A Singular Law: The Adoption of Pre-Colonial Statutes in Commonwealth Countries has caused a Multi Layered Legal Order and there is an Imperative to Enact a Civil Code for Uniformity and Certainty in the Constitution

Zia Akhtar*

Abstract

The Pakistani state adopted the Parliamentary model at its inception like many other countries that were governed by a codified common law. Its first constitution was the Government of India Act 1935 which it adopted as its framework. This has created a prerogative of powers for the executive which has often been the subject of abuse and abrogation of the constitution. The colonial era laws have been retained and the judicial status quo has not changed. The legal order is superimposed by additional layers of jurisprudence in the form of a Sharia law, regional courts laws and customary codes creating a *Janus* like legal system. In order to redress this ancient regime the jurisdictional question posed is can there be the creation of a civil code that is based on a one uniform law? The evaluation requires a comparison with Malaysia where the legal system also emanates from the British Parliamentary model. The analogy can be drawn and that has led to the derogation of power to a strong executive causing the denial of due process. By a process of evaluation it will be possible to reject the codified common law based on an outmoded constitution and to incorporate a framework in a civil code. This will inaugurate a civilised society that will achieve a rule of law that flows from a system that has expunged the fetters of the strong executive as grounded in the British constitution. This is an argument for a framework of a civil code that could promulgate a set of rules for a modern citizenship and identity that provides rights that are *sui generis*.

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*The author is a member of Grays Inn. He specialises in judicial review and comparative constitutional law. He has published articles in the Pakistan Law Journal, India Law Journal, Sri Journal of International and Comparative Law; Bangladesh Law Journal, etc.

I. Introduction

The controversy surrounding the capacity of Pakistan to govern itself has never abated. Since coming into existence in 1947 the country has been trying to frame a *modus vivendi* of its laws and structures. Its dismemberment—when the Eastern wing severed in 1971—has caused some to doubt the two nation theory, but the Western unit has survived because of its powerful military apparatus.[1] The question that needs to be addressed is whether the codified common laws are the viable solution to the country's colonial framework or a hindrance towards developing a uniform system of laws. The country has uncritically adopted the Westminster style constitution that has perpetuated the entrenchment of the statutes of the British Raj, and in broad measure disenfranchised the citizens. There are customary laws that bunch up the jurisprudence, and the homage to Islam as the source of its foundation as a Muslim majority state is compromised by the liberal hierarchy that adopts an Anglophile value system. The superficial nature of its principles invites an evaluation of a replacement in the form of a Civil Code and a comparison with Malaysia where there is also a common law based dual system.

In its lifespan of a nation that is sixty four years old Pakistan has been oscillating between the military and civilian feudal regimes whose legitimacy is often questioned. There is a strong interface that projects the former as the product of the latter in a continuing rotation of governments that play musical chairs. The political vacuum that has been present in the six decades of its existence has caused Pakistan to be ruled in an emergency with many of its structures still intact from the colonial period. Its foundation after partition from India as an Islamic state was anchored on a secular ideology and since its conception there has been difficulty in reconciling the ideological contradictions.

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[1] This is based on the notion that there is a Hindu and a Muslim nation in the subcontinent that is sum of the parts and does not incorporates the whole of the sum. MA Jinnah defined this at the ML's annual session at Delhi on 24 April 1943, as follows: *"History has presented to us many examples, such as the Union of Great Britain and Ireland, of Czechoslovakia and Poland. History has also shown to us many geographical tracts, much smaller than the sub-continent of India, which otherwise might have been called one country, but which have been divided into as many seven or eight sovereign states. Like-wise, the Portuguese and the Spanish stand divided in the Iberian Peninsula."* http://www.storyofpakistan.com/contribute.asp?artid=C031.

The documents bringing the country into existence are the preambles to its future conduct. The paper trail leads to the address of the Pakistan Resolution of 1940 and the speech by Ali Jinnah, the leading advocate and moving spirit of Pakistan who by his defining oration set out the blue print for the country.[2] The fledgling country has been attempting to set out a constitution that will accord with those aspirations that have not been converted into a doctrine of laws. The culmination of this lack of a substantive framework is the imperative of redrawing an approach to present a solution to the myriad problems by building an order that may rest on a civil law.

This article compares the Pakistani constitution to that of Malaysia with which it shares several features, such as the common law basis and the adoption of Islamic codes in specific areas of jurisdiction. It has produced a similar contradiction and a strong executive that is reminiscent of the UK constitution from which it draws an inspiration. The synthesis will enable an outcome of a clearer and broader framework in which the laws can be promulgated.

II. Westminster Parliamentary Model

The legal system in Pakistan rests upon a plethora of statutes that date back to the British imperial era. These have made an impact on the history of Pakistan by the Westminster style of constitutional government that was adopted when the nation state was founded. The Government of

[2] On March 23, 1940 the Pakistan Resolution was proclaimed. MA Jinnah's address is often quoted as a testament of his liberal thought. He said as follows: "*You are free; you are free to go to your temples, you are free to go to your mosques or to any other place or worship in this State of Pakistan. You may belong to any religion or caste or creed that has nothing to do with the business of the State. As you know, history shows that in England, conditions, some time ago, were much worse than those prevailing in India today. The Roman Catholics and the Protestants persecuted each other. Even now there are some States in existence where there are discriminations made and bars imposed against a particular class. Thank God, we are not starting in those days. We are starting in the days where there is no discrimination, no distinction between one community and another, no discrimination between one caste or creed and another. We are starting with this fundamental principle that we are all citizens and equal citizens of one State.*" http://www.pakistani.org/pakistan/legislation/constituent_address_11aug1947.html

India Act 1935 served as the first constitution of both India and Pakistan and it had a provision that has been subject of much abuse. It was article 58 (2) (b) that grants a *de jure* power in combination with the *de facto* head of state to dissolve the national assembly. In Pakistan's case it has been preserved in succeeding constitutional documents and when the military has stepped into power the clause has been invoked to invalidate the previous regime on the pretext that it is dealing with a national crisis.

At present there is a sense that the military is waiting in the wings and that it wields real power in face of politicians who lack any ideological integrity. The 'civilian' government has also resorted to extra judicial methods in pursuing the war on terror in the North West Frontier and an armistice has been revoked between the authorities and local representatives who wanted to enforce an indigenous code instead of the Frontier Criminal Regulations that are a relic of the British colonial era.[3] The strong arm tactics of the army against the people in the backwaters of Pakistan means that the writ of *habeas corpus* is seldom enforced and due process has not been respected as is manifest from the British terror suspects who were allegedly tortured when they were outsourced to the Pakistani authorities for interrogation.[4]

The apparatus of the law is however, incapable of dealing with pogroms committed against the minorities. The recent killing of a large number of worshippers in the Ahmediya community seems not to have

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[3] In early 2009 there was an accord between the government and a fundamentalist party the *Tehreek-e-Nafaz-e-Shariat-e-Mohammadi* and a militant branch (dubbed the Pakistani Taliban by the media) to enforce the Sharia law in the district of Swat which is in the North West Frontier Province (now named Khyber Pushtonkwa) The agreement stipulated a five point programme for the implementation of the *Nizam-e-Adl* Regulations 2009 in the tribal belt of the then NWFP province in place of the Frontier Regulations dating from the British Raj. This was not implemented as the military under pressure to pursue the war on terror. http://www.diis.dk/graphics/Publications/Reports2010/RP2010-12-Tehrik-e-Taliban_web.pdf.

