

# ISLAMABAD LAW REVIEW

Vol: II Nos. 1&2  
Spring & Summer 2018

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*Special Issue on Islamization of Laws in Pakistan*



*Published as part of the project  
Legal Education Support Program in Pakistan  
in collaboration with Sandra Day O'Connor College of Law  
Arizona State University, Phoenix, AZ*

A Journal of the Faculty of Shariah and Law  
International Islamic University, Islamabad

# Islamization of Occupancy Tenancy Laws in Pakistan: An Overview of the Jurisprudence of Constitutional Courts

MAZHAR ALI KHAN\*

## Abstract

*This paper aims to analyze the concept of occupancy tenancy laws in Pakistan and as well its roots in Sharia. It discusses the historical evolution of tenancy laws in Indo-Pak Sub-continent with reference to the earlier legislation on the subject. A short account of the concepts of ownership and tenancy under Islamic law is also within the scope of this study. Moreover, this work critically evaluates the existing laws on occupancy tenancy in Pakistan. Importantly, the landmark judgments of the Federal Shariat Court and Shariat Appellate Bench, wherein, certain provisions of the Khyber Pakhtunkhwa Tenancy Act, 1950; and the then N.W.F.P Tenancy Rules, 1981 were declared repugnant to Islam is the main theme of this paper. Finally, a short overview of the judgments of the constitutional courts in case concerning land reforms will be given.*

## Keywords

Land, Property, Tenancy Laws, Land Reforms, Zamindari, Ryotwari, Mahalwari, Tenants, Landlords, Federal Shariat Court, Shariat Appellate Bench, Injunctions of Islam

## Introduction

Each society has certain regulatory norms both for public and private affairs of individuals. In primitive societies the binding factors behind these norms were morality, principles of natural justice, divine rules and force or sanctions. However, with the emergence of modern state system the pre-existing social and moral norms were recognized as a matter of custom through enactments by the state law-making institutions (legislature). The writings of the originators of the theory of social contract suggest that the establishment of the state serve a special purpose which is the protection of fundamental human interests i.e. life, liberty and property.<sup>1</sup> Almost all the modern constitutions of the world's

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\* The Author is a serving Civil Judge-cum-Judicial Magistrate/ Judge Family Court at district D.I.Khan. He has LLB and LLM (Human Rights Law) from International Islamic University Islamabad. He is currently a PhD Law (Scholar). The author is thankful to Mr. Qazi Zia u Rehman Advocate for his valuable suggestions and providing materials for accomplishing this piece of work.

<sup>1</sup> See for example on the theory of social contract Brian R. Nelson, *The Making of the Modern State: A Theoretical Evolution* (New York: Palgrave Macmillan, 2006); Dmitry Shlapentokh, *Societal Breakdown and the Rise of the Early Modern State in Europe* (New York: Palgrave Macmillan, 2008); Jean-Jacques Rousseau, *The Social*

nations contain provisions as regard to protection of life, liberty and property.<sup>2</sup> In substance property rights of individuals are well recognized by all states, however, slight differences exist in the mode of its application and acquisition.

In modern context, property rights are the limited legal interests of individuals or corporations protected and recognized through state enactments. The phrase 'limited legal interest' is used here in a sense that in modern state system the territory of a country originally belongs to the state and the properties owned by the individuals are subject to state laws. For instance, the government may dispossess an individual or an entire locality under the land acquisition laws in public interest or for a construction of governmental buildings or even forfeit property of an individual as against his/her criminal or financial liability.<sup>3</sup> It denotes that in modern state system the absoluteness of property rights is almost vanished and is severely subject to various restrictions.<sup>4</sup> Moreover, it is the state that lays down substantive and procedural rules for the acquisition of property by its

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*Contract*, trans. G. D. H. Cole (New York: Cosimo, Inc., 2008); Carl Schmitt, *The Leviathan In The State Theory Of Thomas Hobbes*, trans. George Schwab and Ema Hilfstein (USA: Greenwood Press, 1996); John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. Shapiro Ian (New Haven; London: Yale University Press, 2003). <http://www.jstor.org/stable/j.ctt1npw0d>.

<sup>2</sup> See generally Elisabeth Ellis, "Citizenship and Property Rights: A New Look at Social Contract Theory," *The Journal of Politics* 68, no. 3 (August, 2006): 544-555, <https://www.jstor.org/stable/10.1111/j.1468-2508.2006.00444.x>; See also Markandey Katju, "Constitutional Jurisprudence," *Amicus Curiae* 87 (2011): 18-21; JAMES W. ELY JR., "The Constitution And Economic Liberty," *Harvard Journal of Law & Public Policy* 35, no. 1 (2012): 27-35.

<sup>3</sup> In modern state system, the principle of sovereignty entitles the State and its organs to acquire property for public good. Most of the states have enacted legislations in respect of land acquisition. The powers of State to get control of privately owned property for public use are inalienable and are primarily based on two maxims: *salus populi est supreme lex* i.e., the welfare of the people is supreme law; and *Necessita public major est quam private* i.e. Public necessity is greater than the private one. However, these powers are subject to giving a reasonable compensation to the individuals from whom the property has been taken in the public interest. See for example Vince Mangioni, "The evolution of the "Public Purpose Rule" in compulsory acquisition," *Property Management* 28 no. 2 (2010): 93-103.

<sup>4</sup> For instance, the concept of property rights under the communist era in the former USSR was very limited in nature. It was the state to which the property originally belongs. A very small quantum of property for personal use or owning a house by peasants was allowed under the communist laws. On the other hand, the concept of private property in rest of the world was broader as compare to communist countries. See for detail discussion on Soviet property laws John N. Hazard, "Soviet Property Law," *Cornell Law Review* 30, no. 4 (1945): 466-487, available at: <http://scholarship.law.cornell.edu/clr/vol30/iss4/5>.

subjects.<sup>5</sup> The modes of acquisition of property are exhaustive and needs fulfillment of certain requirements.

Similarly, the rules governing private and public property rights under Islamic law are well defined. Islamic law entitles individuals to own property.<sup>6</sup> However, according to teachings of Islam real ownership vests in Allah Almighty and Man being vicegerent holds trust in it.<sup>7</sup> The Islamic concept of private ownership carries twofold purposes: legal protection to individuals and socio-economic prosperity of society.<sup>8</sup> Islamic law extends legal protection to individuals by recognizing their privately owned properties through lawful means and makes the payment of *Zakat* obligatory over the Muslims who own a prescribed quantum of property in order to achieve socio-economic goals.<sup>9</sup> The terms 'property' and 'land' are often used in a same context under *Sharia*. Moreover, there are certain prohibitory rules and provisions laid down by Quran and Sunnah which renders the ownership of a property unlawful, for instance, the prohibition of *Riba* (Interest) and *Gharar* (speculations) in contract.<sup>10</sup>

Property rights are well established under the constitution and as well the substantive laws of Pakistan. The Constitution of

<sup>5</sup> For example Pakistani Land Acquisition Act, 1894.

<sup>6</sup> See generally Imran Ahsan Khan Nyazee, "Property and Ownership" in *Outlines of Islamic Jurisprudence* (Islamabad: Advanced Legal Studies Institute, 2010), 235-243; see also Siti M. M. S. Salasal, "The Concept of Land Ownership: Islamic Perspective," *Buletin Geoinformasi* 2, no.2 (December, 1998): 285-304, available at: <https://core.ac.uk/download/pdf/11781156.pdf>.

<sup>7</sup> In support of this contention the Quran clearly states in Surah Al Nisa: "And to Allah belongs whatever is in the heavens and whatever is on the earth. And ever is Allah, of all things, encompassing." 4: 126. Similarly, in Surah Al-Nahl it has been stated: "And to Him belongs whatever is in the heavens and the earth, and to Him is [due] worship constantly. Then is it other than Allah that you fear?" 16: 52.

<sup>8</sup> See for example Abdel-Hameed M. Bashir, "Property Rights in Islam," *Proceedings of the Third Harvard University Forum on Islamic Finance: Local Challenges, Global Opportunities*, Cambridge, Massachusetts, Center for Middle Eastern Studies, Harvard University (1999): 71-82.

<sup>9</sup> See for the Islamic system of *Zakat* and its socio-economic implications for society Sheriff Muhammad Ibrahim, "The Role of *Zakat* in Establishing Social Welfare and Economic Sustainability," *International Journal of Management and Commerce Innovations* 3, no. 1 (2015): 437-441; Mek Wok Mahmud and Sayed Sikandar Shah, "The Use of *Zakat* Revenue in Islamic Financing: Jurisprudential Debate and Practical Feasibility," *Studies in Islam and Middle East* 6, no. 1 (2009): 1-15; Adam Bukowski, "Social Role of Alms (*zakāt*) in Islamic Economies," *Annales. Ethics in Economic Life* 17, no. 4 (December 2014): 123-131.

