
The Strange Career of the Rule of Law in Colonial Punjab

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The recent lawyers' movement, and its central significance in the fall of Pervez Musharraf, calls our attention to the checkered but critically important history of the rule of law in the Punjab. In organizing the movement, many lawyers pointed to the rule of law as a critical element in Pakistan's creation, intimately linked to Muhammad Ali Jinnah's generally called the Quaid-i-Azam vision of the new state. For Jinnah, the rule of law and the independence of the judiciary, were central not only to democracy, but also to the Pakistani state's identity and legitimacy. Yet, the weakness of the rule of law in Pakistan's history was also widely noted. Though the lawyers' movement developed in opposition to the policies of Musharraf, the history of Musharraf's long rule—and those of the military regimes that had preceded him—suggested the rule of law's historical limitations in Pakistan. As one author noted, the very context of the lawyers' movement—as a reaction against long years of army rule in Pakistan—highlighted what had also become, to many minds, a truism of Pakistani politics: “that in Pakistan, law and order do not go hand in hand.”¹

In fact, many of the contradictions surrounding the history of the rule of law in Pakistan need to be traced back to the policies of the British during the colonial era, particularly to the structure of their rule in what is now Pakistan's largest province, the Punjab. It was the British, of course, who defined the contours of what has become a dominant state discourse with regard to the law in Pakistan: A strong rhetorical commitment to the “rule of law” as a legitimizing framework for government authority, coupled with a pragmatic willingness on the part of government leaders to ignore the law when it suits them in order

to protect the authority of the state. Yet, to say this much is only to suggest the broad outlines of the complex ways in which the discourse of the “rule of law” has come to constitute the state and to define its relationship to Punjabi society. In order to provide a rough framework for thinking about some of the tensions evident in the discourse of the “rule of law” in Pakistan, in both constituting and limiting the power of the state, this article will examine the often contradictory, yet critically important, story of the rule of law in colonial Punjab. In fact, different narratives of the relationship of the state to the “rule of law” have played critical roles in shaping the ways that historians put together competing visions of the impact of colonialism on the nature of the Pakistani state.

Narratives of the Rule of Law in the Punjab

I. The First Narrative: Punjab as the Home of Authoritarian Paternalism

In one common narrative of Punjabi history, the province stands out in the history of colonial India as the home *par excellence* of a colonial tradition that subordinated law to a powerful tradition of authoritarian paternalism. This story dates back to the so-called Punjab school of administrators in the mid-19th century, who emphasized personalistic rule as the key to social and political order. The importance of this tradition in Punjab has been developed by a number of historians. Its roots lay in part in the militarized structure of early British administration in the Punjab under the early Board of Administration and Chief Commissioner. Punjab’s “early British rulers,” who faced serious problems of pacification after the Sikh wars, dealt with these problems, as Ian Talbot writes, “by developing a semi-military, despotic system of government.”² These rulers were hardly oblivious to law (which had long served as a rhetorical referent for the legitimacy of British imperialism in India), but they saw law as strongly subordinated to paternalist administration and individual self-assertion.

This tradition was rooted in a particular vision of Punjabi society, which most British officials saw as simpler and more

deeply rooted in patriarchal, tribal authority than parts of India lying further to the east. Indeed, administrators such as Sir John Lawrence saw Punjab as a quintessentially peasant society, defined by loyalty and commitment to patriarchal authority. Punjabi peasants were, in such a view, in their very nature more susceptible to bonds of personal (and “tribal”) loyalty than to law. Such a paternalist vision of the stereotypical Punjabi peasant was explicit in the thinking of a long line of prominent Punjab administrators, from John Lawrence in the 1850s (and his brother Henry, whatever his emphasis on the importance of inherited aristocratic authority) to Sir Denzil Ibbetson and Sir Michael O’Dwyer in the early 20th century. And this view was only reinforced by Punjab’s emergence as a critical recruiting ground for the army, a development that reinforced a British stereotype of the Punjab peasant as a man who responded best to strong authority and discipline.³ Though British policies that singled out Punjab’s “martial races” and “martial tribes” for army recruitment excluded more Punjabis than they admitted to army recruiting pools, they nevertheless fed into a strongly paternalist British vision of the distinctive character of Punjabis in general as men who valued loyalty and order above all else—and who understood *power*. For the British, bonds of loyalty and control were thus rhetorically constructed around highly masculine images of strong administrative action, which was, in British eyes, the hallmark of effective rule, whether in the army or in society. “We do not want antique generals, and brigadiers with antiquated notions,” Henry Lawrence wrote, “...but energetic, active-minded men, with considerable discretionary power, civil and military.”⁴

The subordination of law to administrative assertiveness fed also into an emerging vision of the connection between “progress” and assertive official authority in the Punjab, which gave the history of agricultural development in the Punjab its distinctive historical cast. From the beginning, the assertiveness of Punjab administration was linked also to public works, and to the idea that strong administration could best mobilize the people to make progress happen. Punjab thus became noteworthy in British India for its canal colonies and for the vast expansion of agricultural production that accompanied colonial rule. Though clearly grounded in a bureaucratic framework, such works

partook deeply of a vision of state-led paternalism, far more so than the average run of development projects in the rest of India.