[4] The issue of international rendition arose when Rangzeib Ahmed from Manchester, UK who had been arrested in Pakistan in 25/8/06 was released in 31/7/07 upon the orders of the Supreme Court. He was then rearrested in the UK in 25/8/2007 and in his trial he alleged that he was tortured, including finger nails removed in the presence of M15 officers. http://www.hrw.org/en/news/2009/02/02/uk-should-investigate-role-torture-pakistan.

led to the serving of any indictments. The communal prejudice in Pakistan has been aggravated by those powerful figures who want the controversial blasphemy law in Article 298 of the Criminal Code to be abolished. Those who are powerless have found in the weapon of terror as the only recourse to silence those seeking the proscription of the only certainty that protects their value system of unadulterated Islam.[5]

The continuing saga of Pakistan's instability is linked to the fact that it has not emerged as a truly sovereign state. There is a seeming inability to deal with infringement of its territorial integrity such as the drone attacks from Afghanistan in the North West Frontier Provence which breach the Durand line.[6] The nation's rulers have not been able to invoke the plebiscite in Kashmir by persuading the international community to pressure India in organizing a referendum that seeks to accept the aspirations of the inhabitants of that province that is also ethnically linked to the Pakistanis.[7]

There is no doubt that Pakistan is a dysfunctional state and this essay will address the possible solution by suggesting the substitution of English common law with the concept of civil law. This is because the codified common law by definition is not a single code of law but several layers of judge made laws that in Pakistan is appended to the religious, regional and customary laws that permeate caused socio economic

[5] The blasphemy law in Pakistan is highly controversial and is an extension of the British Criminal code of 1861 section 298, upon which is superimposed a section b that allows for anyone who insults the Prophet Mohammad by denying his finality or divinity will be incarcerated. http://www.pakistani.org/pakistan/legislation/1860/actXLVof1860.html.

[6] This is a boundary that the British colonial authority fixed dividing the Afghanistani and Pakistani Pushtons who are ethnically the same. It refers to the porous international border between Pakistan and Afghanistan which is approximately 2,640 kilometers (1,640 mi) long. It was established after the 1893 by the agreement of the British foreign Secretary HM Durand and the Afghan representative Amir Abdur Rahman. http://www.cfr.org/pakistan/troubled-afghan-pakistani-border/p14905.

[7] The Kashmir dispute is the longest documented dispute at the UN. The UN Security Council Resolution no 47 of 21 April 1948 stated that the "question of the accession of Jammu and Kashmir to India or Pakistan should be decided through the democratic method of a free and impartial plebiscite". The Indian government has not abided by the resolution. http://www.kashmiri-cc.ca/un/sc21apr48.htm.

division and political conflict. These laws allow the landowning class to maintain a constituency, civil service to sustain their autocratic rule, and for the military to derogate powers when it acts in an 'emergency'. There is in practice a neo colonial regime in Pakistan that has inherited powers of the British Raj.

The manner in which the Common law statutes were enacted in what was then pre partition India needs exploration. It has impacted on Pakistan and the structure and the concept of its laws owes to the adoption of the Westminster Parliamentary model. This is an experience that has been shared with the other countries who have adopted the English common law, such as Malaysia and by this process of evaluation it will be possible to reject the codified common law based on an outmoded Westminster style constitution and to incorporate a framework that is embodied in a civil code. This will inaugurate a society that will achieve a rule of law that flows from a system that has been achieved after the fetters of British imperial legacy have been expunged. This article is a prescription for change in the constitution and for a new ideological framework of Pakistan and other Commonwealth countries.

III. Governing Instruments of the British Raj

In its period since independence Pakistan has not accomplished a uniform code of law. The jurisprudence in the body fabric of the state suffers from various layers which are based on a hotchpotch of the Common law; Sharia law; Frontier Regulations; and feudal laws that mitigate against the homogeneity of the state. It means that there is insufficient remit for a universal law in the metropolitan centers and in the village level in present day Pakistan. The existing system causes dynastic privileges, a stratified civil service and military to serve as an unaccountable elite. The various levels of hierarchy have one interest in common and that their power derives from the ownership of land.

The web of laws that emanate from the British legislature came in the wake of the East India Company's rule in the 18th century. The first statutory enactment went on to establish an aristocracy in Pakistan in the wake of the Lord Corwallis's instigation of the Permanent Settlement

Act 1793. This served to regulate the procedure for taxation and effected changes in land tenure that allowed the creation of a landowning class. The British East India Company devolved power to the local landlords by appointing them as *zamindars* who were allocated the power to collect taxes from the local cultivators and keep a portion for themselves before conveying the rest to the Company authorities.[8]

The British noticed a resemblance between their role and the squire archy in England and the landowners were entrusted with important judicial and governmental functions by the Crown in the capacity of being the appointed justices of the peace. In time their power grew and they became the feudal lords and as they acquired a mystical reverence from the local inhabitants it caused the distinctions in status. The families who inherited land enforced their will along familial lines and their local fiefdoms became their constituencies as they acquired political power which consisted of magisterial authority, army recruitment, and patronage.

In Pakistan there has been a perpetuation of this system of landed wealth ensuring access to the corridors of power and the PSA laid the foundation stone of this monopoly. There has been no check on this mathematical land = political power and the neo conservatism of Pakistani power brokers derives from this originating document. It has allowed nepotism and venality to become the source rising to the rungs of the various offices of state.

The consolidated power of a self serving elite was fomented by an educational system for the wealthy families in the form of inaugurating schools for English language instruction. The mechanism was the Indian Charter Act 1833 that was designed by Lord Macaulay, the reforming English Parliamentarian who was delegated the duty in India of organising the civil service.[9] The ICA was the blueprint for the codification of the

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[8] www.legalserviceindia.com/articles/tena_agr.htm.

[9] The emerging English-educated Indian middle classes who aspired to be recruited into the Civil Service were inducted in order to create, in the words of Macaulay, "a new class who may be the interpreters between us and the millions whom we govern - a class of persons Indian in colour and blood, but English in tastes, in opinions, in morals and in interests." www.informaworld.com/index/779933275.pdf.

common law by the establishment of the machinery of state that set out the groundwork for the adoption of the viceroy's rule over British India.

The Indian Civil Service achieved its exulted status when India became part of the empire after the Indian Mutiny 1857-59 was suppressed. This led to the extension of the British writ and created the tiers of the HEICS "Honourable East India Company Civil Servants".[10] They became a highly stratified group with an entrenched power base who were directly responsible to the Viceroy's office in India. It served as the edifice upon which the executive's power rested and was imbibed by the rulers by the departing British who had enjoyed similar discretionary powers. The stratification achieved by the higher civil servants in the Company led them to become known as "covenanted" servants, whereas those not signing such agreements came to be known as "uncovenanted". The latter group generally filled the lower positions.

By the 1880s when the imperial age was at the height of power and India was ruled directly by the Crown the Statutory Civil Service was replaced by the provincial civil services. The Aitchison Commission's recommendations were accepted by the establishment of two layers that of the Provincial Civil Service and Subordinate Civil Service. The application of the scheme of cadre organization to the administrative departments owed itself to the 1833 Act that had entrenched the powers of both the imperial and provincial branches of this instrument of government. This cadre system caused the bureaucracy to become a preserve and this in turn facilitated a hereditary process to take effect.[11]

After independence in 1947 the Imperial Civil Service was renamed the Civil Service of Pakistan (CSP), while the Indian section retained its name of the Indian Civil Service. This has provided the tools of government that bypass proper judicial scrutiny and administrative watchdogs, because of its close links with the executive. It is one of the vestiges of the colonial Raj and is aloof from the common man by its

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[10] en.academic.ru/dic.nsf/enwiki/922527.

[11] www.scribd.com/doc/16325948/Refoms-in-Civil-Service-in-India.

rigid acceptance of authority and by serving successive regimes in Pakistan without transparency or accountability.[12]

There has been criticism of the civil service as a colonial instrument and as being over formalised. Andrew Wilder in an article in the *Journal of International Affairs* entitled *The Politics of Civil Service Reform in Pakistan* states as follows:[13]

> Pakistan's colonial heritage has heavily influenced its political culture as well as its bureaucratic and political institutions. For the purposes of this study, the legacy of executive rule by a powerful bureaucracy is particularly worth highlighting. During the 19th and 20th centuries, colonial administrators developed powerful and highly centralized bureaucratic institutions, administered by the famed Indian Civil Service (ICS), to rule the empire. While representative institutions were gradually introduced into colonial India, the role of these elected bodies was to serve as advisory rather than policymaking bodies, and to deal with local administrative matters rather than substantive issues. They were never intended to be democratic institutions that transferred power to elected representatives, but rather were designed to help legitimize and strengthen the authority of the bureaucratic state. The power imbalance between the very strong bureaucratic institutions that Pakistan inherited from colonial India and the very weak representative and democratic institutions has been one of the greatest causes of political instability in Pakistan since its independence.

