

## Political and Economic History of Personal Law in Pakistan

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**ABSTRACT:** The colonial rule of west left ineffaceable imprints over the discourse of Law and on its practice in India. The Public and private sphere of life dealt by two different laws; secular and religious respectively. The economic needs of Raj in India were forced British to collaborate with local notables, women of India and then subsequently of Pakistan denied any opportunity or freedom promised by colonial government. Those coded personal laws to this day in Pakistan is one of the reason hurting the effort of Pakistani women in getting her rightful place in society.

**KEYWORDS:** Political and Economic History, Personal Law, Pakistan.

### 1 INTRODUCTION

Miss Nazia Jamal Lecturer in Agriculture Extension department of University of Agriculture Faisalabad was died on the eve of 10<sup>th</sup> February this year. She received serious burnt injuries because of mysterious fire broke out a couple of days earlier while working in her Kitchen<sup>2</sup>. According to a Facebook page created in her name by her students, fire was not accidental<sup>3</sup>. The father of the deceased alleged that her husband, an employ of a Punjab Bank, murder her daughter out of anger. The reason was her disapproval of permitting her husband (Salman Shahid) for second marriage. Police reluctantly registered a first investigation report (FIR) on the intervention of Regional Police officer, pressurized by the Academic staff association (ASA) of Agriculture university. Unfortunately, the young lecturer was bearing child of six month at the eve of her alleged murder. There is not went a single day in Pakistan when women are not being raped, murdered or beaten by their men-folks. The violence is not limited only to poor, uneducated and uninformed women but neither Gazala<sup>4</sup> nor Nargis<sup>5</sup> are protected from this injustice. The causal determinants of Violence against Women are various and wide-ranging. The patriarchal norms and structures, the treatment of women as other sex, increasing extremism in society, crisis of identity, mismatched marriages, poverty and unequal gender relations neglected by colonial institutional framework reinforced by post-colonial state<sup>6</sup>. The feminist and Women rights activist deal all these reasons comprehensively. Therefore, the focus of this study is the analysis of historical, Political and Economic forces shaping the condition of subjugation of women in Pakistan.

The law as commonly known is an insurance against violence and safeguard against injustice. However, the reality and evidence on offer is different, law did not provide the required safety to the marginalized and underprivileged in Pakistan. There are numerous non-profit organizations working for women rights, the country elected twice a female prime minister and female foreign minister and national assembly speaker once, won an Oscar award for documentary on women issue and provide defiant resistance symbols for women rights; *Malala Yousaf Zai* and *Mukthaan Mae*<sup>7</sup>. It has passed loads of Parliamentary bills to end anti-women discriminations and repealed anti-women laws<sup>8</sup>. The university campuses are teeming with girl students competing with male students at universities and market places in urban centres. As, perceived and documented, education and financial independence has failed in providing the promised empowerment in Pakistan (Miss

Nazia Jamal is one such example). The inequality and injustice is neither allowed by the constitution of Pakistan nor Islam the state religion of Islam. However, it prevailed and most alarmingly on rise in Pakistan<sup>8</sup>.

The reason of failure, as I argued earlier, are diverse and overlapping but largely stemming from the pre-independence, colonialism experienced by Sub-continent. The policies of colonists, the separation of Public and Private life, the hypocritical-liberal institutions laid over the extractive economic institutions, the marriage of secular common and religious personal law, unstable post-colonial regimes and reinforced conservative hierarchies etc. Such policies laid the foundation for reinforced identities created over the bodies of Women under the shadow of political Islam. The debate over human rights in Pakistan has been facing historical ebb so, as the women rights. The prevention of Anti-women Practices (criminal act) 2011 had become law in 2012. Will it guarantee the bar the injustice treated with women? Some will say, at least it is a welcome step and must be appreciated. However, I would ask, why the true soul of Islamic teachings as Sister of Islam contend, is yet to be realized? The blacks in United States still face the discrimination although equal in the eyes of law. Muslim Indians lives under a secular state yet considered second-rate citizens. The menial castes in Punjab (Pakistan) on paper enjoyed equal rights but treated still as menial on ground. Therefore, in my opinion problem firstly lied in the incapacity of Pakistani state (which is a post-colonial state) in creating an effective institutional mechanism for the implementation of legislated laws. Secondly, the socialization process of post-independent Pakistan was inherently conservative and hypocritical impelled by colonial subjugation and ill-planned and executed partition of the sub-continent<sup>10</sup>. The Pakistan movement as the state ideologues supposedly calls it, inherited disorganized, weak and quasi-liberal state from British. The state institutions formed around subjugation and economic exploitation of the lower classes and ethnicities remained. However, politically very important and potentially revolutionary (As some fundamentalist say) constitutional alteration was made; the diadem of Sovereignty Switched from king to God<sup>11</sup>. The people of Pakistan again denied the virtue of controlling their own lives. The interpretation of God's Law usually performed by the Apostles (prophets), however, Muhammad (PBUH) was the last prophet, so this great responsibility was left on the shoulders of Maulana Maudoodi, which he performed meticulously in the Punjab disturbances of 1953<sup>12</sup>. The universal human right perspective since its day first was absent from the priorities of Pakistani ruling elite. Unfortunately, the women rights can only be secured within the larger framework of human rights. Thirdly, the political parties were less developed and mostly comprise of Bengalis and Urdu-speaking emigrants, while civil and military bureaucracy was overwhelmingly Punjabi<sup>13</sup>. The over-developed state structures and under-developed political institutions because of historical absence of industrial middle class opened the space for reinforced conservative social hierarchy, through the adaptation of British common and Muslim personal law, respectively in public and private spheres of the individual<sup>14,15</sup>. Lastly, the cultural, national and identity struggle between the colonists and indigenous was fought around Sexuality of women<sup>16</sup>. The colonist policy of divide and rule has found an ally in religion and women were the victims of new legal jurisprudence; an amalgam of secular and religious laws. This legacy is continued until this day in Pakistan.