<sup>10</sup> See Camille Paldi, "Understanding *Riba* and *Gharar* in Islamic Finance," *Journal of Islamic Banking and Finance* 2, no. 1 (March, 2014): 249-259; see also Imran Ahsan Khan Nyazee, *Concept of Riba and Islamic Banking* (Malaysia: Islamic Book Trust, 2016).

Pakistan, 1973 provides for property rights by virtue of Article 23 and extends protection to property rights under Article 24. In addition to, there exists a comprehensive regulatory regime on the land/property laws. In order to avoid any complication with regard to subject matter of a contract or litigation before the courts, Pakistani laws distinguish between moveable and immovable property.<sup>11</sup> Land falls under the category of immovable property. Similarly, under Pakistani law a property is 'tangible' when it exists physically; and is intangible when it doesn't exist physically such as intellectual property rights. In pursuance of Article 23 of the Constitution, every citizen of Pakistan has the right to acquire, hold and dispose of property (either moveable or immovable) in any part of Pakistan.<sup>12</sup>

Land revenue system in Pakistan dates back to 13<sup>th</sup> century Muslim rule in sub-continent. However, the existing codified laws on land revenue, occupancy, tenancy and ownership were enacted during the British era, whereas numbers of legislations were enacted in order to regulate land and property and especially land revenue most of which are still in field. For example the Contract

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<sup>11</sup> The Transfer of Property Act, 1882 defines immovable and moveable properties as: "Immovable property includes land, buildings, benefits to arise out of land, things attached to the earth, or permanently fastened to anything attached to the earth, hereditary allowances, rights to ways, lights, ferries and fisheries but does not include- (a) standing timber, growing crops or grass whether immediate severance thereof is intended or not; (b) fruit upon and juice in trees whether in existence or to grow in future; and (c) machinery embedded in or attached to the earth, when dealt with apart from the land." Similarly, "movable property" stands for any property, except immovable property.

<sup>12</sup> Article 23 of the 1973 Constitution has its roots in the Constitutions of Pakistan of 1956 and 1962. However, article 23 is more exhaustive and wider in scope. Under Article 11(b) of the 1956 Constitution every citizen had the right to acquire, hold and dispose of property. Article 15 of the 1956 Constitution provided for the acquisition of individual's property by the Government for public use subject to payment of compensation. A proviso was contained in Article 15 that restricted the liberal application of Article 15 in certain circumstances. For instance, in some cases the Government could compulsorily acquire property for preventing danger to life, property or to public health; or for the administration or management of any property for the benefit of its owner. Similarly, Article 5 of the 1962 Constitution of the Islamic Republic of Pakistan provided for Freedom of movement and Right to Acquire Property. The scope of the provisions contained in Article 5 was limited as compare to Article 23 of the 1973 Constitution. A proviso was added to article 5 which states: 'On the freedom of a citizen to acquire, hold or dispose of property in any part of Pakistan. This Principle may be departed from where it is necessary so to do in the public interest.' The use of term 'departure' entails wider consequences especially when it is invoked in public interest. No reasonable procedure was provided therein under Article 5 for taking the possession of individually owned property in the public interest which is provided in Article 24 of the 1973 Constitution.

Act, 1872<sup>13</sup>; the Transfer of Property Act, 1882<sup>14</sup>; the Punjab Tenancy Act, 1887<sup>15</sup>; the Punjab Land Revenue Act of 1967 based on the Land Revenue Act, 1887<sup>16</sup>; the Government Tenants Act, 1893<sup>17</sup>; the Land Acquisition Act, 1894<sup>18</sup>; and the Colonization of Government Lands Act, 1912<sup>19</sup>. For the purpose of establishing a provincial regulatory mechanism for occupancy and tenancy each province enacted separate legislations on the subject such as the Sind Tenancy Act, 1950; the Khyber Pakhtunkhwa Tenancy Act, 1950; and the Baluchistan Tenancy Ordinance, 1978.

The theme of this work is the detail analysis of land and tenancy laws in Pakistan. This work will mainly focus on the landmark judgments given by the Federal Shariat Court (hereinafter FSC) and Shariat Appellate Bench (hereinafter the Bench) in respect of certain provisions of the Khyber Pakhtunkhwa Tenancy Act, 1950 and the rules made under it. Moreover, the whole discussion on the aforesaid themes will be made in the context of the Islamization of laws in Pakistan. An attempt will also be made to analyze and distinguish between the concept of ownership in Islam and that one relied in the above judgments.

## **Historical Development of Land Ownership and Occupancy Tenancy Laws in Pakistan**

During the Muslim rule in sub-continent the land of the empire was the sole proprietorship of the King or Ruler, while the people (peasants) were allowed to use land at the discretion of the emperor.<sup>20</sup> In other words, the peasants were considered as the real owner of the land in their possession.<sup>21</sup> Moreover, the powers to increase or decrease land tax were also vested in the King. Land Revenue system dates back to thirteen and fourteen century. Land administration was for the first time introduced by the Muslim

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<sup>13</sup> Act No. IX of 1872.

<sup>14</sup> Act No. IV of 1882.

<sup>15</sup> Act No. XVI of 1887.

<sup>16</sup> Act No. XVII of 1887.

<sup>17</sup> Act No. III of 1893.

<sup>18</sup> Act No. I of 1894.

<sup>19</sup> Act No. V of 1912.

<sup>20</sup> See for example W.H. Moreland, *The Agrarian System of Moslem India* (Delhi: Oriental Books Reprint Corporation, 1968);

<sup>21</sup> Hareet Kumar Meena, "Land Tenure Systems in the late 18th and 19th century in Colonial India," *American International Journal of Research in Humanities, Arts and Social Sciences* 9, no. 1 (December, 2014-February 2015), 66, accessed January 7<sup>th</sup>, 2019, <http://iasir.net/AIJRHASSpapers/AIJRHASS15-113.pdf>.

ruler of India Sultan Allaudin Khilji (1255-1316).<sup>22</sup> Later on, Sher Shah Suri (1540-45) another Muslim ruler of India re-introduced the land revenue system with significant reforms.<sup>23</sup> Afterwards the Mughal Emperor Akbar (1556-1605) brought tremendous improvement in the land administration and revenue system. Akbar's Minister of Revenue Affairs and one of the renowned revenue experts Todar Mal (d. 1659) introduced structural reforms in land revenue and land administration system which are prevalent till date in nowadays India, Pakistan and Bangladesh.<sup>24</sup> For collection of land revenue Emperor Akbar appointed thousands of *Mansabdars* throughout the empire.<sup>25</sup> These *Mansabdars* were called as *Jagirdars* and *Zamindars*. The land of the empire was given by the king to *Zamindars* and *Jagirdars* who rented parcels of the lands to peasants in consideration of half share in produce.<sup>26</sup> *Mansabdari* system was maintained by all the subsequent Mughal rulers.<sup>27</sup>

In the Mughal *Zamindari* system, *Zamindars* were entitled to inherit, gift or sell their interests in collection of revenue from the peasants.<sup>28</sup> Sometimes, the King would entrust the right to collect taxes in certain officials who performs their duties on behalf of the government especially in tax collection. In some cases, small farmers were appointed as tax collector and they would receive salary for their duty. It can be held that at the end of the Mughal

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<sup>22</sup> Ibid; see also S.C. Raychoudhary, *Social, Cultural and Economic History of India: Medieval Age* (Delhi: Surjeet Publications, 2005); Kishori Saran Lal, *History of the Khaljis A.D. 1290-1320* (Karachi: Union Book Stall, 1950).

<sup>23</sup> Irfan Habib, *The Agrarian System of Mughal India: 1550-1707* (Bombay: Asia Publishing House 1963), 372-382.

<sup>24</sup> Moreland, *Agrarian System*, 257-69; see also W. H. Moreland and A. Yusuf Ali, "Akbar's Land-Revenue System as Described in the "Ain-i-Akbari"," *The Journal of the Royal Asiatic Society of Great Britain and Ireland* (January, 1918): 1-42, <https://www.jstor.org/stable/25209343>; Shireen Moosvi, "Todarmal's Original Memorandum on The Revenue Administration, March 1582," *Proceedings of the Indian History Congress* 49 (1988): 237-248, <https://www.jstor.org/stable/44148388>.

