

# Colonial Legacy of Pakistan and Genesis of a New Constitution

## Legitimacy of Power, Land Ownership and the Enlightenment

Zia Akhtar\*

### Abstract

*The state of Pakistan came into being in 1947 after inheriting the laws of the British colonial rule based on a framework that has allowed the land-owning stakeholders to compete for influence and power. The constitution of the country has been reconfigured to suit its rulers, including the military in power and the largest constituency is the land-owning class which maintains its presence in all the elected assemblies that have formed the legislature in Pakistan. The ideological underpinning and the electoral system have been inherited from the British rulers and with it the zamindari system also which provides the landed gentry its power base. The issue is to what extent is the feudal system tilted towards maintaining the status quo that gives those in the land-owning class their privileged status. The power of the nobility known locally as the jagirdars command a mystical allegiance drawn from their privileges of birthright. This article defines the colonial legacy that has permeated the constitutional framework through laws instituted by British rule which persists in the corridors of the legal and political hierarchy. The argument presented is that Pakistan has to sever its colonial inheritance and emerge as a redefined state by adopting the intellectual preamble of the French Enlightenment that will bring about a revised system that can also be sustained in the light of dispensation based on a social contract.*

**Keywords:** British colonialism, Zamindari system, Sufism, French Enlightenment, social contract.

### A Introduction

The normative structure of the Pakistani state rests on the Westminster Parliamentary system of government. The country came into existence in 1947 and from its inception adopted the colonial institutions and the legal codes that were formulated under British rule.<sup>1</sup> The legal foundations of the state are based on the

\* Zia Akhtar, University of London, Grays Inn, Coventry University.

1 Pakistan Adapted the English law by Section 18(3) of the Indian Independence Act, 1947, which provided that the law of British India shall be applicable with the necessary adaptations to both dominions of India and Pakistan.

common law and this has been codified through legislative reform after the Indian Mutiny of 1857-1859 which brought Imperial India under the direct rule of Britain.<sup>2</sup> The power struggle in Pakistan is a manifestation of the rotating rule of a feudal land-owning class that ensures the political succession through patronage. There is a need to analyse how this vestige of the colonial period became established at independence in 1947, the injustices of inherited power, and how it can be ejected by a new social contract that emanates from the grassroots and adopts a popular mandate that has its parallels with the French Enlightenment.

In Pakistan, the government has vacillated between the 'civil' authority vested in a national assembly and military rule under martial law. The instances when the military has intervened were those when political chaos was extreme and presented a threat to the country's existence.<sup>3</sup> This implies that there was a possibility of the federation unravelling and the provinces seceding from the country that was carved out at its independence. This has been a possibility after the war of secession by the Eastern wing of the country in 1971 which led to the formation of Bangladesh.

The military in Pakistan has been established as a powerful institution and it has been believed to have created a garrison state after its repeated interventions in the form of military coup d'état and behind the scenes manipulation of the politicians. The military are the elite in Pakistan whose role as kingmakers has been influenced by the chaos caused by the instability in the country. The reasons for this are twofold: First, the conflicting ideology of its founding father Mohammed Ali Jinnah, whose background intellectually was as a convert to 'western orientalism'.<sup>4</sup> He was not a practicing Muslim and projected a version of Islam which was not in accordance with its orthodox principles.<sup>5</sup> The 'Great' leader projected the state's doctrine which consisted of vanguard secularism which does not accept a radical solution to a complex web of political problems. Second was the fusion of social and economic interests across the spectrum which consists of the landed gentry. The concept of a feudal landed gentry was created during the colonial period when the East India Company established a taxation system for the native population in the late eighteenth century. This enabled the nobility to act as the intermediary between the colonial authority and the local population by collecting revenue. The land was converted into a commodity and its ownership transferred to a middle class which allowed titles to be conferred and enabled the propertied

2 The common laws have been codified in both the criminal and civil laws and have been incorporated by statute such as the Adaptation Act of 1947.

3 The Supreme Court has legalized all three successful military coups in 1958, 1977 and 1999 by giving them legal cover under the 'doctrine of necessity'. This is a judicial precept which otherwise is not lawful, and that the public welfare and the safety of the state is the supreme law. Steven Barracca, Ravi Kalia's (ed.) *Pakistan's Political Labyrinths: Military, Society and Terror* (2015), Chapter 7, Routledge, New York, 133-134.

4 Mary Louise Becker, 'Some Formative Influences in the Career of Quaid-i-Azam, MA Jinnah', in Ahmed Hasan Dani (ed.) *World Scholars on Quaid-i-Azam Mohammad Ali Jinnah* Publisher: Quaid-i-Azam University, (Islamabad, 1979), 83.

5 Sharif Al Mujahid, *Jinnah's Vision of Pakistan* (Netherlands: Transnational Institute, 1 December 1996), <https://www.tni.org/en/article/jinnahs-vision-of-pakistan>.

class to emerge. They collected taxes and simultaneously assisted in preventing a breach of the peace.

The central research question in this article is the reason for the turmoil in Pakistan and its political dysfunctionality. The issue is whether the governments in Pakistan have ever achieved legitimacy? What is the cause and effect of its provincial divisions and social stratification? The root cause that this article has identified is the colonial legacy of the state which has adopted all the norms of the former imperial power that ruled undivided India and the most enduring of which is the zamindari system which is of landed wealth that is based on ownership of lands. It is the retention of the elitist system that is slowly devouring Pakistan and this article presents a radical solution to reverse the alienation of the masses and their distance from decision making. A parallel is drawn with the period before the French revolution where the Enlightenment was the brainchild for the Revolution and this was equalized by the driving force of the sans culottes which terminated the corrupt and backward system based on privilege.

The road map for the article is as follows: Part I considers the imposition of the British Raj and the landed aristocracy by the British East India Company which extended the writ of the colonial authorities through the *zamindars* who were delegated powers to collect taxation; Part II examines the legislative instruments that created social and economic power based on land and the hierarchy of powers and its impact; and Part III provides the argument for the termination of the colonial dispensation drawing lessons from the French Enlightenment for debate on the issues that confront the masses and for them to exercise the right for popular assemblies that create the basis for a social contract rather than practising adherence to a hollow constitution.

## B Transposing an Aristocracy on Land

The colonial project that Britain launched in India was premised on civilizing the natives and providing them with the administrative system which could entrench the laws and value system of the imperial power. This required it to 'reimport' into India the 'monitorial educational system' that could be applied in the successive stages of colonial rule over the subcontinent.<sup>6</sup> It was by a process of establishing mechanisms

by concentrating on the use by the state, of the landed elite, legislative interventions, bureaucratic power, and electoral politics, to reinforce and reproduce the institutional framework of politics in British India.<sup>7</sup>

6 Jana Tschurennev, 'Diffusing Useful Knowledge: The Monitorial System of Education in Madras, London and Bengal, 1789-1840', *International Journal of the History of Education*, Vol. 44, No. 3, (2008), 245-264, <https://doi.org/10.1080/00309230802041526>.

7 Hasan Javid, *Class, Power, and Patronage: The Landed Elite and Politics in Pakistani Punjab* (2012), 34, A thesis submitted to the Department of Sociology of the London School of Economics for the degree of Doctor of Philosophy, London, June.