This was evident, even before the opening of the canal colonies, in the roles of men like Captain L. J. H. Grey (builder of the so-called “Grey canals” in Ferozepore in the 1870s and 1880s), who spearheaded irrigation expansion through highly personalized administrative action. The appeal of such an approach to the average peasant was underscored by the publication by the British of a praise poem by a village headman that underscored the roots of Grey’s success in his appeal to paternalistic official leadership. “He was terrible to look at like a king,” the poet wrote of Grey, but “he performed all his works by kindness to the people.”⁵ Such leadership was later subordinated to bureaucratic rules in the great canal colonies that opened in the decades from 1890 to 1920, but even then, the canal colonies were widely seen as dependent on leadership that made rules the instrument of a paternalistic administrative structure. Indeed, the workings of the canal colonies came to be known for the assertive role that administrators played in the large-scale settling of the peasantry on formerly uncultivated (or intermittently cultivated) lands.

It was within this context that a narrative of paternalistic, personalized rule, stressing the weakness of commitment to the “rule of law” in modern Punjabi history, has taken shape—and has survived into the 20th century, even within a framework of state-led developmentalism. This was not, of course, a tradition in which the appeal to law was missing, but rather one in which law was not seen primarily as a constraint on the authority and discretion of officials and the state, but rather as an instrument for a paternal administration. Thus, Punjabi administration continued to be marked, even in the 20th century, by a notion that the culture of the Punjab peasant required authoritarian direction for any advance. As the lambardar-poet who praised Captain Grey’s irrigation efforts had put it: “Self-willed men can do nothing and know nothing...; without the aid of the rulers, water cannot be had.”⁶ Even an important 20th century ICS officer such as Frank Brayne continued to view his role in the district, as Clive Dewey puts it, as essentially that of a “ma-bap” to the Punjab peasant, whatever his concerns for village “uplift”.⁷

Paternalism was, in British eyes, a language the peasantry understood.

This was also the language in which the government tended to confront protest and resistance. Thus, leading Punjabi administrators in the early 20th century became known for their intolerance of dissent, and for their contempt for lawyers, and for legalistic authority, however much in practice they continued to recognize the role of law in their regime. This was as true of Sir Denzil Ibbetson in his response to the canal colony protests of 1907, as it was of Sir Michael O'Dwyer, the Lieutenant-Governor of the Punjab who was responsible for the declaration of martial law in the face of the "disturbances" of 1919. While O'Dwyer was certainly not lacking in legal training and background, he saw official paternalism as the key to maintaining the loyalties of the peasantry. The traditions of paternalist authoritarianism championed by such leaders have thus been seen as providing a powerful precedent for the limited commitment to the "rule of law" that can be read into much of Pakistan's subsequent history of military rule and martial law. The direct narrative connection from 1919 to the military takeover of Pakistan in 1958 is perhaps best captured in the title of Syed Nur Ahmad's book, *From Martial Law to Martial Law*.⁸ In this story, Pakistan's history of military rule and its limited commitment in linking "order" to "law," all have their roots in the distinctive narrative of Punjab's colonial history.

II. The Second Narrative: Punjab as the Home of the Rule of Law

Yet one could counterpose this to another narrative of Punjab's history that emphasizes a far different narrative trajectory—one focused on law's *centrality* to Punjab's colonial history. Indeed, one could argue that the structure of the rule of law was in some ways more important to the trajectory of colonial Punjab's history than the law was to the history of administration and politics in almost any other province of British India.

Whatever the power of the narrative of paternalistic administrative administration in the Punjab, there is thus another narrative of Punjab's history that in some ways runs parallel to

this. In this story the law, rule-bound bureaucracy, and the courts helped to define a political culture in Punjab in which respect for law (and for legal documents)—particularly as these related to the operation of property—became deeply embedded in popular culture. Ironically, this was a vision also shaped by a vision of the “Punjab peasant” that had much in common with the vision shaping the paternalist narrative. Yet, this is a narrative of Punjab’s colonial history that in some ways runs counter to the first narrative, and offers a critical counterpoint in interpreting the historical impact of the rule of law in the Punjab.