This paper will be separated into five different but connected parts. First Part will deal with the philosophy of law, contesting schools in law, overlapping connection between ideology and law and different legal systems working in the world. Second part will shed light on the politics of rights and evolution of the institution of law in colonial times linking it with the modern discourse of women rights in two distinct schools of thoughts; Universal Human Rights paradigm and Muslim *Shari'ah* framework. Third part will deal with the post-independence struggle for women rights. Fourth Part will focus on the current debates of women rights especially in Pakistan and at large in Muslim world and their purposed roads to freedom. Final part will conclude the argument that violence against women, the discrimination they faced and with unfairness, they are treated can only be ceased through modernization of the economy, raising education, increasing living standards and secularization of the state and law, entailed in a universal human rights perspective.

*"In its majestic equality the law forbids the poor and rich alike to sleep under the bridges, beg in the streets and steal loaves of bread". Anatole France, 1894, Red Lilly, The more laws, the less justice. Marcus Tullius Cicero*

## 2 PHILOSOPHY OF LAW

Law is usually defined as, the system of rules and guidelines, enforced by institutions to govern the behaviour individuals and to maintain justice in society. However, this definition is just explaining the utility of law and to an extent the need of law. What is law *per se*? A mind-twisting question dealt by legal theorists, historians and solicitors differently, throughout the whole history. While the other more normative question echoed throughout history, *what it ought to be*? These ontological (analytical) and Normative (epistemological) questions made it difficult for different philosophers and theorists to agree on a single definition of law. The positivists doubt the authenticity of any law resulting from morality<sup>17</sup>. While the Naturalist believed the efficacy of law only when it is accorded the Natural law of universe<sup>18</sup>. Kelsen tried to develop a "Pure" theory of law, aside from moralities and ideologies<sup>19</sup>. The objectivity of law according to Kelsen lied in the interpretation of the primary or basic norm<sup>20</sup>. The actions or social conditions cause a disequilibrium or injustice, which can be redeemed by the

existing law . If any previous law is not helpful than the Sovereign power (Parliament in most cases) after long deliberations can enact a new law. The deliberations made by the parliamentarians, in Kelsen views on reflect over the “is” questions an objective situation faced by them. The law enacted by any such deliberation have to presuppose a basic norm, either the Natural law of God, or the abstract idea of justice or humanity or the precedent of any such law found in past. The basic norm is according to the premises of Kelsen himself offered, is about positive-order of power. The hierarchy of the legal order have to respect the historical first norm (Constitution in modern state) either settled by revolution custom, popular referendum or any historical incidence. The jurist cannot challenge the basic norm<sup>21</sup>. In the case of Pakistan, constitutionally the parliament is sovereign however, the basic norm is not any universal human right but some blurred Islamic injunctions. The sovereignty of the parliament organized and elected on the liberal principles of rationality and universalism denied execution by the un-elected bodies like *Shari 'at Court* and Islamic Ideological Council<sup>22</sup>. The legal perspective taken up by Islamic Feminist organizations is of religio-positivism<sup>23</sup>. The struggle for equal woman rights by these organizations confined itself within the framework of Islam ignoring the social, Economic and political forces behind the gendered interpretations of Islam<sup>24</sup>. How the power structure influences the legal institutions and how the ideologies convolute law is yet less rigorously researched area in contemporary Muslim world. The reason are numerous and varied.

