent amendments to the law on controlling honour killings. It cites the incidents in which perpetrators of honour killing get away with murder punishment or at times pardoned altogether.

In Pakistan, two judicial systems formal and the informal (tribal justice system), working parallel to each other, deal with honour killings. The formal judicial system administers constitutional law, criminal law, Islamic law (shariah) including Qisas and Diyat law with a hierarchal court system¹⁹⁹ presided over by qualified judges in all the four provinces of Pakistan (except for the Federal Shariat Court which has three religious scholars appointed as Judges²⁰⁰). The formal judicial system is constitutionally an independent body²⁰¹ but General Zia²⁰² brought in constitutional changes which made the judiciary and legislature effectively subservient to the executive and now “what seems on paper to be a tripartite government of executive, legislative, and judiciary powers turns out to be a long executive arm enveloping and so curtailing both the legislature and the courts.”²⁰³ However, according to Article 247(7) of the Constitution, the Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA) do not fall under these courts. These tribal areas have their own legal and judicial system largely based on tribal adjudication²⁰⁴. This informal judicial system has an informal honour code and a quasi-judicial tribunal generally called jirga either headed by Sardar (colloquial

¹⁹⁹ Article 175 of Constitution: “*Establishment and jurisdiction of courts.* (1) There shall be a Supreme Court of Pakistan, a High Court for each Province and such other courts as may be established by law. (2) No court shall have any jurisdiction save as is nor may be conferred on it by the Constitution or by or under any law. (3) The Judiciary shall be separated progressively from the Executive within [Fourteen] Years from the commencing day.” *Constitution of Pakistan*, *supra* note 16.

²⁰⁰ Article 203-A to 203-J of the Constitution, *Constitution of Pakistan*, *supra* note 16. This court was established by Zia to implement his Islamization policy and to use as a tool to strike down legal provisions prohibiting the implementation of his policy. Matters dealing with Sharia are appealed to Federal Shariat Court.

²⁰¹ Article 175(3) of the Constitution, reproduced *supra* note 199.

²⁰² General Zia was a military dictator who with a military coup overthrew the democratic government of Mr Bhutto and imposed marshal law in 1977. He brought many amendments in the Constitution in the name of his Islamization policy, which affected especially women’s rights and liberties.

²⁰³ Bruce, “Shattering the Myth”, *supra* note 20 at 143.

²⁰⁴ The tribal justice system is discussed in detail *infra* under sub-heading of jirga system.

name of feudal)²⁰⁵ of the tribe or by a body of council appointed by the influential people of the tribe.

Against the backdrop of this legally pluralistic adjudication of honour killings criminal laws are used to discriminate against women. Pakistan's constitutional law guarantees equal protection to all its citizens.²⁰⁶ It also guarantees protection of marriage, family, mothers and children besides ensuring full participation of women in all spheres of national life.²⁰⁷ However, women are discriminated against violating their constitutional rights. Women face a systemic subordination to men determined by the forces of patriarchy across classes, regions, and the rural urban divide.²⁰⁸ In honour killing cases the provisions of Qisas and Diyat law are used to discriminate against women. In the tribal judicial system, honour killings are legalized suppressing women's constitutional rights.

The impunity with which the perpetrator commits the crime of honour killing and the systematic failure of the state to exercise effective control on such acts makes the state responsible under national and international law. These murders in the garb of cultural practices have not only been ritualised but also legitimised by jirgas in Pakistan. It is a version of the implicitly accepted violence on women in everyday life.²⁰⁹ This violence against women is a violation of fundamental rights protected under the constitutional law of Pakistan as well as international law under which state parties are obliged to exercise "due diligence" to ensure prevention, investigation and punishment of the perpetrators of

²⁰⁵ Feudalism is a form of social order in which the possessing class appropriated the surplus produce of peasants by exercising superior rights over their lands and persons. Feudals are political disintegrators and administrators in their specific areas. Cited in Hassan Gardezi, *Feudal and Capitalist Relations in Pakistan* Hassan Gardezi & Jamil Rashid (eds.), *Pakistan: The Roots of Dictatorship* (London: Zed Press, 1983) 19 at 22.

²⁰⁶ Art. 25 of the Constitution is as follows: "25. (1) *Equality of citizens*. 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 alone. (3) Nothing in this Article shall prevent the State from making any special provisions for the protection of women and children. *Constitution of Pakistan*, *supra* note 16.

²⁰⁷ Articles 25, 27, 34, and 35 of the constitution, *Constitution of Pakistan*, *supra* note 16; See also, Alice Bettencourt, "Violence Against Women", *supra* note 124 at 7.

²⁰⁸ Country Briefing Paper – Asian Development Bank Programs Department (West) and Office of Environment and Social Development, "Women in Pakistan", July 2000 [ADBP, "Country Paper"].

²⁰⁹ Copelon Rhonda, "International human rights dimensions of intimate violence: another strand in the Dialectic of Feminist Lawmaking" (2002-2003) 11 Am U. J. Gender Soc. Pol'y & L. 871 [Rhonda, "Dimensions of Violence"].

such crimes.²¹⁰ Pakistan, as a state party to Women's Convention and the Convention of Rights of Child, is also responsible for its failure to exercise due diligence.

2.2 The Formal Legal System in Pakistan

Pakistan has a 'hybrid legal system' resulting in legally pluralistic jurisdictional conflicts under the prevalence of Islamic law (shariah), customary norms, and secular or civil codes. In a legally pluralistic society such as Pakistan, it is not the statutory law alone which determines the rights and status of women but customary practices and social norms too influence everyday life.²¹¹ This 'legal pluralism' has created an atmosphere of oppression against women where any advantage or opportunity offered to them by one law is cancelled out by one or more of the others.

Under this pluralistic system, constitutional law protects the fundamental rights of all citizens without any discrimination of sex. But women are discriminated against their constitutional rights under customary law and Islamic law. To give a few examples, under Muslim Family Law Ordinance, 1964, (MFLO) rights to divorce are unequally distributed between men and women. Men can initiate and obtain a divorce under clearly defined conditions; however the right to divorce may be delegated to women at the time of entering into marriage under clause 18 of the marriage contract (Nikahnama). Contrary to men's right to divorce, women can obtain divorce (Khula) only through a court on a specific ground.

In Pakistan many women do not have access to formal judicial system, i.e. the courts. The social dissection of the private and public spheres for women in Pakistan during General Zia-ul-Haq's government made women vulnerable and susceptible to harassment.²¹² The government's political policies affected the legal status of women as the political struggle

²¹⁰ Article 4 of *Declaration on Elimination of Violence Against Women*, UN GAOR Res. 48/104 48th Sess. 85th Mtg., (1993) [DEVAW]. See also Radhika and Lisa, "Violence Against Women", *supra* note 130 at 178.

²¹¹ Shaheen Ali, "Equal Before Allah", *supra* note 44 at 92.

²¹² General Zia was a military dictator who with a military coup overthrew the democratic government of Mr Bhutto and imposed marshal law in 1977. He brought many amendments to the Constitution in the name of his Islamization policy, which affected especially women's rights and liberties.

was “combined with cultural phenomena in a bid to seek a return to values and structures of the past, including traditional sex roles.”²¹³ This brought in the dichotomy of public and private spheres on gender specific roles. Women were confined to the private sphere to manage the household. General Zia initiated the policy of “chaddar” (veiling) and char devari (literally meaning four walls) in the garb of implementing his Islamization policy to confine women to the house.²¹⁴ The public arena was allotted to men participating in political, financial and national matters. As an outcome, women’s right to constitutional equality was denied in everyday life, in the name of Islamization. Religious clerics, who are upholders of a strict patriarchal system, perceive women as inferior to men physically, morally, and intellectually²¹⁵. During General Zia’s regime they extended their firm support to his policies and made inroads into the Federal Shariat Court he formed.

Generally, people follow an interpretation of Islamic divorce law under which a husband repeats divorce (talaq) verbally three times in succession. But the MFLO says the notice of divorce is finalized only after compulsory attempts at mediation in three months have failed. However, women’s ignorance of the law and men’s access to several systems contribute to drastic deterioration of the situation of women. In the presence of the patriarchy and male dominance, men have easier access to legal systems than do women. Due to restraints on women imposed in the name of purdah (veiling) they are confined to homes and have little access to legal aid. Women have lesser awareness of their legal rights because of their little exposure to outside world and a woman is not suppose to step outside her house without being escorted by a male family member. So a woman divorced verbally contracts another marriage faces Zina (illegal sexual intercourse) charges²¹⁶ as her divorce is socially but not legally valid.

²¹³ Shaheen Ali, “Equal Before Allah”, *supra* note 44 at 102.

²¹⁴ Discussed above in chapter 1.

²¹⁵ Reflection of this general notion about women is present even in the laws, such as under the Qisas and Diyat law Section 313(2) (b) PPC holds that if the victim has no *wali* other than a minor then the right of Qisas rest with the father, and if the father is not alive then it rests with parental grandfather of such *wali* shall have the right of Qisas.

²¹⁶ The laws promulgated during General Zia’s regime are called Hudood Ordinances. They are: ‘*The Offences of Zina (Enforcement of Hadd) Ordinance, 1979* (the “Zina Ordinance”), which deals with the laws related to offences of illegal sex out of wedlock including rape, adultery and fornication; *the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*, which deals with the existing law relating to ‘Qazf’ (accusing a virtuous man or woman of adultery) to bring it in conformity with the injunctions of Islam this law is applicable in honour killing cases especially in cases where a husband accuses his wife of

The Islamic law requires explicit consent of both partners to the marriage. The Constitution says that anyone above the age of 18 years is an adult and does not need a parent's permission to marry. But women are not allowed to choose a spouse; their consent is not even asked for and their dissent is punished as a sin.

2.3 Fundamental Rights in the Constitutional Law

The Constitution of Pakistan guarantees certain fundamental rights to all its citizens equally without gender discrimination. Article 25 protects those laws made especially for the protection of women and children. Women are given special attention for safeguarding their interests and safety. Article 8²¹⁷ of the Constitution protects against any law or custom or usage having force of law which is inconsistent with the fundamental rights conferred by the Constitution, stating that such law or custom "shall be void to the extent of its inconsistency". Article 9 of the Constitution guarantees the security of every citizen by stating that "No person shall be deprived of life or liberty, save in accordance with law."

Article 35 of the Constitution provides that "the State shall protect the marriage, the family, mother and the child". Such "protection" has so far been counter-productive at the hands of Pakistan's predominantly conservative judges, all too eager to confine women within the traditional and discriminatory notions of inequality against the constitutional guarantees. The discriminatory interpretations could easily rely on customs and personal morality. Orthodox interpretations of Islam also provide ready tools for advancing discriminatory judgments.²¹⁸

committing adultery, the provision of Li'an is invoked; and the *Qanun-e-Shahadat Order, 1984*, which replaced the *Evidence Act, 1872* to bring the provisions of evidence required in civil and criminal cases to be in accordance with the injunctions of Islam.

²¹⁷ Article 8 of the Constitution says that "*Laws inconsistent with or in derogation of Fundamental Right to be void.* (1) *Any law, or any custom or usage having the force of law, in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.* (2) *The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void...*" *Constitution of Pakistan, supra* note 16 [emphasis added].

²¹⁸ Discussed in detail below in chapter 3.

There are laws in Pakistan, including customary laws, which negate the equality provided by the Constitution. To quote a few examples, constitutional law provides fundamental guarantees and special protection to women but customary practices, especially in cases of right of marriage negate them.²¹⁹ Special protection to women is provided under Article 25 of the Constitution. But the Qanoon-e-Shadat Order of 1984 says the evidentiary value of a woman's testimony is not equal to that of a man in financial transactions²²⁰. Under the Zina Ordinance²²¹, women are considered equal partners in offence of Zina, whereas the Frontier Crimes Regulation, 1901 (FCR)²²² defines adultery as a crime committed only by a woman.²²³ In Zina cases a woman's testimony as a victim is not accepted if evidence to prove the allegation is insufficient; it is rather taken as a confession for having committed Zina.²²⁴

Section 14 of the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, breaches the constitutional equality guaranteed to women in cases of conviction of adultery in a matrimonial relationship. Only the husband can invoke the provision of Li'an provided in this section, not the wife.²²⁵ This provision again brings women to a subordinate level as compared to men. Under Article 151(4) of the Qanun-e-Shahadat Order, 1984 only a woman's character can be impeached in Zina cases. According to the Hudood laws the definition of an adult eligible for the punishment of Hadd²²⁶ discriminates against women: while a male is considered adult when he reaches the age of 18 years, a female is considered adult when she reaches the age of 16 or attains puberty, whichever comes first (reaching puberty may vary, starting as early as the age of 11 or 12 years).

²¹⁹ A woman is not *sui juris* under customary law. Discussed below in detail.

²²⁰ Article 17 of *Qanun-e-Shahadat Order*. Discussed below in detail.

²²¹ *Zina Ordinance* is one of the *Hudood Laws*. Zina means illegal sex, including rape, adultery and fornication. Under this law there is no difference between a woman convicted of rape or a woman convicted of adultery. Both the parties (man and woman) are equal sex partners under this Ordinance.

²²² *Frontier Crimes Regulations* were promulgated in 1901 to adjudicate on civil and criminal cases in tribal areas. *The Frontier Crimes Regulation, 1901 [FCR]*.

²²³ *Ibid.* s. 14.

²²⁴ A critical example of this law is Safia Bibi Case. Safia worked as a maid at a landlord's house. She was raped by the landlord and his son. She became pregnant and her father filed a case of zina with police. The judge ruled that Safia's pregnancy was a valid proof of her committing adultery and due to lack of sufficient proof required by law to prove rape, the convicts were released as free.

²²⁵ This section is discussed in detail below in chapter 3.

²²⁶ Hadd is a fixed punishment, which has been defined in Quran and Hadith (Sharia law). M.K. Chohan, *Islamic Hudood Laws in Pakistan* (Lahore: Khyber Law Publishers, 2004) at 5 [Chohan, "Hudood Laws"].

Rape victims often fear death at the hands of their family members in the name of honour. In cases of rape under Zina Ordinance (where women are considered equal partners in the sexual offences of adultery, fornication and rape), and in the presence of Article 151(4) of the Qanun-e-Shahadat Order,²²⁷ (where a women's character could be impeached in a rape case) women fear to be convicted as equal partners in sexual offences if they cannot meet the strict evidentiary requirement. The evidence required under Zina Ordinance to prove rape is to produce four Male Adult Muslims as eyewitness to the crime. In the presence of these laws it is difficult for a woman to prove the offence of rape. Besides the evidentiary hurdles, in the presence of social pressure women know that their families and communities would feel dishonoured due to a conviction or allegation of being equal partners in a sex offence, and so often fear for their lives. In some cases their kin killed the women who filed complaint of rape for "dishonouring" the family.²²⁸

2.4 Criminal Law Relating to Murder

Laws applicable to the cases of bodily hurt, injury and murder are laid down in Chapter 16 of Pakistan Penal Code (P.P.C.). Before the introduction of Islamic concept of Qisas (punishment equal to the offence) and Diyat (compensation), the principle of grave and sudden provocation was a part of criminal law since its promulgation as an exception to the law of defining culpable homicide as murder under Section 300²²⁹. However, this

²²⁷ Discussed above in chapter 1. In Zina cases, the evidence required is testimony of four Male Adult Muslims who have witnessed the crime of Zina (including rape). If there is one non-Muslim out of these four Muslim's requirement then punishment of Hadd cannot be enforced. This evidentiary requirement makes it almost impossible for a woman to prove she was raped.

²²⁸ U.S. Department of State, "Country Report on Human Rights Practices – 2001" Released by Bureau of Democracy, Human Rights and Labor, March 4, 2002 [U.S. "Country Report"] online: <http://www.state.gov/g/drl/rls/hrrpt/2001/sa/8237.htm>.

²²⁹ Only relevant provisions of PPC are reproduced hereunder relating to the exception of grave and sudden provocation in murder cases. s. 300 "Murder:-Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or..... Exception 1. – *Culpable homicide is not murder if the offender, whilst deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident.*" The above exception is subject to the following provisos: "first – That the provocation is not sought or voluntarily provoked by the offender as an excuse for killing or doing harm to any person. Secondly – That the provocation is not given by anything done in obedience to the law, or by a public servant in the lawful exercise of the powers of such public servant. Thirdly – That the provocation is not given by anything done in the lawful exercise of the right of

exception provided in P.P.C.²³⁰ was reversed by the Shariat Appellate Bench of the Supreme Court in the year 1989²³¹, thereby introducing the Islamic concept of Qisas and Diyat.

This exception of grave and sudden provocation had invariably been used by the courts while deciding cases of honour crimes. Provocation was evaluated according to the facts presented and it was at the discretion of the courts to accept the plea of grave and sudden provocation or not.²³² This led to a situation where crimes of passion (involving honour) were taken as the lesser crime of manslaughter²³³ instead of cold-blooded murders. The Commission of Inquiry for Women²³⁴ has rejected “honour” as a mitigating circumstance in murder cases and recommended that such killings be treated as simple murders.

2.4.1 Law of Qisas & Diyat (Islamic Law)

Among other statutory laws, the law of Qisas and Diyat²³⁵ covers offences relating to physical injury, manslaughter and murder. This law has changed the concept of criminal

private defence. Explanation – *Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact.* [emphasis added].

²³⁰ *The Pakistan Penal Code with commentary, Pakistan Penal Code, 1860 (Act No. XLV of 1860), edition 2004* (Lahore: Irfan Law Book House, 2004) at 1.

²³¹ *Federation of Pakistan vs. Gul Hassan Khan*, PLD 1989 SC 633.

²³² Discussed in detail below in chapter 3.

²³³ Victoria F. Nourse, “Law’s Constitution: A Relational Critique,” (2002) 17 Wis. Women’s L. J. 42 at 42.

²³⁴ 1997 Commission’s Report, *supra* note 33 at 87.

²³⁵ To give a brief background of promulgation of Qisas and Diyat law, and how it was undemocratically imposed on to people by Zia. The draft of Offences Against the Human Body, Qisas and Diyat Ordinance prepared by the Council of Islamic Ideology (“Council of Islamic Ideology” was a body consisting of members, being not less than eight and not more than twenty, as the President of Pakistan may appoint from amongst persons having knowledge of the principles and philosophy of Islam as enunciated in the Holy Quran and Sunnah) was first proposed in 1980, and presented to the public. A majority of the Majlis-e-Shura (Parliament) did not agree with the proposal. However, these laws were adopted in the end because Parliament was dissolved by Zia because of expressing its lack of consent to this draft. In 1989, the Supreme Court’s Shariat Bench (again a parallel court system set up by Zia for implementation of his Islamization policy) came to the conclusion that certain sections of the *Criminal Procedure Code 1898* and the *Pakistan Penal Code 1860* were repugnant to the injunction of the Quran and amendments were brought in to bring these laws in conformity with the injunctions of Islam. The Supreme Court Shariat Bench exercised power under Article 203-D of the *Constitution of Pakistan* (Art. 203-D: Powers, jurisdiction and functions of the Court (FSC). (3) if any law or provision of law is held by the Court to be repugnant to the Injunctions of Islam---(a) President in the case of a law with respect to matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and (b) such law or provision shall , to the extent to which it

accountability in justice system²³⁶ re-conceptualising the offences in such a way as are not directed against the legal order of the State but against the victim. This has rendered murders of family members a family affair and prosecution and judicial redress negotiable.