Wilder's article concludes that there has been a process since the inception of Pakistan leading to the institutionalization of patron-client relationships between the civil service and the local power structures. The civil service is cited as the recipients of "land grants, pensions and titles to provide political allegiance and to collect revenues". This mutually beneficial relationship often allied to the land owing class has

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[12] Prime Minister Lloyd George referred to the civil service as the steel frame of British rule in India. HML Alexander, *Discarding the 'Steel Frame' changing images among Indians Civil Servants in the early 20th century.* South Asia, Journal of South Asian Studies, [1982] 5(2). http://www.tandfonline.com/toc/csas20/5/2-informaworld.com.

[13] http://www.docstoc.com/docs/60502378/The-politics-of-civil-service-reform-in-Pakistan(Report).

undermined the development of political parties that normally would have played this intermediary role. The bureaucracy's as patron also contributed "to the desire of every family to have a member employed in government service to as a problem-solver and provider of patronage".[14]

In a report by the *International Crises Group* entitled *Reforming Pakistan's Civil Service Asia Report No 185*[15] severe criticism is levied at the Pakistani government apparatus which upon its collusion with the military retards the growth of democratic institutions to gain or retain power even under elected civilian governments. At the same time, over centralisation, corruption and political interference in the civil service have undermined government capacity to deliver public services. Some 30 commissions have been constituted since independence to reform the civil service, but very few recommendations have been accepted or implemented.[16]

The report also cites that there are at present around 2.4 million regular civil servants for a population of 170 million or one civil servant for every 67 citizens. In comparison India has one civil servant for every 110 citizens. The active alliance of the military and civil service has allowed the bureaucracy to be oversubscribed by former staff officers. This began in the period of the military regime of General Zia ul Haq when he institutionalised military induction into the civil service, a practice that had been conducted on an ad hoc basis by earlier regimes.

The military ruler had decreed that 10% of all vacancies in the federal civil service would be reserved for retired military officers which would be selected by a committee headed by himself. General Ayub Khan, who was the first military officer to rule the country had in 1962 reserved 50% seats for the ex servicemen in some posts of the bureaucracy and politician Ali Bhutto's regime caused 83 military officers to be appointed into senior public service positions. This has caused a military

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[14] *Ibid.*

[15] http://www.crisisgroup.org/en/regions/asia/south-asia/pakistan/185-reforming-pakistans-civil-service.aspx. Retrieved 16th February 2010.

[16] *Ibid.*

and civil service pillar to be erected which acts as a steel frame that the colonial civil servants were originally meant to create when it was founded.

IV. Creation of an Executive Dominion

The military in Pakistan has developed a novel concept by which it rules in times of emergency. It has intervened four times on grounds of state necessity. The generals have stepped into the corridors of power four times and issued Provisional Constitutional Orders which are a means to rule by decree. The laws that they have passed have been through the mechanism of the Legal Framework Orders that are instituted as the legislative provisions in lieu of Parliamentary statutes.[17]

The Martial law regime has assumed the *de jure* powers by abrogating the constitution and it has relied upon the doctrine of legal necessity.[18] Its premises rests on the instrument that was part of the Government of India Act 1935 that became Pakistan's first constitution. Article 58 (2) (b) provided the means for the Governor General to act for the Crown in disbanding the National Assembly and imposing direct rule by the executive who had annulled the legislative authority of the National Assembly.

The Pakistani military has been able to plead the ground of state necessity when it has reached out to exercise political power by defining a link between its colonial inheritance and the constitution of the country. It was stated by the Supreme Court in the case of *Molvi Tamizuddin Khan v State of Pakistan* (1955)[19] when the first Constituent Assembly was dissolved by the Governor General. Chief Justice Munir ruled in

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[17] At the time of the last military coup staged by General Pervez Musharaff in October 1999 the first Provisional Constitutional Order was issued that placed the constitution in abeyance. This stated: "*Any orders made by the military authority, in the person of the General cannot be challenged by any source, in any court of law whatsoever.*" www.supremecourt.gov.pk/.../JR_Judgment_on_17th_Amendmend_and_Presidents_Uniform_Case.pdf.

[18] State necessity translates as acting under compulsion for the good of the people. '*Salus populi est suprema lax*'. http://legal-dictionary.thefreedictionary.com/.

[19] PLD SC 240.

accepting its dismissal as valid that the Assembly was "not a sovereign body" and that "to understand the role of Pakistan's chief executive it was necessary to go far back in the history and to trace the origin and development of the British Empire itself." In his opinion, the statehood the founder of Pakistan MA Jinnah gained when the British Parliament passed the Indian Independence Act of 1947 was restricted by the prerogative rights of the English Crown.

Lord Diplock, an English judicial lord who was representing the Pakistan government stated to the Court that Pakistan did not become independent in 1947, but attained a status like the senior dominions, 'virtually indistinguishable from independence.' The judgment in this case furnished the ground for the application of extra constitutional powers to those in the military to seize power and justify their act on the ground of state necessity. It has allowed the army in Pakistan to derogate from the constitution by imposing martial law and declaring it on account of this theory.[20]

However, the role of the military itself owes to its origins in the colonial era statutes that have allowed it to become the guarantor of power and an estate owner. It has achieved its status as the third most important power block after the aristocracy and the civil service by the plank of statutes that were passed by the British. These began with the Indian post-rebellion reconstruction which was commenced by the Indian Councils Act 1861 that was an innovation in Indian governance. This served to reorganise the Indian military with a plethora of reforms that went quite a long way into the body politic of India.[21]

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[20] In the case of *Dosso v Pakistan* [1958] 4 PLD, 5L chief Justice Munir elucidated this theory when he set out that it was contingent upon Hans Kelsen's positive theory of law that logically sets out the elements of a successful government when it is first constituted and that the new order begins to be 'efficacious' because the individuals whose behaviour it regulates actually behave, by and large, in conformity with the new order. If this becomes fact then the ground norm is deemed to have changed and this basic norm means that the former order has no more validity and the change itself is 'a law creating fact'. Hans Kelsen, *General Theory of Law and State*, (Translation by Andres Wedbery) (Cambridge, Massachusetts), at pp 110-20.

[21] It gave the viceroy a cabinet style government in which there were 6 ministers who had portfolios of home, revenue, government, law finance and public works. The

The ICA caused the routine departmental decisions to be made exclusively by the member; however, important decisions required the consent of the Governor-General and, in the absence of such consent, required discussion by the entire Executive Council. The military makeover after the collapse of the Indian Mutiny continued with powers made available to the army high command. This came with the Colonisation of Land Act 1912; the Alienation of Land Act 1900[22] and the Land Acquisition Act of 1894. The CLA was promulgated for the purpose of developing an Indian army that was concentrated in the Punjab where the rank and file of the forces were based. The procurement of the Indian army went hand in glove with the provision of resources to the military.

In A Talbot's *The Punjab under Colonialism: Order and Transformation in British India* it is stated that there was a common interest in the development of the state hierarchy and the military. The British high command relied upon the Punjab as the recruiting ground of its army and the provider of the manpower resources on the ground. This allowed it to become a stronghold of the armed forces when Pakistan came into existence.[23]

Talbot states:

> A nexis developed between landholding and military services that continues to exert a profound influence on contemporary Pakistan.