The opening curtain on this narrative rose not with the establishment of a rough-and-ready administration in the years immediately after Punjab’s annexation, but rather with the great late 19th century land surveys and settlements that provided the bedrock for Punjab’s subsequent administration. At the heart of this narrative is a simple fact: Punjab witnessed perhaps the most thorough land surveys of any province in India (which represented, as Clive Dewey has suggested, not only a great administrative but a great intellectual feat). Though these were driven by the state’s need for revenue, they also reflected the particular importance in the decades following Punjab’s annexation (and particularly after 1857) of intellectual trends among the British emphasizing the connections between law, evolutionary social theory, and property in providing the best possible foundations for stabilizing colonial rule. Even as some administrators stressed the importance of a paternalistic style of governance, the operation of British rule thus came to be undergirded also in Punjab by a vast recording of “rights,” whether these be individual (or family) property rights or the village level “records of rights” (*wajib ul-arz*) compiled at the time of settlements. This effort had the effect of drawing Punjab society into a structure of property rights that came to profoundly shape Punjab’s administration, a structure embodied in a massive collection of state records.⁹

This structure of records and law had two important aspects. First—and in contrast with the first narrative—this was an undertaking that hinged on a view of Punjabi landowners as consent-bearing individuals (rather than “children” needing paternal guidance), as these records essentially recorded “rights” created by contracts signed between the state and those whose

“rights” in land were recognized: essentially, in exchange for free commitments to pay revenue, the state recognized (in writing) legal claims to land. At its core, this process helped to create an image of Punjabi society as constituted largely by individuals, however much they were embedded in local family and “tribal” culture. But this structure came to have powerful consequences precisely because of a key second feature: that it linked this vision of individual property, recorded and organized by the apparatus of the state, with a simultaneous legal recognition of the ongoing power of Punjab’s “peasant” culture, which, with its emphasis on patriarchy and tribe, defined and constrained the Punjabi individual. This recognition was embodied nowhere more clearly than in Punjab’s distinctive system of “Customary Law,” which embedded individual land rights in an inheritance system based firmly on “tribal” kinship. Ironically, the establishment of a vital system of property law in the Punjab, thus evolved from some of the same assumptions about the “Punjab peasant” embodied in the narrative of authoritarian paternalism. But it cast this vision not primarily in terms of a culture of *loyalty* and *paternalism*, but in terms of a developing language of land *rights*, that often inhered in individuals, however much it also saw these rights as embedded in Punjab’s distinct structure of village-based “tribal” patriarchy.

Casting this vision in terms of “rights” of course implied a far different relationship between the state and the peasantry than did the vision of loyalty. Critical was the fact that “rights” derived not simply from the political whims, or administrative authority, of officials, but from written records that were justiciable in the courts. And, indeed, a structure of semi-independent courts came to play a powerful role in adjudicating those rights. The key to the emergence of a structure that we can call the “rule of law” lay in the fact that courts had the power to rule not only against individuals but also, potentially, against the state, which often appeared in property cases as an equal litigant with other claimants to “rights.” It is of course true that what was written in records was initially recorded by the state, and that this lay at the root of their legal recognition. But “rights” arising from settlement defined a source of power that existed in some ways independently of the paternal discretion of British officers. It was this, one could argue, that was central to a vision

of the “rule of law” in the province. Since records could be theoretically appealed to in court by litigants (particularly property owners) as a foundation for “rights,” they provided a source of power that could (in theory) trump the immediate political authority of officials. This is what Richard Saumarez Smith has called “rule by records,” or what Matthew Hull has more recently called “*Kaghazi Raj*,” or an empire of paper.¹⁰ Such terminology is of course easy to associate with mindless, bureaucratic authority, and there is little doubt that this too can be given a prominent place in the narrative of Punjab’s colonial history. But the language of “rights” assumed a significance in Punjab’s history that suggests a far deeper significance; whatever their limitations, records defined a source of authority that was, in a sense, higher than (and outside) the immediate interests of state officials. The independent interpretation of such records could thus be used (theoretically) to call the state to account.