Murder is defined as an offence of Qatl-i-amd (intended murder) under Section 300²³⁷ of P.P.C. (Pakistan Penal Code, 1860) with punishment provided in its Section 302 thereof. Under Section 302 of P.P.C. whoever commits the offence of murder shall be subject to (a) punishment by death as Qisas²³⁸ or (b) punishment by death or life imprisonment as ta'zir²³⁹ (punishment other than Qisas) "having regard to the facts and circumstances of the case, if proof in either of the forms specified in section 304²⁴⁰ P.P.C. is not available" or (c) punished by imprisonment of either description for a term which may extend to 25 years, where punishment of Qisas is not applicable. Under these provisions, if the murderer voluntarily confesses that he/she has committed the murder, he is liable for the punishment of Qisas. But in case where the evidentiary requirement is not fulfilled as prescribed in Section 304 P.P.C. he can still be punished under Taz'ir (which includes the death sentence and life imprisonment) but this is subject to the facts and circumstances of

h shelf to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect) of the Constitution and amended sections of PPC and Cr.PC. Rashida Patel, "Woman versus Man", *supra* note 24 at 157 & 190.

²³⁶ Shahla Zia, "Women, Islamization and justice" in Kamla Bhasin & Ritu Menon, Nighat Said Khan, eds., *Against all odds: essays on women, religion, and development from India and Pakistan* (New Dehli: Kali for Women, 1994) 70 at 74.

²³⁷ s. 300 PPC. "Qatl-e-amd:- Whoever, with the intention of causing death or with the intention of causing bodily injury to a person, by doing an act which in the ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes the death of such person, is said to commit qatl-e-amd".

²³⁸ s. 299(k) of PPC "qisas" means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed Qatl-e-Amd, in exercise of the right of the victim or a wali".

²³⁹ s. 299(l) of PPC "ta'zir" means punishment other than qisas, diyat, arsh or daman".

²⁴⁰ Proof required for punishment of Qisas under s. 302 PPC is (a) the accused makes voluntary and true confession of commission of offence before a competent court (b) by evidence as provided in Article 17 of *Qaun-e- Shahadat Order* which reads as follows: "Article 17. Competence and number of witnesses: (1) The competence of a person to testify, and the number of witnesses required in any case shall be determined in accordance with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.

(2) Unless otherwise provided in any law relating to the enforcement of *Hudood* or any other Special Law – (a) in matter pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and

(b) in all other matters, the Court may accept, or act on the testimony of one man or one woman, or such other evidence as the circumstances of the case may warrant."

the case. This section is invoked in cases where the judge considering the 'mitigating circumstances of grave and sudden provocation' lets the perpetrator escape the punishment of Qisas under Section 302(b) P.P.C.

Sections 306²⁴¹ and 307²⁴² of P.P.C. have some loopholes which people use in the cases of honour killing to get away with the punishment of Qisas. According to Section 306, the punishment of Qisas shall not be applicable where murder is committed by a minor or insane person or in cases where the victim is a child or grandchild of the offender. This clause saves fathers or grandfathers, who kill their daughters in the name of honour from the punishment of Qisas. The last clause of Section 306 protects the offender from the punishment of Qisas if any legal heir of the victim is a direct descendant of the offender. This clause saves the man from Qisas in cases where his wife (victim) has left a child who, besides being her legal heir, is also a direct descendant of the offender.

Moreover, the perpetrator may escape the punishment of Qisas through the application of Section 307 P.P.C. according to which Qisas is not enforceable in cases of murder where any legal heir voluntarily waives his right of Qisas as prescribed in Section 309²⁴³ or compounds his right of Qisas under Section 310 P.P.C.²⁴⁴

²⁴¹ s. 306 (a) of PPC "where an offender is a minor (b) or offender caused death of a child or grandchild, howlowsoever. (c) third and last of provision when the wali (legal heir) of the victim is the direct descendant howlowsoever of the offender".

²⁴² s. 307 (b) of PPC "where any wali voluntarily and without duress, to the satisfaction of the court, waives the right of qisas under s. 309 or compounds under s. 310. (c) When the right to qisas devolves on the offender as a result of the death of the wali of the victim, or on the person who has no right of qisas against the offender."

²⁴³ s. 309 of PPC "Waiver (afw) of qisas in qatl-i-amd: (1) in the case of qatl-i-amd an adult sane wali may at any time and without any compensation, waive his right of qisas:

Provided that the right of qisas shall not be waived _____

(a) *Where the government is the wali*; or (b) where the right of qisas vests in a minor or insane person.

(2) Where a victim has more than one wali, anyone of them may waive his right of qisas:

Provided that the wali who does not waive the right of qisas shall be entitled to his share of diyat. (3)

(4) Where there are more than one offender, the waiver of the right of qisas against one offender shall not affect the right of qisas against the other offender." [emphasis added].

²⁴⁴ Sec. 310 "Compounding of qisas (sulh) in qatl-i-amd: (1) in the case of qatl-i-amd, an adult sane wali, may, at any time on accepting badal-i-sulh, compound his right of qisas:

Provided that only giving a female in marriage shall not be a valid badal-i-sulh.

(2) Where a wali is a minor or insane, the wali of such minor or insane wali may compound the right of qisas on behalf of such minor or insane wali.

Provided that value of badal-i-sulh not be less than the value of diyat.

(3) where the government is the wali, it may compound the right of qisas.

Provided that the value of badal-i-sulh shall not be less than the value of diyat.

In the criminal law of Pakistan certain offences are compoundable. Section 345 of the Criminal Procedure Code (Cr.P.C.) provides a schedule of such offences and the persons by whom the offence may be compounded. The compounding of an offence signifies that the victim or his legal heirs can obtain compensation from the perpetrator and in return can agree that the perpetrator will not be punished.²⁴⁵ Originally, murder was not a compoundable offence. However, at the time of the introduction of the Qisas & Diyat law in the P.P.C., a corresponding amendment was made in Section 345 (2) Cr.P.C. whereby, *inter alia*, the offence of murder was made a compoundable offence by the legal heirs of the victim. According to the Qisas & Diyat law, Section 338-E P.P.C. states that all offences under Chapter 16 of P.P.C. (i.e. offences affecting the human body) can be waived or compounded in the manner provided in Sections 309 (i.e. a sane adult legal heir can waive his right of Qisas in murder without compensation) & 310 P.P.C. (which provides compounding of Qisas on accepting badl-i-sulh²⁴⁶ (i.e. compensation), subject to the provisions of Section 345 Cr.P.C. i.e. with the permission of the court and only by the persons mentioned in the schedule. The Section also empowers the court to either acquit the accused or to award punishment under ta'zir even after waiver or compounding of offence.

According to Section 311 P.P.C. an offender, against whom the right of Qisas has been waived or compounded, can be punished with imprisonment under ta'zir²⁴⁷ for a maximum term of 14 years. According to Section 307 P.P.C. Qisas for murder cannot be enforced where it has been waived or compounded, *inter alia*, under Sections 309 and 310 P.P.C. The provisions of Sections 309 and 310 P.P.C. are applicable only in the cases

Explanation: In this section badal-sulh means that mutually agreed compensation according to Shariat to be paid on or given by the offender to a wali in cash or in kind, or in form of *movable or immovable property* [emphasis added].

²⁴⁵ Muhammad Mazhar Hussain Nizami, *The Code of Criminal Procedure V of 1898 with Commentary* (Lahore: All Pakistan Legal Decisions, 1974) at 305.

²⁴⁶ Mutually agreed compensation according to Shari'ah either in cash or in kind or in the form of movable or immovable property [emphasis added].

²⁴⁷ s. 299(1) of PPC "ta'zir" means punishment other than qisas, diyat, arsh or daman"; "Tazir is derived from the work "azar" which means to prevent; to respect, to reform. It is a discretionary punishment to be inflicted for transgression against Allah, or against an individual, for which there is neither a fixed punishment nor a penance or expiration." Chohan, "Hudood Laws", *supra* note 226 at 7.

where the punishment is under Qisas and are inapplicable when the conviction is under ta'zir. In such cases, Section 345 (2) of Cr.P.C. is invoked to reach a compromise.

These provisions in the criminal law make the capital offence of "murder" compoundable and exempt certain persons from being punished with Qisas.²⁴⁸ These provisions have in effect privatised murder. Under the present legal regime anybody can simply get away with the crime (of murder) by paying off money as compensation to the legal heirs of the victim. In most of the cases of honour killings it is the family, the legal heirs of the victim, who forgive the offender, also their relation.

I will briefly discuss two cases to show how the loopholes in criminal law are used to protect the perpetrator; (a) In the case titled *Federation of Pakistan vs. Gul Hassan Khan*²⁴⁹ where the victim left a legal heir (child) who was a direct descendant of the offender (described above under Section 306 P.P.C.) and (b) Samia's case where the offence of murder was compounded under Section 345 Cr.P.C.

(a) *Federation of Pakistan vs. Gul Hassan Khan*

A man killed his wife. The woman's legal heir was her 2-year old child. A complaint was filed and the offender was sentenced to death under Section 302(a) P.P.C. The convict filed a petition²⁵⁰ before the Supreme Court, which determined the question whether the murder committed by the victim's husband, leaving behind a child (legal heir) was liable to Qisas in the presence of provisions like Sections 302(a), 306(c), 307 and 308²⁵¹ P.P.C. The Supreme Court ruled that the offender sentenced to death as Qisas under Section 302 (a) P.P.C. was in gross violation of the law. The Court held that Section 306(c) P.P.C. clearly laid down that murder committed by the husband of his wife leaving behind

²⁴⁸ Rashida Patel, "Woman versus Man", *supra* note 24 at 164.

²⁴⁹ *Federation of Pakistan vs. Gul Hassan Khan*, PLD 1989 SC 633.

²⁵⁰ Petition in Supreme court filed to the challenge the decision made in the case of *Federation of Pakistan vs. Gul Hassan Khan*, PLD 1989 SC 633, titled, *Khalill-uz-Zaman vs. Supreme Appellate Court, Lahore and four other*, PLD 1994 SC 885.

²⁵¹ s. 308 of PPC "Punishment in qatl-i-amd not liable to qisas, etc.:- Where an offender guilty of qatl-i-amd is not liable to qisas under section 306 or the qisas is not enforceable under clause (c) of section 307, he shall be liable to diyat."

child/children was not liable to Qisas. The Court said the punishment for murder not liable to Qisas was provided under Section 308 P.P.C.

The Supreme Court did not consider the provisions laid down in Section 309 of the same statute (P.P.C.) which states that the right of Qisas shall not be waived in the case where the legal heir of the victim is a minor child or the government. In this case a 2-year-old daughter was the legal heir of the victim.²⁵² But the court overlooked the provisions of Section 309 of the P.P.C. Also under section 308 (2) P.P.C. if an offender is not liable to the punishment of Qisas, the court can in addition to the punishment of Diyat²⁵³ may punish the offender with imprisonment as Taz'ir. But this provision too was overlooked by the Supreme Court while making the decision on the murder of a woman who was mother of a child. The law gives carte blanche to any man who has a minor child to kill his wife at his whim and to escape punishment of Qisas by operation of the law. Retired Justice Nasir-ul-Mulk says that even if the offence of murder is compounded under Sections 309 and 310 P.P.C., the prosecution could still press under Section 311 P.P.C. for the punishment of the Tazir.²⁵⁴

(b) *The State vs. Muhammad Younas (Samia's Case)*

Samia Sarwar was killed in the office of her lawyer and there were eye witnesses to this murder. A charge of murder²⁵⁵ was filed against Muhammad Younus *inter alia* under Section of 302/34²⁵⁶ P.P.C. There were no attenuating circumstances of grave and sudden provocation. It was a pre-planned murder. The accused moved an application under Section 345 Cr.P.C. for a compromise. Samia's legal heirs, her abusive husband and two children, agreed to a compromise and waiving their right of Qisas. They said that they had no objection to the acquittal. The Court accepted the settlement and ruled that "the

²⁵² Rashida Patel, "Woman versus Man", *supra* note 24 at 166.

²⁵³ s. 299 of PPC, "Definitions", (e) Diyat means the compensation specified in section 323 payable to the heirs of the victim.

²⁵⁴ Rashida Patel, "Woman versus Man", *supra* note 24 at 167.

²⁵⁵ *Samia's Case*, *supra* note 2.

²⁵⁶ s. 34. of PPC "Acts done by several persons in furtherance of common intention: When a criminal act is done by several persons, in furtherance of the common intentions of all, each of such person is liable for that act in the same manner as if it were done by him alone."

said offence is compoundable and legal heirs of the deceased have waived their right of Qisas.”²⁵⁷

Under Section 338-E of P.P.C., the judge could punish the offender with life imprisonment as Tazir even if the legal heirs had compounded the offence under Section 345 (2) of Cr.P.C. Also under Section 311 of the P.P.C. the judge could punish the offender with imprisonment as Taz’ir, if the right of Qisas had been waived by the legal heirs. But the judge overlooked the circumstances of the case. The murder was settled by paying money to the legal heirs using the provisions of the law. The judge did not fulfil his duty to bring justice to the woman killed in the name of honour, thereby upholding the inhuman tradition of her tribe. This case was decided by a formal judicial tribunal. The offence was compounded through the provision available under the criminal law of Pakistan. A woman was murdered and the perpetrator was pardoned for his crime in consistency with the legal provisions.

2.4.2 The Criminal Law Amendment Act, 2004

After five years of struggle by human rights activists and NGOs against the crimes of honour killings, a law amending the P.P.C. and Cr.P.C. was passed on 2nd January, 2005 to punish the perpetrators of the offence of honour killings. The government said the law aimed at eliminating these killings. This law has inserted a definition of offence in the name of honour²⁵⁸ and increased the punishment of murder in the name or under the pretext of honour under Section 308 P.P.C. from 14 years to 25 years. But a major problem in the cases of honour killing tried as murder under Qisas and Diyat law is waiver or compounding of the offence of murder.

The offences committed in the name or under the pretext of honour may be waived or compounded “subject to such conditions as the court may deem fit to impose with the

²⁵⁷ *Samia’s Case*, *supra* note 2, order sheet dated 10-04-2000 by Additional Session Judge, Lahore.

²⁵⁸ s. 299 of PPC defines offence in the name of honour as “offence committed in name or on the pretext of honour” means an offence committed in name or on the pretext of karo kari, siyah kari or similar other customs or practices.”

consent of the parties having regard to [the] facts and circumstances of the case.”²⁵⁹ In the presence of this amendment, the chances for controlling the offence of honour killing and punishing the perpetrator are very bleak. In almost all cases of honour killing, family is involved in the murder and the murder is pardoned by the victim’s legal heirs. For example, if a man murders his sister (in the garb of honour killing), her legal heir is her father (if she was unmarried) or her husband and/or her children (if married). In all these cases, the legal heirs are related to the offender and so can forgive him/her or agree to compensation. As the cases discussed earlier show it is difficult to control such a crime due to the provisions placing murder, including honour killings, in the category of compoundable offences. In Samia’s case it was easy for the perpetrator to kill the woman in the name of honour and escape punishment by paying money to her heirs. Despite clear evidence, the judge did not punish the offender and accepted the waiver. This means that those who have the money can pay the price of the murder. If the Criminal Law Amendments Act, 2004 is evaluated for its effectiveness on the touchstone of Samia’s case, there is little hope it could help control honour killings. Under the new amendments honour killings have substantively been privatized.

The Amendment Act 2004 has changed Section 305(a) of the P.P.C. where a wali (legal heir) is defined as the legal heir of the victim, to add that legal heir “shall not include the accused or the convict in the case of Qatl-e-Amd (intended murder) if committed in the name or on the pretext of honour.” This amendment will be useless in cases where more than one person is involved. For example, in the case of Afsheen Musarat²⁶⁰, the whole family was suspected to be involved. However, only Afsheen’s father was arrested, and under the law of honour killing the offence could be compounded or the offender could be pardoned by the rest of the family members who are the legal heirs.

²⁵⁹ *Amendment Act, 2004*, *supra* note 50 at amendment no. 12.

²⁶⁰ A girl named Afsheen was murdered in the city Multan suspected by her family and buried without any post-mortem. A report was filed by HRCP as a case of murder in the name of ‘honour’. The body was sent for post-mortem and it was discovered that she did not die of natural causes and was murdered by more than one person. Only her father has been arrested. Muhammad Badar Alam, “The Multan bypass: The alleged murder of 23-year old Afsheen is being probed on the directives of the president, but it does certainly discredit the system that we have been seeking to build” *The News*, 21 December, 2003 at 24 [Badar “Multan bypass”].

Keeping in view the cases of honour killing, where the offence is committed often with the connivance of family members, the murder in the name of honour should not be included in Section 345 of Cr.P.C (schedule of compoundable offences). Sections 309 (i.e. an adult sane legal heir can waive his right of Qisas in murder without compensation) and 310 of P.P.C. (which provides compounding of Qisas on accepting badl-i-sulh²⁶¹ i.e. compensation), should not be applicable in the cases of honour killing. There should be an amendment, especially to Section 338-E of P.P.C. The provisions of waiver and compounding should not be applicable to said cases.

2.5 The Informal Legal System in Pakistan: (Jirga System)

The protection and equality enshrined in the constitutional law are negated by customary practices and rules that allow the male members of the family to sell, buy, and exchange women as commodities and kill and murder them in the name of honour. This gap between equality of gender in formal laws and de facto realities of women's life is too wide.²⁶² The informal justice system comprising the jirga system, customary law and the honour code is biased against women.

Jirga law based on customary practices is the most resilient and the most barbaric law affecting women's rights²⁶³ where a woman is not sui juris²⁶⁴ under customary law (riwaj)²⁶⁵. Her consent is not sought in marriage or any decision making even though it relates to her. She cannot seek divorce, but man can divorce her at will. There is no representation of women in jirgas. Punishment for a woman who commits adultery is prescribed but her male partner in the act is not held responsible.²⁶⁶ In these rural areas women are not educated. They do not know their legal rights. Tribal women observe strict

²⁶¹ Mutually agreed compensation according to Shari'ah either in cash or in kind or in the form of movable or immovable property.

²⁶² ADBP, "Country Paper" *supra* note 208 at 19.

²⁶³ Shaheen Ali, "Equal Before Allah" *supra* note 44 at 173.

²⁶⁴ Latin word, meaning: of his own right; possessing full social and civil rights; not under any legal disability, or the power of another, or guardianship. Having capacity to manage one's own affairs not under legal disability to act for one's self. *Black's Law Dictionary; with Pronunciation*, 5th ed., s.v. "sui juris".

²⁶⁵ Shaheen Ali, "Equal Before Allah" *supra* note 44 at 176.

²⁶⁶ s. 14 of FCR defines, "adultery is a crime committed by woman only". Customary Chart, *supra* note 8 at 81.

purdah²⁶⁷ (veil) and it is virtually impossible for them to meet any one outside their family. Mostly disputes involving women's rights are laid before these informal dispute resolution fora (jirga), which are highly disadvantaged to women.²⁶⁸

The jirga system is a prime protector of the tradition of 'honour killing', upholders of these jirgas are the feudal lords²⁶⁹ who are, in large numbers, in positions of political power.²⁷⁰ These lords represent their areas from Sindh, Balochistan, FATA and PATA in the national and provincial assemblies. The worsening moral, social, economic and political crisis faced in these areas can be attributed to these powerful feudal influences operating there.²⁷¹

This informal justice system runs parallel to the formal judicial system at some places even state officials recognise it as an effective way of settling disputes.²⁷² Jirga²⁷³, Panchayat²⁷⁴ and Faislo²⁷⁵ are judicial bodies which apply customary practices to settle disputes. These are some of the names²⁷⁶ given to these ethnic judicial tribunals²⁷⁷, acting

²⁶⁷ Women in Pakistan follow a strict dress code, which varies from one province to another but in general the purpose is the same as to cover the women at times from head to toe. In the province of Sindh and Balochistan, women are not allowed to come out of their houses unescorted. Here purdah not only includes covering women's body but also amounts to seclusion from any male interaction except for her blood relations, including father, brothers and sons.