The land was an instrument for control and taxation even before the British arrived in India and was part of the Mughal dynasty's framework of rule whose capital was in Delhi and which practiced devolution of the provinces.<sup>8</sup> This was carried out by the process of both Sufi and courtly literatures that stressed the need to establish authority over a *wilāyat*, or a territorially defined region. The Arabic term *wali*, meaning 'one who establishes a *wilāyat*', meant in one tradition 'governor' or 'ruler' and in the other 'saint' or 'friend of God'.<sup>9</sup> In pre-colonial India, the economy was based on agricultural crops cultivated on its fertile lands and the surplus formed the primary source of revenue and wealth. This provided land and those who owned it with immense authority and they exerted their influence on the political lords and also acted as intermediaries between the farmers and the government.<sup>10</sup>

The Mughal emperors in India had innovated a system of land grants that led to the *jajmani* system of land ownership and taxation. The introduction of the *jajmani* system was part of the 'gift exchange theory' that enforced the division of labour between different castes and clans in the villages and ensured the different occupational groups had a contributory role in the productive process.<sup>11</sup> This arrangement was the precursor to the development of the powerful land owners called *jagirdars* who inherited large estates and the second tier of local landowners – *zamindars*, who provided the means through which indirect rule could be established over the empire.<sup>12</sup> The chain was established for the revenue collection for the empire by this role of the proactive *zamindars* who had a physical presence on land.<sup>13</sup> The Mughals divided the revenue between the central and the provincial governments and it was the former which reserved for itself land revenue, customs, profits from the mints, inheritance rights and monopolies. The taxes from the land were the most important source of income and the income more than doubled between the reigns of Akbar and Shah Jahan.<sup>14</sup>

The British empire validated this arrangement and increased the state's institutional capacity, legitimizing the administration of the territories by creating a civil service that became an instrument of government. Toye argues that

- 8 The Mughals ruled India from 1526 and by 1707 ruled most of the subcontinent. After that they declined rapidly but nominally ruled territories until the 1850s. John F. Roberts, Gordon Johnson, C.A. Bayly, *The Mughal Empire, The New Cambridge History of India*, Vol. 1 (Cambridge University Press, 2016, Cambridge, UK), 1.
- 9 Richard M. Eaton, *The Rise of Islam and the Bengal Frontier, 1204-1760* (University of California Press, 1993, California), Chapter 4, The Articulation of Power.
- 10 C. Fuller, 'British India or Traditional India?: Land, Caste and Power', in Hamza Alavi and John Harriss (eds.) *Sociology of 'Developing Societies': South Asia* (Basingstoke: Macmillan, Hampshire, 1989), 34-35.
- 11 Vikram Seth, *The Story of Indian Manufacturing: Encounters with the Mughal and British* (Palgrave Macmillan, London, 2018), 4.
- 12 R. D'Souza, 'Crisis Before the Fall: Some Speculations on the Decline of the Ottomans, Safavids and Mughals', *Social Scientist*, Vol. 30, No. 9/10 (2002), 3-30; Andrea Hintze, *The Mughul Empire and its decline*, Aldgate, Aldershot, England. (1997).
- 13 M. Alam, *The Crisis of Empire in Mughal North India: Awadh and the Punjab, 1707-1748* (New York: Oxford University Press, 1986). Also see I. Habib, *The Agrarian System of Mughal India*, 2nd edn (London: Oxford University Press, 2000), 1526-1701.
- 14 S. M. Edwards and H. L. D. Garrett, *Mughal Rule in India* (Delhi : S. Chand & Co. 1962) 164-165.

British government in the eighteenth century was local government, carried out by local volunteers, the Justices of the Peace. As far as the central government was concerned, the form that 'royal interference' took was allowing the chief minister to distribute Crown patronage, which he used to consolidate his majority in Parliament.<sup>15</sup>

It also enabled a legal dispensation that 'could implement and enforce a framework of laws designed to protect the interests of British rulers and their landed allies'. The consequences were that the power of the state was 'greatly expanded' and it brought about the 'centralization of its military capacity'.<sup>16</sup> The British imposed a system of collection of land revenue and accounting agencies that implemented a national system of administrative control by delegating powers to the local councils at village level.<sup>17</sup>

This conferred a titular prestige on the landowners that was based on the British model of the landed gentry which was prominent in the eighteenth century and was represented in the Magistracy.<sup>18</sup> The land owners with the title deeds were entrusted with important judicial functions such as the magistracy and the East India Company administrators enhanced the status of the *zamindars* by this delegation of authority.<sup>19</sup> Upon consolidating their rule in India, the British applied a parallel regime by conveying to the *zamindar* not only land but the important judicial and tax collection responsibility by the devolutionary policy in the areas under its control.<sup>20</sup>

The establishment of colonial authority in India in the late eighteenth century was coterminous with the industrial revolution in the UK. The policy of mercantilism that was being implemented in the American colonies was also employed in India to facilitate the importation of raw materials with the protection offered by military and naval power to make it the export market for industrial products made in

- 15 John Toye, *Modern Bureaucracy*, Research Paper, no 2006/52 (United Nations University), 5. [https://www.researchgate.net/publication/23547789\\_Modern\\_Bureaucracy](https://www.researchgate.net/publication/23547789_Modern_Bureaucracy).
- 16 Imran Ali, *The Punjab under Imperialism, 1885-1947* (Princeton: Princeton University Press, 1960), 9.
- 17 An instance of that was in the Mughal period there was a *patwari* or village accountant who was responsible for keeping the financial records and who was an employee of the village. Under the British Raj, the relationship was transformed into the agent of the government. Ibn Hasan, *The Central Structure of the Mughal Empire* and its practical working upto 1657 (SOAS, University of London, 1932), 238-239.
- 18 History of the Magistracy, Magistrates Association. [www.magistrates-association.org.uk/about-magistrates/history-of-the-magistracy](http://www.magistrates-association.org.uk/about-magistrates/history-of-the-magistracy) (last accessed 14 January 2022).
- 19 Samuel Schmitthener, 'A Sketch of the Development of the Legal Profession in India', *Law & Society Review*, Vol. 3, No. 2/3, Special Issue Devoted to Lawyers in Developing Societies with Particular Reference to India (November 1968-February, 1969), 337-382.
- 20 A Maddison states that 'the dominant families in each village remained as their 'tenants-in-chief' and continued to enjoy many of the old customary rights, i.e. they could not be evicted, their rights were heritable and their rental payments could not be raised easily. Lower-caste families were usually sub tenants of the tenants-in-chief, rather than direct tenants of the zamindars. Often there were several layers of tenancy between the actual cultivator and the zamindar, sub tenants had less security and less defence against renting than tenants-in-chief'. A. Maddison, *Class Struggle and Economic Growth: India and Pakistan Since the Mughals*. (Allen and Unwin, 1971), 7-8.

England.<sup>21</sup> The consequence of this policy was that it made workers in the domestic mills unemployed and they migrated to the agricultural lands to secure a basis for existence by tilling on the land.<sup>22</sup> This increased the influence of the land owners known locally as *zamindars* who leased the lands to the land labourers while the income from the land was paid in tax and they lived on the remainder after the share was paid to the 'sub assignees'.<sup>23</sup> The land under taxation was increased by the British authorities and it became quite common to have 10 to 20 intermediaries without a specific function between the government and the farmers, and they all had a share in the cultivation yield or worked as tenants at will.<sup>24</sup>

The most significant legal development in establishing wealth through land ownership was when the UK Parliament enacted the Permanent Settlement Act 1793. The then Governor General of the East India Company, Lord Cornwallis, a Whig aristocrat believed that the creation of a landed gentry was 'an indispensable condition for order and prosperity for the British rule in India'.<sup>25</sup> The 1793 Act allowed the British overlords enormous powers and they brought the *zamindars* under their patronage. In a comparative study of their role of intermediaries, Firoj H Sarwar states:

The Company hoped that the Zamindari class would not only be a revenue-generating instrument but serve as intermediaries for the political dominance of their rule, preserving local custom and protecting rural life from the possibly rapacious influences of its own representatives. However, this worked in both ways; Zamindars became a conservative interest group. There was a tendency of Company officials and Indian landlords to force their tenants into plantation-style farming of cash crops like indigo and cotton rather than rice and wheat. This was a cause of many of the worst famines of the nineteenth century. In addition, Zamindars eventually became absentee landlords, with all that implies for neglect of investment on the land. Once the salient features of the Settlement were reproduced all over India, the political structure was altered forever.<sup>26</sup>

The British East India Company had entrenched the power of the landholding class and gave it economic, social and political influence. They had managed to do this by not only replicating what the Mughals had achieved but also by centralization and the bureaucratization of power. This enabled a consensus between the British