<sup>25</sup> See for detail discussion Shireen Moosvi, "The Evolution of the "Mansab" System under Akbar Until 1596-7," *The Journal of the Royal Asiatic Society of Great Britain and Ireland* (1981):173-185, <https://www.jstor.org/stable/25211244>; Sayed Ali Abbas, "Socio-Economic Crisis in the 18<sup>th</sup> Century Pakistan and India," *Journal of the Punjab University Historical Society* 17 (April-July, 1961), 10, accessed January 11, 2019, [http://pu.edu.pk/images/journal/history/PDF/v17\\_2\\_1964.pdf](http://pu.edu.pk/images/journal/history/PDF/v17_2_1964.pdf); Abdul Aziz, *The Mansabdari System and the Mughal Army* (Delhi: Idarah-i Adabiyat-i Delli, 2016).

<sup>26</sup> Meena, "Land Tenure System", 66.

<sup>27</sup> See generally Fakhar Bilal, *Mansabdari System under the Mughals: 1574-1707* (Germany: VDM Verlag Dr. Müller, 2010).

<sup>28</sup> Habib, *Agrarian System*, 375-76.

rule a sort of right in land was established, however, such right was limited only to use the land.<sup>29</sup>

### Land Ownership during British Era

The East India Company (hereinafter Company) introduced somewhat different mechanism for revenue collection.<sup>30</sup> The agrarian system was almost inherited by the British from the Mughals.<sup>31</sup> However, in order to meet local expenses and for transferring out dividends in monetary terms to the shareholders in England, the Company replaced the revenue collection system of crop sharing with fixed taxes in Rupees.<sup>32</sup> Although, fixed taxation formula was a new one for local farmer but the same was introduced with the intent to bring it in conformity with the British laws and most importantly to secure the interests of Company's shareholders.<sup>33</sup> The Company introduced major reforms both leading to revenue collection and land ownership which includes: the concept of "title deed" under which the

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<sup>29</sup> See Vijender Singh, "Akbar's Land Revenue System," *International Journal of Engineering, Management, Humanities and Social Sciences Paradigms* 19, no. 1 (2016): 8-15.

<sup>30</sup> Abhijit Banerjee and Lakshmi Iyer, "History, Institutions, and Economic Performance: The Legacy of Colonial Land Tenure Systems in India," *The American Economic Review* 95, no. 4 (September, 2005), 1193-94, available: <https://www.econ.nyu.edu/user/debraj/Courses/Readings/BanerjeeIyer.pdf>; see also Baden-Powell B. H., *A Short Account of the Land Revenue and its Administration in British India with a Sketch of Land tenure* (Oxford: Oxford Clarendon Press, 1894); William J. Barber, *British Economic Thought and India, 1600-1858: A Study in the History of Development Economics* (Oxford: Clarendon Press, 1975).

<sup>31</sup> Imran Ali, *The Punjab Under Imperialism 1885-1947* (Princeton: Princeton University Press, 1988), 173-75.

<sup>32</sup> See generally J. Albert Rorabacher, *Property, Land, Revenue, and Policy: The East India Company, c.1757-1825* (USA: Routledge, 2016); Muhammad Munir, "The Judicial System of the East India Company: Precursor to the Present Pakistani Legal System," *Annual Journal of International Islamic University* (2005-6): 53-68. The official name of the Company was "The Governor and Company of Merchants of London Trading into East Indies". The Company was granted charter by Queen Elizabeth I on 31<sup>st</sup> December, 1600 for initial period of 15 years. For management purposes, the Company had a Court of Director consisting of Governor and 24 directors. Since its creation, the Company for the first century and a half remained a mercantile enterprise to compete with other European traders. As against the French expansion in Indian sub-continent, the Company in the middle of eighteenth century became a political expansionist entity in furtherance of British colonial agenda. Finally, the Company established its rule in the sub-continent with support of the British crown and parliament. Being a business enterprise, the Company introduced its own system of revenue collection in order to sustain its rule and secure the interests of shareholders.

<sup>33</sup> See George Louis Beer, *The Origins of the British Colonial System* (London: Kessinger Publishing, 1962); see also Ian St. John, *The Making of the Raj: India under the East India Company* (USA: ABC-CLIO, LLC, 2012), 21-23.



farmers were given ownership rights;<sup>34</sup> land registry and establishment of civil courts; establishment of hierarchal system for revenue collection; *Zamindari* system in Bengal; *Ryotwari* system in Madras and Bombay; and *Mahalwari* system (village-based) in Punjab.<sup>35</sup>

## Zamindari System

Under the *Zamindari* system the *Zamindars* (feudal lords) were declared the proprietors of the lands under their control on the condition to pay fix revenue to the Company.<sup>36</sup> *Zamindars* were given absolute rights to settle terms with the peasants as their tenants.<sup>37</sup> In *Zamindari* system the right of ownership was alienable and subject to regular payment of revenue to the Company and in case of any default on part of *Zamindars* such rights could be took back.<sup>38</sup> Although *Zamindari* system is historically conceived as a tool of exploitation but on the other hand a concept of limited rights of land ownership was developed.<sup>39</sup>

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<sup>34</sup> See for example Minutes of Evidence Taken before the Select Committee on the Affairs of the East India Company, Vol. III: Revenue, (British House of Common Records, 1832), 381-83, Digitized by <https://books.google.com>.

<sup>35</sup> See Rekha Bandyopadhyay, "Land System in India: A Historical Review," *Economic and Political Weekly* 28, no. 52 (1993): 149-155; Firthankar Roy, *The economic history of India: 1857-1947* (Oxford: Oxford University Press, 2000); Timothy Besley, and Robin Burgess, "Land Reform, Poverty Reduction, and Growth: Evidence from India," *Quarterly Journal of Economics* 115 no. 2 (2000): 389-430.

<sup>36</sup> Meena, "Land Tenure System", 67-68; see also Sugata Bose, *Peasant Labour and Colonial Capital: Rural Bengal Since 1770* (Cambridge: Cambridge University Press, 1993); Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Paris: Mouton & Co., 1963); N. Nakazato, *Agrarian System in Eastern Bengal: 1870-1910* (Calcutta: KP Baggchi & Co., 1994).

<sup>37</sup> See G. Blyn, *Agricultural Trends in India, 1891-1947: Output, Availability, and Productivity* (Philadelphia: University of Pennsylvania Press, 1966), 136-142; see also Abhijit Banerjee, Paul Gertler, and Maitreesh Ghatak, "Empowerment and Efficiency: Tenancy Reform in West Bengal," *Journal of Political Economy* 110, no.2 (2002): 239-280.

<sup>38</sup> Baden-Powell, *A short Account*, 138, see at note 30 above.

<sup>39</sup> See for the loopholes in *Zamindari* system introduced by the British in India Peshotan Nasserwanji Driver, *Problems of Zamindari and Land Tenure Reconstruction in India* (Bombay: New Book Company, Ltd., 1949); see also Report of the United Provinces of Agra and Oudh (India), *Zamindari Abolition Committee*, Vol. 2, (Allahabad (UP): Superintendent, M.G. Shomr, Printing and Stationery, 1948): 227-232. Some authors argue that the purpose of *Zamindari* system introduced by the Company was not to make improvements in land management and cultivation, rather to collect revenue. Secondly, a sort of 'absentee landlordism' was promoted through *Zamindari* system where the British authorities had reserved rights in sharing of produce with *Zamindars* without participating in the

## **Ryotwari System**

After the *Zamindari* system, the Company introduced *Ryotwari* system with the intent to collect revenue in a more effective manner.<sup>40</sup> Notwithstanding the purpose of *Ryotwari* system, this time the people would get more rights as compare to *Zamindari* system.<sup>41</sup> Under this system a direct relationship between the colonial government and individual landholders (tenants) was established. Every registered landholder was recognized as proprietor of the land and such tenure was permanent in nature as long he/she would pay revenue to the Company.<sup>42</sup> Moreover, under *Ryotwari* a landholder could sell, transfer or sublet his land. Unlike *Zamindari* system, the land ownership rights under *Ryotwari* system were more exhaustive, absolute and permanent in nature.<sup>43</sup>

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process of produce. Finally, the *Zamindars* were vested with unlimited rights to receive rents from the peasants according to their wishes which was a direct exploitation of peasants. See for example Meena, "Land Tenure System", 69.