²⁶⁸ Shaheen Ali, "Equal Before Allah" *supra* note 44 at 174.

²⁶⁹ Feudal are landlord possessing hundreds or even thousands of acres of land. The landlord, by virtue of his ownership and control of such vast amounts of land and human resources, is powerful enough to exercise considerable influence over the revenue, police and judicial administration of the area. Almost half of Pakistan's Gross National Product and the bulk of its export earnings are derived primarily from the agricultural sector controlled by a few thousand feudal families. Pakistan's major political parties are feudal-oriented, and more than two-thirds of the National Assembly is composed of this class.

²⁷⁰ Adresh Cowasjee, "A first step in getting Jirga system abolished" Religious Groups for Human Rights (weekly e-newsletter, Vol. 06. No. 22 May 31, 2004). E-newsletter initiated by Asian Human Rights Commission online: <http://www.rghr.net/mainfile.php/0622/721/>.

²⁷¹ Sharif M. Shuja, "PAKISTAN: Feudalism: root cause of Pakistan's malaise", *News Weekly*, 25 March, 2000 online: <<http://www.newsweekly.com>>. Sharif M. Shuja is an Adjunct Assistant Professor of International Relations at Bond University, Queensland. Professor Sharif Shuja explains the background to Pakistan's continuing economic and political uncertainty [Shuja, "Feudalism"].

²⁷² A dispute was settled by convening jirga at Larkana involving police officials to decide the blood feuds between two tribes in 1995 at the Circuit house (district level state houses) Nafisa Shah, "Faislo: The Informal Settlement System and Crimes Against Women" in Sindh in Farida Shaheed, Sohail Akbar Warraich, Cassandra Balchin, Aisha Gazdar, eds., *Shaping Women's Lives: Laws, Practices and Strategies in Pakistan* (Shirkat Gah: Lahore, 1998) 227 at 249 [Nafisa, "Faislo"].

²⁷³ Informal judicial tribunal called in Baloch and Pakhtuns tribes of Pakistan.

²⁷⁴ Informal judicial tribunal called in Punjab provinces of Pakistan.

²⁷⁵ Informal judicial tribunal called in Sindh province.

²⁷⁶ U.S. "Country Report" *supra* note 228.

as quasi-judicial forums in tribal as well as other areas in Pakistan, based on their ethnic group or class.

Though the number of personnel convening jirgas varies from place to place, the tribunals mainly work as arbitration councils to settle disputes among the people of a tribe or among different tribes. At some places the Sardar (Chief of the tribe) presides over the jirga and decides the disputes. Jirgas decide cases of all nature including civil and criminal offences²⁷⁸ and often exercise legislative and executive powers besides judicial powers.²⁷⁹

Originally, the jirga system aimed to acquire and retain social harmony.²⁸⁰ It was first legally introduced by the British rulers under the Frontier Crimes Regulations of 1901 (FCR) to try criminal or civil case in tribal areas by “Sarkari Jirgas”²⁸¹. These tribunals comprised elders of the tribe appointed by the magistrate and political agent²⁸² of the tribe. These jirgas were given power to settle disputes arising out of “zan (woman), zar (money), zamin (land)”²⁸³ among the tribes.²⁸⁴ Later, when Pakistan came into existence, Jirga was legalised under Article 247(7)²⁸⁵ of the Constitution in tribal areas including

²⁷⁷ There are other ethnic judicial bodies/systems in the world such as one in Rwanda – Gachaca is one of the grass root judicial body acting to settle the disputes among people to regain the harmony in society. People believe in this system for many reasons including cultural awareness, fast and expeditious and not as expensive as formal judicial system. Centuries-old role played by these quasi-judicial institutions is to settle disputes among tribes and individuals.

²⁷⁸ Rashida Patel, “Woman versus Man”, *supra* note 24 at 152.

²⁷⁹ *Mst. Shazia vs. Station House Officer & others*, 2004 P.Cr.L.J. 1523 [*Shazia's case*].

²⁸⁰ Nafisa, “Faislo” *supra* note 272 at 227.

²⁸¹ The term “Sarkari Jirga” means “Government tribunals”.

²⁸² “Political agent” is an official usually from amongst the bureaucracy appointed by the government in tribal areas such as FATA and PATA.

²⁸³ Discussed above in chapter 1. This law has further strengthened the concept of commodification of women by including it in the same list as other valuable property disputes.

²⁸⁴ Rashida Patel, “Woman versus Man”, *supra* note 24 at 153.

²⁸⁵ Art. 247 (7) of the *Constitution of Pakistan* – “Neither the Supreme Court nor a High Court shall exercise jurisdiction under the Constitution in relation to a Tribal Areas, unless [Majlis-e-Shoora (Parliament)] by law otherwise provides: Provided that nothing in this clause shall affect the jurisdiction which the Supreme Court or a High Court exercised in relation to a Tribal Area immediately before the commencing day.” Mian Abdul Ghaffar, *The Constitution of the Islamic Republic of Pakistan, 1973 (Amendments and Case Law-up-to-date)* (Lahore: Irfan Book House, 2000) at 1028. It is important to note here that Majlis-e-Shoora has the power to promulgate a law amending the laws promulgated in these tribal areas; *Qaum Bangash & others vs. Qaum Turi & others*, 1991SCMR 2400; *Haji Salim Khan & 2 others vs. Commissioner, F.C.R. Kohat Division, Kohat & 2 others*, 1996 CLC 1702; *Ch. Manzoor Elahi vs. Federation of Pakistan etc; Province of Baluchistan etc. vs. Malik Ghulam Jilani; Government of Pakistan*

Federally Administered Tribal Areas (FATA) and Provincially Administered Tribal Areas (PATA) and some Princely states²⁸⁶ which came under Pakistan's jurisdiction geographically but had their own judicial legal system.

Article 247 of the constitution deals with the administration of the tribal areas. Under Article 247 (7) the High Court and Supreme Court are prohibited from exercising any jurisdiction in the tribal areas unless allowed by any special law made by parliament. This could generally mean that the constitutional rights provided to citizens living in tribal areas are subject to tribal adjudication.

2.5.1 The Jirga System and the State Administration

The informal system of justice in Pakistan is backed or supported by the State administration at one level or another. The State has been quite supportive in upholding jirga system, either by way of judiciary upholding FCR, or by police not intervening in the decisions of the jirga and further facilitating the dispute resolution of this jirga system.²⁸⁷ Interventions of tribal councils or jirgas affecting the rights to life and security of men and women are not rare but the state's acquiescence or connivance in such practices has frequently been reported.²⁸⁸ In many cases, the state administration has been instrumental in the implementation of decisions by jirga; in particular, the police play an important and effective role in the implementation of the jirga decisions in the community.²⁸⁹

through the Secretary, Tribal Areas, Rawalpindi vs. Hafiz Umer Gul & others, PLD 1975 SC 66; *Abdul Badsha vs. Deputy Commissioner & another*, PLD 1997 Peshawar 132.

²⁸⁶ Princely states mean those states that are governed by some Prince – a legacy left by the Mughals before subcontinent was conquered by British.

²⁸⁷ For instance, in 1998, the Commissioner of Larkana announced holding of a Grand Jirga in Larkana to reach a uniform code of conduct for jirgas to settle intra-and inter-tribal disputes. Amnesty "Tribal justice system", *supra* note 17 at 22; Discussed below in chapter 3.

²⁸⁸ Amnesty "Tribal justice system", *supra* note 17 at 4.

²⁸⁹ Nafisa, "Faislo" *supra* note 272 at 250. 'For example in one case in Khairpur, in which one of the parties refused to abide by the decision of faislo, police was called and they not only locked up the men of the family but also drove out their cattle, on the directions of the influential people of the area'.

2.5.2 Judicial Review of FCR and Jirga System

The Frontier Crimes Regulation, 1901, was in force in many areas of Balochistan and Frontier Province before Pakistan came into existence. FCR (also known as “black law”²⁹⁰) was based on tribal custom and was used by Sarkari Jirgas established under the British rule. After promulgation of first Constitution in Pakistan the FCR law was challenged as discriminatory against the constitutional rights first in the case of *Khair Mohammad and another v. the Province of West Pakistan & others*²⁹¹. In this case Justice Mohammad Rustam Kiyani while discussing the salient features of jirga, said that ‘jirga is discriminatory against the fundamental rights guaranteed under the Constitution “as it can record the evidence in secrecy, i.e. behind the back of an accused.”’²⁹² Again the FCR was challenged in 1959 for being in violation of the constitutional rights.²⁹³

These judicial precedents holding the FCR as discriminatory against constitutional rights were overturned in 1962. Chief Justice A. R. Cornelius ruled in a case titled *Muhammad Akram and others v. the State*²⁹⁴ that ‘High Court does not have territorial jurisdiction to set aside the decision by jirga under FCR because High Court jurisdiction did not extend to special areas of Balochistan’. He sidestepped the issue whether jirga rulings under FCR were discriminatory. Contrary to the decision and observations made by Justice Kiyani on the jirga system²⁹⁵, Justice Cornelius upheld the jirga system and praised what he called its excellent method of the administration of justice in the tribal areas.²⁹⁶

²⁹⁰ It is called black law due to its extremely harsh, inhuman and discriminatory provisions. Shaheen S. Ali & Kamran Arif, “Special Bulletin October 1994 - Blind Justice for All? Parallel Judicial Systems in Pakistan: Implications and consequences fore human rights” (Islamabad: Shirkat Gah, 1994) at 19 [Shirkat Gah, “Blind Justice”].

²⁹¹ *Khair Mohammad and others v. the Province of West Pakistan*, PLD 1956 (W.P.) Lahore 668 [*Khair's case*].

²⁹² Durab Patel, *Testament of a Liberal*, (Oxford: Oxford University Press, 2000) at 34. [Durab, “Testament of Liberal”].

²⁹³ In 1956 *Constitution of Pakistan*, “Article 4 – (1) any existing law, or any custom or usage having the force of law, in so far as it is inconsistent with the provisions of this part, shall, to the extent of such inconsistency, be void. (2) The state shall not make any law which takes away or abridges the rights conferred by this Part, and any law in contravention, of this clause shall, to the extent of such contravention, be void.”

²⁹⁴ *Muhammad Akram and others v. the State*, PLD 1963 SC 373.

²⁹⁵ Discussed in *Khair's case*, *supra* note 291.

²⁹⁶ Durab, “Testament of Liberal” *supra* note 292 at 58.

The jurisdiction of the country's superior courts on jirga decisions repugnant to the fundamental rights protected in the Constitution has been discussed and decided by the Supreme Court in two cases.²⁹⁷ The Supreme Court decided that the provisions of the Constitution regarding the Fundamental Rights and jurisdiction of the Supreme Court and High Court to enforce them are not controlled by Article 247 (7). The bar on the courts is not applicable in cases where jirga decisions are against the fundamental rights protected in the constitution. These fundamental rights they protect all the citizens of Pakistan notwithstanding any territorial jurisdiction.

In 1979, the FCR was challenged again under Islamic injunctions in a case titled *Maulvi Mohammad Ishaque Khosti vs. Govt. of Balochistan*²⁹⁸ in Shariat Appellate Bench of Balochistan.²⁹⁹ Article 247 (7) of the Constitution which oust the jurisdiction of High Court and the Supreme Court, does not specifically bars Federal Shariat Court (FSC). So the FCR was declared a bad law and against the Islamic Injunctions. The FCR is highly discriminatory against women. Its Article 14 provides punishment for a married woman who knowingly commits adultery, but no such punishment is provided for the man who is her accessory in this act.³⁰⁰ So a new Ordinance II of 1968 was made applicable to PATA of Balochistan through Criminal Law (Special Provisions) Regulations 1979.³⁰¹ But it is still applicable to areas specified in Schedule III of the FCR including some tribal areas and jirga trials are still conducted there.

Recently, Justice Rehmat Jaffery of Sindh High Court banned all trials conducted under Jirga system in Sindh³⁰² on case filed by woman. Shazia Mangi married a man of her choice. The jirga branded the couple as Karo and Kari³⁰³. Justice Jaffery ruled the jirga system as unlawful and illegal, and against the provisions of the Constitution and the law of the land. He ordered violators of the Sindh High Court orders charged with the

²⁹⁷ *Ch. Manzoor Elahi vs. Federation of Pakistan etc.*, PLD 1975 SC 66.

²⁹⁸ *Maulvi Mohammad Ishaque Khosti vs. Govt. of Balochistan*, PLD 1979 Quetta 217.

²⁹⁹ Samia Jasam, "Violence in name of honour", *supra* note 64 at 30.

³⁰⁰ Shaheen Ali, "Equal Before Allah" *supra* note 44 at 184.

³⁰¹ Shirkat Gah, "Blind Justice" *supra* note 290 at 21.

³⁰² *Shazia's case*, *supra* note 279.

³⁰³ Syed A. Mateen, "Ban on Jirga System" *Dawn*, 28 April, 2004 online: <<http://www.dawn.com/2004/04/28/letted.htm#7>> [Mateen, "Ban on Jirga"].

contempt of court irrespective of their status or influence.³⁰⁴ In the presence of this judgement Sindh Assembly has reportedly proposed a law to legalize jirga trials to settle disputes and to provide legal cover to jirga system.³⁰⁵

2.5.3 Jirga Trials

In honour crimes cases, settled by jirga, the victim is one who kills a kari on the pretext of honour killing. A compensation, cash or woman, is paid to satisfy him and his family for the damage. Jirgas have sometimes even allowed rape as compensation.

In jirga system, rape is used as a punishment to compensate the lost honour of the victim. Since women are considered as the repositories of honour of the family³⁰⁶, offender's honour is mutilated as a punishment. But it is the women who become the target in vengeance. Innocent women are raped³⁰⁷ as punishment of a crime committed by any male member of their family.

If a woman is declared kari³⁰⁸, she may be murdered, sold off, or if she is lucky she might take shelter in a feudal or tribal chief's house until the jirga decides her fate. If she is married, her marriage is dissolved with or without her consent even if her husband doesn't want so.³⁰⁹ Honour crimes are sometimes committed with the permission or on a decision made by the jirga or tribal council who order men to kill the woman (including pre-pubescent girls to old women).³¹⁰

Formal courts consider the offences relating to bodily harm including murder are compoundable under Qisas and Diyat Law. In the tribal justice system too a settlement is

³⁰⁴ *Ibid.*

³⁰⁵ Abbas Jalbani, "Legalizing Jirga System, *Dawn*, 26 October, 2004 online : <http://www.dawn.com/2004/10/26/fea.htm>>.

³⁰⁶ Amnesty "Tribal justice system", *supra* note 17 at 12.

³⁰⁷ *Ibid*; For example, Mukhtaran Mai raped on jirga's verdict.

³⁰⁸ A woman accused of having illicit relationship. It not only includes woman who commits sexual intercourse out of wedlock but also woman who is raped.

³⁰⁹ Najma's husband didn't believe she was a kari but she was sold off against his will and police made him sign the paper to be used as divorce papers.

³¹⁰ Report on violence against women, 2003, *supra* note 8 at Para 1132.

reached between the parties involved. While the formal justice system does not consider the murderer as a victim, not to mention here the opinion of biased judges, the jirgas consider someone whose honour has been defiled as a victim. If a man accused of adultery is set free by the formal legal system, he could still be convicted and tried according to tribal custom and be compelled to pay compensation to the murderer of the kari to save his life.³¹¹

Under tribal custom, a woman does not have the right to choose her spouse. If she does so, she is considered to have brought shame to her male kin and so should be killed. Such extra-judicial executions of women for honour are common³¹². A girl named Hajira who married to Faheemuddin, a member of a lower caste tribe, and eloped with him. Hajira's father filed a case of abduction against Faheemuddin. Police arrested the couple and presented them before a magistrate. The girl said she went with Faheemuddin at will and that they have married. As the Sindh High Court heard the case, the male members of the family convened a jirga who decided death for the couple for 'bringing shame to the family'. They were killed; shot by Hajira's father, brother and male relatives outside the High Court. A complaint was registered of the murder but criminal prosecution was dropped after both the couple's families agreed to a compromise under the law of Qisas and Diyat.³¹³

In the NWFP, if a woman moves a court to seek divorce (khula), she might be killed.³¹⁴ Although a woman has a right to divorce her husband under Islamic Law, it is impossible for her to do so in the cultural set-up she lives in. An example is Saima's case. If

³¹¹ Rukaiya was declared kari because her uncle saw Ejaz Kehar (her cousin) holding her hand without her consent while she was dancing at a family gathering. She immediately snatched her hand away but during this accident her uncle saw her and declared her a kari and killed her on the spot, in presence of 50-60 people at the gathering. Naziha Syed Ali, *The Price of Honour*, (Newsline November, 2003) at 27 [Naziha, "Prince of Honour"].

³¹² Ann Elizabeth Mayer, "Issues Affecting the Human Rights of Muslim Women" in Kelly D. Askin & Doreen M. Koenig, eds., *Women and International Human Rights Law, Volume 3* (New York: Transnational Publishers, Inc., 1998) 367 at 373 [Ann, "Issues Affecting Muslim Women"].

³¹³ Amnesty "Tribal justice system", *supra* note 17 at 9.

³¹⁴ Customary Chart, *supra* note 8 at 36.

a woman is divorced legally and marries another man she would be considered as having become kari and the couple would run the risk of being killed.³¹⁵

Victims of rape may become the victims of their families' vengeance.³¹⁶ In a reported case of Lal Jamila Mandokhel, a 16-year-old mentally retarded girl who was raped³¹⁷ by an official of agriculture department, was shot by her tribe in Kurram Agency (FATA) in March. She was murdered because by being raped she had brought shame to the tribe which could only be mended by her blood, i.e. death.

Jirgas have also ordered gang rapes in cases involving honour of the victim's party. Mukhtiar Mai, 30-year old, was gang-raped for more than an hour in Meerwala village near the southern Punjab city of Multan under a verdict passed by the jirga as a punishment for her brother's alleged affair with a girl from another tribe.³¹⁸ The jirga decided the compensation on the principle of "dishonour for dishonour"³¹⁹. People watched the execution of the verdict passed by the jirga. The police did not intervene. On complaint filed by human rights activists and NGOs, an anti-terrorism court in Dera Ghazi Khan (a city in the province of Punjab), sentenced six men to death and acquitted eight other influential men of the village acquitted.³²⁰ On an appeal Lahore High Court's Multan Bench overturned the decision acquitting four men for lack of evidence. Death punishment of one person was turned into life imprisonment. This judgement presents the dilemma of judicial redress available to women. Mai will appeal the verdict in the Supreme Court.

The tendency to take the law into one's own hands and ignore the role of the official judiciary is widespread in Pakistan and not restricted to the tribal justice system

³¹⁵ Akbar & Zeenat 'Mor' and 'Tor', *supra* note 80 at 38.

³¹⁶ U.S. "Country Report" *supra* note 228.

³¹⁷ Under the Criminal Law of Pakistan, in the amended law the difference between fornication and adultery was taken out and both are now addressed under the offence of zina; this is the same kind of practice as in Baluchistan, where there is a distinction between fornication and adultery in the matter of punishment. Women are sometimes blamed for rape and are killed. This is a common practice, and known by the local administrative bodies. See details in Customary Chart, *supra* note 8 at 80.

³¹⁸ Report on violence against women, 2003, *supra* note 8 at Para 1127.