- 21 A. D. Innes, *A History of the British Nation* (London: TC & EC Jack, 1912), 826.
- 22 Bagchi, A. K., *The Political Economy of Underdevelopment* (Cambridge: Cambridge University Press, 1982), 20; A. Banerjee and L. Iyer 'History, Institutions, and Economic Performance: The Legacy of Colonial Land Tenure Systems in India', *American Economic Review*, Vol. 95 (2005), 1190-1213.
- 23 Paul Baran, *Political Economy of Growth* (Harmondsworth: Penguin, 1958), 49.
- 24 Bernard S. Cohn, 'The Initial British Impact on India: A Case Study of the Benares Region', *The Journal of Asian Studies*, Vol. 19, No. 4 (1960), 418-431.
- 25 Thomas R. Metcalf, 'The Struggle Over Land Tenure in India, 1860-1868', *The Journal of Asian Studies*, Vol. 21, No. 3 (May 1962), 295-307.
- 26 Firoj H. Sarwar, 'The Colonial Mechanism of Surplus Extraction in 19th Century British India', *Journal of Humanities and Social Sciences*, Vol. 2, No. 4 (2012), 16-26.



authority and *zamindars*, many of them in the Punjab, who also became strategic allies and displayed their loyalty when the insurrection in the form of Indian Mutiny took place (1857-1859). They provided logistical support against the rebellion that had sprung up in the towns and districts of northern India and spread outwards.<sup>27</sup> After the British Crown exerted direct authority over India and incorporated it as part of the Empire in 1859, the colonial authorities dispensed additional favours on the *zamindars* and made them a politically privileged entity by a series of land acts that gave them institutionalized power.

The British imposed the colonial administration after quelling the Indian Mutiny and instituted the 'steel frame of power' through the British Indian Civil Service (BICS).<sup>28</sup> This was the most conspicuous development of British rule and served as an adjunct to the tax collection and patronage through land ownership in the administration of its empire. The civil service was the urban equivalent of the *zamindars* in the country side and it was responsible for facilitating the implementation of the Indian Penal Code (IPC) between 1860 and 1862. This enforced the writ of the colonial authority and ensured that: 'Rising from the ashes of violent rebellion was thus a new legal subject, a new sovereign, and a peculiarly colonial idea of social contract binding the two together'.<sup>29</sup>

## C Legislative Instruments and Entrenching Landed Wealth

### I Gifting Land to an Elite

The devolution of power to the landlords persisted when India came under the direct rule of the British Monarch at the time the British empire was extended to cover the whole of India. This was after the rebellion in 1857-1859 was crushed and direct rule imposed by the colonial power and the Parliament in the UK began to legislate for India. It was then the landholding system with the *zamindars* as a socio-economic elite was consolidated and power became concentrated in land that was to have long-term consequences for the future state of Pakistan.

This was carried out by the British Raj enacting a series of legislative changes beginning with the Punjab Tenancy Act of 1868, the Land Revenue Act of 1887, the General Clauses Act 1897, the Alienation of Land Act of 1900 and 1947, all of which had a direct impact on the power and status of the land holding elite. The Punjab Law Act 1872 promulgated by the British institutionalized the customary law in the interior of what became the most populous province in Pakistan.<sup>30</sup> Section 5 states that the colonial authorities have to make 'their decisions according

27 G. Smith, *Twelve Indian Statesmen* (London: John Murray, 1897), 81-82.

28 The expression 'steel frame' originated in a speech made by Prime Minister Lloyd George to the House of Commons in 1922, defending the British civil service in India. He stated 'This small nucleus ... of British officials in India ... they are the steel frame of the whole structure. I do not care what you build on it - if you take the steel frame out, the fabric will collapse'. HC Deb 2 August 1922, Vol. 157, cc 1495-525.

29 Alastair Richard McClure, *Violence, Sovereignty, and the Making of Colonial Criminal Law in India, 1857-1914*, Dissertation for PhD to Corpus Christi College, Cambridge University (2017), 8.

30 Its preamble states 'An act for declaring which certain rules, laws and regulations have the force of law in the Punjab and for other purposes'.

to local law' and Section 7 proclaims that 'local customs and mercantile usages' are acceptable 'when valid. The statute gave the local *zamindars* the authority to set up their own courts and dispense justice according to custom. The customary law was enforced by the superintendent who supplemented the role of the landlord with that of the warden or judge.<sup>31</sup>

The impact of these Acts was such that the landed gentry became entrenched as a powerful class. The British Crown promulgated the Land Acquisition Act of 1894 and the Punjab Alienation of Land Act 1900<sup>32</sup> in order to merge the power of the military and the *zamindari* class by enacting the Registration of Money Lenders Act 1900 and the Registration of Mortgaged Land Act in the same year which enabled lenders to recover all the land which they had mortgaged before 1901 from the mortgagee. The enactment of the Colonisation of Land (Punjab) Act 1912 for the purpose of institutionalizing the collection of taxation of land in the province created a *zamindari* class that relied on the military for enforcement of its revenue from its land base. The Act stipulates under Section 10 (1) 'the Board of Revenue may with the general approval of the Government may grant land in a colony to any person on such conditions as it thinks fit' which establishes a system of patronage. This right of pre-emption to the colonial authority to convey land to any individual or family encouraged the formation of an elite that was to be a stakeholder in the economic system.<sup>33</sup>

This served to strengthen the framework of rural organizations around which the colonial state built its authority. The result of enforcing the manorial law in pre-partition India has been documented by David Washbrook as the creation of a 'Janus faced' legal system. This was reflected by the

- 31 'Rather than adhering to the principles of the free market when making these allocations, British officials simply reproduced the structure of local level rural society, providing ownership to the same cultivating *biraderis* that had traditionally been able to claim a hereditary share in the agricultural surplus. While the government did sometimes recognise 'superior' proprietary rights, of the type claimed by the aristocracy, it only tended to do so in the absence of occupancy tenants who could claim to be part of the village cultivating community. Manual for the Guidance of Revenue Officers in the Punjab, Lahore, Kohinoor Press'. (R. Cust, 1866) quoted in Hasan Javid, *Class, Power and Patronage*, Phd thesis at the London School of Economics, Department of Sociology (2012), <http://etheses.lse.ac.uk/id/eprint/468>.
- 32 MM Islam states that the need for this legislation was because 'a substantial part of the land sold and mortgaged by the cultivators was going to the moneylenders, and this meant the dispossession of the peasant proprietors'. This represented a potential threat to the government and if no remedial steps were taken 'the animosity of the peasant population towards the moneylenders (*sahukar*) would ultimately be directed against the government'. Initially the government refused to take any steps, arguing that the facts were not sufficient to prevent 'transfer of land' but relented and passed this Act. M. M. Islam, 'The Punjab Land Alienation and the Money Lenders', *Modern Asian Studies*, Vol. 29, No. 2 (1995), Cambridge University Press, 271-291.
- 33 Imran Ali argues that under this Act 'some colony land was obtained by the non landed elite of the Punjab, such as retired public servants. The rest was allotted to the men belonging to land holding groups. The fact that they already held land were also the ones who acquired colonial land was highly significant'. Imran Ali, *The Punjab Under Imperialism, 1885-1947* (Princeton, NJ and Guildford, Surrey: Princeton University Press, 1988), 269.