<sup>40</sup> See generally on *Ryotwari* system N. Mukherjee, *The Ryotwari System in Madras: 1792-1827* (Calcutta: Firma K.L. Mukhopadhyay, 1962); Baden-Powell, B.H., *The Land-systems of British India: The raiyatwari and allied systems*, Book IV (New York: Johnson Reprint Corporation, 1972), Digitized on 23 September, 2009.

<sup>41</sup> Comparatively, *Ryotwari* system was better than *Zamindari* and *Mahaltwari* systems in terms of occupancy or property rights. It was for the first time introduced by Sir Thomas Munro in Madras in 1802 and by Elfishon in Bombay. Later on, the princely states of Jaipur and Jodhpur in Rajasthan also felt gradually under *Ryotwari* system. Moreover, *Ryotwari* system caused a dramatic increase in the revenue of colonial government after its introduction in Madras which is from 32.90 million pounds in 1861 to 41.80 million pounds in 1874. Meena, "Land Tenure System", 69; see also T.H. Beaglehole, *Thomas Munro and the Development of Administrative Policy in Madras 1792-1818* (Cambridge: Cambridge University Press 1966).

<sup>42</sup> Meena, "Land Tenure System", 69.

<sup>43</sup> In terms of ownership rights the *Ryotwari* system eliminated the sense of insecurity among the peasants or farmers because as compare to *Zamindari* system this time they were recognized as landholders by the colonial authorities. Moreover, in *Ryotwari* there was no intermediary between the government and the peasants, and the relation was direct. See for example A. Banerjee, L. Iyer & R. Somanathan, "History, social divisions and public goods in rural India," *Journal of the European Economic Association* 3, no.2-3 (2005): 639-47.

## *Mahalwari System*

In this system the village lands were jointly held by the communities and the whole village community was jointly responsible for payment of land revenue to the government.<sup>44</sup> The *Lumbrdar* (headman of the village) was the focal person under *Mahlwari* system to collect revenue from the village and to deposit it to the government.<sup>45</sup> In return, the *Lambrdar* would receive 'panchatra' i.e. five percent commission.

It was the land revenue system introduced by the British led Company government that gave rise to private land ownership in sub-continent. Despite that such rights were limited in nature but common people were for the first time recognized as owners of the lands in partial capacity subject to payment of fixed revenue to the government. Moreover, the reforms so introduced by the Company government also laid down basis for the tenancy legislations enacted by the British government in nineteenth century. It is pertinent to note that the Company government and the successive government of British India had no interest in the improvement of the socio-economic condition of the local people rather they were interested in the collection of revenue. The three systems discussed above underwent a lot of changes during the

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<sup>44</sup> See Romesh Dutt, C.I.E., *The Economic History of India Under Early British Rule: From the Rise of the British Power in 1757 to the Accession of Queen Victoria in 1837*, Vol I (Great Britain: Kegan Paul, Trench, Triibner, 1902), 16-17, available at: <https://www.vifindia.org/sites/default/files/139217913-Economic-Hist-of-India-Under-Early-British-Rule-Vol-1-1902.pdf>; Baden-Powell, B.H., *The Land-systems of British India: The system of village or Mahâl settlements*, Book III (New York: Johnson Reprint Corporation, 1972), Digitized on 23 September, 2009.

<sup>45</sup> *Mahalwari* system which was mainly introduced in Punjab by the Company government was in fact a land settlement. The idea of *Mahalwari* system was given by Holt Makenzie, the then secretary of the Board of Revenue in 1819. The nowadays revenue official posts such as *Tehsildar* and *Patwari* have their roots in the institution of *Lumbrdari*. As compare to *Zamindari* system in Bengal and *Ryotwari* system in Madras, the *Mahalwari* system proved an effective mean of revenue collection for the Company government. The institution of *Lambardari* assisted the Company government in various ways such as playing the role of intermediary between the village community and the colonial government in respect of revenue collection; cooperation with the officers of the state in tax assessment and fixing the quota of peasants according to the quantum of produce; and collecting and paying the assessed amount to the colonial authority. See Md. Hamid Husain, "Significance of the institutions of lambardars, tehsildars and patwaris in the operation of the mahalwari system," *International Journal of Advanced Education and Research* 2, no. 3 (May 2017): 179-184. For an opposite view see Md. Hamid Hussain and M. Parwez, "Consequences of the Mahalwari Settlement: Village Community," *Paripex - Indian Journal Of Research* 1, no. 12 (2012): 76-80.

successive years and some of the features of these systems can be still seen in nowadays Bangladesh, India and Pakistan.

### Legislations during British Rule

The colonial authorities introduced agrarian legislation in sub-continent that continued after the partition. The most significant legislation was that dealing with occupancy tenancy laws.<sup>46</sup> British authorities were cognizant of the fact that to maintain an even balance between different interest groups in order to protect the social base of their colonial rule, such legislations were highly needed.<sup>47</sup> Moreover, these legislations were aimed at serving the political and economic interests of colonial authorities instead of socio-economic development of the common people.<sup>48</sup> Beside land revenue laws introduced so far, the tenancy legislations in sub-continent established occupancy rights of peasants (tenants) subject to fulfillment of certain conditions. Legislations during British rule for the first time recognized the rights of occupancy by the tenants over the lands who were cultivating the same for a specific time.<sup>49</sup>

The Bengal Rent Act of 1859 being the first step in evolution of tenancy laws laid down the foundation of occupancy rights of peasants.<sup>50</sup> For the first time a definition of the rights of occupancy

<sup>46</sup> See generally P S Appu, "Tenancy Reform in India," *Economic and Political Weekly* 10, no. 33-35 (1975): 1339-1375.

<sup>47</sup> Dietmar Rothermund, "The Bengal Tenancy Act of 1885 and its influence on Legislations in other Provinces," *Bengal Past and Present*, Diamond Jubilee Number (1967), 90.

<sup>48</sup> As a matter of fact the reforms brought by the Company government in land and tenancy sectors were significant in a sense that sort of proprietary rights in land ownership were recognized. Though, the colonial authorities were less interested in socio-economic change in Indian sub-continent but the legislations introduced by them were progressive in nature. For instance, the administration of justice system established in Madras and Bombay presidencies was not originally meant for the settlement of disputes among the common people, rather the same was for protecting the corporate interests of East India Company. However, in nineteenth century the problems of common people were also brought into the domain of the civil court for adjudication. See for example Faisal Chaudhry, "A Rule of Proprietary Right for British India: From revenue settlement to tenant right in the age of classical legal thought," *Modern Asian Studies* 50, no.1 (2016): 345-384, <https://doi.org/10.1017/S0026749X14000195>;

<sup>49</sup> Timothy Besley et al., "The Regulation of Land Markets: Evidence from Tenancy Reform in India," *Economic Organisation and Public Policy Programme (EOPP)* 31 (2011), 2. Available at: <http://sticerd.lse.ac.uk/dps/eopp/eopp31.pdf>;

<sup>50</sup> The permanent land settlement in Bengal was introduced in 1793 which defined the rights of *zamindars*, however, it was silent about the rights of *raiyyats* (tenants). The Land Settlement Regulation I of 1793 recognized the customary rights of tenants in a vague manner, which created a growing insecurity among

over land both for *zamindars* (landlords) and tenants was provided under the Rent Act. Under the Act, occupancy rights were conferred on tenants who had held land for twelve years.<sup>51</sup> Similarly, to overcome the issues of tenancy and fixation of annual rents to the landlords, the then colonial government adopted the first Punjab Tenancy Act in 1868.<sup>52</sup> Actually in South-east Punjab there were three categories of tenants: Occupancy tenants; Tenants with conditions; and Tenants-at-will. Under the Tenancy Act of 1868 certain rights were given to both the categories. After the passing of the Tenancy Act in Punjab, a large number of tenants were entered as tenants with occupancy rights in the record of the first settlement held in the years 1873-74.<sup>53</sup>

The Act was beneficial for the tenants, however, there was no solution provided under the Act for the ejection of tenants in case when the landowners were interested to retain the lands under their own cultivation. To cope with the issue of ejection of tenants, a second Punjab Tenancy Act was passed in the year 1887.<sup>54</sup> Under the new Act a uniform procedure for the ejection of tenants was provided in cases where the tenants refused to pay the rent, however, the occupancy rights of the tenants were

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the peasants. This vacuum was brought by the tenants into the notice of the colonial authorities which then after acted upon the demands of tenants enacted Act No. X of 1959 also known as the Bengal Rent Act. The Act was enacted in order to regulate the increase in rent for occupancy and non-occupancy tenants. Moreover, the Act had classified the tenants into three broad groups: tenants paying rent at fixed rate; tenants having rights of occupancy, but not holding at fixed rate of rent; and tenants having acquired occupancy right and paying rent at a competitive rate. See Amit Hazra, *Land Reforms: Myths and Realities* (New Delhi: Concept Publishing Company, 2006), 43-44.