The importance of this depended on the courts as an institution. Courts were critical to giving meaning to the “rights” embodied in records, and the courts in the Punjab were hardly wholly independent of official influence in the Punjab. Neither local magistrates, nor the Chief Court of Punjab (and after 1919, the Lahore High Court), acted with complete independence from official arms of the state. But the courts nevertheless had sufficient independence, and challenged the state just frequently enough, that the notion of the law (and of records) as a source of authority superior to the immediate whims of officials gained significant purchase on the popular imagination. Central to this was the growing importance of lawyers in the Punjab in the late 19th and 20th centuries, whose very position as experts on legal procedure and records as a source of authority allowed them to become leaders in taking on the state. Their expertise in fact gave meaning to the very notion of “rights” (and most particularly property rights) as claims which could be used to constrain the independent power of the state. Colonial rule thus was marked by a number of high profile cases in which Punjabis challenged the colonial state in court over landed “rights”. A good example is the celebrated Hajiwah Canal case of 1901, in which the Privy Council in London overturned on appeal an attempt by the Punjab administration to take over for purposes of efficiency and development a private canal belonging to the

Khakwani family of Multan district. Here was a classic case of early developmental paternalism (however much it was framed by documents and law). But the case made dramatically clear the idea that the law existed as a source of authority that transcended the immediate authority of paternal officials.¹¹ This of course did not remove the power of the state (or state officials) in such matters, for the result of the case was simply a negotiation over compensation during which various official pressures on the Khakwanis continued to be brought to bear. But the development of a discourse of legal “rights”—and most particularly, landed *property* rights rooted in settlement records (which lay at the heart of this case)—laid the foundations for a vision of society that could be imagined as being constituted independently of direct official control, a society rooted in the constitution of justiciable landed property law.

What gave this vision of society importance in the larger narrative of Punjab history, however, was its embedding of individual, contractually-based property rights in the distinctive culture of tribe and *biradari*. Indeed, from the perspective of liberal theory, one of the noteworthy features of the Punjab’s legal structure (and particularly its prominent use of “customary law”) was the degree to which the free individual, though recognized as a holder of “rights,” was also legally constituted as constrained by a patriarchal, kinship based structure.¹²

This is not to contend that this defined an all-inclusive vision of Punjabi culture or social structure. It was, in fact, open to Punjabis to declare that they followed religious law in preference to custom in family matters, and many (particularly, though not exclusively, in Punjab’s cities) did so. But even within this framework, Muslim law (or *shariat*) was itself treated almost as if it were a distinct form of “custom,” its substantive family dictates framed within the large procedural structure of colonial law and rights. The law thus created an essential image of Punjabi society and culture (whatever its actual cultural and religious variations) as fundamentally defined by an indigenous culture of tribe and patriarchy, within which individual legal “rights” were embedded. It was, in fact, this very confluence between legally constituted rights and indigenous culture that shaped the signal importance of the “rule of law” in the narrative of Punjab’s colonial history.

One can trace out key moments in this narrative in the first half of the 20th century. One such moment that allows us to juxtapose the narrative of paternal authoritarianism, with a narrative focused on the importance of law, came with the canal colony protests of 1907. This was a moment, as we have seen, when paternal authoritarianism was prominently on display, both in the forms of developmental paternalism in the canal colonies which largely prompted the protests, and in the reactions of Sir Denzil Ibbetson, who, as Punjab's Lieutenant-Governor, attempted to suppress them. But the story of these protests can also be told as one illustrating how deeply a particular conception of law and "rights" had penetrated by that time into popular Punjabi thinking. Nothing was in fact more central to these protests than the demand that canal colony leases be converted into proprietary rights, which were construed as the key to resisting what were seen as the more arbitrary forms of paternal administration in the canal colonies. And, what was equally significant, the importance of such rights was in the end recognized by the state itself, which responded to the protests by ultimately granting proprietary rights, and in doing so underscoring the importance of these rights (and the structure of "customary law" that went with it) as a foundation for the state's relations with society. This was hardly a complete repudiation of authoritarian paternalism (or its role in "development," as the Report of the Punjab Colonies Committee made clear), but it was a recognition of the importance of law in defining the relationship between society and state under the colonial regime.¹³

Perhaps most important to this narrative was the role that this structure of law came to play in the development of 20th century Punjabi politics. Indeed, for all the fame of Punjab as the home of paternal authoritarianism, it can be plausibly argued that the structure of the law—and legislation—played a more central role in Punjab's 20th century politics than it did in the politics of any other Indian province. At the heart of this politics was the Alienation of Land Act of 1901, itself a piece of legislation that crystallized the law's structural concern in the Punjab to ground individual property rights within a legal framework that embedded the individual also in a patriarchal, "tribal" culture (the culture of Punjab's "agricultural tribes").¹⁴