British Raj's public policy of codifying contractual laws in the cities and in the rural areas the fostering of the primordial traditional customary laws. While the former drew on British commercial and criminal law principles, the later was based on customs and mysticism that was part of the inherited cultural tradition in the Punjab.<sup>34</sup>

Washbrook argues

the Punjab Law Act onwards, personal law was not rooted in an Islamic or Hindu religious framework, but rather in tribal customary law. The later differed from religious law in such important areas as inheritance. Female rights would have been greater under the Islamic Shariat than they were under customary tribal law. The British preferred the tribal based custom precisely because of the independence from a religious system in which they could not be Christian outsiders. Moreover, as upholders of bureaucratic rationalism, they could codify and systemize the existing patterns of customary law. This provided a rationalization for British rule, at the same time as strengthening the patterns of social organization around which the colonial state constructed its authority.<sup>35</sup>

The locally administrated laws integrated the state's officials with rural intermediaries in this region of British India. The primacy of 'manorial' law was an important element in the 'legalization' of customs in the Indian Punjab which was the foundation of a system that was conveyed when the independent state of Pakistan came into being in 1947. This entrenched the feudal landowners in the land and their political constituency in the land had been preserved by which they entered the corridors of power in Pakistan since its inception as a state.<sup>36</sup>

## II 'Feudal' Saints and Landed Wealth

There is a connection between the legitimization of landed wealth and the reverence of the land owners that allows for their wealth and political influence to be maintained. This is because of the land ownership that has been fused with the patronage of mystical or Sufi Islam and the ownership of land of the feudal elite. The British colonial authorities began this form of estate ownership and tax collection and aligned this by facilitating the local customary law and through

34 D. Washbrook, 'Law, State and Agrarian Society in Colonial India', *Modern Asian Studies Journal*, Vol. 3, No. 15 (1981), 653-654.

35 *Ibid.*

36 Tehmina Javaid and Umbreen Javaid state 'Feudalism in Pakistan, which is a descendent of Indian feudalism, has its roots and characteristics entrenched in local history (such as the influence and intent of invaders) and society (such as the social structure), though there might be certain similarities between Medieval Europe and Medieval India in the realm of feudalism'. U. Javaid and T. A. Ranjha, 'Feudalism in Pakistan: Myth or Reality/Challenges to Feudalism', *Journal of the Research Society of Pakistan*, Vol. 54, No. 1 (2017), 227:235.

Zia Akhtar

investing a devotional status to those zamindars whom they elevated to being the redeemers of their inhabitants.<sup>37</sup>

This arrangement followed the Mutiny of 1857-1859 that led to the development of the status of those landowners who also transformed themselves as the *pirs* and religious figureheads who imposed a customary code with religious sanction. The patronage of the *pirs* was in direct contrast to the Mughals who had encouraged the *Ulemas* as the leading authority on Islam and their role 'expanded as the relative bureaucracies expanded'.<sup>38</sup> This stemmed from the colonial patronage which endowed these local saints with the title of *sajjada nashins* or custodians of local Muslim shrines. David Gilmartin states the British

increased their patronage of the shrines, granting large tracts of land to the Sajjada Nashins and providing them with economic resources to match the ideological power they already possessed. This fusion of religion and economic power would later prove to be one of the regime's most enduring sources of support.<sup>39</sup>

Gilmartin asserts that the British approach

favoured tribes over the religious community and this was achieved by the British utilising in the Punjab an ideology of authority that predicated on their 'discovery' of a customary law that related to and sustained fragmented tribal social organisation where local agrarian based leadership, supported by favourable land legislation became collaborators.<sup>40</sup>

This was based on 'land patronage' that permeated the 'median structures' which related to 'kin centred 'tribes' that had to function in a context in which the authority rested on agricultural land.<sup>41</sup> The concept was of nobility of birth in the development of a social hierarchy and the control established through devotion of the feudal *pirs*. The Tiwanas of Shahpur were an example of a prominent landholding family who, because of their military and political patronage by the colonial regime, were 'able to greatly expand their wealth and influence as a result of the preferential treatment meted out to them by the British government'.<sup>42</sup> This tiered section of the feudal class has been preserved in Pakistan as the *pir* families receive donations in the form of alms from the faithful who are mostly peasants on the land. These

37 In Pakistan, the feudal nomenclature includes such titles as Chaudharies, Warraich, Pirs, Khans, Makhdooms, Arbabs, Mizaris, Khars, Legharis, Nawabzadas, Nawabs, Sardars and Shahs S. Anwar, *The Feudal Culture* 19 May 2013, The Nation, <http://nation.com.pk/letters/19-May-2013/the-feudal-culture>.

38 Barbara D. Metcalf, *Islamic Revival in British India: Deoband, 1860-1900* (Princeton: Princeton University Press, 1982), 16-45.

39 David Gilmartin, 'Partition, Pakistan, and South Asian History: In Search of a Narrative', *Journal of Asian Studies*, Vol. 57, No. 4 (1998), 1068-1095.

40 *Ibid.*

41 *Ibid.*

42 I. Talbot, *The Punjab Unionist Party and the Partition of India* (London: Routledge, 1996).

disciples fulfil their 'economic needs and the zeal showered on them keeping them politically strong'.<sup>43</sup>

There are also in existence the *zamindari* clans who have been in occupation of lands before the British arrived who are worshipped as saints such as the Pir Pagaro (blessed or the turbaned one) who have *jagirs* (large estates) sanctified by religious obedience since time immemorial in the Sindh province of Pakistan. The Pir Pagaro 'has the largest following of all the hereditary Sufi saints or pirs, whose families for centuries have controlled swaths of what is now Pakistan. Pir Jo Goth, a town of 100,000 or so people in south-east Pakistan, about 140 km from the Indian border, is the family seat'.<sup>44</sup>

### III Inner Sanctum of Landed Wealth

There is another manifestation of the landed gentry in their sanctified hubs in Pakistani rural heartlands and these are the feudal families who want to retain their estates intergenerationally. In some of the families, the inheritance is preserved within the family by not allowing marriage of their daughters to those who are not their next of kin.<sup>45</sup> This allows the clan to maintain the estates within the family domain because land does not have to be gifted as a form of dowry. This is an instrument that is activated when the land is conveyed to another household upon the marriage of the woman.

In order to prevent this transaction from taking place the daughters are ordained in religious servitude as 'married' to the Quran which is a lifelong commitment to be pledged than allowed to be in a different household. This practice, known as the *Haq Bakshish* tradition, is mostly practiced in Sindh, but is also prevalent in some parts of southern Punjab. This is a practice that is not in accordance with mainstream or orthodox Islam which provides inheritance rights to both genders and which Pakistan has adopted under the Family Laws Ordinance 1961 and Muslim Personal Law Shariat Application Act, 1962 which protects those rights.<sup>46</sup>

The *haq bakshish* serves to protect the interests of those who want to maintain the property within the family which condemns the woman 'to a lifetime of celibacy and sterility'.<sup>47</sup> It has been outlawed in Sindh by legislation that seeks to protect

43 A. Siddiq, 'The Inner Tragedies of Feudal Life', *The Friday Times* (9 May 2014), [www.thefridaytimes.com/2014/05/09/the-inner-tragedies-of-feudal-life/](http://www.thefridaytimes.com/2014/05/09/the-inner-tragedies-of-feudal-life/).

44 Isambard Wilkinson, 'Pakistan's Living Sufi Saints Flex Their Political Power', *Financial Times* (18 April 2018), [www.ft.com/content/b7503f38-358e-11e8-8eee-e06bde01c544](http://www.ft.com/content/b7503f38-358e-11e8-8eee-e06bde01c544).

45 Art. 25 of the Constitution. Equality of Citizens. (1) All citizens are equal before law and are entitled to equal protection of law. (2) There shall be no discrimination on the basis of sex.

46 Section 498A of Pakistan Penal Code specifically warns against an unfair division of inherited property. It also talks about the consequences of forcing women to surrender their rightful share to their male relatives. The text says, 'Whoever by deceitful or, illegal means deprives any woman from inheriting any movable or immovable property at the time of opening of succession shall be punished with imprisonment for either description for a term which may extend to ten years but not be less than five years or with a fine of one million rupees or both'.

47 Fatima Shadab, 'Haq Bakshish (Marriage to Quran): A Custom Confused with Religion: A Case Study of Qaisra Sharaz's Protagonist 'Zari Bano' From the Novel Holy Woman', *Research Journal of Arts & Humanities* (Irjah), 6. (2020).