There has been an insightful treatise on the manner in which the military has acquired private wealth in Pakistan and made it a preserve as a power broker. The former researcher employed by the army Ayeisha

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military commander sat as the extraordinary member. http://www.archive.org/stream/indiancouncilsac00grearich/indiancouncilsac00grearich_djvu.txt.

[22] This Act allowed the land holder to dispense patronage and it came with the safeguards built in against patronage. The key measures were the Second Amendment Act which removed the loopholes of the *benami* transaction, the Registration of Money lenders Act and the Registration of Mortgaged Land Act. The later had enabled persons to recover all the land which they had mortgaged before 1901.

[23] A Talbot, *The Punjab under Colonialism: Order and Transformation in British India*, (University of Southampton, 2007) at pg 3.

S Siddiqa in *Military Inc.: Inside Pakistan's Military Economy*[24] states the properties that the military has acquired in the civil sector includes land and other industrial resources and that there has been collision in the military and the civil servants in the acquisition of land under the Alienation of Land Act 1894 and the Colonisation of Land Act, 1912. With this statutory base the building blocks of the military as a business corporation grew into a monolith of power in Pakistan.

Siddiqa states in her chapter *The New Land Baron*:[25]

> The estimated worth of the legally acquired worth of Pakistan's generals under the colonial era statutes varies from Rs 150 to 400 million (US $ 2.54 - 6.90) a figure that is based primarily on the senior commanders urban and rural properties. The systematic exploitation of natural resources, especially urban and rural based has significantly enriched the officer cadre. The military justifies its acquisitions of agricultural land as part of its inherited colonial tradition land to military personnel. Moreover, the real estate acquisition, including properties in the cities are justified on the grounds that since military personnel more frequently during their service they need to be provided with housing facilities to ensure commitment to their work.

In the subheading *The Military and Land* she elaborates further:[26]

> Currently, Pakistan's military is one of the largest landowners in the country. As a single group the armed forces own more land than any other institution or group. The military controls about 11.58 in acres which is approximately 12% of the total 93.67in acres of state land. Other government departments such as Pakistan Railways also have land holdings, but there is a major difference between the military and other departments. Unlike any other state institutions the armed forces have the capacity to convert the usage of state land from official purposes to private ones.

This confirms the social politico values of the military that maintains the judicial status quo. The interests of the landed gentry whose titles

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[24] A Siddiqa, *Military Inc: Pakistan's Military Economy*, (Pluto books, London, 2007).
[25] *Ibid*. Chap 7 pg 174.
[26] *Ibid*. Chap 7 pg 175.

have been created in fee by the land holding statutes which the British enacted. The mechanism for the devolution of power has been enacted by the civil service and the existing laws that the military is able to utilise have their origins in the colonial era statutes that have served to make these institutions neo conservative in principle.

V. Development of the Parallel Forms of Jurisprudence

The plank of legislation in statutory form that codifies common law is set out in the Pakistan Code.[27] The codified civil and criminal laws are both encapsulated in the form of Acts and the state has separate civil and criminal courts, the higher courts form the middle tier and at the apex is the Supreme Court which is headed by a Chief Justice.[28] According to the constitution of Pakistan, the apex court has both *de jure* and *de facto* powers. The *de jure* powers are sanctioned by Article 58, which allows the dismissal of the national assembly by the President subject to the approval of the Supreme Court. The *de facto* powers are in the gift of the Court and allow it to hear judicial review when the military rule has been challenged by writs issued to invalidate the government as illegally formed.

The second tier of laws that govern Pakistan derive from the preamble to the country's constitution.[29] These are the Islamic laws that have been promulgated in the 1970s when the military regime of General Ziaul Haque came to power in a coup de tat in 1977.[30] In February 1979, the President enacted the *Hud* Ordinances based on Islamic law that had two main planks, firstly, the criminal law sanctions and secondly, the establishment of the Federal Shariat Court in 1980 to hear appeals arising from the new code. The General in an effort to 'Islamize' the laws of Pakistan authorized Shariat benches in the High Court of each province

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[27] The Federal Laws of Pakistan are published by the Government in a document called the *Gazette of Pakistan*. The law reports are compiled in the *Pakistan Legal Decisions* (PLD) and the *Pakistan Law Journal* (PLJ) that also contain the statutes in their statutes sections. http://www.nyazee.org/pklaw/Pakistan%20Law%20Infobase.html.

[28] http://unpan1.un.org/intradoc/groups/public/documents/un/unpan023239.pdf.

[29] http://www.pakistani.org/pakistan/constitution/preamble.html.

to "examin[ing] and decid[ing] the question whether or not any law or provision of law [was] repugnant to the injunctions of Islam."[31]

The Objectives Resolution in Pakistan's preamble was made a part of the FSC's substantive provisions by the insertion of Article 2A in 1985, thereby requiring all laws to be brought into consonance with the *Quran* and *Sunnah*.[32] Part IX of the Constitution is entitled "Islamic Provisions" and provides for the eventual Islamization of all existing laws, reaffirming that no laws repugnant to the injunctions of Islam are to be enacted.

The English common law provisions generally cover the commercial laws while the Islamic law is designed to meet the needs of personal and inheritance provisions. The bone of contention that emerged when the military regime literally translated the injunctions in the Quran that are defined as the *Hudood* Ordinances. These laws were controversial from their very inception and such legal instruments came into force as the Prohibition (Enforcement of *Hadd*) Order 1979 – P.O No 4 of 1979; the Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979 – Ordinance VII of 1979; and Enforcement of *Hadd* Ordinance, 1979 Ordinance VIII of 1979. The third is divided into four sections that regulate propriety; *qazaf* (false accusations of adultery); adultery; and prohibitions.

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[31] The Court was also invested extensive other powers and it was within the discretion of the court to decide whether to try a case under civil or Sharia law. If the latter, then the appeals process heads to this Court, rather than to the high courts. The powers of the FSC are extensive as it can of its own motion or through petition by a citizen or a government (federal or provincial), examine and determine as to whether or not a certain provision of law is repugnant to the injunctions of Islam. An appeal against its decisions lie to the Shariat Appellate Bench of the Supreme Court, consisting of 3 Muslim judges of the Supreme Court and 2 *Ulema* (religious scholars), appointed by the President. If a certain provision of law is declared to be repugnant to the injunctions of Islam, the government is required to take necessary steps to amend the law so as to bring it in conformity with the injunctions of faith.

[32] Article 2A, thereby requires all laws to be brought into consonance...with respect to personal law, the expression "*Quran* and *Sunnah*".

In essence the *Hudood* is one of the four categories of punishment in Islamic Penal Law, that exists in addition to *Qiyas*, that corresponds to retribution; *Diyya* compensation paid to the heirs of the victim, and *Tazir* that is punishment usually corporal administered at the discretion of the judge. The *Hudood* offenses comprise theft, highway robbery, illegal sexual intercourse, wrongful allegations of impropriety, drinking alcohol, blasphemy and apostasy.[33]

The previous military government had enacted the Womens Protection (Criminal Law Amendment Act) 2006 to moderate the effect of the *Hudd* punishmens. However, the Federal Shariat Court has declared as unconstitutional and un-Islamic three sections of the Protection of Women Act 2006, holding that these take away the overriding effects of the *Hudood* Ordinance 1979. These relate to the Sections 11 and 28 of the PWA 2006 which were declared as annulling the effect of *Hudood* Ordinances VII and VIII of 1979.[34]

The objections of the FSC was that the WPA overrode its jurisdiction in offences whose punishments are either prescribed as "acts forbidden or disapproved by the Holy Quran and Sunnah, including all such acts which are akin, auxiliary, analogous or supplementary to or germane with *Hudood* offences". It ruled that the enforcement powers rested with the Court as it was part of the injunctive power of the Islamic law that came within its own jurisdiction. It has brought into sharp relief the conflict between the secular and Sharia jurisprudence in Pakistan.