## 2.1 IDEOLOGY AND LAW

The ideology is set of ideas conscious or unconscious perceptions, choices, desires and actions, whereas law is the set of rules enforced by state to control the conflicting desires. Conflicting desires and wants logically, in the opinion of radicals and critical legal theorists, arose from conflict within the society, the conflict between class, race, ethnicity or sex<sup>26</sup>. In his famous critique on Law, Althusser explained a direct link between the ideology and law<sup>27</sup>. The pure theory of law considered the basic norm as the sublime source for normativity and objectivity of law. However, in critical theorists argued that the beacon of “rule of law” has been erected on false assumptions of justice. Althusser reasoned that it is typical of some grand propositions to be always untrue, suggest propositions, which are. One of such statement is “All is equal before law”. It is theoretically a sound statement to have equal worth before law. However, the rich because of the law of private property can afford better lawyers and this puts equality before law in question<sup>28</sup>.

Secondly, the ideological state apparatus governing through the institutions of family, media, religion and particularly education subjectivize the individual; shape its desires ultimately a surrounded subject, created by the structures of state<sup>29</sup>. Who controls these apparatus; find itself in a position to manipulate the subjectivity of its citizen. The post-structuralism’s critique of knowledge production in modern society also pinpoints the hegemony over the production of knowledge controlled by those who own the physical means of production<sup>30</sup>.

Thirdly, how law is associated with ideology is a question demands further elaboration and separate investigation. The neo-liberal economic ideology purposes three fundamental reforms in the structure of economy, privatization, liberalization and deregulation. This extreme conservative liberal ideology preaching abandoned role for government, forced the developing countries through the International financial institutions (IFI’s) to change laws and welcome foreign direct investment, open up markets and reduce government spending<sup>31</sup>. These laws were drafted by considering individuals as completely rational (rationality in itself is a questionable category) and markets equally efficient everywhere just like United States. The principal of equality tied with market efficiency produced the greatest rate of economic inequality all over the world. Marx put avowedly and with immaculate clarity, that ideology is the ideas of ruling class. In Pakistan the ideology of the nation is being stated as Islam, so an explicit link between state apparatus, ideology and law is predictable.

## 2.2 PUBLIC AND PRIVATE LAW

Rise of law is indelibly correlated with the rise of civilization. Increasing complexity of human intercourse both at home and with other nations necessitate its vigilance. The simultaneous rise of Egyptian and Sumerian civilization developed first time codified civil laws<sup>32</sup>. The city-states of Greece introduce the inclusive political institutions without the codification of any norms or procedures into law. During the Pax Romanic during the reign of Justinian the Roman law, which was procedural earlier was codified. The participatory political institutions of Greek nation-states and roman civil law after the renaissance constituted the modern institution of democracy and procedural law.

Since ancient times the distinction between public and personal, law is apparent. The family relations and compensation for private harms were governed and regulated by the states, regimes, communities or fiefdoms. Modern civil or common law also bifurcated into this public and private realm. Table 1<sup>33</sup> will provide a summary for this distinction.

Table 1.

	Private Law	Public law
Govern	<i>Private interactions</i>	<i>Relationship between state and individual</i>
Examples	Tort law, Contract law, Family law, Labour law	Constitutional law, administrative law, International law, trust law

Out of the all these law the focus of this study is the family law. The issues of marriage, divorce, Alimony, child custody, inheritance and succession came under the jurisdiction of family laws. Pakistan as the Article 1 and Article 2 of the constitution declare is an Islamic state concomitantly, Muslim Personal law governs the domestic sphere and interaction. Part IX of the Constitution is titled Islamic Provisions and provides for the eventual Islamization of all current laws, reiterating that no laws offensive to the commands of Islam are to be legislated<sup>34</sup>.

Similar to the debates world over women rights in Pakistan also gyrate around two universal frameworks; Human Rights perspective and shari'a. The information, debate and struggle for equal human rights for women is limited to only professional, educated and urbanized middle and upper class activists. The social presence of religion is very high and overlaps with the cultural norms and practices. The fundamentalist insurgency and state-led Islamization of every political and social discourse left a little room for any other rational or secular discourse. Nevertheless, to solve the mystery of present the key is past. In next part, I would try to re-construct the political, social and intellectual history of Muslim past since the decline of Mughal Kingdom in 18<sup>th</sup> century.