<sup>51</sup> In substance, the Rent Act of 1859 for the first time recognized the occupancy rights of tenants and laid down the law regulating the relation between the tenants and the landlords. It can be held that the positive legal history of the tenancy laws started from 1859 which afterwards underwent various changes. See in this regard Government of Bengal, *Report of the Land Revenue Commission Bengal*, Vol. I (Alipore, Bengal: Superintendent, Government Printing Bengal Government Press, 1940), 22-24.

[https://archive.org/stream/reportofthelandr032033mbp/reportofthelandr032033mbp\\_djvu.txt](https://archive.org/stream/reportofthelandr032033mbp/reportofthelandr032033mbp_djvu.txt)

<sup>52</sup> The Punjab Tenancy Act, 1868 was a first attempt to address the issue of occupancy rights of tenants in Punjab. However, the Act could not achieve the desired results and was replaced by a second Act in 1887. Under the Act certain categories of tenants were recognized with occupancy rights. See for example G. R. G. Hambly, "Richard Temple and the Punjab Tenancy Act of 1868," *The English Historical Review* LXXIX, no. CCCX (January 1964): 47-66.

<https://doi.org/10.1093/ehr/LXXIX.CCCX.47>

<sup>53</sup> See Sir James M. Douie, "On the Rights of Tenants" in *Punjab Settlement Manual*, 4<sup>th</sup> ed. (Chandigarh: Controller of Printing & Stationery Department, Punjab, 1974), 112-128. Available at: <http://hid.gov.in/Douies%20Manual.pdf>.

<sup>54</sup> *Ibid.*, 119-120.

recognized.<sup>55</sup> In the same manner, in order to fulfill the lacunas in the Bengal Rent Act, a new piece of legislation known as 'Bengal Tenancy Act, of 1885' was adopted.<sup>56</sup> The Bengal Tenancy Act was a self contained agrarian code as compare to the Rent Act of 1859.<sup>57</sup> Occupancy rights of tenants were once again recognized in the new Act with the pre-condition of holding of land from the last twelve years.<sup>58</sup> After few years, the provisions of Bengal Tenancy Act were extended in piecemeal to Orissa between 1891 and 1896 and followed by Orissa Tenancy Act of 1913.

These were the major legislations passed during the British rule in sub-continent dealing with tenancy laws and occupancy rights of tenants. All these acts passed in different provinces of the then British India contained some common features. For instance, the recognition of occupancy rights of tenants;<sup>59</sup> the protection against ejection without notice by the landlord<sup>60</sup>; protection against the ejection for arrears of rent<sup>61</sup>; protection from enhancement of rent beyond certain limits;<sup>62</sup> and importantly, the entries of tenants in the settlement record with occupancy rights.<sup>63</sup> Tenancy legislations passed during the British rule are still in field with significant changes in Bangladesh, Pakistan and India. As the main theme of this paper is the analysis of Tenancy laws in Pakistan, therefore, the upcoming sections will deal only with the important developments made in Tenancy laws and occupancy tenants rights in Pakistan.

## Land and Tenancy Laws in Pakistan

<sup>55</sup> See Colonel W. G. Davies, *Tenant-Right in the Punjab and the Punjab Tenancy Act* (Allahabad: Pioneer Press, 1882). Colonel Davies wrote this piece in response to a pamphlet titled "Opinions of the Press on the Tenant-right Controversy". He narrated the rationale behind the introduction of tenancy legislations in Punjab and has given cogent justification in support of tenant rights. Available at: [https://archive.org/stream/tenantrightinpun00davririch/tenantrightinpun00davririch\\_djvu.txt](https://archive.org/stream/tenantrightinpun00davririch/tenantrightinpun00davririch_djvu.txt).

<sup>56</sup> Act No. VIII of 1885.

<sup>57</sup> See generally P.G. Robb, *Ancient Rights and Future Comfort: Bihar, the Bengal Tenancy Act of 1885, and British Rule in India* (London: Curzon Press, 1997).

<sup>58</sup> Section 20 of the Bengal Tenancy Act of 1885 provided for occupancy rights of tenants as: "(1) Every Person who for a period of twelve years whether wholly or partly, before or after the commencement of this Act, has continuously held as *raiyat* land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled *raiyat* of that village."

<sup>59</sup> Section 20 of the Bengal Tenancy Act, 1885; section 5 of the Punjab Tenancy Act, 1887.

<sup>60</sup> *Ibid.*, sections 45 & 46 respectively.

<sup>61</sup> *Ibid.*, sections 46 & 39 respectively.

<sup>62</sup> *Ibid.*, sections 29 & 20 and 22 respectively.

<sup>63</sup> *Ibid.* section 101.

Land and tenancy laws in Pakistan are mostly inherited from the colonial governments of Indian sub-continent. However, after the establishment of Pakistan the land and tenancy laws underwent significant changes in shape of parliamentary acts, ordinances and judicial decisions. Most importantly the rulings of FSC in respect of Land Reforms and Tenancy laws have a vital role in development of a general jurisprudence over the subjects. Since the establishment of the new dominion Pakistan, tenancy laws evolved during different regimes and currently each province has its own regulatory framework on tenancy and occupancy.<sup>64</sup> The existing provincial laws on tenancy have its roots in Punjab Tenancy Act of 1887.<sup>65</sup> Before partition the Sindh Tenancy Laws Committee Report of 1945 had proposed granting tenancy rights to *haris* (tenant-at-will) who had cultivated land four acres for the same zamindar for eight or more years.<sup>66</sup> Later on, the Sindh Hari Committee Report of 1948 came out in favour of landlords and proposed ending to permanent land rights.<sup>67</sup> The subsequent Sindh Tenancy Act of 1950 was the outcome of the 1948 Report and set standards for the tenancy legislations throughout Pakistan.<sup>68</sup>

Under the Tenancy Act of 1950 the *haris* were granted permanent tenancy rights who cultivated four acres land for three consecutive years.<sup>69</sup> Similarly, the then NWFP (now Khyber Pakhtunkhwa) Tenancy Act of 1950 and the Punjab Tenancy (Amendment) Act of 1952 provided for greater security of tenure, prohibition of share other than crop which was fixed 50%, increased grounds for self-cultivation by the landlords, recognizing ownership rights for occupancy tenants and reducing of landlord share from 50% to 40%. In order to lay down certain conditions for the evictions of tenants the province of Punjab

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<sup>64</sup> See generally UN-HABITAT, *A Guide on Land and Property Laws in Pakistan* (Islamabad: UN-Habitat, 2012).

<http://www.ndma.gov.pk/Publications/A%20Guide%20on%20Land%20and%20Property%20Rights%20in%20Pakistan%202012.pdf>.

<sup>65</sup> It is for the reason that the rest of provincial legislations on tenancy laws in Pakistan were enacted in 1950s, therefore, the Punjab tenancy Act of 1887 is the mother legislation which have laid down the basic framework and principles on tenancy matters in Pakistan.

<sup>66</sup> Nazish Brohi, "Gender and Land Reforms in Pakistan," *Sustainable Development Policy Institute (SDPI), Working Paper Series No. 17* (2010), 10.

<https://www.sdpi.org/publications/files/Microsoft%20Word%20-%20A117.pdf>.

<sup>67</sup> Government of Sind, *Government Hari Enquiry Committee 1948* (Karachi: Pakistan Law Society, 1965).

<sup>68</sup> Syed Mohammad Ali, *Development, Poverty and Power in Pakistan: The impact of state and donor interventions on farmer* (Oxon and Newyork: Routledge, 2015), 47.