However, this does not reflect a change in attitude toward the concept of property relations that determine the social status in a country where landholding is the preserve of the elite. The right to proprietorship has been approved by the Supreme Court Shariat Division has pronounced

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[33] World of Islam Summary of Hudd punishments. Sheikh Munnajid. http://www.angelfire.com/mo2/scarves/hudud.html.

[34] http://www.dawn.com/2010/12/23/shariat-court-knocks-out-3-sections-of-women%E2%80%99s-protection-act.html. (Criminal Law Amendment) 23 December 2010.

[35] [1990] 1 PLD SC 99.

judgment in *Qazalbash Waqf v Chief Land Commissioner*[35] The issue was of the law that the late Premier ZA Bhutto passed in the 70s to appropriate excess land from the rich to distribute to the poor.[36] In 1977, at the eve of the elections before the previous National Assembly was dissolved, Mr. Bhutto's government passed through the Parliament the Land Reforms Act 1977 which further decreased the maximum amount of land which could be lawfully possessed but this time compensation was to be provided to those stripped of land, but not on the market rate.

The organizations that were deemed to possess additional lands included the Islamic charity called *Qazalbash Waqf*. The stipulation that they were to lose their lands for redistribution among the landless peasants caused the trustees of QW to bring an action in the courts seeking relief but judicial review was prohibited. However, when Mr. Bhutto was overthrown in a military coup the QW claimed restitution in the form of their returning their expropriated lands. This was rejected by the Federal Shariat Court but the appeal went to the Supreme Court's Shariat Appellate Bench (SAB).

The Court declared the 1972 MLR regulations to be a violation of both Islamic injunctions and unconstitutional. The reforming laws were invalidated and they cease to have any effect. The striking down of both the first phase of reforming Act and the second statute has dismantled the land reform in Pakistan and the Islamic courts have allowed the ownership of land that is unrestricted and the position of land proprietorship is now at the same levels as it was in 1947, at time the country was partitioned from India.

There is also incompatibility between the state laws and the customary laws that exist in Pakistan's rural sector which are a layer of medieval and colonial laws that mitigate against a uniform system of law. In the North West Frontier province (*Khyber Pushtonkwa*) of Pakistan, which is home to tribes based along the rim of the Khyber Pass populated by 5 million Pushtons there are the self regulating codes of

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[36] Regulation (MLR) No. 115[5], 1972 provided for land to be taken from the rich and distributed among the poor without compensation.

Paktonwali and the colonial era Federal Criminal Regulations 1906 that prescribe corporal punishments on the population for infringements. The Pushtonwali is imbibed by the Pushtons assiduously to settle their own disputes by means of a tribal forum known as the *loya jirga*. It is a conventional practice based on the tribal code of honour.[37]

There is a conflict of interest in the imposition of the FCR in the territories of the Federally Administered Territories Areas (FATA) and it has been magnified in the 'war on terror' when the opposing forces have collided in the harsh mountainous region. The Pushton tribes of FATA are subordinates of the Agent of the Pakistan government. The tribes who resent the century old FCR have not been allowed to elect their own magistrates and these have not been superseded by any home grown system of law for these tribal regions that could appease their tribal councils.

The FCR are draconian in effect and resented by the Pushtons for imposing severe penalties for infractions on whole clans or affiliates of the alleged criminal perpetrator. The evidential requirements are satisfied with simply "solid supporting information" for the authorities under the Malik or the 3 Tehsildars acting under him can dispense summary justice. [38]There is no recourse to an appeal and this has caused the procedures enforced under the FCR to be criticised as a fundamental breach of human rights.[39]

There is another layer of jurisprudence that flows from the Punjab Law Act 1872 enacted by the British that had the effect of

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[37] This is a binding set of ethics that governs their lives and provides a bedrock to their seminal existence as a traditional society. It prescribes loyalty to the family and tribe over that of the state. The practitioners of this code are invariably very religious and the central tenet of the code is the '*Itbar*' which means trust, or guaranteed assurance or is the arch of society which is governed by un-written laws or conventions and ruled by consensus. http//www.khyber.org/culture/pashtunwali.shtml.

[38] An instance of that is the application Section 393 of the Code of Criminal Procedure 1905 that can inflict upon him a sentence of whipping in addition to any other punishments to which he may be sentenced.

[39] Under Chapter II the Provincial Government may appoint any Magistrate or Additional District Magistrate without any limit of time.

institutionalizing customary law in the interior of Pakistan's most populated province. While the towns had access to the courts through which they can invoke their rights it is not possible in the rural areas that are the fiefdoms of landowners who also exercise their jurisdictional powers on their estates as the local judges.

The legislation that has cemented this concept of a manorial law governs the personal laws and is not rooted in either an Islamic or Hindu religious framework but rather in expediency. In the *The Punjab under Colonialism: Order and Transformation in British India* (See Above)[40] Ward states : "*The colonial state was the agent of an expanding commercial society which had tried Indian into the world economy, but it also depended for purposes of political control, on the maintenance of an indigenous base*".

Ward contends that the British preference for the tribal customary law stemmed from the requirement that excluded an order that would preclude the Christian religion. It was necessary for them to institute their "bureaucratic rationalization" that had the capacity to incorporate the existing patterns of customary laws. In Ward's view that served to strengthen the framework of rural organization, around which the colonial state build its authority. In his summary he argues that the Punjab formed a crucial element in the bridge between the state with the rural exigencies of this geopolitically sensitive region in the sub continent.

The primacy of customary law was an important element in the "paternalist system" of imperial rule in the Punjab and he cites the land regulating statutes of the early 20th century as the building blocks of such a system that is prevalent even now in Pakistan's backwaters. This form of imperial rule in the Punjab ensured that the interests of the feudal landowners and the military were vested in land and their socio economic interests were intertwined.

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[40] Chapter 'Customary law' in the Punjab at pg 7.
[41] [1981] Modern Asian Studies Journal, 15(3), pp 653-654.

The result has been what David Washbrook has termed in his essay *Law, State and Agarian Society in Colonial India* the creation of a 'Janus faced' legal system.[41] This was reflected by the 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 folklore and mysticism that was part of the inherited cultural tradition in the Punjab.

VI. Malaysian Legal Inheritance

A. *Structure of the Constitution*

The modern Malaysian system is like Pakistan heavily influenced by English common law and a system of *stare decisis* applies to govern the case law. It has embodied many features of the English legal system on the basis of imbibing the Westminster Parliamentary model and it is ruled as a Constitutional Monarchy, with His Majesty the *Yang di-Pertuan Agong* (the King) ceremonially as the Head of the country.[42] *The Yang di-Pertuan Agong* is elected by the Conference of Rulers for a five-year term from amongst the hereditary Rulers of the nine states in the Federation which are ruled by Sultans.[43]

The framing of Malaysian laws on the British legal framework stems from their rule over Malaya in a span of more than one hundred and fifty years that was interrupted only by the World War II. The Malayan states were brought into the process of federation by the acquisition of Penang in 1786 and the introduction of the Charters of Justice in 1807, 1826 and

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[42] The influence of the British constitution is visible by Article 39 which allows a power to govern that is vested in the *Yang di-Pertuan Agong* that is exercisable by a Cabinet of Ministers headed by the PM. The Cabinet is answerable to the King as the head of Executive Authority in the country and each executive act of the Federal Government flows from his Royal authority, whether directly or indirectly.

[43] These states are Perlis, Kedah, Perak, Selangor, Negeri Sembilan, Johor, Pahang, Terengganu and Kelantan. In the other states, namely Melaka, Pulau Pinang, Sabah and Sarawak, the Head of State is the *Yang di-Pertua Negeri* or Governor of the State. The title holder is appointed by the King for a four-year term.