### 3 THE WEIGHT OF HISTORY

The decisive battle for the throne of India was fought between the two sons of Shah Jehan at the plane of *Samugarh* close to Agra. The younger son, then known in history as Aurangzeb Alamgir, won the battle, *Dara Shakoh* was sentenced to death and the fate of India sealed. In retrospect, the win of staunch, conservative and ideologically hard-core religious *Aurangzeb* was a complete opposite of handsome, intellectual fecund and liberal *Dara Shakoh* (In the creed of Akbar). That was the beginning of end, the start of downfall, an end of one of the most prosperous, peaceful and enlightened rule India ever received. The material forces of history, piled up in Indian society, recognized the necessity of a comprehensive social, political and economic framework, which by accepting the cultural, religious and ethnic plurality of India provide an inclusive state apparatus. Unfortunately, the intellectual armoury of India at such a critical juncture of history went into the hands Alamgir<sup>35</sup>. The religiosity of the man widen the gulf between different ethnicities, and the compilation of *Fataw e Alamgiri* into Islamic law closed the path of *Ijma* (Consensus) and *Qiyas* (Reasoning by Analogy) once and for all in Muslim jurisprudence in India<sup>36</sup>.

Muslim rulers in India usually used Islam to solve the problem of legitimacy<sup>37</sup> the coffers of Mughal Empire were in a state of decline when Alamgir got his hands on throne. Contrary to the practise of previous rulers, Alamgir has left with no easy money to construct monuments of his historic victory or fallen love<sup>38</sup>. His hard-core religious beliefs were rooted in his life as well as in the socio-political necessity of his reign. The "lucrative collaboration" of state and ulemas has started from there on. To halt the political decline of Mughal empire Alamgir used Islam in varied ways, imposed *Jaziya* on non-Muslims, Hindu temple razed to grounds, music was banned even in *the Khanqahs of Sufis*, and banning the Shia celebrations of death of Imam Hussein<sup>38</sup>. The loosing grip of central authority, brewing conflicts in North-Western India, revolt of Sikh-Hindu revivalists created a general environment of insecurity particularly for Muslims, surrounded by a huge majority of Infidels<sup>40</sup>.

This new socio-political reality of 18<sup>th</sup> century has given birth to a religious scholar and jurist in the line of *Sheikh Sirhindi*; Shah Wali Ullah. Badly influenced by the insecurity of his times, he took the course of Sirhindi, although with a new vigour in the interpretation of Sharia. He was overwhelmingly influenced by the teachings of Abdul Wahab of Arabia<sup>41</sup>. This specific interpretation of Islam imbued in Arabian culture alienates the true soul of Indian Muslims from a rich cultural legacy of a thousand years<sup>42</sup>. In my opinion, it was one of the greatest intellectual miscarriage of Muslim scholarship in India, because it were the teachings of *Shah Wali Ullah* overtly used by *Syed Ahmad* in jihad against the Sikhs in first quarter of 19<sup>th</sup> century and implicitly used by founders of Deoband seminary in third quarter and *Maluna Maududi* in the 20<sup>th</sup> century. Arguably, I would stress that a symbiotic relationship between clergy and state was the outcome of specific social, political and economic era. However, the codification of the knowledge produced within the timeframe of sheer chaos and Muslim insecurity explicitly determine the future course of Muslim politics in India under colonists. The class, Gender and ethnicity

was denied any place in the creation of new Muslim identity and the losers were the poor, women and marginalized ethnicities of Muslims in India respectively.

### 3.1 LAW IN BRITISH INDIA

At the onset of East India Company's rise to power in India, it was divided and separated into different religions, castes, communities, regions and cultures. Every community has practised different customs, rules and norms unaltered since centuries. The idea of universal law with central enforcing authority, independent judiciary and elected executives was entirely absent. A closed society regulated by religious and cultural mores lacked an autonomous concept and abstract theory of law<sup>43</sup>. Another problem was laid in the execution of authority, a despot sitting on a throne ruled through the traditional institution varied region-to-region and community to community. The traditional rules governing marriage, transaction, succession, ownership and treatment of misdemeanour were diverse and in contradiction to each other<sup>44</sup>.

The problem for British was to create an efficient economic base governed by a universal common law (like in Britain of 19<sup>th</sup> century). The Lockian adaptation of Natural law into common law, which was absent in pre-colonial India required a central authority to impose a universal code of law. As the control of India transferred from the East Indian Company to the throne of England, a series of enactments passed i.e. Code of Civil Procedure 1859, Penal Code 1861 and Code of Criminal Procedure 1861. The demarcation between preservation of authority and political contingency realized through the bifurcation of law into separate domains namely, public and private.