³¹⁹ Editorial Page "Persisting Ignominy", *The News*, 8th May, 2004, online: <<http://www.jang.com.pk/thenews/index.html>> [The News, "Persisting Ignominy"]

³²⁰ Report on violence against women, 2003, *supra* note 8 at Para 1127.

overstepping its legitimate limits. The impunity with which private 'justice' is meted out has no doubt led to the increase of such instances. A newspaper reported a local punchayat decree for disgracing two women of a family, an unmarried girl and her sister-in-law, as a 'compensation' on the principle of 'dishonour for dishonour' for the alleged illicit relations between their kin and the daughter of a landowner.³²¹

2.6 State's Obligation under International Law

Murder in the name of honour is a violation of internationally recognized human right, i.e., right to life. Right to life, liberty and security are basic human rights inscribed in Article 3 of Universal Declaration of Human Rights (UDHR) and Article 6(1) and 9(1) of International Covenant of Civil and Political Rights³²² (ICCPR). UDHR and its principles may be regarded as "an authoritative interpretation of human rights provisions contained in UN Charter".³²³ UDHR is not legally binding by itself, but many provisions and rights proclaimed in UDHR have attained the status of customary international law³²⁴. The basic civil and political rights enshrined in UDHR are now widely regarded as binding on all states³²⁵ "either as interpretation of the U.N. Charter or as customary international law, or both."³²⁶ Some authors say that not all the provision of UDHR have reached this status but agree that some provisions especially put stress on certain rights including right to life, freedom from slavery or torture which are so fundamental that no derogation may be accepted from these rights.³²⁷ These non-derogable rights are explicitly iterated in Article 4 of ICCPR, which includes Articles 6, 7, 8(1), 8(2), 11, 15, 16 and 18. Right to life is a

³²¹ The News, "Persisting Ignominy", *supra* note 319.

³²² *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171.

³²³ Julie Mertus, Mallika Dutt & Nancy Flowers, *Local Action/Global Change: Learning About the Human Rights of Women and Girls* (New York: Centre for Women's Global Leadership and UNIFEM, 1997) online: <<http://academic3.american.edu/~mertus/Nondiscrimination.htm>>.

³²⁴ *Ibid.*

³²⁵ Richard B. Lillich, "Civil Rights" chapter 4 in Theodor Meron ed., *Human Rights in International Law: Legal and Policy Issues* (Oxford: Clarendon Press, 1984) 115 at 116 [Richard, "Civil Rights"].

³²⁶ Douglass Cassel and Jill Guzman, "The Law and Reality of Discrimination Against Women" in Kelly D. Askin & Doreen M. Koenig, eds., *Women and International Human Rights Law, Volume 1* (New York: Transnational Publishers, Inc., 1998) 287 at 291-292 [Douglass, "The Law and Reality of Discrimination Against Women"].

³²⁷ Cited in Richard, "Civil Rights", *supra* note 324 at 117 (foot note 14).

basic inherent right of every human being. Some scholars hold that “human right to life is entrenched in customary international law”³²⁸ which is binding on all the states. State is responsible for this gross violation of human rights, especially violence on women by its failure to exercise due diligence to control, prevent and investigate it.

Pakistan has failed to fulfil its obligations under the international law, to exercise due diligence in preventing, investigating and punishing abuses of honour killings. The state has failed to protect women’s right of life and control violence against them condoning customary practices, which amounts to gender discrimination. The state has failed to protect and provide equal protection of law, inscribed in its Constitution, to all without sex discrimination especially in cases of honour killing.

The government’s indifference towards increasing rise of honour crime also shows its “complicity in women’s oppression”³²⁹. The government’s inaction to prosecute and punish perpetrators of honour crimes results in the victimisation of women.³³⁰ “This attitude by the state reflects institutionalised gender bias that pervades its machinery, including the law enforcement apparatus”³³¹. This inaction by the government against gender specific violence is in itself a blatant form of discrimination against women.³³² The systematic failure by the state to prevent, investigate and punish the perpetrators is an irresponsible attitude of the state towards international obligations.³³³

Pakistan, being a party to the Convention on Rights of Child³³⁴ and the Convention on the Elimination of All Forms of Discrimination Against Women (Women’s Convention), holds the responsibility to fulfil its duty to comply with the human rights standards and respect the international laws and treaties. UDHR is a declaration of basic principles of human rights and freedoms “to serve as a common standard of achievement for all

³²⁸ *Ibid* at 121.

³²⁹ Amnesty International, *Pakistan: Honour killings of girls and women*, online: <<http://web.amnesty.org/library/print/ENGASA330181999>> at 1 [Amnesty, “Honour killings of girls”].

³³⁰ Radhika and Lisa, “Violence Against Women”, *supra* note 130 at 179.

³³¹ *Crime or custom? Violence against women in Pakistan*, online: <http://www.findarticles.com/cf_dls/m2872/1_26/62795173/p1/article.jhtml?term=>.

³³² *Crime or Custom*, *supra* note 1 at 3.

³³³ Amnesty, “Honour killings of girls”, *supra* note 328 at 1.

³³⁴ *Convention of the Rights of the Child*, 20 November 1989, UN GAOR Res. 44/25 [CRC].

peoples of all nations”³³⁵ but Pakistan has failed to comply with the state obligation under both national and international law.

The Charter of United Nations affirms equal rights of men and women.³³⁶ This concept of non-discrimination is further elaborated in UDHR³³⁷ article 1 which says that all human beings are born free and equal in dignity and rights. Article 2 sets forth that all people are entitled to rights and freedoms without distinction with regard to sex, whereas, article 3 provides protection to right to life, liberty and security of persons. Article 5 states that “no-one shall be subjected to torture, to cruel, inhuman or degrading treatment or punishment.”³³⁸

Besides protecting basic human rights, UDHR also contains provisions like Articles 8 and 10, for right to effective remedy by a free, impartial and independent judicial tribunal. These provisions are also reiterated in ICCPR in Article 9, 10, 14, 15. Besides Pakistan’s obligation under the customary international law to provide all its citizens with impartial and fair trial, the state is also bound to do so under its Constitution. The provisions are reiterated in the Constitution’s preamble and Article 2-A. In the honour killing cases obligations under the national and international law are breached in providing this right. In the presence of gender bias against women, the state machinery has failed to protect them from violence in formal and informal judicial system.

Equality before the law and equal protection of law is the right of every human being. This right is protected under Article 7 of UDHR and Article 26 of ICCPR which constitute a general norm of non-discrimination, considered to have attained the status of customary international law.³³⁹ Equality is also enshrined in the Constitution of Pakistan’s under Article 25. But in reality this equality is not provided or protected especially in honour killings cases. This equality of protection is discriminated against women by the

³³⁵ Hurst Hannum, “The Status of the universal declaration of human rights in national and international law” (1995) 25 GA. J. Intl & Comp. L. 287 at 318.

³³⁶ Preamble of *UN Charter* 1946, U.N.T.S. XVI; UKTS 67 (1946); 7015.

³³⁷ *Universal Declaration of Human Rights*, GA Res 217 (III), UN GAOR, 3d Sess., Supp/No. 13, UN Doc. A/810 (1948). Declaration adopted Dec. 10, 1948.

³³⁸ Radhika and Lisa, “Violence Against Women”, *supra* note 130 at 181.

³³⁹ Richard, “Civil Rights”, *supra* note 324 at 133.

police or the biased judges. This protection is also not available to women living in tribal areas where jirga punishes them for using their fundamental rights. The state is obliged to provide a mechanism for fulfilling its obligation under national and international law and establish an impartial administration of justice.

Pakistan as a state party to the U.N. Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) is also responsible for its ineffective control of violence against women. Pakistan became a party to the Women's Convention in 1996. A general declaration was made invoking the primacy and sovereignty of the Constitution of Islamic Republic of Pakistan, 1973 overruling all the provisions of the Women's Convention.³⁴⁰ A single reservation was made to Article 29 paragraph 1³⁴¹ of the Women's Convention. The government of Pakistan declared itself not bound by the arbitration clause of Women's convention.

Being a party to the Women's Convention, Pakistan is required under its Articles 2 and 5 to take "all appropriate measure to modify.... social and cultural patterns" in order to eliminate prejudices and customs based on inferiority or gender-based stereotype roles".³⁴² Despite its obligations, the government has taken no meaningful steps to address the discriminatory laws and customs that encourage honour killings.³⁴³ suffered at the hands of family members and local communities.³⁴⁴ These "extra judicial executions of women for so-called honour crimes are common in some regions and government(s) have done little to curb such customary practises."³⁴⁵

³⁴⁰ This declaration is subject to the *Constitution of Pakistan* having Article 2-A which says that "There shall be no law repugnant to the injunctions of Islam". as its integral part, which automatically brings in the reservation towards any provision of Women's Convention contrary to Islamic laws.

³⁴¹ Article 29 of Women's Convention, 1. 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. If within six month from the date of the request for arbitration the parties are unable to agree on the organization of the arbitration, any one of those parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

³⁴² Article 2 & 5 of Women's Convention.

³⁴³ Report by ALRC, *supra* note 100 at Para 3.

³⁴⁴ Brad R. Roth, "CEDAW as a collective Approach to Women's rights" (2002-2003) 24 Mich. J. Int'l L. 212; See generally, Phillip, "Human Rights in Context", *supra* note 172 at 1528-224.

³⁴⁵ Dinorah La Luz, "Concerns of Women in Armed Conflict Situations in Latin America" in Kelly D. Askin & Doreen M. Koenig, eds., *Women and International Human Rights Law, Volume 3* (New York: Transnational Publishers, Inc., 1998) 325 at 373 [Dinorah, "Concerns of Women"].

Pakistan has failed to protect and control the violence inflicted upon women in the name of honour. This gender violence amounts to discrimination against women. Violence is also a form of discrimination against women as it is inflicted upon them because of their gender. In women being victims of honour killings or those who are under threat, “what all victims share is vulnerability that stems from their status as women.”³⁴⁶ The Committee on the Elimination of Discrimination against Women (CEDAW Committee, constituted under article 17 of Women’s convention)³⁴⁷ defines gender based violence as “violence directed against a woman because she is a woman or which affects women disproportionately.”³⁴⁸ The CEDAW Committee receives the periodic reports by the state parties under Article 18 of Women’s convention. It is the monitoring mechanism of the Women’s convention.³⁴⁹ Formulating a constructive dialogue between the reporting parties under Article 18 of Women’s convention, the committee provides useful comments on the efforts made by the state and further making specific comments on the areas to be looked up by the state parties. The committee also makes general recommendations for further guidance and assistance to the state parties for implementation of specific issues of concern.³⁵⁰ This committee comments and give recommendations on the reports of state parties on how to improve conditions of to women’s rights in their country. The CEDAW Committee has noted in General Recommendation 19 (1992)³⁵¹ the responsibility of states in “private acts if they fail to act with due diligence to prevent violation of rights, or investigate and punish acts of violence, and for providing compensation.”

³⁴⁶ Lois, “Trafficking in Women” in Kelly D. Askin & Doreen M. Koenig, eds., *Women and International Human Rights Law, Volume 1* (New York: Transnational Publishers, Inc., 1998) 321 at 327.

³⁴⁷ Committee on the Elimination of Discrimination against Women, established under Article 17 of Women’s Convention. [CEDAW Committee]. See also, Phillip, “Human Rights in Context”, *supra* note 172 at 160.

³⁴⁸ General Recommendation 19 at 1, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992). See also Radhika and Lisa, “Violence Against Women”, *supra* note 130 at 182.

³⁴⁹ *Bringing International Human Rights Law Home: Judicial Colloquium on the Domestic Application of the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of Child* (New York: United Nations, 2000) at 54 [United Nations “Bringing human rights law home”].

³⁵⁰ *Ibid.*

³⁵¹ Douglass, “The Law and Reality of Discrimination Against Women”, *supra* note 325 at 309 foot note 96.

In 1993, the United Nations General Assembly adopted a Declaration on the Elimination of Violence Against Women (DEVAW)³⁵². DEVAW is not legally binding but it sets out standards for States for preventative and protective measures to achieve the objective of elimination of violence against women.³⁵³ It identifies the subordination of women as a principal cause of domestic violence. DEVAW sets forth specific steps which could be adopted in combating domestic violence. These steps include instructions for improving domestic criminal justice system, including investigation and punishing acts of domestic violence. Another important step is to provide training to law enforcement officials and to collect statistical data of domestic violence.³⁵⁴

The United Nations Commission on Human Rights also appointed a Special Rapporteur on violence against women to investigate and report on the causes and consequences of global violence against women and to make recommendations for its remedy³⁵⁵. In 1994, Radhika Coomarswamy (the first Special Rapporteur on Violence Against Women)³⁵⁶ in her preliminary report³⁵⁷, emphasised that states parties had a duty under international human rights law to protect women from violence in their homes. In her report, she stated that “all states are not only responsible for their own conduct or the conduct of their agents, but are now also responsible for their failure to take necessary steps to prosecute private citizens for their behaviours, in compliance with international standards.”³⁵⁸

Pakistan is also a party to the Convention of the Rights of Child (CRC), which it ratified on 12th November 1990, with a general reservation.³⁵⁹ Under Article 6 (1) of the CRC,

³⁵² Declaration on the Elimination of Violence Against Women, G. A. Res. 48/104 (1993).

³⁵³ United Nations “Bringing human rights law home”, *supra* note 348 at 66.

³⁵⁴ Cheryl Thomas, “Domestic Violence” in Kelly D. Askin & Dorean M. Koenig, eds., *Women and International Human Rights Law, Volume 1* (New York: Transnational Publishers, Inc., 1998) 219 at 250 [Cheryl, “Domestic Violence”].

³⁵⁵ Commission on Human Rights, *Preliminary report submitted by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/45*, UN. Doc. E/CN.4/1995/42/ (November, 1994) Para. 6 and 7 [mimeo. provisional] [Preliminary Report on violence against women, 1995].

³⁵⁶ Cheryl, “Domestic Violence”, *supra* note 353 at 250.

³⁵⁷ Preliminary Report on violence against women, 1995, *supra* note 354 at Para. 99-107.

³⁵⁸ *Ibid.* at Para 107; See also Cheryl, “Domestic Violence”, *supra* note 353 at 250; See also Shaheen Ali, “Equal Before Allah”, *supra* note 44 at 210.

³⁵⁹ The reservation states that the provisions of the said Convention shall be interpreted in the light of principles of Islamic laws and values. Practically no provision of the Convention comes into direct conflict with any of the major precepts of Islam, barring the matter of adoption for which an appropriate provision

“every child has an inherent right to life”³⁶⁰. It is mandatory for the states parties to protect children within their jurisdiction without discrimination of any kind, which also includes discrimination irrespective of the child’s ethnic or social origin.³⁶¹ States parties also undertake all appropriate legislative, administrative and other measures for the implementation of these rights recognised in the present convention³⁶². The Human Rights Commission of Pakistan has reported victims of honour killings as young as three years old, though the government is responsible under international law to protect these children against the threat to their right to life and security. Under article 19(1) of the CRC, the state has the obligation to protect a child from any violence, injury or abuse inflicted upon him/her in private life, including violence by parents, legal guardians or other person taking care of him/her.³⁶³ Pakistan has submitted two country reports³⁶⁴ required under Article 44 of CRC to the Committee on the Right of the Child³⁶⁵ in 1993 and 2003, but it has not addressed violence in the name of honour killings affecting the lives of young children.

The state has neither fulfilled its domestic responsibility to provide equal protection to women and nor its international obligation to eradicate the violence against women. It has failed to prevent, investigate and punish the crimes against women in the name of honour. Increase in the crimes of honour killings holds the state nationally and internationally responsible for its failure to administer justice equally and impartially.

2.7 Conclusion

With formal and informal legal systems running parallel to each other it is difficult to control the crime of honour killing. There should be one unified court system. Illiterate people with no legal education or know how of law hold jirgas. This is evident in jirga trials where women have been negated their legal and Islamic right to choose their

has already been made in the Convention. Convention of the Rights of the Child, *Initial reports of the States parties due in 1993 Addendum (Pakistan)*, UN Doc. CRC/C/3/Add.13 (May 1993) [mimeo].

³⁶⁰ CRC, Article 6(1).

³⁶¹ *Ibid.* Article 2.

³⁶² *Ibid.* Article 4.

³⁶³ See also Amnesty “Violent Against Women”, *supra* note 15 at 42.

³⁶⁴ State reports are required within two years of the entry into force of the Convention for the State party concerned and thereafter every five years. Article 44 of CRC.

³⁶⁵ Committee established under CRC, Article 43.

matrimonial partner or punished for using it. Other examples of un-Islamic customs upheld by jirga system are “Vani”, under which women are sold, “Swara”, under which women are exchanged in compensation for resolving compounded disputes.³⁶⁶

In rural areas, people often approach jirgas to settle their disputes because it is easily accessible and is an inexpensive mode of settling disputes. But these jirgas are discriminatory against women and violate the right and dignity of women as a whole. Women have no representation in these forums and in any kind of cases affecting women they are represented by male members of their family. In honour related cases an accused woman is not allowed to represent herself and she cannot defend herself.³⁶⁷ Government officials, who support and participate in jirgas³⁶⁸, must be penalized. The State should make formal judicial system accessible to all the citizens equally and impartially.

Amendments should be made to the criminal law to fill in the loopholes often used by the perpetrator to get away with the crime of honour killings. Making honour killing a compoundable offence has given the perpetrator a legal cover. Sections like 306 & 307 P.P.C. and Section 345 Cr.P.C. protect an offender accused of murder against punishment. The amendment made vide Criminal Act 2004 to Section 338-E P.P.C. substantively allows the compounding of offence of honour killing, which may be waived or compounded subject to conditions as the court may deem fit. In the presence of this amendment and a biased judiciary, it will be very difficult to control the increasing crime of honour killing. If cases are registered in the name or on the pretext of honour, this amendment would rather facilitate the perpetrator to go free than to be punished for the crime. Flaws in the law of Criminal Act 2004, especially one of making honour killing compoundable, must be removed.

The state does not fulfil its responsibility under national and international law to protect its citizens and prevent, investigate and punish honour killings. The State should take positive measures to eradicate violent cultural practices and discrimination against women

³⁶⁶ Syed Zahir Shah Sherazi, *Un-Islamic Customary Practice Need to be Abolished*, online: <http://sachet.org.pk/home/agehi_news_letter/summer_2003/issue_06_05.asp>.

³⁶⁷ Amnesty “Tribal justice system”, *supra* note 17 at 31.

³⁶⁸ *State of Human Rights in 2004*, (Lahore: HRCP, 2005) at 190 [HRCP report 2004].

especially in legal and judicial institutions. The State should implement provisions laid down in women's convention to improve the status of women in social, economic and cultural spheres of life. The government should compile data on honour killings to know how to tackle the crime. Flaws in the law on honour killings should be removed. There should be substantive penal provisions to punish the murderer without any leniency. Legal and social reforms are required to improve and protect women's rights and to ensure implementation of legal provisions protecting women.

Chapter 3: Administration of Justice

It is the state's obligation to provide justice fairly, impartially, equally, and expeditiously, under an organised system of administration to all its citizens.³⁶⁹ As discussed in the previous chapter, Pakistan has a state obligation under its domestic law and under international law, to provide justice to its citizens equally and fairly. Fulfilment of a state's obligation regarding women's protection can be evaluated against two criteria: "first, whether the state's written law provides for the equality of women and, second whether there are enforcement actions available for women who have been wronged."³⁷⁰ Pakistan's state obligation as a party to Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) holds it responsible not only for the legal implementation and protection of women's rights, but also requires it to take positive steps towards elimination of all kinds of discrimination against women in social, political, cultural and economic spheres of life. It is incumbent on law enforcement agencies (police) and the courts "to intervene appropriately in relation to violence in the family and not to allow its perpetuation through indifference or inadequate response".³⁷¹ However, Pakistan's law enforcement agencies are not only alleged to be unfair in their treatment of women complainants but also at times, instrumental in the commission of crimes.³⁷²

Criminal injustice in the cases of honour killing arises out of inadequate administration of law and order by the police, lack of accountability, a conservative judiciary and the amended penal law of Qisas (punishment equal to the offence) and Diyat, (compensation) i.e., a criminal law based on Islamic injunctions which has made murder a compoundable offence. Controversial laws and their interpretations by the courts have further eroded the status of women and exposed them to injustice. Often police and judges consider

³⁶⁹ Nasir, "Women's Judicial Redress", *supra* note 15 at 53.