<sup>69</sup> Section 4(i) of the Sindh Tenancy Act, 1950.

adopted Protection and Restoration of Tenancy Rights Act in 1950.<sup>70</sup> The said Act was meant to protect the tenants from eviction—a perpetual sword hanging over their heads.<sup>71</sup> The province of Baluchistan adopted its separate legislation on tenancy laws in 1978 known as Baluchistan Tenancy Ordinance.<sup>72</sup>

### **Land Reforms in Pakistan: An Overview**

Besides legislations on tenancy laws, land reforms also remained the focus of the government in newly established country. Shortly after partition, the founder party Muslim League formed an agriculture reforms committee and which submitted a detail report in 1949 known as Muslim League Agrarian Committee Report.<sup>73</sup> The report proposed the abolition of *Jagirs* (landed property owned by feudals); security of tenure for tenants; replacement of share rents through rent in kind; ceiling on landholdings of 150 acres irrigated and 450 acres unirrigated; and land distribution to tenants and compensation to landlords.<sup>74</sup> The recommendation of report could not be fully realized due to political opposition at that time from landlords. However, in East Pakistan large landholdings were abolished in pursuance of the committee report.<sup>75</sup>

In 1959, a land reforms commission was set up by the first Martial Law Administrator Ayub Khan and the commission presented its report and recommended the ceiling of 500 acres.<sup>76</sup> The report and recommendation of the commission became ineffective because the landlords alienated lands in the names of their family members and thus remained beyond the scope and application of the Land Reforms report.<sup>77</sup> In 1972 the Civilian Martial Administrator Zulfiqar Ali Bhutto promulgated the Martial Law Regulation No. 115 also known as Land Reforms Regulation of 1972. Under the Regulation the ceiling for landholding was fixed as 150 acres for irrigated and 300 for unirrigated lands and it contained no provisions relating to

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<sup>70</sup> Punjab Act No. XIII of 1950.

<sup>71</sup> Section 3 of the Punjab Protection and Restoration of Tenancy Rights Act, 1950.

<sup>72</sup> Baluchistan Ordinance No. XXIV of 1978.

<sup>73</sup> See Mushtaq Ahmad, "Land Reforms in Pakistan," *Pakistan Horizon* 12, no. 1 (March, 1959): 30-36.

<sup>74</sup> Brohi, "Gender and Land," 17.

<sup>75</sup> *Ibid.*, 14.

<sup>76</sup> West Pakistan Land Reforms Regulation No. 64 of 1959.

<sup>77</sup> Shahrukh Rafi Khan et al., "The Case for Land and Agrarian Reforms in Pakistan," *Sustainable Development Policy Institute (SDPI)*, Policy Brief Series No. 12 (2001), 8. <https://sdpi.org/publications/files/PB12-The%20Case%20for%20Land%20and%20Agrarian.pdf>.



compensation for the landlords.<sup>78</sup> The Regulation met with failure due to no compensatory mechanism. However, in furtherance of the same agenda a new legislation on land reforms was introduced known as Land Reforms Act of 1977.<sup>79</sup> This time the ceiling for landholding was further reduced to 100 and 200 for irrigated and unirrigated lands respectively,<sup>80</sup> however, compensations were given to the landlords under the new act<sup>81</sup>.

In May, 1980 the military regime of General Zia-ul-Haq established the Federal Shariat Court through the President's Order No. 1 of 1980. Under Article 203D of the Constitution of Pakistan the FSC has jurisdiction 'either on its own motion or on the petition of a citizen of Pakistan or the Federal Government or Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet'.<sup>82</sup> In consequence of the land reforms implemented through Land Reforms Regulation of 1972 and Land Reforms Act of 1977, a Lahore based charitable endowment namely *Qazalbash Waqf* lost much of its landed property. Besides *Qazalbash Waqf*, more than sixty other petitions were also filed impugning the land reforms being against the Holy Quran and Sunnah. Finally, the issue was settled once and for all in 1989 by the Bench in a majority judgment declaring the land reforms as un-islamic and repugnant to injunctions of Islam. The main judgment was written by Mufti Taqi Usmani the then *Ulema* Judge of the Bench. He stated:

"1. Individual property rights in Islam are the same as rights over categories like goods, etc. Everything in the world actually belongs to Allah and he has granted humans the right to utilize them within the limits of divine laws. Limits have been prescribed both on the acquisition and use of property. There are certain obligations on the person who uses the land. The right to property in Islam is absolute, and not even the state can interfere with this right.

2. Islam has imposed no quantitative limit (ceiling) on land or any other commodity that can be owned by a person.

3. If the state imposes a permanent limit on the amount of land which can be owned by its citizen, and legally prohibits them from acquiring

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<sup>78</sup> Section 8 of the Land Reforms Regulation, 1972.

<sup>79</sup> Act No. II of 1977.

<sup>80</sup> Section 3 of the Land Reforms Act, 1977.

<sup>81</sup> *Ibid.*, section 11.

<sup>82</sup> Article 203D of the 1973 Constitution of the Islamic Republic of Pakistan.

any property beyond that prescribed limit, then such an imposition of limit is completely prohibited by the Shariah.”<sup>83</sup>

In *Qazalbash Waqf* case the Land reforms finally met its fate and termed as un-islamic. The judgment was given effect from March 23, 1990 and all arrangements took place after the promulgation of the Regulation and Act of 1972 and 1977 respectively were set aside and declared void. The ratio laid down by the Bench was based on the Islamic notion of ownership (*milk*) which entails absolutism and excludes “adverse title”.

### **Constituional Scheme for Land and Property Rights**

Land in Pakistan can be classified into three categories: State owned land, private owned land and village common land (*Shamilat*). These classes of land are well protected under the law since the establishment of Pakistan. The 1973 Constitution of Pakistan deals with these classes of land in a very comprehensive manner. Article 23 of the Constitution provides for private owned land and property rights thereof:

“Every citizen shall have the right to acquire, hold and dispose of property in any part of Pakistan, subject to the Constitution and any reasonable restrictions imposed by law in the public interest”.<sup>84</sup>

Similarly, Article 24 extends protection to property rights and states as:

“No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefore and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given”.<sup>85</sup>

Article 172(1) of the Constitution provides for ownerless property i.e. State owned land as:

“Any property, which has no rightful owner shall, if located in a province, vest in the Government of that province and in every other case, in the Federal Government”.<sup>86</sup>

Moreover, Article 173(1) deal with powers of government to acquire property and make contracts, etc:

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<sup>83</sup> *Qazalbash Waqf v Chief Land Commissioner*, PLD 1990 SC 99.

<sup>84</sup> Article 23 of the 1973 Constitution of the Islamic Republic of Pakistan.

<sup>85</sup> *Ibid.*, Article 24.

<sup>86</sup> *Ibid.*, Article 172.

“The executive authority of the Federation and of a Province shall extend, subject to any Act of the appropriate Legislature, to the grant, sale, disposition or mortgage of any property vested in, and to the purchase and acquisition of property on behalf of, the Federal Government or, as the case may be, the Provincial Government, and to the making of contract”.<sup>87</sup>

The above stated provisions of the constitution laid down general principles of property rights, its acquisition, disposition and holding. For the purpose of regulating the affairs of land and property the Government of Pakistan has enacted various laws and regulations from time to time.<sup>88</sup> Most of legislations dealing with land and property are of pre-partition era, therefore, for bringing it into conformity with the Islamic principles the FSC and the Bench are empowered in this behalf, for instance, the declaration of land reforms repugnant to Islam in *Qazalbash Waqf* case by the Bench. On other hand, the socio-economic equality has always been remained the primary agenda of the governments and soon after six years of the establishment of Pakistan almost all the provinces at that time have their own Tenancy legislations. However, the socialist agenda of Zulfiqar Ali Bhutto the then Prime Minister substantiated the framework for fixing a ceiling on lands owned by feudal lords and finally land reforms was introduced.<sup>89</sup> As discussed above that in *Qazalbash Waqf* case the Bench declared the land reforms repugnant to the injunctions of Islam in a majority judgment. Now considering that how the FSC and the Bench dealt with the issue of repugnancy of tenancy laws with Islamic principles.

### **The Role of Constitutional Courts in Islamization of Tenancy Laws**

The judgment in *Qazalbash Waqf* case laid down a principle that there is no room for ‘adverse possession’ in Islam especially pertaining to one’s property rights and the same dictum almost

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<sup>87</sup> Ibid., Article 173.

<sup>88</sup> These are some central legislations dealing with land and property rights in different manners enacted after 1973: The Evacuee Property and Displaced Persons Laws (Amendment) Act, 1973; The Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975; The Baluchistan Land Revenue (Amendment) Act, 1976; The Abandoned Properties (Taking Over and Management) (Amendment) Act, 1976; The Transfer of Evacuee Lnad (Katchi Abadi) (Amendment) Act, 1977; The Transfer of Evacuee Land (Katchi Abadi) (Amendment) Act, 1977.