### 3.2 PERSONAL AND PUBLIC LAW IN INDIA; HOW IT STARTED?

"In order to prevent another 'mutiny', Queen Victoria proclaimed: The crown was to 'abstain from all interference With the religious belief". Bilimore, 2002

The 1857 war of independence put an end to the rule of East India and company, and India became a crown colony. The British were very upset because the uprising shook their perceived stronghold over sub-continent. The legal framework enacted after the uprising in Public sphere enacted a universal civil code, while in order to defy any further resistance, taking inspiration from threatened religious beliefs, Private domain of individual life discerned from the public by the enactment of religious laws<sup>45</sup>. The colonial state achieved multifarious objective through the demarcation of public and private domain;

- 1) The creation of Central authority governing an extractive Economic system under the umbrella of English Law, was Legislated by English Privy Council, Judged by English Judges.
- 2) This new statute law, opposite to the traditional and customary laws directed by religious and cultural mores, putatively construct a legal edifice, which treated justice as norm per se.
- 3) The loyalty of the elites of all religious communities was managed by accepting their right to use religious laws to regulate their personal and family life.
- 4) The seed of religious and sectarian discord and political intolerance had also sown among the ethnicities and nationalities living side by side in relative harmony since ancient times.

The colonialism as the most liberal thinkers of 19<sup>th</sup> century considered and rendered as the "Civilizing Project" of the natives, turned out as a new beginning of unprecedented agony and oppression for all marginalized communities, groups, sects, classes and sexes in India. The political contingency of colonial state by codifying religious laws reinforced the patriarchal (traditional/customary) structures and made the bodies of women a location to decide the fight between the colonist and nationalist<sup>46</sup>. The laws passed after the "Entering of India" under the holy shadow of English crown evidently stifle the life and opportunities offered by new system.

Table 2.

<i>Hindu Personal Law</i>	<ul style="list-style-type: none"> <li>• <b>Sutte Regulation, XXVII of 1829.</b></li> <li>• <b>Caste Disabilities Removal Act 1865</b></li> <li>• <b>Hindu Widows Remarriage Act 1856</b></li> <li>• <b>The Hindu Gainful Employment Act 1930</b></li> </ul>
<i>Muslim Personal Law</i>	<ul style="list-style-type: none"> <li>• Muslim Personal Law (Shari at) Application Act 1937</li> <li>• Shari at Act 1937</li> <li>• Dissolution of Muslim Marriages Act 1939</li> </ul>
<i>Parsi Personal Law</i>	<ul style="list-style-type: none"> <li>• Parsi Marriages &amp; Divorce Act 1936</li> <li>• Native Converts Marriage Dissolution Act 1866</li> </ul>
<i>Christian Personal Law</i>	<ul style="list-style-type: none"> <li>• Indian Divorce Act 1869</li> <li>• Indian Christian Marriage Act 1872</li> </ul>

Source; -Billimore, 2002.

This binary of contradictory rules and regulations created the ambivalent and torn identity for the native, Materialist, progressive and liberal externally while spiritual, saviour of culture and guardian of tradition privately, A half-breed, a mimicry, a white man's burden. Religion in all anti-colonial struggles has remained an ally of the almost all native movements; it entered into politics and even then led to the partition of India on religious lines. This communalist politics also reflected in the codification of personal law as described earlier. The clear division of inner and outer domain of personal and public life gave way to the rise of incoherent, opposite and conflicting values, rules and institutions.

It seems pliable to provide evidence for explaining the outcomes of dichotomous legal procedures face by the nation state of Pakistan, a case study of two laws, one each from public and private domain, can do the business.

- Land Alienation Act 1900, Punjab.
- Sharia Act 1937.

The land alienation act passed in 1900 was in essence a decree of colonial state to hold the transfer of land into the hands of Hindu creditors (Baniya) from Muslim rural land owning gentry. The land colonization of barren lands of Punjab were used by British for dual purpose, 1) Earning Revenue 2) Consolidating political power. The newly colonized land then distributed into three distinct categories among the "Agricultural castes". To put it short, the big land-lords who were Muslims in majority, started to lose their lands to Hindu *Mohajins*. This obviously challenged the conservative hierarchy put in place by the British because the Hindus were settled in urban centres and if this process left unchecked it could have, changes the whole future Economic, political and social evolution of the Punjabi society<sup>47</sup>. This process most importantly could create a commercial market of land and eventually lead to parcellation of land into smaller units, which ultimately broke the stronghold of rural conservative gentry over the politics of the province.

Despite this entire progressive outcome, in line with the Civilizing Project of colonialism British by virtue of power they held, made the transfer of land a non-agriculturist caste illegal. The categories of Agricultural and non-Agricultural were also not in lined with the idea of justice common law celebrates. The enactment of this law deepen the ethnic, religious and class divide and block the required opening up of the society<sup>48</sup>. It could be rendered as a classical example of law codifying the ideology of the ruling class.