This law eventually came to shape the political formation that dominated Punjabi politics in the era of electoral reform after 1919. The Unionist Party, which was founded in 1923, was defined in one sense by the common interests of its supporters, whether large landlords or smaller landowners, in “rights of property.” But given the framing of such “rights” within the framework of colonial law, they tended also to link these rights to a vision of a distinctive Punjabi culture that also was fundamentally shaped by patriarchy and tribal/*biradari* organization, a vision associated with the “agricultural tribes” as defined in the Land Alienation Act.¹⁵

What was most significant about the Unionists (apart from the fact that they dominated the legislature for more than 20 years), therefore, was that they built a powerful political alliance on the structure of colonial law—an alliance shaped by a vision of political community rooted in the intersection between property rights and the bonds of patriarchy and kinship that underlay “customary law.” Their vision of the typical rural Punjabi (the Punjab “peasant”) was not significantly different from that underlying the authoritarian British paternalist position (and it is little surprise in this connection that many Unionist leaders had close links to British officials). But their ability to transform this vision into a political party that could operate in an era of elections was made possible only by the emergence of a distinctive history of the “rule of law” in colonial Punjab, which defined a culture of “rights” (particularly property rights) that was conceptually independent of immediate official power and authority.

Legacies of Colonial Tradition: The Rule of Law Since 1947

The juxtaposition of these two competing narratives of the role of law in Punjab’s colonial history tells us much about the tensions marking Punjab’s modern history. However important a “Punjab tradition” of personalized rule, resting on a vision of “order” linked less to law than to power and loyalty, Punjab at the same time witnessed the development under the British of an

ideological emphasis on the “rule of law”—as a source of order transcending personal authority—that had a profound effect on the evolution of Punjab politics. But how were the tensions between these two narratives reconciled? And how were they reconfigured (or reworked) as the meaning of authority was reconstituted in the Punjab with partition and the incorporation of west Punjab into Pakistan? With Punjab comprising the majority of the population in Pakistan, what do these two narratives tell us about the ongoing role of the law (and the “rule of law”) in Pakistan?

It is important, in asking these questions, to underscore the degree to which, as already noted, paternalist authoritarianism and the “rule of law” in colonial Punjab were based, in critical respects, on common visions of the essential nature of the Punjab “peasant”. In both cases, Punjabi society was viewed by British officials and judges as rooted in the primacy of social structures that embedded Punjabis in nets of tribal order and kin-based patriarchy. This was a distinct vision of Punjabi culture (which marginalized, if not entirely, Punjab’s urban middle class). Yet within this framework, an emphasis on paternal authoritarianism defined a very different vision of the relationship between state and society than that defined by respect for the “rule of law.” While paternal authoritarianism suggested that only the rulers, who stood outside these structures, had the superior wisdom and leadership capacity to guarantee general “order” in society, the “rule of law” defined a framework in which “society” (constituted by those with state-recognized “rights”) itself operated as a source of order, at times supporting and at times constraining the state.

The redefinition of the moral foundations of the state represented by the creation of Pakistan had, of course, an inescapable impact on such definitions, and with critical implications for the subsequent evolution of the rule of law in Pakistan. On one level, the ideology of the Pakistan movement challenged overtly the ideology of paternal authoritarianism that was so ingrained in one narrative of Punjab’s colonial history. It did this by holding out an idealized vision of political community linked to the universal values of Islam. In campaigning for support of Pakistan, Jinnah was at times explicit in his critique of the official authoritarianism that made Punjab’s

colonial history famous, referring to the province as the “fortress of *naukarshahi*” in colonial India.¹⁶ The creation of Pakistan implied a state subject to a Muslim political community standing outside—and constraining—an authoritarian state. And for Jinnah, the mobilization of such a community as a political entity was clearly linked to the structure of the “rule of law.” This was implicit in the importance Jinnah vested in the elections of 1946 as the critical legitimizing exercise for the Pakistan demand. These elections clearly framed the existence of an independent political community in Punjab within legal structures based on individual “rights,” in this case, by a “right” to vote that was, significantly, also closely linked to property qualifications.

But the Pakistan movement also challenged in critical ways the *particular* structure of the “rule of law” that had developed in colonial Punjab under the British. It did this precisely by holding out an idealized vision of political community that was, whatever the structure of colonial elections, linked not to property rights, or to the existing structure of “tribal” social organization in the province, but rather to the universal values of Islam. Hints of this can be found not only in Punjab Muslim League rhetoric attacking the prominence of “tribe” and *biradari* in Unionist Party organization, but also in the attacks in the decades before partition on the primacy of customary law, which had, in the eyes of its critics, ignored the *shariat* in denying village property rights to *kamins*, for example, and all inheritance rights to women. In this sense, Pakistan’s creation was predicated on the more egalitarian and inclusive image of society that, for many, the *shariat* symbolized. Though linked to Jinnah’s vision of a state constrained by the rule of law, Pakistan’s creation unsettled in critical ways the actual cultural foundations on which the rule of law had in fact been historically established in colonial Punjab.