1855. As Malaya won its independence from the British in 1957 the fully fledged Federation was formed in September 16, 1963, when the eleven states including the former colonies of Sarawak and Sabah on the western coast of Borneo and the State of Singapore united to form Malaysia.[44]

There are three milestones that are the signposts as to when Malaysian laws were composed. The first stage was when the Malay states were decentralized between 1866 to 1942 and divided into the Straits Settlement group comprising Penang, Malacca and Singapore; the Federated Malay States (FMS) group consisting of Perak, Pelangor, Negeri Sembilan and Pahang; and the Unfederated Malay States (UMS) group comprising of Johor, Kedah, Perlis, Terengganu and Kelantan. The post-war period led to the unification of all the Malay states except Singapore under federal administration between 1946 to 1957, and the final stage was reached when the post-independence law was instituted after the creation of the Federation of Malaysia in 1963.

The incorporation of English law in Malaysia followed the same path of codification as in India and was accomplished by statute after the promulgation of the Civil Law Enactment Act of 1937.

In this period most of the laws of the UK were adopted into domestic legislation as substantive law or given the role of precedence. The application of common law was instituted in the Civil Law Act 1956 by Sections 3 and 5 which allows for the application of English common law, equity rules, and statutes in Malaysian civil cases where no specific laws had been made.

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[44] In August 1965, however, Singapore seceded from this newly-formed federation to become an independent republic. Malaysia, as it is known today, consists of the eleven peninsular states that constituted of Malaya (this is referred to as peninsular Malaysia), Sabah and Sarawak.

The Malaysian Criminal Procedure Code 1999 (as amended) was based on the Indian Criminal code as are the Labour and the Contracts Acts.[45] There is a parallel with the formulation of Section 5 that states English law shall be applied in cases where no specific legislation has been enacted.[46] However, the land law was enacted along the framework of the Australian Torrens legal framework.[47]

As in Pakistan there are a number of laws made during the colonization period that are still in existence and applicable with certain modifications in line with domestic circumstances. The basic arrangement of the current Malaysian legal system is a reflection of Pakistan because while the common law has been embodied in statutory form there are other supplementary sources of law that gives it a makeover of a *Janus* faced legal system.

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[45] www.aseanlawassociation.org/papers/sing_chp2.pdf.

[46] The dual system of law is provided in Article 121(1A) of the Constitution of Malaysia 1957. Article 3 also provides that Islamic law is a state law matter with the exception for the Federal Territories of Malaysia.

[47] In Australia when the system was first applied of registration to land all land alienated from the Crown was recorded and other titles could be registered voluntarily. Once a transfer was completed the applicant brought the deeds to land registry, together with any applicable survey plans, and a statement from an 'examiner of titles' as evidence of the title. Once these were approved the title was recorded and no further legal work was required to establish a root of title. The registry established a record of title and a copy of that record was provided to the owner. The system is based on the principle that title to a parcel of land cannot pass, and no encumbrance can be enforced, unless it is noted on a land register; registered title is then deemed to be absolute and indefeasible, *i.e.* it is guaranteed or effectively insured by the State, and as a rule the registered owner maintained his title in the event of error or fraud. In addition, a mortgage was recorded against the title thereby alleviating any question of the title being transferred to the mortgagee and then reconveyed when the loan was repaid. https://www.realestatedefined.com/html/sample_terms/Torrens_title.html. However, there is no uniformity in the land law because in the Peninsular the National Land Code governs most of the laws relating to land. In Sabah, the main legislation is the Sabah Land Ordinance; and in Sarawak, the Sarawak Land Code applies to govern all transactions in real estate.

B. *Secondary Sources of Law*

The Malaysian legal system similar to Pakistani jurisprudence has a dual set of laws that differ from the common law codes and which run concurrently affecting certain sections of the community in the form of Islamic law and customary law.[48] It makes it necessary to evaluate as to when these rules apply and whether these laws are still effective. The Federal Constitution of Malaysia divides the law-making authority of the Federation into a separation of power that occurs both at federal and state levels.[49] The Federal law applies to local governments while Islamic law enacted by the state legislative assembly applies in that particular state.

The legislative authority is divided into sources of primary legislation and the distribution of legislative power between the Federal and State Governments as set out in the Ninth Schedule of the Federal Constitution as framed in the Federal List, State List and a Concurrent List. The main subject areas of the Federal List are external affairs, defence, internal security, civil and criminal law, citizenship, finance, commerce and shipping industry, communications, health and labour.

The State List comprises matters such as land, agriculture, forestry, rivers, and also the province of Muslim jurisdiction. The Concurrent List, under authority of both the Federal and State Governments, covers social welfare, scholarships, protection of wildlife and town and country planning. If there is any inconsistency between federal and state law exist the federal law takes precedence over state law.

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[48] The dual system of law is provided in Article 121(1A) of the Constitution of Malaysia. Article 3 also provides that Islamic law is a state law matter with the exception for the Federal Territories of Malaysia.

[49] Under Article 66(1) of Federal Constitution at the Federal level, the legislative power is vested in a bicameral Parliament headed by the *Yang di-Pertuan Agong* and comprises the *Dewan Negara* (House of Senate) and *Dewan Rakyat* (House of Representatives). The *Dewan Negara* has 70 members, of whom 44 are nominated by the King and 26 elected by the State Legislative Assemblies. The *Dewan Rakyat* is fully elected and has 219 members. The duration of the life of each Parliament and State Legislatures is about five years and is split into one-year sessions, after which the session is terminated or reconvened usually in September.

There is a Sharia jurisdictional court in Malaysia on par with the Federal Sharia Court in Pakistan. This is called the Syariah Court of Federal Territory which was established by Section 44(1) and by the Selangor Islamic Administration of Islamic Law Enactment 1952. The Court was revised by the Federal Territory Order (1974) and is known as the Syariah Court but this system plays a relatively small role in defining the laws on the country. It only applies to Muslims with respect to civil law and these courts have jurisdiction in personal law matters. Their jurisdiction covers only marriage, inheritance and trust matters.

In some states there are Sharia criminal laws, for example there is the Kelantan Syariah Criminal Code Enactment 1993 and their jurisdiction is limited to imposing fines for an amount not more than RM 3000 and powers of imprisonment are no more than 6 months. However, the duality is not always workable and may cause confusion when the proscription apply to Muslims, but not to non Muslims for the same offence. This has caused for reform to be advocated to the legal system.[50]

In Malaysia, unlike Pakistan there is a more streamlined version of specialised courts that adjudicate or arbitrate in industrial and commercial disputes. These appear in the form of professional courts such as the Industrial Court that came into effect under the Industrial Relations Act 1967 whose objective is to set-up principles and guidelines for solving disputes under labour law in the private sector through awards handed down by the court which will be precedent in the practice of industrial relations system. There are also the fifteen Intellectual Property Courts that the Malaysian government has approved to operate as Sessions Courts

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[50] In 2007 the then Chief Justice of Malaysia AF A Halim questioned the need to resort to the English common law and proposed that as the country had been independent for 50 years that it be replaced with Islamic law jurisprudence or Sharia law. However, the Bar Council responded by rejecting that on the basis that the common law is part of Malaysian legal system since its inception.
Malaysia Civil and Political Rights Report 2007 Overview.
http://docs.google.com/
viewer?a=v&q=cache:sCGEbtr35OwJ:www.digitalibrary.my/dmdocuments/
malaysiakini/
346_msia%2520civil%2520n%2520political%2520rights%2520report%25202007%2520overview.pdf

in each state including Putrajaya. These courts came into effect in the Kuala Lumpur High Court as of 17 July 2007.

There is a Tribunal for Consumer Claims which is an independent body established under Section 85, Part XII, of the Consumer Protection Act 1999 that has the primary function of hearing and determining claims lodged by consumers under the Act that is designed to be more efficient than the civil court procedure which is also more expensive. The Regional Centre for Arbitration (RCAKL) in the capital settles claims through various alternative dispute settlement means. This was established in 1978 to offer an avenue of dispute resolution outside the court structure.