³⁷⁰ John Valery White & Christopher L. Blakesley, "Women or Rights: How should women's rights be conceived and implemented?" in Kelly D. Askin & Doreen M. Koenig, eds., *Women and International Human Rights Law, Volume 2* (New York: Transnational Publishers, Inc., 1998) 51 at 52 [John and Christopher, "Women or Rights"].

³⁷¹ Document, "Judicial Colloquium", *supra* note 133.

³⁷² Nasir, "Women's Judicial Redress", *supra* note 15 at 57; See also *Mst. Humaira Mehmood v. The State & others*, PLD 1999 Lahore 494. Discussed below in detail.

domestic violence as a family matter and are reluctant to intervene. This is a major impediment for women seeking criminal justice.³⁷³ The courts also draw a distinction between cases of murder for honour and the one for some other reason.³⁷⁴ The judicial system of Pakistan makes it difficult for a woman to seek justice.³⁷⁵

3.1 Women and the Criminal Justice System

The state of Pakistan is obliged under national and international law to provide justice equally and expeditiously to all its citizens. This is the '*raison d'être* for a statehood'³⁷⁶ under the Islamic injunctions and the Constitution of Pakistan described in Article 2-A³⁷⁷ of the Constitution. The rule of law is the foundation of a responsible government and requires that settled and just laws are fairly administered *without fear and favour* for its advancement.³⁷⁸ Such laws must offer protection to all individuals and their rights, especially of those who are minorities or *otherwise disadvantaged*.³⁷⁹ The state does not inflict violence on women directly but it "often supports or condones an exploitative family structure through various laws and rules of behaviours which legitimise the authority of male members over the lives of female members..."³⁸⁰

³⁷³ U.S. "Country Report" *supra* note 228.

³⁷⁴ Murders involving honour are often considered familial issues and are often not taken as first degree murders but under the circumstances of grave and sudden provocation. Also, murder is not a crime against the state anymore but is treated as offence against the victim and his legal heirs. It has been made compoundable under the amendments of Qisas & Diyat Ordinance, which were made the substantial part of the criminal law.

³⁷⁵ U.S. "Country Report" *supra* note 228.

³⁷⁶ Nasir, "Women's Judicial Redress", *supra* note 15 at 53.

³⁷⁷ Article 2-A of the Constitution is read in relevant parts as "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 includes *inter alia* that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed. Also including "guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith worship and associate, subject to law and public morality.

³⁷⁸ Cited in Nicola Padfield, "Opening Remarks by the Representative of the Commonwealth Magistrates' and Judges' Association" in Kirstine Adams and Andrew Byrnes, eds., *Gender Equality and Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level* (London: Commonwealth Secretariat, 1999) 26 at 26 (reading from the Proclamation adopted by unanimous vote at the end of Associations' 1994 Triennial Meeting held at Victoria Falls in 1994) [Nicola, "Opening Remarks"] [emphasis added].

³⁷⁹ *Ibid* [emphasis added].

³⁸⁰ Document: "Victoria Falls Declaration of Principles for Promoting the Human Rights of Women as agreed by Senior Judges at the African Regional Judicial Colloquium" in Kirstine Adams and Andrew

Pakistan is an Islamic republic in which the dictates of the Holy Quran are upheld, but this is not the case when women's rights and protection is concerned. Although the state is obliged to establish a society in accordance with the injunctions of Islam, personal bias and moral standards are looked upon to make decisions on rights and liberties guaranteed to women in Islamic society. This is against the teachings of Islam since the Quran, *inter alia*, ordains that "personal likes or dislikes must not influence the administration of justice"³⁸¹.

The administration of justice depends on the actors involved in the penal system, i.e. the police, prosecutors and the judges for its effectiveness.³⁸² Women will turn to police and judicial institutions to seek judicial redress. However, the police are corrupt³⁸³ and are generally not supportive of women victims in the cases of honour killing. There are many reported and unreported cases of women who are mutilated and killed by male relatives, being suspected of illicit relationship or adultery. Among those cases which actually get reported, few are thoroughly investigated by the police. Accused murderers are often acquitted upon the mitigating circumstance of the grave and sudden provocation allegedly caused by the victim's act.³⁸⁴

A female activist in Pakistan³⁸⁵ says that in the cases of honour killing, it is alleged that there is "an unholy alliance of the murderer, tribal leaders (condoning the act and protecting the killer) and police's connivance in the cover-up."³⁸⁶ There are many flaws in the judicial system, which seemingly reflect public opinion, societal trends and attitudes towards the family and domestic relations³⁸⁷. The conditions of Pakistani courts are not

Byrnes, eds., *Gender Equality and Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level* (London: Commonwealth Secretariat, 1999) 1 at 1. [Document, "Promoting Human Rights"].

³⁸¹ Nasir, "Women's Judicial Redress" *supra* note 15 at 54.

³⁸² Cited in Cheryl, "Domestic Violence", *supra* note 353 at 221.

³⁸³ Discussed *infra* under the sub-heading of policing of legislation.

³⁸⁴ U.S. "Country Report" *supra* note 228.

³⁸⁵ Nighat Taufeeq is a female activist in Pakistan working with women's resource centre Shirkat Gah.

³⁸⁶ Amnesty "Violence Against Women", *supra* note 15 at 24.

³⁸⁷ Cassandra Balchin ed., *A Handbook on Family Law in Pakistan*, (Lahore: Shirkat Gah & WLUMI, 1994) at 98.

such where a woman may have justice.³⁸⁸ It has invariably been denied to women on the plea of family honour where brutal murders were committed under the traditions of Karo Kari (honour killing)³⁸⁹.

3.2 Policing of Legislation

Unfortunately, corruption is to be widely found in the Pakistani legal system³⁹⁰ especially within the police department and this has seriously compromised the official judicial system.³⁹¹ This is the foremost hindrance faced in seeking judicial redress. Police and medical personnel continue to hamper legal redress for domestic violence and honour killing by concealing evidence.³⁹² Within the police department one might find abuses in the form of bribes, personal favours to some relation, or favours to oblige some senior official or bureaucrat.³⁹³

The administrative inadequacies begin when a crime is committed; a complaint is filed by the police to set the machinery of law into motion by lodging a First Information Report (F.I.R.)³⁹⁴ under Section 154 of the Criminal Procedure Code (Cr.P.C.).³⁹⁵ However, due

³⁸⁸ This is based on empirical knowledge, reflection of public opinion and attitude in court decisions. Political expedience with the need of the time (referring to the Zia's regime), attitude of the courts towards family disputes, considered to be resolved within the family premises especially dispute between husband and wife, and unbearable delay in litigation in the formal courts; For detailed report on this issue see Shahla Zia, *supra* note 15.

³⁸⁹ Nighat S. Khan, Rubina Saigol & Afiya S. Zia, eds., *A Celebration of Women; Essays and Abstracts from the women's studies conference March '94* (Lahore: ASR publications, 1995) at 211.

³⁹⁰ Rubya Mehdi, *The Islamization of the law in Pakistan* (Richmond: Curzon Press, 1994) at 40 [Rubya, "Islamization of laws"].

³⁹¹ Mateen, Mateen, "Ban on Jirga", *supra* note 303.

³⁹² Amnesty "Protection of Women", *supra* note 15 at 40. Nasreen suspectedly murdered by her husband and his family in June 2001, had marks of injuries on her body. Violent torture was inflicted: her nose, ears and hair being cut off and there were several marks of cigarette burns on her body. Nasreen's family filed a case of murder against her husband Rafique and his brother Majid, who was a police employee. During the investigation, doctors appointed to conduct the post-mortem were bribed; several witnesses were harassed and threatened. A former police officer of the area threatened to implicate residents of the colony in false criminal cases if they bore witness to Nasreen's ill-treatment or murder.

³⁹³ Rubya, "Islamization of laws", *supra* note 389 at 40.

³⁹⁴ First Information Report (FIR).

³⁹⁵ s. 154 of *Cr.PC* "Information in Cognizable cases: Every information relating to the commission of a cognizable offence if given orally to an officer-in-charge of a police-station, shall be reduced to writing by him or under his direction and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof

to corruption the F.I.R. is not registered. If there is a complaint, the F.I.R. might not be lodged because of bribes to the police from influential parties involved in the crime³⁹⁶.

Police officers earn considerable sums from bribes offered by the perpetrator and his family to hide the facts and not register the cases of honour killings. Often police statements are concocted, which then mislead the higher authorities on the incident by hiding the real evidence³⁹⁷ in the report (Challan)³⁹⁸ submitted to the court. The Human Rights Commission Pakistan³⁹⁹ has reported that Jacobabad (a city in the province of Sindh) topped the list in number of honour killings.⁴⁰⁰ Police stations in Jacobabad are considered 'gold mines' in police circles, because of the high incidences of honour killings in that area. According to police officials, it costs between 10,000 and 200,000 Rupees (approximately, CDN\$200 – 4,000) to suppress an honour killing with this amount being divided amongst the police officers involved in the cover-up.⁴⁰¹ In some cases of honour killing if there are convictions (which are very few), most of the accused literally "get away" with murder by obtaining a razinama⁴⁰² (compromise agreement) presented to and accepted by the police.⁴⁰³ Under the criminal law of Qisas and Diyat, compromise on bodily hurt and murder is accepted by the victim or his legal heirs at any time of the trial. If a settlement has been reached between the parties the agreement is presented to the police. The complaint filed with the police is withdrawn by the victims or his legal heirs. The offender is no longer liable for the conviction under the complaint.

shall be entered in a book to be kept by such officer in such form as the Provincial Government may prescribe in this behalf".

³⁹⁶ Rabia, "Dark Side of Honour", *supra* note 24 at 28.

³⁹⁷ *Ibid.* at 29.

³⁹⁸ 'Challan' is not a defined term in *Cr.PC* but this is a legal term used for the formal report of the police officer under s. 173 *Cr.PC* stating the result of the investigation and containing the names of the accused and the witnesses and other relevant document(s) of evidence on the basis of which the trial has to be conducted. *The Code of Criminal Procedure*, by Amer Sohail, Irfan Law Book House 2002 at 154-155.

³⁹⁹ Human Rights Commission Pakistan (HRPC) is an independent, non-profit organization in Pakistan, which is not associated with Government or any political party. There reports are available online: <http://www.hrcp.cjb.net/>.

⁴⁰⁰ *Girls aged 3 among 382 killed under Karo Kari*, Dawn - Karachi, 12/23/2002 (INFVVP; consolidated digest of News and crimes, December 2002).

⁴⁰¹ Naziha, "Prince of Honour", *supra* note 311 at 34-35.

⁴⁰² "Razinama is a settlement/compromise agreement – a statement of reconciliation reached between two parties involved in any kind of dispute. Before the introduction of Qisas and Diyat Ordinance, the provision of compromise was not available for the offence of murder. However, the Ordinance provides room for compromise in matters of bodily hurt and murder as well. The punishment for murder was either death or life imprisonment. Qadir Shah, "No honour in killing", *supra* note 55 at 12.

⁴⁰³ Rabia, "Dark Side of Honour", *supra* note 24 at 28.

This right provided to the legal heirs of the victim in the cases of honour killing promotes the practice of resolving murder cases through a settlement agreement.⁴⁰⁴

An example of corruption of the police is evident in the case titled *Mst. Humaira Mehmood v. The State & others*.⁴⁰⁵ A 29-year-old girl named Humaira Khokhar against her family's wishes secretly married Mehmood Butt (a businessman settled in U.S.) in 1997, Humaira's father is a landowner (having a feudal background) and a member of the Punjab provincial assembly. When her family knew of her wedding, she was physically tortured and forced to put her thumb impression on the marriage contract with her cousin. Mehmood Butt came back from the U.S. after this forced marriage to take Humaira with her. Humaira ran away from her parents' house and took refuge at a shelter in Karachi (the capital of Sindh province). In the meanwhile, her father and brother filed a complaint of offence of Zina under Section 16⁴⁰⁶ of the Zina Ordinance. Proclaiming that Humaira is married to her cousin and that Mehmood Butt abducted Humaira, the Police then arrested Humaira from the shelter upon the instigation of the complaint filed under section 16 of Zina Ordinance by Humaira's brother and father, but she was rescued from police custody with the help of women activists and NGOs. The Sindh High Court ordered not to arrest Humaira on any charges. A pre-arrest bail was granted by the Lahore High Court. Understandably, fearing death, Humaira and Mehmood Butt tried to flee Pakistan to the U.S. However, they were illegally arrested by the police at the Karachi airport and were held in custody to be transferred to Humaira's father.

A writ was filed by a human rights activist Shahtaj Qazilbash under Article 199⁴⁰⁷ of the Constitution to the Lahore High Court for production of Humaira after she was arrested by the Punjab Police from Karachi airport although she was on pre-arrest bail. Thereafter, Humaira filed another writ petition to have quashed the abduction charges against

⁴⁰⁴ Qadir Shah, "No honour in killing", *supra* note 55 at 12.

⁴⁰⁵ *Mst. Humaira Mehmood v. The State & others*, PLD 1999 Lahore 494.

⁴⁰⁶ s. 16 of *Zina Ordinance* "Whoever takes or entices away any woman with the intent that she may have illicit intercourse with any person, or conceals or detains with that intent any woman, shall be punished with imprisonment of either description for a term which may extend to seven years ...".

⁴⁰⁷ Article 199 of the Constitution in relevant parts reads as "(a) on the application of any aggrieved party (High Court) make an order—(i) directing a person performing, within the territorial jurisdiction of the Court, functions in connection with the affairs of the Federation, or a Province or a local authority to refrain from anything he is not permitted by law to do, or to do anything he is required by law to do".

Mehmood Butt filed earlier by her father and brother under Zina ordinance and also to consider if her marriage to Mehmood Butt was valid. The Lahore High Court gave a consolidated judgment on both the writ petitions and quashed the case filed under Section 16, of Zina Ordinance.

Under Article 199, a High Court may make an order on the application of any aggrieved party if there is no other adequate legal remedy. Under sub-clause (i) of Article 199, the Court can make an order directing the person performing functions in connection with the affairs of Federation or a Province or a local authority to “refrain from doing anything he is not permitted by law to do or to do anything he is required by law to do”.

In this case the judgement was pronounced by Justice Tasadduq Hussain Jillani. He admonished the police officials handling the case. He observed that the police officials acted in a manner which demonstrated total disregard of law of the land and of their mandate. He referred to Article 4 and 25 of the Constitution of Pakistan which guarantees that everyone should be treated in accordance with law and also Article 35 of the Constitution, which provides that the state shall protect *inter alia* the marriage and family.

The judgement noted that the police played an instrumental role in harassing and illegally arresting Humaira and her husband. Police officials committed contempt of court by illegally arresting Humaira although they knew she was on pre-arrest bail. The police lied to the Lahore High Court that they went to arrest another woman named Rabia in Karachi though it was actually Huamira arrested under this fictitious name.

Justice Jillani reminded the state in the judgement of its obligation under international law as a member of United Nations and a signatory to the Women’s Convention. Especially referring to Article 16 of Women’s Convention which states that the state parties should take appropriate measures to eliminate discrimination against women in all matters relating to marriage, Justice Jillani chided the police officials for the bias and bad faith with which they handled the case. He noted that police officials had abused their lawful

duty to help Humaira's father and to promote their personal interests. Humaira and Mehmood later fled to U.S. fearing for their life in Pakistan.

It has been noted in the U.S. State Department's Country Reports on Human Rights,⁴⁰⁸ that government officials have failed to take action in the cases of honour killing where influential families are involved.⁴⁰⁹ In the case titled *The State vs. Muhammad Younas*, (Samia's case) Samia Sarwar's lawyer, Hina Jilani, at whose office she was murdered in the name of honour at the hands of her family, said the police refused to take statements from eyewitnesses of the murder and they also tampered with the evidence.⁴¹⁰

The police are also used as an instrument to tamper with the evidence and to disguise fake honour killings to camouflage another murder. If anyone tries to file a complaint or seek judicial redress for an alleged crime, the police may often harass him or her to withdraw the complaint. The case of Ameer Bukhsh is instructive on this point. On 19 January, 1999 in Jampur city, Punjab, Bukhsh killed his wife Khadeja and a bank officer he alleged she was having an affair with. Khadeja's brother Abdul Qadir registered a complaint of murder under Section 302 PPC⁴¹¹ against Ameer Buksh, alleging that he had killed the bank officer for some other reason and then killed his wife to disguise the murder as an honour killing. However, the police distorted the facts of the complaint registered by Abdul Qadir. They concocted a story in the F.I.R. which completely contradicted the facts registered in the complaint by Abdul Qadir⁴¹² and they sought to

⁴⁰⁸ Country Reports on Human Rights Practices.

⁴⁰⁹ U.S. "Country Report" *supra* note 228.

⁴¹⁰ *Ibid.*

⁴¹¹ Punishment of the offence of Murder. Discussed in detail *supra* chapter 2 under sub-heading of "Law of Qisas and Diyat (Islamic Law)".

⁴¹² Abdul Qadir registered a complaint under s. 302 PPC after which he received the copy of FIR in six days. In FIR, the facts reported were completely contrary to what Abdul Qadir filed in the complaint. The FIR said that Abdul Qadir and another brother and cousin were in Khadeja's house watching television with her four children when they heard Khadeja's scream from the next room, on entering they saw Ameer Bukhsh shooting the victim (with the bank officer) lying together on a bed. Abdul Qadir denied that he had ever reported such an account and he said that he had heard of his sister's murder when he returned home after his driving job at around 12:30 a.m. He and another male relative then reported the murder to police but before obtaining the body of his sister for burial, he was forced by police to sign blank papers. He reported that police threatened to involve him in false murder case if he did not sign the paper. Abdul Qadir alleged that Ameer Bukhsh had bribed police to distort the complaint. Amnesty, "Violence Against Women", *supra* note 15 at 53.

pressure him to agree to whatever was written in the FIR, threatening him with a false charge of murder.⁴¹³

Gender bias is also entrenched in the Pakistani judicial system. The police are often prejudiced against women and they have an established tendency to ignore or condone incidents of abuses⁴¹⁴ and violence against women. Police officers often believe that those who commit honour killings have done the right thing to restore their family's honour.⁴¹⁵ They often consider violence against women not as a crime but as a family affair and to be the right of the male members of the family to control their women through violence. They see themselves as having a duty to protect the victims of honour crimes by labelling them issues of honour (ghairat), something too personal to interfere with,⁴¹⁶ thereby ignoring the gravity of the violence involved in these acts. Police officers are often reluctant to lodge complaints,⁴¹⁷ and at times 'persuade'⁴¹⁸ women through harassment, not to file a report against domestic violence. So women generally believe that it is futile to approach the police. As a result of inadequate or non-existent investigation by the police, men who have allegedly committed violent crimes against women are often not arrested or are never charged with a crime.⁴¹⁹

Police bias and gender discrimination are also fuelled by the patriarchal system that exists in Pakistani society. 'Police act as agent of the particular system in which they operate'⁴²⁰. Therefore especially in tribal areas, where the customs and traditions are implemented in preference to the formal legal system and decisions are made by the jirga or chief of the tribe (Sardar), the police are instrumental in reinforcing those customs as a

⁴¹³ *Ibid.* This is also an example of fake honour killings, discussed above in chapter 1. The evidence that it was a fake case taking pretext of honour was that in FIR the statement of Abdul Qadir was completely distorted; Discussed in *supra* note 411.