The enactment of the Islamic principles into statues of law in 1937 heralded a long waited victory of Educated Muslim elite for more than quarter of a century. The religious principles deduced from the collection of *fatwas* arranged in the reign of Alamgir. The enactment of this law again reduced the lip service of colonial mission to mirth. The old patriarchal structures, norms and regulations were left untouched. Arguably, it could be concluded that enactment of this law was a gift to the educated Muslim elite, flag bearer of the Muslim nationalism in India. However, the ultimate victim was Muslim woman and the politics of Right in post-partition Pakistan. Again, the political contingency caused the sectarian rift (Shia jurisprudence neglected completely), and forgoes the diverse customary practices prevalent within and among communities. Notably, there is a common thread in the enactment of both laws, the fear of rebellion, which in my opinion rendered the post-colonial state in efficient and incapable of enforcing a universal set of rules as well as its implementation<sup>49</sup>.

#### 4 MUSLIM NATION AND MUSLIM LAW A POSTCOLONIAL UNION

The colonial politics for independence or sovereignty can be characterised broadly into two meta-categories, Nationalist and Religious. Both of these liberation narratives have shown a serious lack of concern for the provision of concrete, comprehensive and democratic framework for diverse social and culture groups. The personal law re-invented by British in India was a queer mix of local and Western traditional moralism, hardly reflecting the coordinates of the lived culture<sup>50</sup>. Although the personal law governs a limited realm of private community conduct, it nevertheless has implications on the thinking of issues pertaining to citizenship, rights and obligations even at state level<sup>51</sup>.

The duty of state (nation state) primarily is to provide conditions for human flourishing to all without any racial, ethnic or gender discrimination<sup>52</sup>. These conditions only can be achieved in a plural society like India and Pakistan through deliberations, democratic dialogue in a universal Human Rights framework, backed by a transformative and constructive politics, which must not marginalize or privatize the question of *human good* to an orthodox and unchanging concept of fixed moralities.

Pre-conditions for such a transformative politics is a well-functioning, representative and effective state, which by avoiding injustice and violence can guarantee a peaceful mechanism for the grievances of its citizen. In the case of Pakistan, the post-colonial state at large lacking all these necessary characteristics problematizes the question of equal women rights. The legacy of colonial rules, institutions, politics, economic structures and legal discourses prevents any new and progressive re-construction of society.

The urgent birth of Pakistan was eclipsed by the tragedy of blood-sewn migration, which eventually reinforced the religious identity of the polity. Even the first (very famous too) address of the founder of Nation (Muhammad Ali Jinnah) fell on deaf ears in which he categorically aspired about a secular state<sup>53</sup>. Within a period of one year after his death, a definite step was taken towards a theocratic state by legislating Objective Resolution as the permeable for constitution for newly independent state<sup>54</sup>. The socialization process of colonial era was inherently conservative and impelled by hypocrisy<sup>55</sup>, which inadvertently cleared the way for a parochial social and political culture. Moreover, the introduction of quasi-liberal institutions during colonial rule, which provide legitimacy for economic exploitation seriously deformed the self-governing capacity of the native ruling classes, succeeded the colonial masters. In the case of Pakistan, the bureaucracy lacked professional work force, universal voting franchise was absent and political institutions were biased in favour of landed aristocracy<sup>55</sup>. The organic evolution of liberal, democratic and representative political institutions correlated with the rise of Bourgeoisie, while in Pakistan inherited at the eve of independence only 34 factories. The result can only be the three fold conjugal union of Clergy and Landed-aristocracy with over developed state structures reinforcing a conservative worldview as a state ideology<sup>56</sup>.

The active or passive role of religion in the affairs of state according to empirical findings of Kuru (2007) is explained by the presence or absence of Ancien Regime. He analysed three countries France, United States and Turkey to prove his point. However, the case of Pakistan is almost different from France and Turkey (These countries never colonized) but close to United States (colonized by British). The glaring difference of attitudes towards religion in state policy can be explained by the nature of the colonization, Settler in case of United States and Exploitive in Case of Indo-Pak. This ubiquitous difference of socialization process and the edifice of legal framework erected during the colonial rule emphatically affected the post-independence policies of State towards religion.

The *objective resolution* was an implicit expression of the insecurity felt by political elite of Pakistan, completely alienated from ground realities and poor masses. The Economic structures left unchanged, land reforms overlooked and done only half-heartedly, constitution making delayed and fair elections avoided until 1970. The procedural law or law *per se*, govern the economic and social precincts of a society reckoned as just. Therefore, the unchanged exploitive economic structure backed by conservative social hierarchy also required an unchanged law, colonial law enacted with the full vigour. The journey towards real independence of the people of Pakistan halted at the beginning. The consequence of such path stagnancy for women and minorities in Pakistan specifically turned out very ugly. The Muslim Family law considered by zealots as holy depress any further debate over the authenticity of the principles guarding the normativity of these laws. Unfortunately, yet there are no visible signs of any rapprochement can be seen in the policy circles of Islamic Republic of Pakistan.