C. *Derogations of Power*

However, in dealing with the colonial instruments that vest the executive with authority there are comparable examples with Pakistan where the military has exercised arbitrary power at times of martial law. In Malaysia the same exercise of discretionary power has not happened but there is a layer of powerful statutes in the constitution that date from the British colonial era. At the time when the British authorities extricated themselves from the peninsular there was a communally divided land and it was beset by an insurgency. The government had imposed an emergency which is still in force though the pre independence statute in the form of the Internal Security Act 1960.

The ISA has clamped down on the government's opponents within the ruling United Malay National Organization. Section 72 of the ISA allows the police to detain any person for up to sixty days, without warrant or trial and without access to legal counsel. The example of a measure that is used by those at the lower rungs of the hierarchy is the Emergency Ordinance, which the government's enforcement agencies can invoke when there is a perceived threat to public order. The EO was first proclaimed in May 16, 1969 when the UMNO lost its parliamentary majority and riots erupted in Kuala Lumpur between ethnic Chinese and Malays causing the deaths of over 190 persons. It led to the imposition of a state of emergency and the Parliament and Constitution were suspended.

The preamble to this ordinance states:

> By reason of the existence of a grave emergency threatening the security of Malaysia, a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong the Malaysian King under Article 150 of the Constitution.[51]

The EO permits the police officer to make a subjective judgment to arrest anyone when he suspects that a person has 'acted' or is 'about to act' in a 'manner prejudicial to public order,' or if he has 'reason to believe' that a person should be detained if 'necessary for the suppression of violence' or for 'the prevention of crimes'. The district police officer then approves the arrest which may be without any prima facie evidence whatsoever. It precludes obtaining a detention order from a magistrate, and thus, the appropriateness of detention cannot be reviewed by a judge. The Federal Court viewed the security provisions when it gave judgment in *Lee Kew Sang v Timbalan Menteri Dalam Negeri* (2005).[52] The case concerned an EO detainee's argument that the government had not considered whether he should be charged and prosecuted instead of being detained under the EO. The Court ruled that there is no obligation for the government to bring criminal actions after a detention order is imposed against a suspect, reasoning that the law specifically authorises the minister to keep persons in detention who are a threat to public order, whereas it entrusts the attorney general with prosecutions.

The Court held that should the minister have referred the case for criminal prosecution, "it would not be surprising to hear arguments that the minister has exceeded his jurisdiction, or that he has taken into consideration matters which he should not have". The Malaysian state can act under emergency regulations by the emasculation of the judiciary even when there is an elected civilian government in power. The multi ethnic composition of Malaysia has enabled the security branches to steer away from declaring any martial law but there have been severe restrictions imposed under the ISA.

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[51] The Emergency Proclamations have been in place since independence and none have been revoked.

[52] 4 AMR 725, 740 28.

In April 2000 panel of distinguished judges from the Commonwealth countries published a report entitled *Justice in Jeopardy* that expressed considerable criticism of the emergency regulations and the duration of these laws.[53]

Their conclusions stated were as follows:

> The continuation of Emergency after the need for it has passed can have an insidiously brutalizing effect upon the administration of justice in any country. We suggest that the Malaysian malaise may be due in no small measure to the gradual acceptance of a state of emergency as the norm of Government.

VII. Basic Flaws in the Colonial Model

The codification of common laws leads to a Janus faced legal system. There is no coherence or uniformity because of the shortcomings of the precedence based law which was instituted top down to facilitate colonial rule. The arrogation of power that results from the strong executive does not guarantee civil liberties. This seems to be the case in the feudal concept upon which Pakistan is structured and is also true of Malaysia which is a society with a strong concentration of power.

The British codified common laws are simply a vehicle for the protection of property as deemed from the enabling acts of the UK Parliament in India. They have allowed the land based nobility in Pakistan to arise by the creation of land titles; the military to appropriate lands and the resources and the civil service to become entrenched.

The flaws can be found in the Westminster constitutional system which allows the enactment of laws by an entrenched executive upon which the judges are called upon to adjudicate when their role is subordinate to the government. The British empire by transplanting its own laws on the subject peoples and vesting on them a Parliamentary

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[53] Report of a Mission on behalf of the International Bar Association on behalf of the ICJ Centre for the Independence of Judges. www.ibanet.org/Document/Default.aspx?DocumentUid=a7623ad6-99eb...

model that reflects its own constitution. The codification of the common laws can only be accomplished if the structure conforms with the strong executive power and a legislature which is amenable to the exercise of that power.

Nandini Chatterjee in his article *Religious change, social conflict and legal competition: the emergence of Christian personal law in colonial India*[54] cites the following keynote factor as present from the earliest days of the British Raj which is a quest to establish a universal body of law that would not conflict with other legal principles and which overrode the difference of religion as well as race.

Chatterjee states:

> One of the most contentious political issues in postcolonial India of an unfulfilled project of a 'uniform civil code' that overrides the existing 'personal laws' or religion-based laws of domestic relations, inheritance and religious institutions is completed. If the personal laws are admitted to be preserved (if somewhat distorted) remnants of 'religious laws', then the legitimacy of state intervention is called into question, especially since the Indian state claims to be secular.

It is a question that Pakistan also needs to address because under its ideology it is also a secular state but it has a myriad legal system that govern the population. The issue of this complexed web of laws has not been solved and the conflict can be redressed by the jurists if they could devise a new constitution. In order to address this issue of a civil code that would succeed to the colonial laws it is necessary to determine the legal order of another Commonwealth country that most resembles Pakistan.

The British empire conveyed its legal system upon the subject peoples by the Statute of Westminster 1931 which was an Act of

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[54] N Chatterjee, '*Religious change, social conflict and legal competition: the emergence of Christian personal law in colonial India*'. [2010] Modern Asian Studies 44 (6), pp 1147 - 1195. Cambridge University Press. doi:10.1017/S0026749X09990394. First published online 21 April 2010.

Parliament that applied to the dominions but not to India, Pakistan or Malaysia.[55] However, this did lay the basis of the Commonwealth and was a transition from the Empire to this new status in which the UK constitution became a role model for the colonial countries.

The executive's domain in the constitution that embodies the Westminster model is that it invests prerogative powers in the executive that can be exercised on the basis of a contingency. These allow for a system of patronage that is enforced through the means of a common law that is protective of the rights of the privileged. They can then be promulgated on account of state necessity rather than on an identifiable set of values that can be trusted by the electorate.

The UK Parliament has itself been absent in providing judges with sufficient checks and balances and the independence of the judges has itself been compromised. This can be found by the very recent formal separation between the powers of the executive and the judiciary which came about by the Constitutional Reform Act 2005. It provides for a Supreme Court to take over from the House of Lords and removes the functions of the Head of the Judiciary of England from the office of Lord Chancellor. The appellate jurisdiction of the House of Lords is abolished and it makes provision for the rulings by the Judicial Committee of the Privy Council. While it separates the executive and judicial branches it does not abolish the prerogative powers of the monarchy.[56]

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[55] http://law-teaching.group.shef.ac.uk/LAW3018/index.php/Chapter_4_Parliamentary_Supremacy_%26_the_Statute_of_Westminster_1931.

[56] These norms are two fold *i.e.* those based on the personal prerogatives of the monarch and those that are exercised by government ministers. In her personal domain of the Crown encompasses powers of the Prime Minister to dissolve Parliament; royal assent to bills, and the authority to dismiss ministers these have become accepted custom. They are exercised as part of the conventions, which guide the Mother of Parliaments in its procedures since the Settlement Act 1701. The sovereign also retains an absolute veto affecting the personal prerogative. This was shown in the absence of consent in 1999 to a Private Member's bill that would have rendered military action against Iraq contingent on Parliamentary approval. In this case the Queen acting on the advice of the government refused to signify her consent to the Military Action Against Iraq (Parliamentary Approval) Bill which sought to transfer from the monarch to Parliament the power to authorize military strikes against Iraq. This was refused the "Queen's Consent", which would have required her direct assent

The Westminster constitution leads to the fusion of power rather than a separation of power in the UK according to the 19th century constitutional theorist William Bagehot.[57] He noted the peculiarity of the Westminster model by describing it as "hidden being" which was the link between the legislative and executive functions.[58] However, other criticisms include the first-past-the-post system that causes a situation in where there a minority of votes regularly creates an absolute majority; a lack of a federal countervailing power; and a lack of a constitutional court.