⁴¹⁴ Nasir, "Women's Judicial Redress", *supra* note 15 at 57.

⁴¹⁵ Amnesty "Violence Against Women", *supra* note 15 at 47.

⁴¹⁶ Rabia, "Dark Side of Honour", *supra* note 24 at 29.

⁴¹⁷ Amnesty "Protection of Women", *supra* note 15 at 46. 'In January 2002, a married woman Arbali, was shot dead by her maternal uncle Sabzal Rajri in Vesti Jeevan Shah, Sukkar district, who alleged that she had developed an 'illicit' relationship. Her husband who was not convinced of her guilt, wanted to register a complaint against the perpetrator but police refused to do so'.

⁴¹⁸ Alice Bettencourt, "Violence Against Women", *supra* note 124 at 12.

⁴¹⁹ *Ibid.*

⁴²⁰ Nafisa, "Faislo", *supra* note 272 at 250.

part of the culture. In a few instances, police officials had actually been present at jirga decisions and provided protection to their members.⁴²¹

Police also act as the agents of tribal feudal. The tribal feudal have a political⁴²² grip hold over the area and they can manipulate their positions to use the police officials to act according to their whims. It is found in many cases that police are hand in glove with the feudal of the tribal areas. In a case reported by a local NGO, the wife of a man named Ali Akbar was accused as Kari⁴²³ by her husband's cousin. In the jirga decision (faislo)⁴²⁴ by the Sardar of the village she was declared Kari⁴²⁵ to be sold to another tribe for Rupees 80,000/- (approximately 1,600 CDN \$). Her husband did not agree to any part of the allegations and the jirga decision (faislo). When he approached the police to file an F.I.R. against the decision for the recovery of his wife from Sardar's house, they instead arrested him and made him put his thumbprint on a blank sheet to be later used as a divorce document. The wife lost her family, home, and husband; she was forcefully sold to another tribe against her will. This incident is one of the examples of police's corruption and becoming complicit to the crime.⁴²⁶

The police may accept the compromise agreement (razinama) sent by the jirga without investigating its authenticity. No inquiry is necessarily made as to whether it was agreed upon with consent or under duress from the jirga.

In tribal areas and due to the strong control of tribal chiefs and feudal, the state machinery is too weak to implement and control the crime according to the state law. There are cases in which police officials have sought help from the Sardars and tribal leaders to settle disputes amongst tribes especially in the areas of Sindh. Political representatives have

⁴²¹ Amnesty "Tribal justice system", *supra* note 17 at 20.

⁴²² Many of the Sardars and Feudals are representing their area in the National Assembly of Pakistan.

⁴²³ Traditional name given to a woman alleged of having committed adultery. Discussed above in chapter 1.

⁴²⁴ Traditional informal settlement institution called *Faislo* in rural and tribal Sindh to resolve conflicts. *Faislo* is derived from the word '*faisla*' which literally means 'decision'. Nafisa, "Faislo", *supra* note 272 at 227.

⁴²⁵ A woman alleged of having illicit relationship. It does not only include woman who commits sexual intercourse out or wedlock but also includes woman who is raped.

⁴²⁶ Qadir Shah, "No honour in killing", *supra* note 55 at 25.

participated in jirgas to make decisions on conflicts involved.⁴²⁷ In 1998, the Police Commissioner of Larkana (a town in Sindh province) convened a grand jirga to accomplish a uniform code of conduct for tribal jirgas in Sindh. The Police Commissioner said before the press that jirga settle agreements between disputants in the presence of the district administration and that the Commissioner and Deputy Commissioner sign that agreement holding that “such attestation of the decision automatically gets legal cover.” He further emphasized on the status of jirga as ‘judicial council’ which should also get explicit legal cover through legislation.⁴²⁸ This proposal has been presented in the Sindh National Assembly as well to legalize jirga system⁴²⁹ but not yet approved.

Police officials justify their reluctance in registering case of honour killing by blaming the law of Qisas and Diyat. Due to the impunity available to the murderer under Qisas and Diyat Law, police are often reluctant to file a case. In the murder case of Afsheen Musarat⁴³⁰, the police were reluctant to initially investigate the crime. Afsheen Musarrat was killed by her family on November 10th, 2003 for marrying the man of her choice.⁴³¹ She was buried by her family who proclaimed her death to be a natural one. An H.R.C.P. coordinator Rashid Rehman went to file a complaint to bring this mysterious murder of Afsheen to the notice of the Police. The police refused to file the complaint.⁴³² They thought that their investigation would be futile in the presence of the law of Qisas & Diyat because legal heirs of the victim were also the family of the murderer (who always get pardoned in such cases). Police officials have raised this issue in a discussion reviewing the Qisas and Diyat Law at a seminar; that “the law should be reviewed regarding compounding of offence under Qisas and Diyat Ordinance because the next of kin in most of the honour killing cases are actually amongst the conspirators.”⁴³³

⁴²⁷ Amnesty “Tribal justice system”, *supra* note 17 at 22. In December 1998, a jirga was convened to settle dispute among three big tribes in Shikarpur. Several parliamentarians participated and state officials were also present at a jirga. Paramilitary Rangers and police were deployed for the protection of the jirga which settled the issue in five hours and imposed various compensation payments totalling over Rs. 12 millions (amount equal to 200,000 USD).

⁴²⁸ Amnesty “Tribal justice system”, *supra* note 17 at 19 [emphasis added].

⁴²⁹ Discussed above in chapter 2.

⁴³⁰ Discussed in detail below.

⁴³¹ It became clear after the post-mortem report that Afsheen was murdered by more than one person.

⁴³² Badar “Multan bypass”, *supra* note 260.

⁴³³ Rashida Patel, “Woman versus Man”, *supra* note 24 at 168.

Afsheen's murder was brought to the attention of President Pervez Musharaf through the media. Musharaf ordered an investigation, promising that "if the accused was made a victim of honour killing, the culprits should be held accountable in accordance with the law."⁴³⁴ Further elaborating on the issue of which law would be applicable in this case, a government official announced that Qisas and Diyat law could not be applied to this case because the legal heirs of the deceased were involved in the murder.⁴³⁵ But if it is not Qisas and Diyat law then would it meet the same fate as in other cases of honour killings where plea of grave and sudden provocation is invoked; or under the pretext of saving the family honour, the murderer is pardoned, under Qisas and Diyat law or given a ridiculously light punishment?

This incident also highlights the dilemma Pakistani system faces in that justice is not available unless the highest authority is provoked publicly. Then under what law the offender will be accountable? Under Section 306 (b) PPC (Qisas and Diyat law), Afsheen's father will not be given the punishment of Qisas which exempts the offender from punishment of Qisas if he murders his child or grandchild. Besides section 306 (b) PPC, the offender could be pardoned under Section 309 PPC by the rest of the family as legal heirs of the victim. It is difficult to punish the offender in the presence of these laws which in one way or another, protects the offender.

3.2.1 Proactive Steps by Police

Some efforts for the protection of women from honour crimes were short lived. In August 2000, a legal aid cell was set up at the office of the Commissioner in Larkana (a town in, Sindh province). The purpose of this cell was to provide free legal aid and other assistance to victims of honour crimes or their relatives. Social workers and lawyers working in the cell would ensure that honour killing cases would be "treated as murder and that police would not evade their responsibility to criminally prosecute those responsible"⁴³⁶. However, according to information obtained by Amnesty International,

⁴³⁴ Badar "Multan bypass", *supra* note 260.

⁴³⁵ "Police role in Afsheen Case 'pitiable'", by correspondent of Dawn, 5th December 2003.

⁴³⁶ Amnesty "Protection of Women", *supra* note 15 at 8.

this initiative of the Divisional Commissioner of Larkana ceased with his transfer to another post.⁴³⁷ It was difficult to run such legal aid cell in the presence of the jirgas. Police lacked the power in the tribal areas where parliamentarians and executive officials of the country backed the jirgas.

In Sindh (south eastern province of Pakistan),⁴³⁸ police tried to implement strategies to control honour killing. Under these strategies, the police were given powers to file the case as complainants in the cases of honour killings.⁴³⁹ This was a radical step to control the occurrence of this crime at such a large scale. On 12th November 2001 the first case of karo kari (honour killing) was filed by a Station House Office (SHO) in Police Station in Larkana.⁴⁴⁰ This initiative will help in getting the cases of honour killings registered with the police. Otherwise, in most other incidents, no case is filed or reported. Unfortunately, there is no further report available on the success of this initiative.

3.3 Pivotal Role of Judges in Criminal Justice

In any society its judicial institution is responsible for ensuring that justice is meted out.⁴⁴¹ Judges play an important role in providing judicial redress and society expects a great deal from its judges. "It expects them to be objective, knowledgeable, independent, discerning, practical and sensitive and above all *it expects them to be fair*."⁴⁴² Judges, while interpreting the law, not only act as interpreters but also as law making bodies, through their decision, to an extent using the powers provided under the Constitution.⁴⁴³ Though judges do not make law as do legislators, they do so while performing their

⁴³⁷ *Ibid*.

⁴³⁸ Sindh is one of the four provinces of Pakistan where highest number of honour killings are reported in HRCP report, Discussed above in chapter 1.

⁴³⁹ Rashida Patel, "Woman versus Man" *supra* note 24 at 175.

⁴⁴⁰ Larkana is a town in Sindh Province; Qadir Shah, "No honour in killing", *supra* note 55 at 35.

⁴⁴¹ Shahla Zia, *supra* note 15 at 1.

⁴⁴² Cited in Kathleen E. Mahoney, "Gender and the Judiciary: Confronting Gender Bias" words quoted from Hon. Rosalie Abella, "the Dynamic Nature of Equality" in S. Martin and K. Mahoney eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) in Kirstine Adams and Andrew Byrnes, eds., *Gender Equality and Judiciary: Using International Human Rights Standards to Promote the Human Rights of Women and the Girl-Child at the National Level* (London: Commonwealth Secretariat, 1999) 85 at 85 [Kathleen, "Gender Bias"] [emphasis added].

⁴⁴³ Federal Shariat Court has specifically been given the power under Article 203-D (3) (b) of the Constitution.

interpretative role.⁴⁴⁴ It is widely accepted that judges do have a law making function. "In constitutional matters, judges play a more overtly political role, often striking down legislation or amending it to make it conform to the judicial interpretation of constitutional rights and freedoms and a particular vision of society."⁴⁴⁵

In honour killings cases, judges have condemned dead women as immoral on the pretext of protecting family honour. Courts have praised the act of honourable men who avenge family honour and every leeway has been extended to condone these murders and exonerate the men who have committed them. Judges have encouraged this customary practice whereby men take the law in their hands.⁴⁴⁶

3.3.1 Judicial Activism

Judges hold an important position in following the substantive law and judicial precedents and for the interpretation of the law. It is for them to make progressive decisions which are for the benefit of all members of society. At the point where women are killed in the name of honour, it is incumbent on the judiciary to set up rules and make decisions calling for social engineering, to control this heinous crime. It is not reasonable for the courts to pronounce judgements on obsolete or unsound rules as in cases of application of grave and sudden provocation, which results in injustice. Courts should apply rules that are "just, equitable, and soundly based..."⁴⁴⁷

Pakistani judges enjoy considerable discretionary powers. Unfortunately, they do not use these powers in a proactive way to bring justice to women victims of honour killings. In a case titled *Ghulam Yasin vs. The State*⁴⁴⁸, Justice Khalil-ur-Rahman Ramday upheld the

⁴⁴⁴ Kathleen, "Gender Bias", *supra* note 441 at 87.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Shahla Zia, *supra* note 15 at 72.

⁴⁴⁷ Kathleen, "Gender Bias", *supra* note 441 at 88.

⁴⁴⁸ *Ghulam Yasin vs. The State*, PLD 1994 Lahore 392. Three accused were charged with the murder of a man they suspected of having illicit relations with Mst. Bakho, the sister and niece of the accused. They were sentenced to 25 years of rigorous imprisonment under s. 302 (b) (c) PPC by trial courts. But the sentence was changed to 5 years of imprisonment relying on the account that murder committed under ghairat (honour) should not be considered the same as cold blooded murder and that pure and simple people deserved concessions.

plea of honour killing holding that “although in existing laws there is no concession for momentary insanity but those implicated in ‘honour’ killings are worthy of some concession since ‘honour’ killings cannot be considered the same as a murder in cold blood.”

3.3.1.1 Conservative Judiciary

How far may judges set aside their personal bias and opinions when they are rendering justice?⁴⁴⁹ Justice is dispensed in the light of popular cultural values⁴⁵⁰, traditions and codes of morality in the country.⁴⁵¹ Every judge in a courtroom is not only equipped with legal texts, “but with a set of values, experiences and assumptions that are thoroughly embedded.”⁴⁵²

Judges do not act in vacuum; cultural norms and religious rules have a potent force, besides societal norms and political pressure that influence judicial decisions.⁴⁵³ Under these pressures it is sometimes possible for the judges to make extremely illogical decisions infringing human rights. For example, the case of invalidating the marriage of a woman without her guardian’s (wali’s) consent declaring the marriage illegal.⁴⁵⁴

In the case of a woman named Shabina, who married without seeking her father’s consent⁴⁵⁵, Justice Cheema of the Lahore High Court held that an adult Muslim woman cannot marry without the permission of a guardian (wali). This issue of an adult Muslim woman’s right to choose and marry without her guardian’s (wali’s) consent was later

⁴⁴⁹ Shahla Zia, *supra* note 15 at 65.

⁴⁵⁰ Saima Jasam, “Violence in the name of honour”, *supra* note 64 at 30.

⁴⁵¹ Shahla Zia, *supra* note 15 at 91; *Mohd. Khalid Jamshed vs. Malik Godha*, PLD 1996 Lahore 462.

⁴⁵² Cited in Kathleen, “Gender Bias”, *supra* note 441 at 92.

⁴⁵³ Shaheen Sardar Ali, “Using Law for Women in Pakistan” in Ann Stewart and Mike McConville, eds., *Gender Law and Social Justice: International Perspectives* (London: Blackstone Press, 2000) 139 at 144.

⁴⁵⁴ *Ayesha Ijaz vs. Station House Officer*, 1997 MLD 641; Another unreported judgement but reported in one of the newspapers in Pakistan in which, Justice Cheema held the marriage of a Muslim woman, Shabina, illegal under Muslim law because she did not get her father’s consent for her marriage. This was a complete violation of Article 25 of equality of law for both the genders. Men are allowed to marry without any consent of their parents but women cannot marry without Wali’s consent. Durab, “Testament of Liberal” *supra* note 292 at 204.

⁴⁵⁵ *Ibid.*

dealt with in detail in the case of Samia Waheed.⁴⁵⁶ Declaring a woman's marriage illegal without the consent of a guardian (wali) invokes the provision of the Zina Ordinance where a woman may be accused of having an unlawful sexual relationship, though she might be rightfully married. The marriage was declared not legal and valid subjecting it to the approval by the guardian (wali) of the girl. A woman's right to marry is effectively denied by judges upholding patriarchy.

This issue of whether an adult Muslim woman is sui juris⁴⁵⁷, as discussed in Saima Waheed's case⁴⁵⁸, shows the bias of the judiciary in the presence of the statutory law granting the right to woman to choose her husband. In the judgement, the law has been discussed very briefly but the judges have taken the conservative approach; allowing a woman to choose her husband yet condemning this practice according to the social and cultural norms in the society.

In Saima Waheed's case Justice Khalil-ur-Rahman Ramday used the phrase 'husband shopping' to express his personal attitude towards choosing a matrimonial partner by a woman. He held that 'The elders of the family should be an important part of the process of selection of a spouse'. There is a judgemental bias evident in court decisions⁴⁵⁹ where the court is dealing with those women who have not conformed to the traditional gendered roles set up by the society. Justice Ihasan-ul-Haq Chaudhury who dissented from the majority opinion in the decision, had a more restrictive view. He stated that children were bound to obey their parents and that such obedience should be enforced through the court. He said that it was the duty of the parents to marry their children especially girls. A woman's right to choose her husband is effectively being denied. Judgement was delivered that an adult Muslim woman has the right to marry even

⁴⁵⁶ *Hafiz Abdul Waheed vs. Asma Jahangir*, PLD 2004 SC 219 (Full Bench).

⁴⁵⁷ Latin word, meaning: of his own right; possessing full social and civil rights; not under any legal disability, or the power of another, or guardianship. Having capacity to manage one's own affairs not under legal disability to act for one's self. *Black's Law Dictionary; with Pronunciation*, 5th ed., s.v. "sui juris".

⁴⁵⁸ Brief view of issues discussed in case are following. Samia Waheed married Muhammad Arshad without her family's consent. The issues raised in the case were of morality of women and their free will in choosing a husband and how much liberty a woman should be allowed in 'Islamic' society.

⁴⁵⁹ Nausheen Ahmad, "The Superior Judiciary: Implementation of Law and Impact on Women" in Farida Shaheed, Sohail Akbar Warraich, Cassandra Balchin, Aisha Gazdar eds., *Shaping Women's Live; Laws, Practices and Strategies in Pakistan* (Lahore: Shirkat Gah, 1998) at 24.

without her guardian's (wali's) consent. However, the tenor of the judgement shows that the court was deeply disturbed by the issue and while making a decision, wanted to keep well within what the court perceived were the injunctions of Islam.

The love marriage of a woman is not considered respectable, rather not acceptable in Pakistani society. Emphasising the cultural values and tradition, in one case the judge held that a love marriage was not accepted in our culture and code of morality. He said that "marriages contracted as result of love bring hatred and shame to the parents".⁴⁶⁰ Such cultural norms are shared by men and women alike but when it comes to the rights of a woman, the judiciary tends to apply customary laws instead of Islamic law.⁴⁶¹

3.3.1.2 Bias evident in Judicial Decisions

Neutrality of judges is expected and required to achieve the goal of equality of all citizens before and under the law of Pakistan receiving equal protection and benefits.⁴⁶² If judges are biased, the whole judicial system fails in "its primary societal responsibility to deliver justice impartially", which makes the judicial administration "suffer as a whole".⁴⁶³ In the cases of honour killings, this bias is evident from the manner in which they perceive and interpret women's behaviour according to cultural norms, instead of considering them equal citizens to men. The issue of honour (ghairat) is perceived no different by some judges as by a jirga. The sympathies of both are lying with the perpetrator rather than the victim murdered under the allegation of adultery, without the accused having a chance to prove her innocence.

Personal opinions of judges become evident in their divergent decisions on the laws applicable to every citizen equally. It is not only the opinions, as Justice Scrutton

⁴⁶⁰ *Mohd. Khalid Jamshed vs. Malik Godha*, PLD 1996 Lahore 462.

⁴⁶¹ *The Shah Bano Case*. Bruce, "Shattering the Myth", *supra* note 20 at 133.

⁴⁶² Kathleen, "Gender Bias", *supra* note 441 at 85; In Pakistan, research was conducted by Shahla Zia in 1998 like the research conducted by Manitoba Association of Women and the Law on gender bias in the Courts. This study highlights how in a large number of cases, judges of Pakistan have given judgement comprising on their biased opinions about women's behaviour based on the cultural norms of the society rather without the presence of any pertinent evidence.