<sup>89</sup> See generally Ronald Herring & M. Ghapfar Chaudhry, “The 1972 Land Reforms in Pakistan and their Economic Implications: A Preliminary Analysis,” *The Pakistan Development Review* 13, no.3 (1974): 245-279.

stood a convincing argument for declaring certain provisions of Tenancy legislations repugnant to Islam.<sup>90</sup> Issues concerning the repugnancy of tenancy laws to the injunctions of Islam for the first time raised out from the application of Section 4 of the then N.W.F.P (now Khyber Pakhtunkhwa) Tenancy Act of 1950 and the N.W.F.P Tenancy (Fixation of Compensation to the Landlords) Rules, 1981 which were challenged before the FSC in a Shariat Petition No. 2/1 of 1983 in a case titled "*Sultan Khan v. The Government of N.W.F.P.*"<sup>91</sup> The main contention of the petitioner who challenged the aforesaid provisions and rules was that neither the Quran, nor Sunnah allows the property of the landlord to be taken away from him and to be given to the tenant. Section 4 of the Tenancy Act of 1950 provided as:

Any occupancy tenant who at the commencement of this Act.

- (a) Occupies any land as such paying no rent thereof beyond the amount of the land revenue thereof and the rates and cesses for the time being chargeable thereon, shall become full owner of such land without payment any compensation;
- (b) Occupies any land as on payment of the rent in cash, shall become full owner thereof on payment of the compensation to the landlord at such rates and within such period as may be prescribed by the Provincial Government under this section;
- (c) Occupies land as such and pays rent both in the cash and as well as in kind, shall become full owner thereof on payment of the compensation to the landlord at such rates and within such period as may be prescribed by the Board of Revenue under this section.

Section 4 entitled the occupancy tenants who at the commencement of the Act pay the rent in cash or partly in cash and partly in kind to become full owner thereof on payment of compensation to the landlord at such rate and within such period prescribed by the Board of Revenue. Similarly, Rule 5 of the Tenancy Rules, 1981 provided that the compensation shall be payable either in lump sum or by installments and the total amount shall be payable within 18 months. The *vires* of Section 4 and the Rules framed under it was a question before the Court. In its detail judgment the Court observed in respect of the NWFP Tenancy Act, 1950 as:

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<sup>90</sup> See for example Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden/Boston: Martinus Nijhoff Publishers, 2006).

<sup>91</sup> Sultan Khan v. The Government of N.W.F.P., PLD 1986 FSC 7.

“The main point to be determined is that whether the Government can extinguish occupancy rights subject to payment of compensation and confer ownership right on the tenant. It has been held in the above judgment that Occupancy Tenancy rights are partly ownership rights in the land and this is a beneficial legislation which tends to resolve all disputes arising out of the duality of ownership in the same land. This disposes of the petition which is, therefore, liable to be dismissed”.<sup>92</sup>

The Court further observed while considering the point that the occupancy tenancy rights on the tenants were conferred by the petitioner’s predecessors as a result of contract, as:

“Firstly, the property is not being taken by the tenant except under the protection of a statute made for public benefit. Secondly, the consent of the petitioner to that statute is proved by his long silence for over a period of 32 years since the legislation was passed although he could challenge it in the High Court and the Supreme Court on grounds of violation of fundamental right of property. It is established proposition of law that the *sukoot* or silence is equivalent to consent.”<sup>93</sup>

In support of the above arguments, an analogy was made by the Court comparing the principle of silence applied in the present case with one applicable in a marriage contract and in this regard the Court observed:

“Silence is considered equivalent to consent in cases where it is one’s duty to speak or express his willingness. In this connection, the Prophet (SAW) observed about the adult girl to whom was made an offer of marriage with a man named before her, that her silence is her consent.”<sup>94</sup>

Resultantly, the petition was dismissed by a three member’s bench of FSC unanimously. All the learned judges based their reasoning on the proposition that ‘silence or *sukoot* amounts to consent’. Being aggrieved from the decision of FSC, the petitioner Sultan Khan filed an appeal in the Shariat Appellate Bench of the Supreme Court of Pakistan. On 10<sup>th</sup> August, 1989 the Shariat Appellate Bench admitted the appeal in a case titled “*Sultan Khan v. The Government of NWFP*” in view of the decision given by it in Shariat Appeal No. 1/81 etc. in a case titled “*Qazalbash Waqf v. Chief Land Commissioner Punjab, Lahore*”. It is pertinent to mention that besides various provisions of Land Reforms Regulation of 1972 and Land Reforms Act of 1977 which were declared repugnant to the injunctions of Islam, the whole of Section 60-A of

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<sup>92</sup> Ibid., para. 7.

<sup>93</sup> Ibid., para. 9.

<sup>94</sup> Ibid., para. 11.

the Punjab Tenancy Act, 1887<sup>95</sup> was also declared un-islamic in *Qazalbash Waqf* case.

Section 60-A of the Punjab Tenancy Act provided for the devolution of tenancy upon preferred heir of a 'tenant' and failing such preferred heir then on his eldest son. The Court in the *Qazalbash Waqf* case declared the above provisions totally against the injunctions of Islam and thus lost its legal effects. It observed that the whole provisions of the aforesaid section are repugnant to Islamic injunctions in so far as it makes non-occupancy tenancy heritable irrespective of the terms of the contract.

In the Shariat appeal in a case titled "*Sultan Khan v. The Government of NWFP*" the Bench gave its detail reasoning on the *vires* of NWFP Tenancy Act, 1950 and 1981 Rules.<sup>96</sup> The landmark decision was penned down by Mufti Taqi Usmani, member of the Bench. Finally, Section 4 of the NWFP Tenancy Act, 1950 and the Tenancy Rules, 1981 were declared repugnant to the injunctions of Islam as per majority judgment. The Bench in respect of the jurisdiction of the FSC held that 'Federal Shariat Court is not to decide individual disputes rather its function is to see laws are repugnant to Injunctions of Islam. Moreover, treatment of individual conduct towards any law is irrelevant. If any law in force is challenged, FSC would be within its jurisdiction to decide whether that law is in accordance with Quran and Sunnah or not.'<sup>97</sup> Further held that 'Consent and even open support of that law by an individual in past, not to speak of his silence, would not render his petition as incompetent or liable to dismissal.'<sup>98</sup>

As regard to silence amounting to consent, the Bench held that:

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<sup>95</sup> "[60-A. Succession to non-occupancy tenancies.- (1) Where a tenant, not being a tenant of land reserved by the land-lord for personal cultivation under any law for the time being in force, not having a right of occupancy and not holding land for any fixed term under a contract or a decree or order of a competent authority dies, the tenancy shall, notwithstanding anything to the contrary in any law for the time being in force, devolve on his preferred heir, if any, and failing such preferred heir on his eldest male child.

Explanation- A preferred heir means any male child named in writing by the deceased tenant as such.

(2) If the deceased tenant has left no such persons as are mentioned in sub-section (1) on whom the right of tenancy may devolve under that sub-section, the right shall be extinguished]."

<sup>96</sup> *Sultan Khan v. NWF Province*, PLJ 1990 SC 174.

<sup>97</sup> *Ibid.*, 177.

<sup>98</sup> *Ibid.*

“To declare silence of an individual as consent, is not a common principle, but is an exception. Rule is that an individual’s silence cannot be treated as his consent. But at some places where it is essential for a person to speak, he remains silent without any hindrance and no reasonable result of his silence except silence, can be inferred, then his silence would be considered as consent.”<sup>99</sup>

In respect of the repugnancy of Section 4 of the Tenancy Act and the Rules made under it, the Bench held as:

“An occupancy tenant becomes owner of the land by payment of a specified compensation without consent of landlord. Under this law, land is transferred to tenant without consent of the landlord, which even in case of payment of compensation, is a forcible sale and is repugnant to Injunctions of Islam.”<sup>100</sup>

In the above terms, the Shariat Appellate Bench accepted the appeal of *Sultan Khan* against the Government of NWFP by declaring Section 4 of the Tenancy Act and Rules made thereunder were declared repugnant to Injunctions of Islam. The line of arguments in *Qazalbash Waqf* and *Sultan Khan* cases are almost the same. In both the cases the notion of ‘adverse possession’ was rejected as against the Injunctions of Islam and the absoluteness of ownership rights of individual were recognized which could even not be extinguished in the name of public good. Target date in both the cases was March 23, 1990 from which the decisions shall be effective henceforth. Soon after the landmark judgment given in *Sultan Khan* case, a review petition titled “*Muhammad Yousaf v. Hukoomat-e-Pakistan*”<sup>101</sup> was filed in the Shariat Appellate Bench against its decision in “*Sultan Khan v. The Govt of NWFP*”, wherein Section 4 of the Tenancy Act and the 1981 Rules were declared un-Islamic.