While Pakistan has paid the price of adopting the Westminster model by incorporating the Government of India Act 1935 that was it first constitution it relinquished the national sovereignty. As a nation state that inherited its constitutional framework from the British the Malaysian state has been similarly suspended from proclaiming its own indigenous framework by the emergency powers under the ISA and a lack of checks and balances. In Pakistan's case there is the colonial era statutes that have been adopted by the governing class as self serving and in the Malaysian experience these have been detrimental to the extent that there has been no revision of its laws even when the civilian government has exercised the power for the duration.[59]

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and was eventually dropped. www.websters-online-dictionary.org/Ro/Royal+assent.html.

[57] Bagehot wrote his seminal The English Constitution in 1867 and his work can be found in *The Collected Works of Walter Bagehot: Volumes 1-15*, ed. Norman S. John-Stevas, (New York, Oxford U. Press, 1986).

[58] http://bagehot.classicauthors.net/EnglishConstitution/EnglishConstitution2.html.

[59] In his article Human Rights in 21st Century Malaysia, Tommy Thomas, a leading constitutional lawyer in Malaysian states: "*As Malaysia has adopted the Westminster model, the Executive, is for practical purposes, responsible for the drafting of all laws and because of the rigorous use of the whip system, the ruling party's overwhelming majority in Parliament ensures that all Bills presented by the Executive are passed by Parliament, often without adequate discussion and always without amendment*". He makes two fundamental criticisms which are, firstly, the effect of these processes was that amendments passed in 1960, 1962, 1964, 1971, 1973 and 1981 substantially altered the checks and balances firmly in favour of the Executive to the severe detriment of the citizen. Secondly, the frequent reliance on Emergency powers has caused the executive to be less respectful to fundamental rights. '*Human*

In this critical analysis the UK Parliamentary system emerges as imperfect in a South East Asian setting because it functions in the national consensus only if social conflicts remains transient and single issue. The Westminster Parliament is largely accepted by the population in the interests of creating strong government and to preserve the vestiges of the Commonwealth. Its strength is in the figure of the monarch in the UK who exercises her prerogative powers and in the Commonwealth countries who have borrowed from Britain, the codified common law has been the vehicle to preserve the privileged tiers or ruling elites in power.

VIII. Conclusion

As the various findings reveal that there is a correlation between the colonial forms of government and the power structures in the Commonwealth nations states and none is more poignant an example then Pakistan. The legal system is a legacy of the 19th and 20th centuries, when the colonial administrators developed powerful and highly centralized bureaucratic institutions, administered by the Indian Civil Service (ICS) to rule the vast Asian empire. The 'red tape' that was created ensured that only those who could be patronised could rise up the political hierarchy to govern the institutions of state.

This has created a self serving elite and while representative institutions have been institutionalised they are unable to make any substantive changes through legislation. This is because while there is a mechanism for elections the power imbalance is against any change to the obsolete laws and institutions dating from the British Raj that cause inequalities. The cause and effect is a strong executive power which has been inherited from the colonial period and the very weak role that the common law has performed as a vehicle for changing the status quo by its precedence based jurisdiction and lack of a comprehensive base.

Therefore, the original question posed whether the common law in codified form is an outmoded concept has been answered in the

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Rights in 21st Century Malaysia', Insaf, The Journal of the Malaysian Bar, XXX, No. 2, June 2001, pp 91 - 106.

affirmative. The social stratification that it has introduced have been to the detriment of those who want a common law that is universally applied with a common ideal of meeting the needs of the electorate. The codified common laws that have emanated from adopting the Westminster constitution had the impact of consolidating the power through statutes on a privileged order. Such legal decadence that is reminiscent of the Roman republic before it adopted its legal codes that gave it uniformity and ended its endemic corruption that permeated at every level of the state.[60]

The initiative has to be taken to change this archaic system by a civil code, so that Pakistan can enter its post colonial stage of laws by termination of the ancient regime. In pre revolutionary France in which an arbitrary monarchy there was a customary law that existed alongside the state law and Catholic institutions which was embodied as the second estate. The customary law was divided into two systems, the *l'ancien droit* prevailed in the south of the country with approximately two-fifths of French territory practicing the Roman written law (*droit écrit*), while in the north of the country there was *droit coutumier* that interpreted the will of the lords of the manor in disputes.[61]

The custom varied from place to place and their jurisdiction varied from one district to another. There were also a number of regions where

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[60] Pakistan shares many parallels with the Roman Republic. It has also been formed after a refugee exodus from the 'mother' country India as the Trojans came out of the city states of Greece in 1300 BC. They are both founded on an ideal of being eternal torch bearers. In the period before Rome adopted its civil code in the form of the Twelve Tables after its foundation in 754 it had practiced the private law '*ius civile Quiritium*' that was linked to religious symbolism and regional affiliation. The earliest attempt by the Romans to create a code of law between 455 BC was in at the time of social crises when there was a strife between the privileged class (patricians) and the common people (plebeians). A 10 member task force drew up a code which became the springboard of the constitution of the Roman Republic. The subjects of the 12 tables were the following: Table I Civil procedure; Table II Civil procedure; Table III Debt; Table IV Parents and Children; Table V Inheritance; Table VI Property; Table VII Real Property; Table VIII Torts; Table IX Constitutional principles; Table X Funeral regulations; Table XI Marriage; Table XII Crimes.

[61] www.napoleon-series.org/research/government/code/c_code2.html.

the law was communal as in the Punjab and the notion led to instability and the grievance of the citizens.[62] The Civil Code originated after the revolution swept away the feudal norms and established equality before the law. The enlightenment philosophy with its interest in the rational ideal greatly influenced legal thought in the eighteenth century and this was reflected in the code that was based on rights.[63]

There is a possibility that if Pakistan can adopt a code that departs from the common law which it received as a parting gift at the end of the colonial era then it could establish a modus operandi to govern itself in the spirit of its originating documents. Its laws and structures can then be unified and lead to a constitution that is framed by its own citizens. The lessons for Malaysia are that it too must discard the Westminster constitution and end the Janus faced oppressive legal system. This will lead to the Commonwealth countries developing an indigenous framework in eradicating their post colonial hangover.

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[62] The general law was *Coutume de Beauvaisis*, compiled by Phillipe de Remy, had a long-lasting influence on French law. Others, the *coutumes locales*, upwards of 300, were in force in specific towns and villages. In some areas the French law, such as marriage and family law, fell under the canon law of the Catholic Church. The philosopher Voltaire described French law pre Revolution on the basis that in France the traveller changed laws as often as he changed horses.

[63] The Code in the format of Justinian's Civil code following the plan of Roman law, is divided into "books," each book is then divided into "titles" dealing with specific aspects of the law such as successions, marriage, *etc*. The Civil Code, comprising 2,281 articles (120,000 words) has a Preliminary Title of six articles and three books. The Preliminary Title was intended by Portalis to be a longer, 39 article, "philosophical" consideration and justification of the Code. Book One, entitled "Of Persons," contains Articles 7 through 515, and deals with the status of aliens in France, marriage, divorce, paternal power, guardianship, emancipation, incapacities, the family council, *etc*. Book Two, entitled "Of Property, and the Different Modifications of Property," contains Articles 516 through 710, concerns the ownership property, usufruct, servitudes, *etc*. Book Three, the longest, is entitled "Of the Different Modes of Acquiring Property," contains Articles 711 to 2281. This book covers successions, gifts and wills, obligations, contracts, matrimonial property systems, liens, mortgages, *etc*. This book has been criticized as being a bit of a catchall.