This irony was central to the subsequent history of the rule of law in the province (and in Pakistan). The courts continued to play a critical role in Pakistan in protecting property rights rooted in the history of the Punjab’s colonial land settlements, and in this sense the “rule by records” as a check on the power of the state continued unabated.¹⁷ But the role of the law in defining a vision of society constituted by rights-bearing individuals, who were simultaneously embedded in the distinctive culture of the

Punjab, faced new challenges. In practice, the preeminence of landed elites—and the culture of patriarchy and *biradari* associated with customary law—continued to define the politics of rural Punjab much as before. But while not undermining this politics in practice, the ideology of the Pakistan movement in critical ways delegitimized the structure of custom and *biradari* as the moral foundation for a legitimate cultural community that could act as an indigenous frame for property rights and thus constrain state power.

The delegitimation of “customary law” as a foundation for indigenous rights was in fact signified by the passage of the West Punjab Muslim Personal Law (*Shariat*) Application Act of 1948, which made Muslim personal law the controlling law in questions of succession to agricultural property. This undoubtedly opened up an expanded vision of the rule of law (including property rights) in defining, in theory, a broader, more inclusive Punjabi society. But such actions were sharply undercut by the fact that the technical application of *shariat* in property matters continued, *in practice*, to be widely resisted (though rarely overtly), precisely because it ran counter to the existing, and still largely politically unchallenged, structure of *biradari* and tribal patriarchy in rural Punjab.¹⁸ The *shariat* defined no new structure of individual and justiciable rights based on a contract between state and society. This had less to do with the structure or content of the *shariat* as a system of law than it did with the continuing solidity of the structure of power and property that had developed under the colonial regime, to which the Pakistan campaign in the Punjab (including the elections of 1946, in which *biradari* played a central role) had offered no effective alternative.¹⁹

Without an effective alternative structure tied to the *shariat*, the delegitimation of the politics of *biradari* and property rights thus opened the door for a new formulation of the state politics of paternal authoritarianism in the 1950s. In practice, Punjab’s patriarchal property-owners remained dominant in rural politics in the 1950s, but their ability to mobilize openly as a political party based on the protection of property rights and the appeal to “custom” as a central pillar of Punjabi culture, was undercut by the Pakistan state’s own claims to new ideological foundations. With the gradual breakdown of the structure of property as the

key to a contract linking rights-holders and the state, Pakistan's landed property holders were easily demonized as "feudals," even as the state sought to protect itself by redeploying old images of the Punjab peasant as a man who could only understand the operation of state-based paternal authority and power.

Indeed, this was the image conjured by General Ayub Khan as he seized power in 1958. And the courts soon upheld this as a pragmatic necessity of order, a doctrine explicit in Justice Munir's judgment in the Dosso case, legitimizing Ayub's takeover basically by holding that power justified itself—that the success of a change in power defined its own legitimacy.²⁰ One can perhaps read this as a concern by judges to protect the *potential* independence of the courts by bowing to the immediate realities of power following the army's takeover. But the retreat from the "rule of law" was nevertheless substantial. With the factional politics of Punjab's rural landowners now seen as a threat to order (and not as a reflection of the legitimate interests of the dominant, legally constituted class of rights-holders), the court itself denied, in effect, the power of the old conceit of "rule by records" (in this case the Constitution) to operate. At the same time, as Munir had made clear, the *shariat* offered no credible alternate vision for a more broad-based and legitimate vision of the "rule of law" within the new framework of Pakistan's ideology. As he had argued earlier (and persuasively) in his famous 1954 *Report of the Court of Inquiry* (on the 1953 Punjab anti-Ahmadi disturbances), the *shariat*, whatever its power as a symbol of a more egalitarian popular community in Pakistan, was, as a practical blueprint for a "rule of law" that could define "rights" and order relations between state and society in Pakistan, largely incoherent.²¹ Though they continued to play an important role in Pakistan, the courts thus had little vision of the "rule of law" to fall back on.