#### 5 STATE AND WOMEN RIGHTS, A PROBLEMATIC RELATIONSHIP

Pakistan has travelled a long journey encompassing almost six and half decades, since its hasty birth in 1947. Yet the dream or more correctly if called the bargain chip used by its founders<sup>58</sup>, of creating an Islamic welfare state is not achieved. The marginalized, down trodden, ostracized, out casted are still finding themselves in their old position, with a slight change

in the colour and religion of their masters along with a little alteration in the form of oppression. A state, which has failed miserably to even provide the necessities to its large population, to expect from it equal rights for its citizen, is a childish wish. The lack of vision, rulers of Pakistan possessed and absence of any serious institutional and legal alternative forced them to work with the old system. The system- building process at a critical juncture of history significantly affect the outcomes even for centuries<sup>58</sup>. The process of system- building is usually but significantly shaped by the ideology of the dominant group<sup>59</sup>. The dominant groups who to certain extent had a say at state level or have some street strength, chiefly were either conservative or religious. Due to an array of reasons the ruling clique to provide legitimacy to their rule imposed "Islamic identity"<sup>60</sup>. The critical moment was lost, which perpetuate the agony for women of Pakistan because the gendered structures got another life.

The adoption of objective resolution as a principle document, a meta-narrative, a guiding code had reduced the discourse of women rights, at state level to Islamic legal injunctions formulated during the periods of Alamgir, reinforced by Shah Wali Ullah and creed, codified and improvised by British into *Muslim Family act 1937*. Although some attempts were made by Ayub regime in, redefining the Family laws in 1961 but implementation faced serious snags<sup>61</sup>. One of the reasons of this bad implementation was the untouched, reinforced and reified social structures of Patriarchy, which the post-colonial state was neither has the capacity not will to challenge.

Patriarchy, a social structure can live along with all formation of production (Primitive, Feudalist and Capitalist). The relationship between patriarchy and ideology is very complex. However, the ideology of the state accompanied by the state capacity of implementation can effectively dismantle the social structures<sup>62</sup>. Linked with transformation of economy, increasing mobility of women, their financial and economic independence of women, increased literacy through education created an *a priori* about women rights in Europe. In the meantime, the beginning of capitalist relation of production was closely associated in Europe with the rise of Liberal Middle class demanding a secular state and secular law. In nutshell, it can be concluded that, awareness about rights in historical experience of "West" is linked with transformation of economy and class structure of a nation-state. The historical experience of post-colonial states is completely different, the shock therapy, indigenous cultures received by colonists has produced a divergent set of ideologies. Secondly, introduction of western cultural and political institutions in twisted form, under the influence of western hegemony (both cultural and Economic), over deeply rooted structures of inequality exacerbated the condition of women. The becoming of woman's body as the battle place between the "west and East" is one of the evil gift of colonization, which certainly affect the legislation of private domain.

Other than politically driven, half-hearted effort of Zia regime, the public laws were never tempered with religious injunctions. The public and private separation of legal discourse needs "decontextualization" both from the western notions of "Rule of Law" and "equal justice and from the religious framework for women liberation. As, the post-colonial theory aids in understanding the situation of women in Pakistan, the *binaries* of religious and liberal/secular must be looked through the lens of "hybridity". The de-contextualization is required for developing a discourse over women rights, because both the binaries of "Secular" and "Religious" are value-loaded and ideologically driven. However, to develop such a discourse, rooted in local cultural reality along with a universal sense of equal human rights, secular state is indispensable. A third space is only viable in the presence of a secular state, which can appreciate the pluralism and encourage the dialogue. Therefore, a struggle for equal women rights can only be located in equal human rights under the banner of a secular state.

#### 5. CONCLUSION:-

This paper while taking its lead from the political and Economic history of sub-continent . It delved into the debate of theory of law and tried to develop the connections ideology and Law holds. The ideology is configured by power of the dominant group. A thorough analysis of Mughal history and then colonial rule leave long lasting effects over the process of state formation , institutional building and codification of law, simply system building. The pervasive intrusion made by religion in the formation of ideology and construction of identity in Indo-Pak debilitated the condition of women in this part of the world. The organic weakness of post-colonial state, hybrid identities, failure of the modernization of economy and conservative socialization in connivance with the ideological (religious) codification of law in post-independence Pakistan stifled the opportunities for women of Pakistan. The need of the hour is to give space to more plural discourses of women rights, which in my opinion is only possible in the presence of secular state.