Zia Akhtar

the abuse of rights.<sup>48</sup> However, it exists as part of the customary code which governs the feudal society and is not in accordance with the law of succession in the Quran which allows women to inherit property upon the death of the testator or upon testator dying intestate. This is a custom that is part of a feudal code based on local 'tribal' law and is permissible under the structure of land + influence = power.

#### *IV Attempts at Land Reform*

The gifting of parcels of land by the British colonial rulers was by creating a subordinate class of land ownership through *zamindars* which could be extended by a form of patronage. This was in the most populated region of Pakistan that is concentrated in Sindh and the Punjab which are irrigated by the canals that were constructed by the British to provide them with the navigational routes to the land. The consequence is that the most fertile region of Pakistan is inhabited by the agrarian communities who have settled there and the land is the most economically productive because of its location.

Gazdar states that its circumference includes

most of the Indus river basin, and in the interest of maintaining colonial power the Colonial government introduced private property rights, granting title to influential families and assuming state ownership of uncultivated land while distributing newly cultivable land opened up by the vast expansion of the irrigation network. In southern Punjab, the colonial government patronised the princely ruler of Bahawalpur State, and feudal relations persist in the region despite the dissolution of royal rule in the 1950s.<sup>49</sup>

The British introduced the practice of gifting land to officers and members of the judiciary and bureaucracy, and 'used the Land Colonisation Act 1904 to allot 10% of all newly cultivatable land (open to cultivation by expansion of the canal network) to the military'.<sup>50</sup>

The perpetuation of this stratified system is that Pakistan

despite changes in government type (military and civilian) the legal practices and statutory framework remain in place. Land allotted to individuals and the

48 The Sindh Domestic Violence (Prevention and Protection) Act 2013 Section 5 states 'Domestic Violence includes but is not limited to, all acts of gender based and other physical or psychological abuse committed by a respondent against women, children or other vulnerable persons, with whom the respondent is or has been in a domestic relationship including but not limited to - (a) 'abet' as defined in Pakistan Penal Code (Act XLV of 1860) hereinafter referred to in this section as the said Code'.

49 H. Gazdar, *The Fourth Round and Why They Fight On: An Essay on the History of Land and Reform in Pakistan* (Karachi: Collective for Social Science Research, 2009).

50 A. Siddiq, *Military Inc.: Inside Pakistan's Military Economy* (Oxford University Press, Karachi: 2007) 174.

military became state-owned under the colonial land settlement policy and was often registered as communal land under state control.<sup>51</sup>

The successor government in Pakistan has granted land using the colonial land settlement policy, which distributed uncultivated land to formal state ownership; legislated for compulsory acquisition a set proportion of newly acquired agricultural land for former state officials. The civil service has functioned along the old colonial remit of enforcing

this direct patron-client relationship between the bureaucracy and local elites strengthened the image of the bureaucracy as the providers of patronage, influence and security and undermined the development of political parties that normally would have played this intermediary role.<sup>52</sup>

There have been sporadic attempts at land reform in Pakistan and there was a land nationalization legislation in the form of the Land Reform Act (LRA) 1977 that was for the purpose of redistributing land by expropriating from the zamindars and granting it to the landless farmers. The legal powers were supplemented by the 1972 Martial Law Ordinance No. 115 and the law proclaimed that surplus land would be appropriated from the rich and given to the poor without compensation. In 1977, when General Zia ul Haq overthrew Prime Minister ZA Bhutto by imposing military rule he promulgated a constitutional amendment Article 2-A which commanded that laws in Pakistan which may be repugnant to Islam were obsolete. He also set up Shariat law benches in the High Court of each province and subsequently a single Federal Shariat Court was established. This Court began receiving claims from those whose lands were seized and given to the landless peasants. It included the Qazalbash clan who were mystic saints by tradition and inherited the mantle in every generation of religious devotion from their followers and dispensed charity towards them in exchange.

In *Qazalbash Waqf v. Chief of Land Commissioner*,<sup>53</sup> the Qazalbash charitable organization or the Waqf brought a claim for the estates in the rural areas in the Punjab that had been appropriated. They had also established an endowment or a 'waqf' which owned hundreds of acres of land near the capital of the Punjab province, Lahore. The Qazalbash clan appealed to this Court that the LRA infringed the principles of Islamic law. The Shariat Court gave judgment that the appropriation of land which was held under a lawful title by the clan was not permitted without the payment of compensation. There was sanctity for property in religious laws and restitution was made in the form of the title being conveyed back to the clan.

51 Antonia C. Settle, 'Agricultural Land Acquisition by Foreign Investors in Pakistan: Government Policy and Community Responses', *Land and Deal Politics Working Paper* 7 (2012), 5.

52 Andrew Wilder, 'The Politics of Civil Service Reforms in Pakistan', *Journal of International Affairs*, Vol. 63 (2009), <https://jia.sipa.columbia.edu/politics-civil-service-reform-pakistan>.

53 SC 99 PLD 1990.

Zia Akhtar

Judge Maulana Taqi Usmani who gave judgment for the court held that the only contingency in which the property could be seized was in a circumstances 'in which if one does not resort to unlawful means he will die or will get close to death'.<sup>54</sup>

In principle this ruling was that the transfer of land title was itself contrary to religious principles unless there was some form of duress. The justification for the repossession claims after the repeal of the LRA were suffused with religious entitlement. This is evidenced by the Shariat Court that was established for the purpose of reviewing land claims of former landlords to hear proportionally a higher number of petitions for the restoration of title to the appropriated lands.<sup>55</sup>

The impact is of institutionalizing the zamindari system of land ownership and in incorporating wealth and status in land and in doing so there is a correlation between the estate owners' power and the disenfranchisement of peasant communities. The tenants are in the clutches of debt bondage which is passed down intergenerationally and the landlord has the ability to control the 'distribution of water, fertilizers, tractor permits and agricultural credit'.<sup>56</sup> This also provides the landlords' influence over the 'revenue, police and judicial administration' of local government and its officials.<sup>57</sup>

The disparity between the unequal land ownership is evidenced by the 4% of wealthiest households owning over half of all cultivated land; 49% of rural households are landless and access to land is declining as the cash economy expands at the cost of sharecropping.<sup>58</sup>

The Tenancy Act 1887 offers protection to sharecropping farmers from eviction, but its provisions are not universally applied.<sup>59</sup> This is because sharecroppers on state farms are not formally recognized in the local land records; hereditary farmers on state land pay cash rents or no rent; and nomadic and settled farming or grazing communities are not permitted on or near state land.<sup>60</sup>

The circumstances of rural labourers are also adversely impacted by the *zamindari* system and more than 80% of agricultural day workers do not own their homes and all human settlements that are located on state land held by any civil and non-civil government departments or institutions remain unregistered.<sup>61</sup>

54 *Ibid.* at 32.

55 Charles Kennedy has estimated that in the period 1979 to 1987, out of the 330 petitions received by the FSC, no less than 122 concerned land cases. These petitions were received mostly in the period 1979 to 1981, In these three years, out of 201 petitions, 100 concerned matters that arose out of land reform. See: C. Kennedy, *Islamization of Law and Economy: Case Studies on Pakistan* (Islamabad: Institute of Policy Studies, 1996), 113.

56 I. Gazdar, H. Khan, T. Khan, *Land Tenure, Rural Livelihoods and Institutional Innovation* (Islamabad: Department of International Development, 2002), at 25.

57 *Ibid.*

58 *Ibid.*

59 Antonia C. Settle, 'Agricultural Land Acquisition by Foreign Investors in Pakistan: Government Policy and Community Responses', *Land and Deal Politics Working Paper 7* (2012), 8.

60 *Ibid.*, 9.