⁴⁶³ *Ibid.* Kathleen, "Gender Bias" at 96.

commented but "... the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish."⁴⁶⁴

In the presence of these cultural norms and social opinions, judges have been biased in cases where the character of woman comes under question. In a case of murder of a woman by his husband, the judge considered her to be of suspicious character. He based his findings not on any evidence, proof but on the assumption that she used to dress up in a modern way that could amount to be of bad character, and therefore justified her husband's act of killing her.⁴⁶⁵ Gender bias as found in criminal law is evident by a plea raised as mitigation of circumstances which allows punishment of male violence "to be partially or sometimes totally excused through "blame the victim ideology".⁴⁶⁶ This is not only discriminatory against women's freedom, but also considering the violence inflicted on them justified (as if it was because of her fault). In this case too, the judge did not require any proof or evidence of whether the woman committed adultery. To him her dress code was objectionable according to the social norms and judge's opinion, and hence was a proof of her being adulterous.

In the case of an honour killing titled *Ghulam Mustafa and another vs. The State*, the bias of the judiciary against women's right to marry the husband of her choice is evident by the words used in the judgement. In this case, a woman who married for the second time was murdered by her son.⁴⁶⁷ The courts accepted the plea of grave and sudden provocation, justifying the anger of a son on seeing his mother with her second husband and reduced the sentence to five years. But most importantly, the cultural notion about a woman's right to marry is explicit in the judgement using the word of "lover" for her second husband. The judge gave the reason that "it was quite natural for him [son] to be furious, lose control and kill his mother's 'lover'".⁴⁶⁸

⁴⁶⁴ Cited in *ibid.* at 92.

⁴⁶⁵ Samia Jasam, "Violence in name of honour", *supra* note 64 at 51.

⁴⁶⁶ Kathleen, "Gender Bias", *supra* note 441 at 95.

⁴⁶⁷ *Ghulam Mustafa and another vs. The State*, 1983 P Cr.L.J. 1712

⁴⁶⁸ Shahla Zia, *supra* note 15 at 66-67 [emphasis added].

3.3.1.3 Using Grave and Sudden Provocation

Judicial injustice is evident in cases where judges have discriminated against women upholding repealed law of grave and sudden provocation and maintaining traditional norms. The concept of grave and sudden provocation in criminology is quite old⁴⁶⁹. It has been used conveniently and invariably in abusing human rights and especially those in the cases of honour killing against women. The amendment to the criminal law vide Qisas and Diyat Ordinance caused great consternation amongst the superior judiciary, who used the law of grave and sudden provocation under the new provisions.⁴⁷⁰ The superior courts of the country kept on applying the principle of grave and sudden provocation in all cases where the accused had raised the plea of murder due to "Ghairat" (honour). The Supreme Court adjudicated upon a 1996 case under the plea of grave and sudden provocation and justified this repealed law by referring to its old presence in the sub-continent. It was observed that, in a way, this plea was reasonable and pertinent enough to give lesser punishment to murderer of a woman.⁴⁷¹

In some cases the offender is given a lenient punishment because being a relative of the victim (woman) he became provoked because of the relationship between them. But, in some cases it is not even considered necessary to have a relationship with the victim. It is made a moral right of every man in the Pakistani society to kill any woman if he suspects her of an illicit relationship or finds her with any other man than her blood relations.⁴⁷²

⁴⁶⁹ Elliott, "Passion and Insurrection", *supra* note 117 at 153. "Reported cases of sexual provocation are sparse until well into the 19th century, when courts elaborated Chief Justice Holt's blunt statement of the law. Originally, sexual provocation appears to have been limited to the killing of rival males. No reported case before the early 19th century concedes the possibility that provocation might provide a partial excuse to a husband who killed his wife. The first cases do so in the court of denying a defence of provocation to men who killed on mere suspicion of adultery. ... The killing had to an immediate response to catching the adulterers in the act. There was an absolute requirement of "ocular inspection", as it was called - a distant echo or Othello's demand for proof against Desdemona. ... Research on criminal litigation of the period has uncovered no recorded instance of a husband prosecuted for killing rival or wife on discovery of adultery".

⁴⁷⁰ Shahla Zia, *supra* note 15 at 66.

⁴⁷¹ *Abdul Haque vs. The State & another*, 1996 SCMR 1566 (Full Bench).

⁴⁷² *Mohd. Rafique and others vs. The State*, PLD 1993 Lahore 848. In this case, the High Court extended the application of the plea of grave and sudden provocation to everyone, stating: "Consequently, when a man who is otherwise stranger to women, sees her in the arms of another loses control over the situation would

This inconsistency in the judicial decisions indicates that some judges arbitrarily determine the women's fate rather than following the law and its equal application to all.⁴⁷³

Judges may often consider age, tribal affiliation, and the illiteracy of the offender as mitigating circumstances in honour killings cases. In some cases, judges have considered the young age of the murderer as the plea of provocation and loss of self control as mitigating factor. In other cases grave and sudden provocation has been established by the evidence of the number of injuries found on the body (showing sudden provocation). Tender age, illiteracy and avoiding making the offender a hardened criminal was made the basis to lessen the punishment⁴⁷⁴. In some honour killing cases, the plea of suddenness has been so much stretched that even where the offender had ample time to reflect on his actions, he was entitled leniency in punishment under grave and sudden provocation.⁴⁷⁵ In one of the cases, the court observed that "there was no way to measure the degree of provocation and how long it continued".⁴⁷⁶

In the case titled *Mohd. Yaqub alias Ayyub vs. The State*⁴⁷⁷, a brother killed a man and then tried to kill his sister on the suspicion that they were coming out of sugarcane fields from different sides. His punishment of murder under Section 302 P.P.C. was reduced to five years. Since the High Court considered the circumstances sufficient enough to raise a genuine suspicion in his mind, it was a case of grave and sudden provocation. It was also stated by one of the judges that "no hard and fast rules could be laid down and that the

be entitled to get benefit of this exception in a particular society where social norms are observed strictly everywhere with no exception."; Shahla Zia, *supra* note 15 at 67.

⁴⁷³ Amnesty "Protection of Women", *supra* note 15 at 48.

⁴⁷⁴ *Mohammad Ayub vs. The State*, 1997 PCr. L. J. 2056 Lahore. High court reduced the sentence of a husband to five years for killing his wife out of 'ghairat'. The Court observed that the accused was an uneducated young man belonging to a tribe and where no loose conduct of a female was tolerated and family honour was jealously guarded; that he was also of an age group (19/20) where tolerance was non-existent and rashness was not the order of the day irrespective of ensuring consequences, and that if he remain in jail a long time he was likely to come out as a hardened criminal, which was not desirable. Shahla Zia, *supra* note 15 at 67.

⁴⁷⁵ *Mohd. Yaqub alias Ayyub vs. The State*, PLD 1965 SC 366, court allowed leniency in sentence under the exception of grave and sudden provocation, where a man, who went looking for his sister on the suspicion that she was meeting a man, subsequently killed her was then entitled to the grave and sudden provocation exception. Yasmeen Hassan, "Honor Killings", *supra* note 8 at 600.

⁴⁷⁶ *Akbar vs. The State*, 1997 P.Cr.L.J. 1887; Shahla Zia, *supra* note 15 at 67.

⁴⁷⁷ *Mohd. Yaqub alias Ayyub vs. The State*, PLD 1984 Lahore 358.

age, environment, occupation and individual character had to be kept in mind while determining the matter.”⁴⁷⁸

In a few cases of honour killings and murders (under grave and sudden provocation) judges have relied on the evidence of the number of injuries inflicted upon the deceased.⁴⁷⁹ Whereas in other cases, fewer injuries have been taken to be indicative of the lack of intention of the murderer killing the woman.⁴⁸⁰ Like in case titled *Fatal Din vs. The State*⁴⁸¹ the murderer found the deceased in a compromising position with his sister and killed him. The plea of grave and sudden provocation was based upon the number of stab wounds on the body. The court held that “numbers of injuries showed that the same were caused in a fit of frenzy and had it been merely suspicion, he would have avenged the family honour with just a few blows”. At the same time, single injury was seen as showing lack of premeditation of murder or no intention to kill.⁴⁸² Retired Justice Nasir-ul-Mulk says that “honour killings are premeditated murder and that the law relating to murders did not allow a court taking into account attenuating circumstances.”⁴⁸³

In case titled *Abdul Nabi vs. The State*, the judge held that though the provision of grave and sudden provocation had been amended by Qisas and Diyat Ordinance, “this does not mean that now zina related plea of grave and sudden provocation cannot be raised at all and if established cannot serve as mitigating circumstance for awarding lesser punishment.” The judge said that to prove such a plea the offender had to provide evidence that the victims were committing zina. “If the plea is established through such evidence it will serve as a mitigating circumstance for awarding lesser punishment under clause (c) of Section 302 P.P.C.”⁴⁸⁴

⁴⁷⁸ Shahla Zia, *supra* note 15 at 67 [emphasis added].

⁴⁷⁹ Shahla Zia, *supra* note 15.

⁴⁸⁰ *Ibid.*

⁴⁸¹ *Fatal Din vs. The State*, 1983 P.Cr.L.J. 692.

⁴⁸² Shahla Zia, *supra* note 15 at 70.

⁴⁸³ Amnesty “Protection of Women”, *supra* note 15 at 48.

⁴⁸⁴ *Abdul Nabi vs. The State*, 1997 SD 115; Rashida Patel, “Woman versus Man” *supra* note 24 at 169-170.

3.3.1.4 Discrimination against Women

Justice without gender discrimination is a fundamental right of every citizen, yet judges, as part of patriarchal establishment, are prejudiced to women in cases of honour killing by the cultural and social norms of the Pakistani society. Hina Jilani, a human rights activist and lawyer in Pakistan, comments that the institutions of justice in Pakistan are patriarchal and “they interpret laws to maintain the status quo. Whenever women break control, the institutions of justice uphold traditional values rather than their rights.”⁴⁸⁵ It is difficult for judges to hold their personal opinions in making decision, particularly in the cases of honour killing. They are also part of the patriarchal society and their sympathies are with the murderer in justifying the action of the man killing a woman to protect his honour and acting as a man who possess honour (ghairatmand).⁴⁸⁶

In case of honour killing where a woman is alleged to have committed adultery, her sexual history is often scrutinized in determining whether the judicial system believes the victim or the perpetrator.⁴⁸⁷ But the proof required for adultery is not looked upon which is mandatory for conviction. In the absence of any proof or in case based on woman’s conduct or prior history, it is not justified according to law to kill that woman. A woman’s conduct, however immoral opposed to social norms, does not justify or “mitigates what is basically murder”.⁴⁸⁸ In murder case of a woman (alleged of adultery) evidence is not given much significance by judges especially where woman’s character is involved. Mere suspicion gives men the right to kill women and provides justification for judges to base the cultural values to deliver justice in such cases.

Death sentences of the murderers, in the cases of honour killing, are reduced to five years imprisonment considering that murder for honour (ghairat) as not a cold blooded act;

⁴⁸⁵ Hina Jilani, “Law as an instrument of social control” in Nighat S. Khan, Rubina Saigol, Afiya S. Zia, eds., *A Celebration of Women; Essays and Abstracts from the women’s studies conference March’94* (Lahore: ASR Publications, 1995) at 166.

⁴⁸⁶ *Ameer Bux vs. The State*, 2000 YLR 867 [*Ameer Bux’s case*].

⁴⁸⁷ Alice Bettencourt, “Violence Against Women”, *supra* note 124 at 14.

⁴⁸⁸ Shahla Zia, *supra* note 15 at 72.

hence upholding the customary values and societal values rather than law.⁴⁸⁹ It shows that personal values of judges and their attitudes towards women “can affect fact-finding and the exercise of judicial discretions in addition to judicial law-making.”⁴⁹⁰

3.3.2 Use of Islamic law by Judges

A woman accused of zina is considered by the judges and the society deserving the punishment of adultery. In a case titled *Ameer Bux vs. The State*⁴⁹¹, the judge justified the murder of a wife by her husband who had committed adultery. The judge cited Section 76 of P.P.C.⁴⁹², which protects a person who committed an offence by reason of a mistake of fact and in good faith believed to be bound by law to do it. The judge based his contention using religion to state that “A Muslim on seeing a person committing zina with a woman and that too of his own house, under Islamic law is justified to do away with both.” This interpretation of Section 75 P.P.C. and Islamic law is repugnant and contrary to the provisions codified in Hudood Ordinances. The provision, under Islamic law in a case where a husband convicts his wife of adultery is referred to as Li’an.⁴⁹³ “The need for clear proof was required by Prophet when one man convicted his wife of adultery. And when he could not produce it he went for the punishment of Li’an.”⁴⁹⁴

Islam does not authorize to kill any woman or man on the allegation of zina. If there is an allegation, it has to be proved according to the evidence (required under Islamic law) to implement the punishment of zina. In an appeal case to the Shariat Appellate Bench (Islamic court) the judges held that, the murder by the husband (or, by inference, by a near relative, as in the instant case) “will attract a punishment lesser than Qisas only if

⁴⁸⁹ *Ibid.* at 66.

⁴⁹⁰ Kathleen, “Gender Bias”, *supra* note 441 at 97.

⁴⁹¹ *Ameer Bux’s case*, *supra* note 485.

⁴⁹² s. 76 of PPC “Act done by a person bound, or by mistake of fact believing himself bound, by law. – Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not reason of a mistake of law in good faith believes himself to be, bound by law to do it” [emphasis added].

⁴⁹³ Under s. 14 of *The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979*, if a husband alleges his wife of adultery, the provision of Li’an is invoked.

⁴⁹⁴ Nicholas “Women in Islam”, *supra* note 37.

proof of commission of such zina exists which satisfies the required standard of evidence prescribed under Islamic injunctions.”⁴⁹⁵

Mere allegation is considered sufficient for the courts to convict someone of an illicit relationship without requiring evidence.⁴⁹⁶ This is the same as in case of customary law in the jirga system where there is no difference in the allegation whether proved or not. The cases decided on mere allegation by the husband to kill his wife without any proof or fulfilment of the evidence required, is contrary to the Islamic law of Li'an. Under Section 14 of The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979, if a husband accuses his wife of adultery, the provision of Li'an is invoked rather than given the right to kill her at his whim. Where a husband makes an allegation of adultery against his wife, both parties are offered the opportunity of going through a procedure known as Li'an. According to Section 14⁴⁹⁷ of the Offence of Qazf (Enforcement of Hadd) Ordinance of 1979, Li'an procedure will always lead to a divorce. Li'an could therefore be taken as a form of divorce. The moment the provision of Li'an is invoked, the couple is divorced. It is not possible that the husband can retrieve his allegation about his wife. When case is decided under the law of Li'an, it does not amount to convict the woman of adultery at any cost under Section 10 of Zina Ordinance which discusses the punishment of zina as Taz'ir (punishment other than Qisas) because there is no evidence provided to the fulfilment under Section 10 of the Zina Ordinance.⁴⁹⁸

Justice Fakharun Nisa Khokhar of the Lahore High Court in March 2000 clarified the legal position relating to adultery: that whenever an accusation of adultery is made the courts must put the accusation to the strict proof of testimony of four male Muslims and if evidence is not available, then Li'an should be applied. Further, she found that the family court had the inherent power to dissolve a marriage where an allegation of adultery was

⁴⁹⁵ 1992 PSC Cr. 498; Rashida Patel, "Woman versus Man", *supra* note 24 at 170.

⁴⁹⁶ *Mohd. Sharif vs. The State*, PLD 1987 Lahore 312.

⁴⁹⁷ s. 14 states that if a husband accuses his wife of Zina before a Court and the wife does not accept the accusation as true, the procedure of Li'an should apply. This consists of oath taking, the husband accusing his wife of adultery and the wife denying the allegation after which the Court passes an order dissolving the marriage.

⁴⁹⁸ *Nek Bakhat v. The Sate*, PLD 1986 FSC 174.

made without strong evidence and that it could penalise the husband for damaging his wife's reputation.⁴⁹⁹

3.3.3 Liberal Activism

Judges may exercise their discretionary powers in order to uphold and protect women's rights. Judge-made law can play an important role in controlling inhuman social traditions. In a registered case of triple murder titled *Muhammad Siddique vs. The State*⁵⁰⁰, the judge condemned the tradition of honour killing and upheld the punishment of the perpetrator under section 302 P.P.C. (punishment for the offence of murder). This case is a good precedent for other judges to consider when deciding cases of honour killing. Muhammad Siddique was convicted for the murder of his daughter Salma (who married without his consent), her husband Muhammad Saleem and their six months old baby girl, Saba. Salma married Muhammad Aslam against her family wishes and after the marriage, her father and brother filed a case under the Zina Ordinance. After two years of marriage, the father sent an invitation to his daughter for reconciliation and invited the whole family to his house. Salma, her young daughter and her husband Muhammad Saleem along with his father and brother (who are witnesses to the murders) went to this meeting. When they reached Muhammad Siddique's house, he killed Salma, her husband and her daughter, all three of them with his shot gun. A case was filed in the High Court by Saleem's family and an application was moved by legal heirs of girl to compound the murder. It was discussed that when and how a court may use its discretion in cases where an offence has been waived or compounded under Sections 338-E P.P.C.⁵⁰¹ and 345 Cr.P.C.⁵⁰²

The judge held that under section 338-E P.P.C., where an offence has been waived or compounded by the legal heirs of the victim, the Court may use its discretion to acquit or award punishment of Taz'ir (punishment other than Qisas) to the offender according to

⁴⁹⁹ Amnesty "Protection of Women", *supra* note 15 at 50.

⁵⁰⁰ *Muhammad Siddique v. The State*, PLD 2002 Lahore 444.

⁵⁰¹ Discussed above in chapter 2 while discussing compounding of the offence of murder under Qisas and Diyat law.

⁵⁰² *Ibid.*

the nature of the offence. He said that according to Sharia (Islamic law) in case where Qisas was not available, the courts could award appropriate punishment to the offender keeping in view the circumstances of the case. This punishment may reach up to life imprisonment or death by way of Tazir.

To emphasize on the discretionary powers invested in the court under section 338-E of P.P.C. and section 345 Cr.P.C., the judge explained that under both sections leave to the Court was necessary. If an offence has been waived or compounded, the court has the discretion to acquit or award Taz'ir to the offender keeping in view of the "circumstances" of the case. While discussing the parameters of this discretionary power vested in the court vide section 338-E P.P.C., the judge emphasized three important issues: first, what are the "circumstances" under this section to be considered and why an accused despite compromise could still be convicted, second, what is the concept of crime and punishment which may emanate from this provision of (section 338-E) law, and third, can the law be a social catalyst for change?

To discuss what are the "circumstances" under section 338-E P.P.C. which may justify conviction of accused under Taz'ir, despite of compromise, the judge discussed different kinds of criminal acts as pertaining to their effects. These acts may include heinous crimes depending on number of people who are physically harmed or killed; acts which are symbolic of a certain bias or prejudice against a particular segment of society, criminal acts which are committed as a reaction to the exercise of a fundamental right by the victim, and lastly, those acts which have the effect of striking at the fundamentals of a civil society. In any of these examples, it is the responsibility of the court to draw the distinction between offences which are serious and have more grave social ramifications and other offences which are less serious and possibly reflect some kind of personal vendetta. In light of the circumstances of this case (where the accused pre-planned the murder and there only reason for committing this murder was that the victim i.e., Salma married someone of her choice which is her Islamic and legal right) the judge used his discretionary power under Section 338-E P.P.C. and upheld that the murder cannot be compounded.