## NOTES

1. Translation of an Urdu couplet;
2. <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/21-Feb-2013/asa-demands-probe-into-lecturer-s-death>.
3. <https://www.facebook.com/UAFinformaton>
4. A pushto singer killed by her Husband for not leaving the showbiz industry.
5. Famous stage dancer, her head clean-shaved by her lover.
6. Carey, 2002
7. A rape case victim of Southern Punjab , now running an NGO for women rights.
8. A suvey by Aurat foundation provide evidence of the rise of Violence against wome.
9. Menial castes mostly are people not allotted land in Punjab.
10. Cary, 2002.
11. Objective resolution was passed in 1949 and then made the part of constitution during the dictatorship of Zai.
12. Punjan disturbance commission report, 1953.
13. Alvi,1972.
14. Alvi,1972
15. Ali, 1985
16. Pederson, 1991.
17. Benthem, A utilitarian philopsehr and theorist of 19<sup>th</sup> century.
18. Rousseau, a French radical writer of 18<sup>th</sup> century.
19. Kelson, 1934
20. Kelson, 1934
21. The basic principal interpreted by Religious jurist against land reforms is a right to property ownership, which is indispensable and unchallengeable.
22. Islamic ideological council can disregard any law it adjudged against the Islamic law.
23. The single pragmatic, shallow interpretation and understanding of religion and law.
24. Sister of Islam, a Malaysia based feminist group raising voice for the feminist interpretation of Islamic jurisprudence.
25. W.H. auden collected works
26. 26. critical legal theorist Stanford
27. 27. Althusser ideological state structures.
28. 28. lacunar discourse, Althusser, princeton.edu <http://www.princeton.edu/~achaney/tmve/wiki100k/docs/Ideology.html>
29. 29. althuser ideological state apparatus.
30. Peet, 2003
31. Rodrik,2005
32. . Théodoridés. "law". Encyclopedia of the Archaeology of Ancient Egypt.  
\* VerSteeg, Law in ancient Egypt
33. 33, "Private Law vs Public Law". Diffen contributors. Diffen LLC, 2013. Web. Sat Jun 01 2013  
[http://www.diffen.com/difference/Private\\_Law\\_vs\\_Public\\_Law](http://www.diffen.com/difference/Private_Law_vs_Public_Law)
34. <http://www.law.emory.edu/ifl/index2.html>
35. Carey,2002, critical juncture is a moment when new institutions can be replaced by new and more democratic, representative ones.
36. Mumtaz and Shaheed,1987.
37. Bari,2007
38. Alamgir in his youth when he was the "Hakim" of Deccan fell for a courtesan in the Haram of his one of fraternal Uncle. Her early death left the prince heart-broken and seriously influenced his intellectual and ideological growth.
39. karen amrstrong quoted by Bari.2008
40. Bari,2008.
41. Bari, 2008
42. Ayasha jalal.
43. Bilimoria, 2003
44. Bilimoria, 2003
45. Shiek,2012
46. Naryan, 2003
47. Ali,1985
48. Ali,1985
49. Carey,2002
50. billimore, 2003
51. billimore.2003
52. perry, quoted by bilimore,2003
53. Jinnah address. Pakistan has travelled a long journey encompassing almost six and half decades, since its hasty birth in 1947. Yet the dream or more correctly if called the bargain chip used by its founders<sup>58</sup>, of creating an Islamic welfare state is not achieved. The marginalized, down trodden, ostracized, out casted are still finding themselves in their old position, with a slight change in the colour

*and religion of their masters along with a little alteration in the form of oppression. A state, which has failed miserably to even provide the necessities to its large population, to expect from it equal rights for its citizen, is a childish wish. The demand for equal women rights can only be justified or become valid after accepting women as human beings, complete conscious living beings. Regrettably, it was never remained a serious concern for those at the helm of power.*

54 *Objective resolutions adopted in 1949.*

55 *Carey,2002*

56 *Alvi,1972*

57 *Ali,2008*

58 *Acemoglu and Robinson,2012*

59 *tiger and levy quoted by fareeda shaheed and khawar mumtaz 1987.*

60. *Religious organizations and feudal lords mostly enjoyed the mass following. Educational missionary organizations too, attract some following in urban centres of Lahore. On the other hand, bureaucracy (both) was to large extent liberal and progressive but was not connected to the people at large. The weak political parties, revoked religious identity, need of breaking from colonized path and provide rationale to the idea of Pakistan, they all agreed to use religion for casting a new Pakistani identity.*

61. *Fareeda and Mumtaz.1987*

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