61 *Ibid.*



The Seed (Amendment) Act 2016 has caused injustices to flow from the lack of infrastructure of Pakistan's agricultural industry. This is compounded by the lack of a legal mechanism to process the farmers requirements. The State Bank of Pakistan (SBP) study in 2022 has found that this has

left farmers at the mercy of informal sector, dealers, who sell seeds of unknown quality, leading to consistent yield losses. The policy uncertainties and lacunas in legal framework led to creation of various vested interest groups who lobbied to prevent the formalization of required rules and regulations for improving the market mechanism.<sup>62</sup>

## D Setting the Stage for a New Constitution

### I *Ending the Colonial Dispensation*

The abolition of the colonial system predicated on the laws seems never to have exercised the minds of the Pakistani rulers. The land-owning class draws its source of legitimacy from the British colonial authority. Their privileges have been retained and have become institutionalized by their permanent stake in the representative assemblies where they can decide the duration of any government in situ. There is also the notion that the land-owning class has consolidated their power and have emerged as the permanent beneficiaries reflecting their status in the country and whose entitlements cannot be challenged.

The power that these upper tiers exercise stems from the colonial laws that were enacted by the British rulers over the population after the Indian Mutiny was suppressed and implemented by the civil service which created the infrastructure in its own mirror image. This has permeated a form of oppression that has empowered a hierarchy based on a stratified system of power. The only solution to this vestige of inequality is to abrogate all the legislation that relates to land law and then proceed towards repealing the civil procedure rules and criminal law codes that serve to maintain an unjust and dilatory system of justice.

The repeal of these statutes that serve the privileged class whose power is in land, includes the Punjab Tenancy Act 1868, Tenancy Act 1887, Land Revenue Act 1887, General Clauses Act 1897, Alienation of Land Act 1900, Land Colonisation Act 1904, Registration of Money Lenders Act 1900, Registration of Mortgaged Land Act 1900 and the Colonisation of Land (Punjab) Act 1912. This will reverse the landholding that is vested in the power of the *zamindars* and their function as the intermediaries and the power brokers in a structure where land is for the benefit of the elites who retain the vestiges of power. The customary laws that serve as the appendages to the feudal landowners and provide them with their authority will be rendered obsolete once the statutory plank of colonialism is abrogated.

62 Sabina K. Jafri, M. Imran, M. H. Asif, *State Bank of Pakistan (SBP) Staff Notes*. Investigating Pakistan's Seed Industry Dynamics 02/22, 18. <https://www.sbp.org.pk/publications/staff-notes/Investigating-Pakistans-Seed-Industry-Dynamics.pdf>.

## II Precedence of the Ancien Regime

The state of Pakistan was created under the pretext of a religion and the concept that Islam is corpus juris of laws which transcends the body politics of the state and impacts the citizens. In its foundation document, religion is not extrapolated in any substantive manner but a direction that there is a Muslim identity even in a non-religious or secular framework.<sup>63</sup> This reasoning led to the need to create Pakistan from the five provinces where Muslims were a majority in British India. The Eastern wing of the country seceded in the Bangladeshi war but that does invalidate the two-nation theory because the doctrine of a Muslim identity as set out in the resolution. The five provinces along with the contiguous territory of Kashmir, that is disputed between India and Pakistan has made the country more homogenous.<sup>64</sup>

However, the tension between the disenfranchised peasants and the landlords continues and it has parallels in the towns and cities where the majority live in poverty and the well-heeled who have thrived in business and the professions which is because of increasing economic differentials.<sup>65</sup> The power struggle between feuding political forces is a corrosive factor in this disequilibrium and this is because the landed gentry have an overriding effect on the outcome of the elections. This leads to the preservation of the *status quo ante* that affirms the social stratification in which the people find themselves and the common man neither comprehends nor can duplicate the imported lifestyle of the society's elite.

The analogy can only be with pre-revolutionary France and the feudal *ancien regime* where there was a similar concentration of wealth in land and the acceptance of a nobility of birth. The three orders in France which formed the Estates-General were the First Estate, who were the Clergy, the Second Estate, the Nobility, and the Third Estate which comprised the bourgeoisie and the tradesmen and artisans. There was a monopolization of land by the two top tiers and First Estate collected revenue in the form of tithes from its own landed property, which was very extensive in northern France. While the lands owned by the Church constituted about one-tenth of all territory within the kingdom, the bishops, abbots, and chapters were also lords over some villages and collected manorial taxes.<sup>66</sup> The

63 The Lahore (Pakistan) Resolution reads 'Muslims are a nation according to any definition of nation. We wish our people to develop to the fullest spiritual, cultural, economic, social and political life in a way that we think best and in consonance with our own ideals and according to the genius of our people'. 23 March 1940. Story of Pakistan. <https://historypak.com/lahore-resolution-1940/>.

64 The state of Jammu and Kashmir was converted into two union territories by India, revoking its autonomous status under the Jammu and Kashmir Reorganisation Act, 2019. This has led to two Indian-administered union territories, Jammu and Kashmir, and Ladakh.

65 Hafiz A. Pasha, Pakistan National Human Development Report conducted by the United Nations Development Program (UNDP) findings shows that the total privileges enjoyed by Pakistan's most powerful groups amounted to Rs. 2,660 billion in 2017-2018, equivalent to 7% of the country's GDP. The richest 20% of the population are also called quintile 5 (Q5), and the poorest 20% are called quintile 1 (Q1). Pakistan has a modified Palma ratio of 4.7, meaning that the richest quintile has 4.7 times the income of the poorest quintile. [www.pk.undp.org](http://www.pk.undp.org).

66 Harrison W. Mark, 'The Three Estates of Pre-Revolutionary France', *World History* (22 July 2022), [www.worldhistory.org/article/160/the-three-estates-of-pre-revolutionary-france/](http://www.worldhistory.org/article/160/the-three-estates-of-pre-revolutionary-france/).

privileges of the nobility, and the ecclesiastical order was premised on the divine right of Kings which was the basis of the feudal *ancien* regime.

The French Revolution was a process of disenfranchisement of the third estate and the origins of the challenge to the old order can be traced to its leading theoretician in the formative stage, the Abbe Emmanuel Sieyes who issued the pamphlet 'What is the Third Estate?'<sup>67</sup> 'Everything' which implies it is a 'complete nation'. He then enquires 'What does a nation require to survive and prosper? It needs private activities and public services'.<sup>68</sup> Sieyes extrapolates the needs of four classes of persons and the first would be of those deprived of land: 'Since land and water provide the basic materials for human needs, the first class, in logical order, includes all the families connected with work on the land'.<sup>69</sup>

The process of the French revolution is a fact of history and its significance is in the documents rather than the cataclysmic events that it produced which serve to make it the benchmark of all movements that inspire citizens to take destiny into their own hands. In terms of the issues that Pakistan has to address in its stupor of colonial-feudal inheritance it has to draw inspiration from the French Enlightenment which was a regeneration of thought and led to the erasing of fetters and a revolution whose ideals rested on the nobility of deed.

### III Impact of the French Enlightenment

The reason why the analogy with Pakistan is instructive is because of the power of the land-owning class to employ landless labour. Therefore, the most immediate reform of the French Revolution was the abolition of serfdom and the ending of the power of the aristocracy vested in the land. The National Assembly issued a decree abolishing the power of the landlords to force the peasants into working as tenants at will.<sup>70</sup>

The key legal concepts introduced by the French Revolution included the absolute separation and antagonism between religion and the State,<sup>71</sup> the nation is indivisible and sovereign;<sup>72</sup> the privileged and virtually unchecked legislative powers of the government,<sup>73</sup> the unrestricted supremacy of statutory law,<sup>74</sup> the

67 Abbe Sieyès, 'What Is the Third Estate?', in Merrick Whitcomb (ed.), *Translations and Reprints from the Original Sources of European History*, Vol. 6 (Philadelphia: University of Pennsylvania History Department, 1789[1899]), 32-35.

68 *Ibid.*

69 *Ibid.*

70 Article One. The National Assembly hereby completely abolishes the feudal system. It decrees that, among the existing rights and dues, both feudal and censual, all those originating in or representing real or personal serfdom shall be abolished without indemnification. All other dues are declared redeemable, the terms and mode of redemption to be fixed by the National Assembly. Those of the said dues which are not extinguished by this decree shall continue to be collected until indemnification shall take place.