During the examination of the case, the court also noted that this kind of criminal act was not one of its kind but is the result of a culture which leads to violence against women especially when they married a man of their own choice. This violent behaviour is sanctified in the name of “family honour” which is an outcome of a societal gender bias. The judge said that the mentality behind this culture was to deprive women of their equal rights i.e., *inter alia* the right to marry or the right to divorce which are recognized by the religions and protected by the law. These honour killings are violative of the law and of the religious tenets.

The judge said law was a dynamic process. This makes it a catalyst for social change, including the judge-made law, to eliminate these inhuman traditions. The increasing number of these murders in the name of honour reflects the inaction of society and complicity with the crime. A justice system of crime and punishment, bereft of its purposive and deterrent elements loses its worth and credibility both. In these circumstances the accused does not deserve a compromise leading to acquittal.

It is a landmark judgement in which the judge did not make a decision considering the cultural norms of society. The judge used his right of discretion to condemn this crime of honour killing and upheld that there is no honour associated with this crime. The judicial decision in this case serves as a deterrent so that such notions of honour killings can effectively be punished and kept in check. There is a dire need for judicial activism to curb this crime and to punish the perpetrators without any delay, because “delay in justice is as much injustice as violation of justice”.⁵⁰³

In another case of honour killing where a man killed his wife with the help of his brother, the judge maintained that these murders of honour killings had never been held legal under the legal system prior to and after promulgation of Islamic laws in Pakistan. Further elaborating on the Islamic procedure of Li’an provided in Offences of Qazf under Hudood Ordinances the judge said that Islam does not allow husbands to kill their wives

⁵⁰³ Khalid Rahman, Muhibul Haq Sahibzada & Mushfiq Ahmed, eds., *Jama’at-e-Islami and National and International Politics* (Lahore: Book Traders, 1999) at 114.

under the Offence of Zina, the punishment is only awarded by the Court and not by individuals.⁵⁰⁴

3.4 Conclusion

The increasing number evidences to the state's failure in controlling honour killings. The state has been unable to ensure that justice is administered fairly and equally ensuring protection of women and their fundamental rights.⁵⁰⁵ Such a state obligation to administer justice equally and fairly is further compromised by the inadequate judicial system in Pakistan. There is a dire need for a radical reformation of judicial administration.

The police are the first state agent to be approached in honour killings cases. The police play a vital role in the initiation of the reporting of honour killing cases and they should perform their duty with diligence and care. Police inability amounts to lack of judicial redress in honour killings cases. The police have to play a proactive role in controlling honour killings and the subsequent administration of justice. They should take violence against women as a criminal offence rather than considering it a family matter.

The state is under an obligation to provide equal protection to all its citizens under its own constitutional and international law. It is also discussed in the report of the Special Rapporteur on violence against women, the "State is under a positive duty to prevent, investigate and punish crimes associated with violence against women".⁵⁰⁶ The Special Rapporteur says that nation states have obligations under international law to investigate the violence against women crimes with due diligence which not only limited to legislation but includes a training of state personnel. Under article 4 of Declaration on the Violence Against Women lays down a series of judicial, legislative and administrative, educational and other steps that a state should take to end violence against women. There should be mandatory training sessions especially for police to handle cases of honour killings emphasizing that women are equal citizens attaining the same attention and

⁵⁰⁴ *Sohrab vs. The State*, PLD 1994 Karachi 431.

⁵⁰⁵ Amnesty "Violence Against Women", *supra* note 15 at 43.

⁵⁰⁶ Cited in *ibid.* at 39.

protection by police as men. They should be trained to understand the sensitivity and nature of the threat of the honour killings and to act efficiently and legitimately to arrest the culprits.

“Asma Jahangir, a human rights activist in Pakistan and a U.N. Special Rapporteur on Extrajudicial, Arbitrary, and Summary Executions addressed the crime of honour killings in her report that “... certain traditional practices which, when condoned or ignored by the authorities, may constitute violation the right to life” which makes the state responsible under its national and international obligations. Further in her report she states that the police fail to intervene in honour killings and the judiciary often view the defence of the family honour as a mitigation of circumstance where a woman has been killed.⁵⁰⁷

Judges interpret and make law. They have an important role to play in judicial redress of victims of honour killings. They should perform their duty without any bias against women. They need to expedite honour killings cases to deter this crime rather than upholding customary norms and social attitudes. They should not use their discretionary powers to invoke the repealed law of grave and sudden provocation to give a lenient punishment to the offender.

Judges should play the role of an activist to mend the social evils. Again referring back to Samia’s case, (who was murdered by her family for seeking divorce from her violent husband) the circumstances were not of grave and sudden provocation. Under Section 338-E of the P.P.C. the judge could have punished the offender with life imprisonment as Taz’ir. Also under Section 311 of the P.P.C. the judge could punish the offender with imprisonment as Taz’ir but he overlooked the circumstances of the case. In Samia’s case the motive for murder was clearly to uphold tribal tradition, whereas amongst the parties; there isn’t any lack of evidence in the mala fides of the victim’s legal heirs to compound the offence. Under Section 338-E of PPC a court has the power to acquit or award Tazir to the offender according to the nature of the offence. The murder was committed

⁵⁰⁷ *Ibid.* at 41.

upholding the traditions⁵⁰⁸ but judges did not consider that law should be used to uphold justice and to condemn inhuman traditional norms.

It is important to have a fair and impartial judicial system in which judges receive gender-sensitive training to effectively rule on cases related to women's abuse and honour killings. There should be training of judges to understand the culture of violence which is propagated against women and to make them better equipped to handle the sensitive cases of honour killings, with special attention to vital details.⁵⁰⁹ Joint seminar sessions of NGOs and the judicial administration should be arranged to understand and discuss the on-going violence perpetrated on women and to help bring the justice for the victims of honour killings.

Judicial gender-sensitivity in the cases of honour killing is of extreme importance, because uncertainties of judicial interpretation are inescapable in any system of law. This problem arises when the judiciary applies a law otherwise than in accordance with the intention of its drafters. In that perspective legislators can amend the law to make it unambiguous; to leave no room for personal interpretation of law rather than legal jurisprudence.⁵¹⁰

⁵⁰⁸ *Ibid.* at 22-23.

⁵⁰⁹ For example one case decided by Justice Tasadaq Hussain Jilani, discussed *supra* under the sub-heading of 'Liberal Activism', where he did not accept the pleas of pardon as gained not by free will but pressure by the family of the murderer.

⁵¹⁰ Aileen McColgan, *Women under the law: the false Promise of Human Rights* (Essex, UK: Longman, 2000) at 25 [Aileen, "Women under Law"].

Conclusion: A Way Forward

Honour killings in Pakistan have a longstanding cultural background of upholding patriarchal norms. This cultural practice evolved with the passage of time regressing women's rights, security and dignity. This cultural tradition, upheld by those who do not want to give women equal rights, is now used as a tool to control women and as a justification for violence inflicted on them. They keep women subordinate violating their legal and religious, Islamic in the case of Muslim women, rights. Islam condemns honour killing and has protected women against any allegation of adultery with a strict requirement of witnesses.

In the presence of Islamic laws and Constitutional protections envisaged equally on all citizens of Pakistan, the State has been unable to protect women from this violence and to control this crime. Some criminal law provisions, used in the cases of honour killing, protect the perpetrator from being punished for murder and provide a lenient sentence. In maladministration of justice, police often connive with the perpetrator. Judges are often biased against women in the cases of honour killing. There is a need for social and cultural reconstruction of the status of women and for reformulating the law to provide and protect the rights of women. There is a need for proper judicial administration to have justice in the cases of honour killings and to control and eliminate violence against women.

Honour killings in Pakistan are increasing because of lack of judicial redress, and weak administration and legislative measures. Samia Sarwar's murder has been discussed and analysed as a generic example of the cases which get reported under formal legal system. Samia's murder is a stark example of the justice available to victims of honour killings in Pakistan. Customary norms hold sway over the constitutional rights available to every citizen of Pakistan.

A multi-pronged strategy should be adopted considering the issues related to honour killing to eradicate the crime. Laws and an amalgam of cultural norms and economic conditions determine women's rights and status in Pakistan.⁵¹¹ There is a need for social reformation and implementation of policies within and outside the criminal justice system to respond to the problem of honour killings. Under the name of pseudo-religiosity, women are allotted specific sex roles subservient to male members of their family, relegating women's status to a lower level than men's. People should be made aware of women's rights under Islamic teachings, especially the equality and respect.⁵¹² Gender bias in administration of justice and certain traditions conflicting with the rights of women should be done away with.⁵¹³

- *Legal Reformation and its Effective Enforcement*

Legal reforms should be made to target honour killings. An offender should not get relief under the Qisas and Diyat law. Compounding of murder makes it easier for the perpetrator to get away with the crime mostly committed at the instigation or with the connivance of legal heirs of the victims. It is important to remove the crime from the list of offences compoundable under criminal law of Pakistan.

The Criminal Act 2004, (the bill on honour killings passed by National Assembly in 2004 to eliminate violence on women in the name of honour) does not fulfil its purpose. NGOs and human rights activists failed to have the provision of compoundability of honour killings removed because of strong opposition from political parties. The law does not address waiver or compounding of the offence which benefits a perpetrator in seeking forgiveness from legal heirs of the victim, mostly their close relatives. In Samia's case her family was party to her murder but was pardoned by her legal heirs. In Qisas and Diyat laws being applicable in cases of honour killing, murderers will often be able to escape

⁵¹¹ Shaheen Ali, "Equal Before Allah", *supra* note 44 at 89.

⁵¹² For detailed discussion of women's rights in Islam and interpretation of Quranic verses, see Hibri, "Islam, Law and Custom", *supra* note 150 at 404-405.

⁵¹³ Gudmundur Alfredsson & Katarina Tomaševski, *A Thematic Guide to Documents on the Human Rights of Women: Global and Regional Standards Adopted by Intergovernmental Organizations, International Non-Governmental Organizations and Professional Associations* (The Hague: Kluwer Law International, 1995) at 24 [Guide to Human Rights of Women].

punishment. Failure in address the issue of compundablity will mean the law can bring little change in women's murder tally.⁵¹⁴

Any laws discriminating against women should be repealed and amended. Laws restricting the liberties and freedoms of women must not be put in place in any part of the country.⁵¹⁵ Laws in tribal areas discriminate against women and are in conflict with the constitutional protections of equality and impartiality provided to all the citizens. Frontier Crimes Regulations 1901 is not only a bad set of laws⁵¹⁶ but also categorizes the citizens of Pakistan under their territorial jurisdiction. Laws restricting the liberties of women must not be introduced in any part of the country.⁵¹⁷ In tribal areas, customary laws override the rights of women protected under religious and national laws. Customary laws need to be replaced by more just laws and the tribal areas need to be brought into the mainstream of national life.⁵¹⁸

Presence of parallel judicial system in Pakistan has harmed women and helped victimize them in the name of honour. A law should ban informal judicial forums of jirga, a major source of abusing women's rights, for setting up one judicial system in Pakistan. A Sindh High Court judgement ordering abolishing of jirgas is yet to be honoured. In fact, after the promulgation of the law on honour killing in October 2004, Sindh Assembly received a proposal to legalise the jirga system.⁵¹⁹ The draft law proposed by the Sindh Government in October 2004 to legitimize the jirgas and their decisions, had no provision for appeal.⁵²⁰ The proposal should be withdrawn immediately because jirgas are the facilitators of honour killings and they act against the constitutional law and Islamic provisions.

⁵¹⁴ *State of Human Rights in 2004* (Lahore: HRCP, 2005) at 190 [HRCP report 2004].

⁵¹⁵ *Ibid.*

⁵¹⁶ *Ibid.* at 60.

⁵¹⁷ *Ibid.* at 190.

⁵¹⁸ Shaheen Sardar Ali, "Are Women Also Human? Women's Rights and Human Rights in Tribal Areas: A Case Study of the Provincially Administered Tribal Areas of Pakistan" in Nighat Said Khan, Rubina Saigol, Afiya Shehrbano Zia, eds., *A Celebration of Women; Essays and abstracts from the Women's studies conference March;94* (Lahore: ASR Publications, 1995) 195 at 196.

⁵¹⁹ Seeking justice for Women, *Dawn*, 8th March, at 7.

⁵²⁰ HRCP report 2004, *supra* note 513 at 171.

The Government of Pakistan should be pressured to adopt a single uniform court system by eliminating the jirga system. Judiciary should make efforts to reinforce its role as an independent custodian of the peoples' basic right. The parallel judicial system has lowered public confidence in the judicial system and so it should be abolished.

- *Reformation of Judicial Administration*

Police and judiciary should receive gender-sensitive training to handle the cases of women's abuse and honour killing. There should be mandatory training sessions for police to handle cases of honour killing, so they consider women as equal citizens as men. They should be trained to understand the sensitivity and nature of the threat of the honour killing and act efficiently and legitimately to arrest the culprits.

Judges should be trained to comprehend the culture of violence against women and to handle sensitive cases of honour killing, with special attention to details.⁵²¹ NGOs and judges should attend joint seminars to understand and discuss violence on women and to help bring justice to victims.

- *Social and Cultural reformation*

Legislation alone cannot eliminate honour killings; society has to play its part by eradicating the social and prejudiced norms against women. Social attitudes that relegate women to a status subordinate to men and on their role and place in a community prevailing in large part of the society; including police, judges and legislators, hinder women victims of honour killings seeking justice.

Customs can be changed and moulded according to the needs of the society. Society has to play a more pro-active role using its means and measures to eradicate this crime in patriarchal community through Islamic clergy's sermons, mass communication,

⁵²¹ For example one case decided by Tasadaq Jilani, discussed above in chapter 3 where he did not accept the pleas of pardon as gained not by free will but pressure by the family of the murderer.

newspapers, small grass-root NGO's seminars and public awareness. The government should encourage a countrywide social dialogue that advocates equality between women and men and a comprehensive public campaign aimed at changing traditional attitudes.⁵²²

- *Awareness campaign on the rights of women through Islamic clergy*

Since custom is the inner core and most influential of the norms regulating and influencing the viewpoint of millions of illiterate Muslim men and women, Islamic teachings which provide women equal rights and protect them should be used to save them from being misinformed and establishing wrong beliefs.⁵²³ If the clergy helps promote the real Islamic rights of women and propagate the provisions of Islam that protect women especially against allegation on their chastity and character⁵²⁴, the problem will be easier to cope with. The crime is more prevalent in Sindh province and the rural areas of the country where people follow their customs and toe Islamic clerics rather than the law. If Islamic institutions help spread the interpretation of Quranic verses which protect and respect women's rights and make people aware of criteria for establishing a case of adultery, and of the punishment of false accusation, the crime can be controlled to a great extent.

- *Compilation of data on honour killings*

Maintaining a statistical data is very important to know the number of and reasons for honour killings for making strategies to curb the crime. The Government of Pakistan has made no effort to establish a database of victims of honour killing. It is only the NGOs compile the information and statistical data based on the cases reported in newspapers. However, many cases do not even get reported in remote areas of Sindh and Balochistan where this crime is practiced very frequently and openly as a custom and tradition. The

⁵²² Phillip, "Human Rights in Context", *supra* note 172 at 192.

⁵²³ Shaheen Ali, "Equal Before Allah", *supra* note 44 at 183.

⁵²⁴ Discussed above in chapter 1. Islamic provisions protecting women against false allegation of adultery; Shaheen Ali, "Equal Before Allah", *supra* note 44 at 107.

government should make efforts to set up a structure in districts to collect information for compiling a statistical data.

Statistics on the cases in which legal heirs of a victim compounded the murder under the criminal law could be used as an evidence to highlight the lacuna in the criminal law and to establish how they are used against women in getting away with the crime, especially the honour killing.⁵²⁵

- *Monitoring Culture notions and improving status of women*

Cultural patterns in Pakistan do not let women enjoy their legal and religious rights protected by the law and provided by the religion. Pakistan is an Islamic state but in women's rights, it derives its interpretation from customs and cultural norms. Culture is not static and so can be moulded. Like other customs and traditions, honour too is a conceptual norm which can be changed if majority of people are willing to do so⁵²⁶ for the betterment of society and women.

A social movement should evolve an atmosphere where fundamental rights are ensured with equality. Only legislative enactment will not suffice to bring change in the attitude⁵²⁷ of people living in Pakistan. Even if law is promulgated against honour killing, administration and judiciary will still be influenced by its attitude and personal bias against women. Men and women should be made aware of their rights and of the respect they owe to each other's rights. What is most importantly required is to change the biased cultural norms and practices in the Pakistani society. Even in the presence of strict laws, the administration being biased will not implement them in their spirit. There is a dire need for a social movement to eradicate the culture of violence against women in the name of honour or tradition. If the cultural norms cannot be eradicated, laws should effectively protect women's rights. Cultural traditions must come closer to the practice of human rights and not vice-versa.⁵²⁸

⁵²⁵ Gudie to Human Rights of Women, *supra* note 512 at 20.

⁵²⁶ IWRAW reports, 1999, *supra* note 143.

⁵²⁷ Yasmeen Hassan, "Honor Killings", *supra* note 8 at 604.

⁵²⁸ Leuprecht, "Culture Against Human Rights", *supra* note 166 at 7 and 9.

Only promulgation of substantive provisions of law will not end discrimination against women. Women's status will have to be raised socially, economically and politically.⁵²⁹ This depends on change in the traditional attitude and customs which are based on the idea of inferiority of women.

- *Mass Media and Educational Strategies*

Media have always been effective in spreading awareness among people, literate and illiterate alike. "Media play a crucial role in influencing and reinforcing social perceptions."⁵³⁰ There could be programmes and plays on reforming women's status in Pakistani society and especially on honour killing. There should be awareness among men about respecting dignity of women and treating them as equal persons, and among women as well about their legal rights. Syllabus for young children should redefine their attitude towards women as carrying equal status and rights as men. Girls should not relegate themselves to a status inferior to men's and should explore their potential.⁵³¹ Gender neutral syllabus should be made part of the primary school curriculum. There should also be national civic education programmes on women's rights. All possible steps should be made to end the culture of impunity associated with the honour killing.

- *Concluding remarks (Samia's case)*

Honour killing in Pakistan is an interplay of culture, formal and informal laws and judicial institution which protects the perpetrator. Under the rule of law it is an outcome of inadequate judicial administration. Court cases illustrate how various excuses have been used to give lenient sentences in honour killings and how honour is being gendered. Legal provisions of Qisas and Diyat law, plea of grave and sudden provocation, cultural

⁵²⁹ In the opening words of United Nations Policy Document "Measures to Promote women's Rights Resolution IX of the International Conference on Human Rights" in *Human Rights: A compilation of international Instruments*, (New York: United Nation, 1968).

⁵³⁰ Yasmeen Hassan, "Honor Killings", *supra* note 8 at 605.

⁵³¹ *Ibid.*

notion and religious norms are often used as an excuse to justify murder in the name of honour.

The case of Samia Sarwar, who was murdered at her lawyer's office by a driver at the instigation of her mother and uncle, was decided by the formal legal system under the provisions of Qisas and Diyat law. The accused was pardoned by Samia's legal heirs, close relation of the victim and her family. The tradition was upheld violating legal and Islamic rights of women. Culture overpowered the legal protections guaranteed by the law of the land. The killer was freed without any punishment. Such incidents will continue happening, if the plea for pardoning the murderer in the cases of honour killing is not eliminated from the law. This excuse acts as a protection against those who kill their women in the name of honour and then receive lenient punishments or get pardoned for the crime.

In the current legal system and the set of laws, it is difficult for women to receive justice. As in Samia's case, a formal legal system acting as does an informal one, to discriminate against women's basic rights, bares the loopholes in the justice mechanism that is unable to provide redress and justice to women.

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