It was left, however, to General Zia to take the *shariat* itself and fully transform it into a symbolic justification for a continuation of the old colonial structure of paternal authoritarianism. While Ayub had sought to gradually adapt *shariat* to a structure of "rights" that could support and justify policies of capitalist development (as in the Family Laws Ordinance of 1961), Zia used *shariat* openly as a symbol of

authority to justify the state's authoritarian paternalism. Nothing dramatized this more clearly than his mobilization of *shariat* against women, not in order to define a space for "rights" that could be asserted against the state, but rather simply to legitimize authoritarian power. Indeed, he sought to appropriate the patriarchal authoritarianism of the Punjab's still vibrant *biradari* structure not through a recognition of customary "rights" deriving from the culture of the people (as had the colonial regime), but by using the *shariat* to provide legitimizing authority for patriarchy and for the suppression of women (and other "dependents") as a matter simply of moral superiority (a moral authority, of course, that paralleled that claimed by the state). The irony was that this was a complete reversal of the way that the *shariat* had at one time been symbolically mobilized in colonial Punjab to suggest a broader redefinition of women's inheritance rights in Punjab within a framework of property rights adjudicated by the courts. This only suggested how dramatically the political context had changed.²²

Yet, as events have since demonstrated, the vision of the "rule of law" that was implicit in Pakistan's creation survived Zia's rule and continues to exert a hold on the popular imagination. The notion of a contract between state and community, guarded by the courts (and the legal profession), continues to act as a powerful counterpoint to the structure of paternal authoritarianism, and has in some ways gained influence as the public sphere in Pakistan has expanded. In critical ways, the recent lawyers' movement that challenged the authoritarian rule of Musharraf, drew on this tradition, holding out a vision of courts, records and legal procedures as a constraint on the immediacy of power.

But to understand the strange career of the rule of law in Pakistan since 1947, it is critical to recognize the influence of the particular, colonial *form* of the "rule of law" in Punjab on the dynamics of this story. The roots of the "rule of law" indeed lay in a contract between the state and the people, but this was a contract fundamentally defined under the colonial regime by landed property, and by the recognition of "rights" to property embedded (through inheritance) in distinct Punjabi traditions of patriarchal authority tied to *biradari* and the land. In recognizing individual property rights, the state mobilized a powerful image

of an indigenous “society” in the Punjab composed of land-owning individuals grounded in the customs of a distinctive Punjabi culture. That this was a limited and hierarchical vision of culture is clear, and the appeal to Islamic nationalism—and to a symbolic moral appeal to *shariat*—sought to broaden and universalize this definition of the political community. But the legacies of that older tradition have nevertheless remained important in Pakistan, particularly as the structures of social organization on which this particular vision of the “rule of law” was based, remain strong. The struggle in Pakistan since 1947 thus has not been simply between the two strands that defined colonial history—the one linked to a powerful narrative of paternal authoritarianism, the other linked to a narrative based on the importance of law. It has rather related to the far more fundamental question of how the “rule of law” has defined the relations between the culture of the people and the authority of the state.

Notes and References

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- 1 Whit Mason, “Order v. Law in Pakistan,” *World Policy Journal*, 25, 1 (Spring 2008) p. 60-61.
- 2 Ian Talbot, *Punjab and the Raj, 1849-1947* (New Delhi: Manohar, 1988) pp. 33-34.
- 3 See Tan Tai Yong, *The Garrison State: The Military, Government, and Society in Colonial Punjab, 1849–1947* (New Delhi: Sage, 2005).

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- 4 Quoted in Lewis D. Wurgaft, *The Imperial Imagination: Magic and Myth in Kipling's India* (Middletown, Conn.: Wesleyan University Press, 1983) p. 35.
 - 5 Muhammad Shah, lambaradar of Gurdittiwala, "Shukriya Anhar Ferozepore." *Ferozepore District Gazetteer, 1915*, Appendices, pp. xxxv-xxxviii.
 - 6 *Ibid.*, Appendices, pp. xviii-l.
 - 7 Clive Dewey, *Anglo-Indian Attitudes: The Mind of the Indian Civil Service* (London: Hambledon Press 1993), p. 61.
 - 8 Syed Nur Ahmad, *From Martial Law to Martial Law: Politics in the Punjab, 1919-1958*, edited by Craig Baxter from a translation from the Urdu by Mahmud Ali (Lahore: Vanguard Books, 1985).
 - 9 For a good overview, see the introduction in Clive Dewey, *The Settlement Literature of the Greater Punjab: A Handbook* (Delhi: Manohar, 1991).
 - 10 Richard Saumarez Smith, *Rule by Records: Land Registration and Village Custom in Early British Panjab* (New Delhi: Oxford University Press, 1996); Matthew S. Hull, "The File: Agency, Authority, and Autography in an Islamabad Bureaucracy," *Language & Communication*, 23 (2003) p. 293.
 - 11 *Ahmad Yar Khan and others, Plaintiffs, and The Secretary of State for India in Council and another, Defendants*. Privy Council Appeal, *Indian Law Reports*, Calcutta Series, vol. 28 (1901), pp. 695-709.
 - 12 For a discussion of this in the context of colonial Indian history more broadly, see David Washbrook, "Law, State and Agrarian Society in Colonial India," *Modern Asian Studies*, 15, no. 3 (1981): 649-721. See also,

Jonathan K. Ocko and David Gilmartin, "State, Sovereignty, and the People: A Comparison of the 'Rule of Law' in China and India," *The Journal of Asian Studies*, vol 68, 1 (February 2009), pp. 55-100.