71 1791 CONST. pmb. (Fr.) ('The law no longer recognizes religious vows or any other' [2010] Ga. J. Int'l & Comp. L. sovereignty of the State.

72 Tit. III, para. 1 ('Sovereignty is one, indivisible, inalienable, and imprescriptible. It appertains to the nation; no section of the people nor any individual may assume the exercise thereof').

73 Pmb. (remarking that all citizens are equal, and that there is no 'superiority other than that of public functionaries').

74 Tit. III, ch. 1I, § 1, para. 3 ('There is no authority in France superior to that of the law').

restrictive role assigned to legal sources (custom, general principles of law, and equity) other than statutory (positive) law,<sup>75</sup> the unification of civil laws in one legal body (the Civil Code) universally applicable to the whole nation, and a diminished judiciary.<sup>76</sup> This was manifested by the article that ‘the courts may not interfere with the exercise of the legislative power, suspend the execution of laws, encroach upon administrative functions’.<sup>77</sup> The stipulation that marriage was to be a civil contract;<sup>78</sup> imposition of universally mandated government instruction,<sup>79</sup> and the consecration of a legal system guaranteeing privileges for the few to the detriment of the many, and the abolition of a legal system guaranteeing privileges for the minority to the detriment of the many.<sup>80</sup>

The nationalization of land that the French revolution enacted by its decree was a prelude to other more profound changes that abolished the canon law that was integrated with the customary law in the regions. This was the fundamental principle that shaped the revolution.<sup>81</sup> The similarity with the Pakistani state is emphatic and as the customary law has been justified as based on religious sanction, the conduct of the revolutionaries in France can serve as an example in revoking the appendages of the *zamindari* system by declaring that custom is no longer a source of law.<sup>82</sup> The enforcement of custom in Pakistan such as the Sufi inspired feudal ownership were the fiat of the British colonial rulers who encouraged the monopoly of the landlords.

The concept that the source of law must be one, uniform law – applicable to everyone in the *polis* that governs the people is the embodiment of the French revolution. In the same manner that the revered saintly clans retained the lands (*jagirs*) prior to the revolution in France there ‘was a lively interaction between the European *ius commune* and customary law’.<sup>83</sup> The revolutionaries intended to abolish the Roman vestiges of a ‘disorganized and highly local – a chaotic state’ and ‘legal homogeneity became a goal in and of itself’.<sup>84</sup> This would prevail in Pakistan if the sweeping land reform was carried out and the inherited medieval system that

75 Tit. I, § 3, para. 13 ([A] code of civil law common to the entire kingdom shall be drafted’).

76 Pmbl. ([N]either jurandes nor corporations of professions, arts, and crafts any longer exist’).

77 Tit. III, ch. V, para. 3.

78 Tit. II, para. 7 (‘The law considers marriage only as a civil contract’).

79 Tit. I (mandating public instruction for all citizens).

80 Tit. III, ch. I, § 2, para. 2 (establishing requirements related to age, birthplace, and social position for the exercise of civil rights).

81 Charles Sumner Lobingier, *Napoleon and His Code*, 32 Harv. L. Rev. 114, 116 (1918) (pointing out that the Convention of 1791 looked upon customary law as a ‘barbarian and degenerate’ system).

82 See Adolphe Granier Decassagnac, *Histoire Des Causes de Larevolution Francaise* 189 (Auguste Pagny ed., 1850) (reviewing the protections provided by the old customary law to families and their patrimonial properties).

83 The influence of Roman Law in Europe and the emergence of the *ius commune*, which the French Revolution aimed to abolish, see generally, Manlio Bellomo, *The Common Legal Past of Europe 1000-1800* (1995); H. G. Keonigsberger, *Medieval Europe 400-1500* (1987); Charles M. Radding, *The Origins of Medieval Jurisprudence: Pavia and Bologna 850-1150* (1988).

84 The Revolution’s attitude toward local customary law established prior to 1789 reflected by Voltaire’s observation, ‘[W]ith the improvements in communications, it became absurd to pass from the domain of one law to that of another every time it was necessary to change horses’. Alain Levasseur, *Code Napoleon or Code Portalis?*, 43 Tul. L. Rev. 762, 763 (1968).

preserved the nobility of birth in the feudal chain would be abolished. It is an imperative for revolution in Pakistan to include that the 'legal uniformity became one of the primary objectives of the revolutionary experiment – to be established fully and irrevocably by the power of the State'.<sup>85</sup>

#### IV *Civil Constitution of the Clergy*

The most profound of the reforms in France after the revolution was the separation of the Church and State in the revolution. The Catholic Church had sanctified the nobility of birth and thus the succession of the Monarch as the head of the State for twelve centuries.<sup>86</sup> While the religion does not have the same level of influence and those religious authorities accepted what is sanctioned by the State, the country was forged in the name of religion and that is still the distinction that gives it a separate identity from India which has a majoritarian Hindu population.<sup>87</sup>

The concept of Islam is based on its fundamental tenets that are based on the Quran and the Shariah as the main legislative source of religion and they are relevant in all circumstances but are open to interpretation. In the Hindu religion, there is a difference between Hinduism and Hindutva and while 'Hinduism is a religion (however defined) the Hindu nationalism, or Hindutva, is a political ideology'.<sup>88</sup> It is not deemed to be 'analogous to the relationship between Christianity and Christian fundamentalism or Islam and Islamic fundamentalism' but it is considered 'to be remarkably thin in terms of content'.<sup>89</sup>

However, the concept of the Civil Constitution of the Clergy, a law passed in 1790, is of universal application because of the existence of the State as the sovereign and indivisible representative of the people.<sup>90</sup> This august document was signed into law by the National Assembly on 12 July, 1790, and was aimed to reorganize the Roman Catholic Church in France on a national basis. The most important aspect of the reform was to create a new administrative framework for

85 Dante Figueroa, *Twenty-One Theses on the Legal Legacy of the French Revolution in Latin America* (30 November 2010), 60, SSRN: <https://ssrn.com/abstract=1966788> or <http://dx.doi.org/10.2139/ssrn.1966788>.

86 Ulrike Müßig, *Giornale di Storia Costituzionale* 27 (2014), 107 and the discourses in *idem*. See also *Recht und Justizhoheit (Law and Judicial Sovereignty)* 2nd ed. (Berlin 2009), 105.

87 Niranjana Sahoo, *Mounting Majoritarianism and Political Polarisation in India*, *Carnegie Endowment for International Peace* (18 August 2020), <https://carnegieendowment.org/2020/08/18/mounting-majoritarianism-and-political-polarization-in-india-pub-82434>.

88 Arvind Sharma, 'On the Difference Between Hinduism and Hindutva', *Asian Studies Journal*, Vol. 25 (Spring 2020), 1, [www.asianstudies.org/publications/ea/archives/on-the-difference-between-hinduism-and-hindutva/](http://www.asianstudies.org/publications/ea/archives/on-the-difference-between-hinduism-and-hindutva/).

89 *Ibid.*

90 Brigitte Basdevant-Gaudemet & Jean Gaudemet, *Introduction Historique Au Droit XIII<sup>e</sup>-XX<sup>e</sup> Siècles* 323 (2000) (referring to the new revolutionary concept of natural law as *indépendantes de Dieu*) ('independent from God' (author's translation)). (*Dans le domaine juridique, cela implique élaboration d'un droit nouveau, librement conçu par l'homme, dont le fondement soit la raison, qui soit au service du peuple et compris par lui.*) ('In the legal field, this means developing a new law, freely designed by man, whose foundation is reason, that is at the service of the people, and is understood by him', 322.

the French Church after the nationalization of Church lands and the prevention of collecting revenue from the peasants.<sup>91</sup>

The Civil Constitution aligned the number of bishops from 135 to 83, and to have each diocese correspond to a *département* (the basic territorial administrative unit established by the National Assembly), and to have enfranchised citizens elect bishops and parish priests, and to have the state pay the clergy's wages.<sup>92</sup> The law imposed the requirement of oath that the clergy had to take to the Constitution which was known as the 'juror clergy' and those who refused were called the 'non-juror clergy'.<sup>93</sup>

This is the process that Pakistan can adopt in constituting one uniform law for the Muslim population of the country. The Civil Constitution would remove not only the influence of customary law, but also unorthodox practices that were used to preserve the status and wealth in the hands of the feudal lords, and the sectarian conflicts by various schools of Islam. While the Civil Constitution of the Clergy caused a schism in France between the juror and non-juror clergy it is not likely to happen in Pakistan because there is no ecclesiastical order in Islam, and it would be a logical step for the post *ancien régime* National Assembly to institute this reform and solve the problem of fanaticism and distortion of religion.