The main contention of the petitioner was that the Tenancy Act was enacted in 1950 under which hundreds of occupancy tenants became the owners of the land. But after the announcement of the judgment in *Sultan Khan* Case the previous owners of that land (which became the ownership of occupancy tenants by virtue of the Section 4 of the Act and 1981 Rules both declared repugnant) are reclaiming the ownership of land occupied by the tenants. And this is of grave concern for the occupancy tenants; hence, the instant petition was filed. Although

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<sup>99</sup> Ibid., 179.

<sup>100</sup> Ibid., 183.

<sup>101</sup> *Sardar Muhammad Yousaf and others v. Hukoomat-e-Pakistan*, PLD 1991 Supreme Court 760.

hundreds of occupancy tenants were the beneficiaries of the Act, but still there so many tenants who couldn't take the benefit of the Act (i.e. acquiring of occupancy rights). After coming out of the decision in *Sultan Khan Case*, the doors for tenants to acquire occupancy rights are permanently closed.

In its detail judgment penned down by Mufti Taqi Usmani, the Shariat Appellate Bench answered the above contention raised by the petitioner in a very effective manner while partially accepting the review petition. The Bench held that:

"1. Section 4 of the NWFP Tenancy Act, 1950 and the Rules made thereunder became ineffective from March 23, 1990 in pursuance of the judgment of Shariat Appellate Bench. And all the transactions under Section 4 and the Rules taken place before the target date are saved from the operation of the judgment. Meaning thereby, that before March 23, 1990 the persons who became the owners of properties under the Act, their ownership rights are protected. And this argument is incorrect that the ownership rights of tenants came to an end due to the operation of judgment.

2. Every person, before the commencement of the target date i.e. March 23, 1990, who has been declared as an occupancy tenant either under the law or in revenue documents, if claims that he/she is the actual owner of the land, then the judgment will not be a hindrance to his claim.

3. Due to being repugnant to the Quran and Sunnah by virtue of the judgment of Shariat Appellate Bench, Section 4 has become ineffective after the target date and which means that people who are actually tenants, but not the landlords, cannot be given ownership rights under the section after March 23, 1990. And the people, who are the real landlords, could not be subjected to payment of compensation for the recognition of their ownership rights.

4. The tenants who were legally declared occupancy tenants in terms of Section 5(c) of the Punjab Tenancy Act, 1887, according to Sharia they were the owners instead of tenants, therefore, they could even after the commencement of the target date March 23, 1990 acquire ownership rights without paying compensation under Section 4."<sup>102</sup>

Thus, the judgment by the Bench in the above review petition finally settled the issue of occupancy tenancy in Pakistan. The judgments of Shariat Appellate Bench in *Sultan Khan* case and in review petition are deemed as progressive developments in the context of Islamization of occupancy tenancy laws in Pakistan. Moreover, the Bench also settled some core issues such as the status of occupancy tenants and also distinguished occupancy

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<sup>102</sup>Ibid., 776.



tenants under Section 4 of the NWFP Tenancy Act, 1950 from those under Section 5(1)(c) of the Punjab Tenancy Act, 1887.<sup>103</sup> Most importantly, the Bench gave its findings while referring to the Islamic concept of ownership (*Milk*) which do not recognize adverse possession.

In substance, the judgment has given preference to the Islamic concept of ownership over the one contained in Section 4 of the NWFP Tenancy Act, 1950. For instance, the Bench in its findings held that there was a custom according to which when few people develop a village at a certain place then these people were called proprietors of the village (*Malikan-e-Deh*) and these proprietors would not only become the owners of the village which they had developed but as well the owners of adjacent barren lands. Under the custom the proprietors of the village by virtue of their status would be entitled to claim the ownership of the adjacent barren lands. Whereas the people who made the barren lands cultivable under the landlords i.e. *Malikan-e-Deh* were called occupancy tenants and they were protected from eviction as compared to ordinary tenants on the grounds that if they were paying rent to the landlords regularly. This custom was later on codified in the shape of Section 5(1)(c) of the Punjab Tenancy Act, 1887.<sup>104</sup>

The Bench while discussing the *vires* of the customs and legal provisions held that such a custom is not in accordance with the injunctions of Islam, because according to rules and principles of Islamic law a person is entitled to ownership of a certain land when the same is remained barren for a long time and such person has made it cultivable, then he/she has the ownership rights only to the extent which has been made cultivable by him/her.<sup>105</sup> Moreover, under Section 5(1)(c) the tenants who have made cultivable the barren lands belonging to the landlords are called occupancy tenants and the landlords (*Malikan-e-Deh*) as owners and same is the case with Section 4 of the NWFP Tenancy Act, 1950. On the contrary, Islamic law recognizes the occupancy tenants who have made cultivable the lands as owners instead of the landlords without paying any compensation to the landlords.<sup>106</sup>

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<sup>103</sup> "Section 5: Tenants having right of occupancy.- (1) A tenant- (c) who, in a village or estate in which he settled alongwith, or was settled by, the founder thereof as a cultivator therein, occupied land on the twenty-first day of October, 1868, and has continuously occupied the land since that date.."

<sup>104</sup> PLD 1991 *Supreme Court* 772.

<sup>105</sup> *Ibid.*, 773.

<sup>106</sup> *Ibid.*, 774.

What differentiate the occupancy tenants under Section 5(1)(c) of the Punjab Tenancy Act from that under Section 4 of the NWFP Tenancy Act are the types of occupancy tenants.<sup>107</sup> Section 4 doesn't differentiate between the classes of occupancy tenants and entitles all of the classes to ownership of the land without the consent of landlords which is against the principles of Islamic law. On the other hand, Section 5(1)(c) is in conformity with Islamic principles of property rights for the reason that it is the tenants who have made cultivable the land and not the landlords.<sup>108</sup> Thus, the *ratio* laid down by the Bench in *Sultan Khan* and *Muhammad Yousaf* cases was on the basis of the Islamic notion of ownership. It may be said that after a long time since its early developments, the tenancy laws were brought into conformity with the Islamic principles.<sup>109</sup>

## Conclusion

Land and Tenancy laws in Pakistan dates back to 13<sup>th</sup> Century Muslim Rule in Sub-continent. Major legislations pertaining to land and tenancy laws were introduced during British era. The current tenancy legislations in Pakistan have their roots in the Punjab Tenancy Act of 1887. After the partition, tenancy laws were enacted at provincial level by each provincial legislature in order to accommodate the demands of the local landlords and tenants. Land and property rights are well protected under the Constitution of Pakistan. A series of laws and rules also exists for the smooth regulation of land and property matters. Since the creation of this country, the Government of Pakistan has introduced various land reforms from time to time. The last piece of legislation on land reforms was enacted by the then Prime Minister Zulfiqar Ali Bhutto in 1977 known as Land Reforms Act.

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<sup>107</sup> After being redundant in pursuance of the judgment in *Sultan Khan* case, Section 4 of the Khyber Pakhtunkhwa Tenancy Act, 1950 was amended through Khyber Pakhtunkhwa Amendment Act No. XI of 1992 which read as: "Any occupancy tenant, who had the right of occupancy in the land so occupied by him under section 5(1)(c) of the Punjab Tenancy Act, 1887, or who may prove by a reliable, clear and unambiguous evidence, before a court of competent jurisdiction, that he is the real owner, according to Sharia, of the land under his tenancy, and who occupies any land as such, shall become full owner of such land without payment of any compensation to the landlord and acquire it free from any encumbrance created in respect of that land by the land lord." In the new amended section the occupancy tenants those covered by section 5(1)(c) of the Punjab Tenancy Act, 1887 was inserted in compliance of the judgment of Shariat Appellate Bench in *Sultan Khan* case.

<sup>108</sup> *Ibid.*, 775.

<sup>109</sup> See generally Charles H. Kennedy, "Islamization Of Real Estate: Pre-Emption and Land Reforms in Pakistan, 1978-1992," *Journal of Islamic Studies* 4, no. 1 (1993): 71-83.

Soon after the establishment of the Federal Shariat Court and Shariat Appellate Bench in the Supreme Court of Pakistan in 1980, land reforms were challenged as being against the injunctions of Islam. Finally, in *Qazalbash Waqf* case the land reforms were declared against the injunctions of Quran and Sunnah and ruled against the concept of adverse possession. Similarly, Section 4 of the NWFP Tenancy Act, 1950 and Tenancy Rules of 1981 were also declared against the principles of Islamic law in *Sultan Khan* case. Both the judgments of the Bench are considered as landmark achievement in the Islamization of land and tenancy laws in Pakistan. Moreover, the *ratio* laid down by the Bench in both the judgments was based on the Islamic concept of ownership.

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