- 13 For a good account of this protest and the reactions, see Imran Ali, "Malign Growth? Agricultural Colonization and the Roots of Backwardness in the Punjab," *Past and Present*, 114 (Feb. 1987), pp. 110-132. Ali, in fact, shows a certain sympathy for at least a degree of developmental paternalism in bringing change and innovation to Punjabi society. He contrasts this with the concern for political stability and power that led the British to rigidify indigenous power structures in the canal colonies, and in ways that have had deep, long-term economic costs.
- 14 *Technically, the law limited the sales of landed property (owned by individuals) from those who were members of Punjab's "agricultural tribes" to those who were outside them. The Act was thus predicated on the importance of preserving the links between individual landholding and tribal/agricultural background in maintaining a structure of order in the province. Much has been written on this, but for an early overview of the passage and meaning of the Act, see N. Gerald Barrier, The Punjab Alienation of Land Bill of 1900 (Durham, NC: Duke University Program in Comparative Studies on Southern Asia, 1966).*
- 15 As a prominent official, John Maynard, put it, the rural representatives in the Punjab Council were not only "jealous" of their rights of property, but also "impressed with the necessity of keeping tenants and labourers [that is, those without property rights] in their proper places." Quoted in David Gilmartin, *Empire and Islam: Punjab and the Making of Pakistan* (Berkeley: University of California Press, 1988) p. 118. Maynard could easily have added women to this list as well.

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- 16 David Gilmartin, trans., “Muslim League Appeals to the Voters of Punjab for Support of Pakistan,” in Barbara D. Metcalf, ed., *Islam in South Asia in Practice* (Princeton: Princeton University Press, forthcoming).
 - 17 In his work on land rights in Islamabad, Matthew Hull provides insights into how this system has evolved in Pakistan, and “rule by records” has been fetishized within a changing structure of power. Matthew S. Hull, “Ruled by Records: The Expropriation of Land and the Misappropriation of Lists in Islamabad,” *American Ethnologist*, 35, 4 (2008) pp. 501 – 518.
 - 18 For some analysis of this, see Matthew Nelson, *In the Shadow of Shari’ah: Islam, Islamic Law and Democracy in Pakistan* (New York: Columbia University Press, 2009).
 - 19 This oversimplifies a complex issue. The problem with a “rule of law” based on *shariat* is treated here as a historically contingent issue. The problem at that time lay in part that the *shariat* was politically mobilized in the Pakistan movement largely as symbolic ideal, and thus had little role in concretely displacing the structure of power that supported customary law. But it also lay in the evolution of the *shariat* under the colonial regime as a system having little connection to political “rights.” It was largely constructed within the framework of colonial law as a set of substantive principles (relating largely to “personal law”) that could be encompassed within legal processes and procedures (that is a “rule of law”) that were drawn from British tradition. There is a large literature on this and on the debates on the role of the *shariat* in the Pakistani legal system, a subject this essay does not begin to address. For an overview on the early politics of Pakistan, and particularly on the role of the ulama in this, see Leonard Binder, *Religion and Politics in Pakistan* (Berkeley: University of California Press, 1961), and Muhammad Qasim Zaman, *The Ulama in*

Contemporary Islam: Custodians of Change (Princeton: Princeton University Press, 2002).

- 20 For the background to this case, and a discussion of Munir's reasoning, see Paula Newburg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge: Cambridge University Press, 2002), particularly chapters 2 & 3.
- 21 Munir was eloquent in demonstrating the incoherence in the thought of the *ulama* at that time with respect to "the phantom of an Islamic state." Justice Muhammad Munir, *Report of the Court of Enquiry Constituted under Punjab Act II of 1954 to Enquire into the Punjab Disturbances of 1953* (Lahore: Government Printing, 1954), p. 231
- 22 For essays exploring the complexities of this process, and its consequences, see Anita Weiss, ed., *Islamic Reassertion in Pakistan: The Application of Islamic Laws in a Modern State* (Syracuse: Syracuse University Press, 1986).