#### V A 'Social Contract' and Popular Mandate

The beginning of every revolution has to be from an intellectual ferment that leads to the genuine representatives of the people taking power. The events that precede a revolutionary change are based on a treatise that enables the peoples to organize themselves in a spontaneous uprising. All this starts after a debate and resolution from the associations in which the more academically inclined participate, and influence into launching a revolution by a manifesto that leads to a popular response from the common people. The revolutions in Europe are a precedence as they were universal in their appeal and those that occurred between 1789 and 1848: 'had long range results, which cannot be confined to any social framework, political organization, or distribution of international power and resources, and its early and decisive phase, which was closely tied to a specific social and international situation'.<sup>94</sup>

The philosopher who was mainly responsible for the French Constitution was JJ Rousseau and his theory of the social contract between the rulers and those who are governed.<sup>95</sup> The ideological conviction stems from the transition of a feudal

91 Colin Jones, *The Great Nation: France from Louis XV to Napoleon: The New Penguin History of France* (2003), 444, Penguin Press, London. ISBN 9780140130935.

92 Art. II. The seat of the bishoprics of the eighty-three departments of the kingdom shall be established as follows: that of the department of the Lower Seine at Rouen; that of the department of Calvados at Bayeux.

93 B. Combes de Patris, *Proces-verbaux des seances de la Societe Populaire de Rodez* (Rodez: Carrere, 1912), 128.

94 Eric Hobsbawm, *The Age of Revolution: 1789-1848* (Penguin; New Ed edition, 1987), 6.

95 J. J. Rousseau, *The Social Contract...* (1863), Translated with an historical and critical introduction and notes by H. J. Tozer, Swan Sonnenschein & Co. London (1895), 59.



regime to a 'new state of nature characterized by oppression'.<sup>96</sup> The legitimacy that a government acquires is through the social contract which is a

form of association which will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting himself with all, may still obey himself alone, and remain as free as before.<sup>97</sup>

The enactment of the laws is then conducted by *volante general* or the general will, which is always for 'the public advantage and the greater good'.<sup>98</sup> The General Will has to be obeyed in order to 'maintain an ordered society'.<sup>99</sup> However, the main springboard for the intellectual transformation of thought is owed to Denis Diderot and Jean Rene d'Alembert who were responsible for creating the Encyclopedia which served as the pretext for a revolution based on rational analysis of the cause and effect of the *ancien regime*. This reasoning was responsible for developing educational and social concepts that were in accordance with scientific innovation.<sup>100</sup> This was the process that led to a radical departure from the assumption that there was a divine right of Kings to rule and it was a direct challenge to the authority of the Church that was premised on feudal allegiance.

The ideals that were adopted into the manifesto of the revolution were 'Liberty, Equality and Fraternity'. These served as the preamble to the legislation that terminated the ancient regime and established the republic. This was a reflection of what can be achieved by philosophers in a short span of time and how rational debate can be a clarion call to overcome superstition and custom and adopt a theory that can be of benefit for all humanity.

In Pakistan, there is a lack of critical debate of substance in forums which can lead to a radical departure from the feudal system that is dependent on the landed aristocracy as the stakeholders and the power brokers who decide the outcome of elections. These are deemed to be the 'electables' who are counted as being indispensable by every political party that has the object of securing a majority in Parliament.<sup>101</sup> They have the durability of being the vested interest and serve as the sitting tenants of the system who expect to gain an advantage over the common people whose votes they receive but whose interests are sacrificed.

The dearth of critical thought in Pakistan is because of the limited vision of Jinnah, who lacked the perception of a revolutionary and was not successful in devolving a system that could be egalitarian or dynamic in substance. There is an inertia in the academic community who are not exercising their minds towards

96 J. MacAdam, 'The Discourse on Equality and the Social Contract, Discussions on Inequality and the Social Contract', *Philosophy*, Vol. XLVII, No. 182 (1972), 308-321.

97 J. J. Rousseau, *supra* 95, at 32.

98 *Ibid.*, 33.

99 R. Grimsley, *The Philosophy of Rousseau* (Banday, Suffolk: OUP, 1973), 97.

100 Denis Diderot, *Encyclopédie*, subtitled A Systematic Dictionary of the Sciences, Arts, and Crafts, by a Company of Men of Letters. ZSR library, 1751-1780. <https://zsr.wfu.edu/2013/encyclopédie-ou-dictionnaire-raisonné-des-sciences-des-arts-et-des-métiers-edited-by-denis-diderot-1751-1780/>.

101 Saad Hasan, 'Who Are the Electables of Pakistan', *TRT* (22 March 2022), [www.trtworld.com/magazine/who-are-the-electables-threatening-imran-khan-s-government-55720](http://www.trtworld.com/magazine/who-are-the-electables-threatening-imran-khan-s-government-55720).

Zia Akhtar

fundamental change and postulating more on speculative questions and coming forward with abstract solutions.<sup>102</sup> The lack of an out-of-the-box approach to political ideology means that there is stagnation and lack of spontaneous or wholesale change. Zia Ahmed has argued

‘much of intellectualism is not proactive in terms of support for the masses via constructive criticism of state policies’ through the ‘critiques of the policies of the government through fictional narratives, public discourses, critical writings and classroom discussions.’<sup>103</sup>

## E Conclusion

The issue that needs attention is why should the long shadow of colonial legacy of Pakistan be erased. The power of the landed gentry and feudal lords is past its midnight hour. The soul of the masses long suppressed is finally reaching the point of no return and this must be in the form of a revolutionary process and actionable change that leads to a new social contract. It will be the good fortune of the country if it is the first to reach a revolutionary state in South Asia and will be a harbinger of better times defined by William Wordsworth’s immortal words: ‘Revolution is bliss’.

The institutions of Pakistan that have consolidated their power since the British rule are those that have their interests in land and are self-serving. The officer class, civil service and the saints or *pirs* are counter revolutionary and not expected to participate in the chorus for change which will lead to a revolution and the end of the *ancien regime* in the country. The masses in the form of the tenants in the countryside and those toiling in the towns and cities need an intellectual vanguard who will aspire to the ideals of the Enlightenment that will ferment change and will also preserve the Muslim identity. This could act as a catalyst for transformation that could terminate the autocratic rule in the Middle East where the potentates in the Arab Gulf are also governed by *ancien regimes*.

The bringing down of the curtain on the rule by the *zamindars*, a creation of the British Raj, will stop the landowners’ ability to maintain succession intergenerationally of the estates where the customary laws are part of a local *ius commune*. This is while the urban centres of city metropolises are governed by a separate legal regime. There should be one nation raised on the altar of a social contract which is a complete departure from the feudal norm and which is derived from a conscious development of a uniform civil law.

102 Pervez Hoodbhoy, ‘Pakistan Badly Needs a Rudder’, *Dawn* (21 May 2022), [www.dawn.com/news/1690772](http://www.dawn.com/news/1690772).

103 Zia Ahmed, ‘Intellectualism in Post Colonial Pakistan’, *Herald Tribune* (22 January 2022), <https://tribune.com.pk/story/2339783/intellectualism-in-postcolonial-pakistan>.