

Land Reforms & Absentee Landlordism

Justice (Rt.) Dr. Tanzilur-Rahman

With Mr. Nawaz Sharif once again becoming Prime Minister of the country, the nation, more or less, has been witnessing the same thing as that of Ms. Benazir Bhutto, ex-Prime Minister, in the matter of enforcement of *Shari'ah* as laid down in the Book of Allah (SWT) and *Sunnah* of the Holy Prophet (SAW). There is enough material in evidence to prove the lack of political will to enforce the supremacy of Qur'an and *Sunnah* in Pakistan. In fact, there has been lack of the courage of faith in Allah (SWT) and His Prophet (SAW) to stand against the dominance of the West in this respect.

However, despite all the difference of opinion between me and Mr. Nawaz Sharif in the process of Islamization, which I had closely witnessed and personally experienced as Chief Justice of the Federal Shariat Court during 1990-92, I wholeheartedly welcome his move to take over possession by resumption of 1.25 million acres of land, from illegal occupants, identified as being the land in excess of the ceilings of land holdings fixed by the Land Reforms Regulations of 1972 and the Central Act 2 of 1977 and distribute the same among landless peasants.

Not only that, Mr. Nawaz Sharif, in his address to the nation on June 11, 1998, also announced, though by a sketchy indication, for taking over possession of land from those feudal lords, *jagirdars* and *zamindars* (of Punjab), *waderas* (of Sindh), the *sardars* (of Baluchistan), and *khawaneen* (of NWFP) who got the land as reward from the British rulers (or as bribe from the past governments) in consideration of their services rendered by them or their ancestors, to strengthen the British Raj over the Indian Subcontinent, bartering the interests of the Muslims and hatch conspiracies against the Muslim Rule of India.

The first Constituent Assembly of Pakistan — which was also performing the function of federal legislature and whose first leader of the House was also the first Prime Minister of Pakistan, Shaheed-e-

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Millat Liaqat Ali Khan — passed a Resolution in or about 1950, whereby the provincial governments of East Pakistan, Punjab, N.W.F.P., Sindh, and Baluchistan were urged to take steps for abolition of *Jagirdari/Zamindari* system from their respective provinces. The Provincial Assembly of East Pakistan passed a law whereby necessary steps were taken to abolish the *Jagirdari/Zamindari* system from East Pakistan. In consequence, the Jagirdar/Zamindar, as a class, was no more an effective power in the political arena of East Pakistan (now Bangladesh) and the middle class was able to get entry into politics and wield power. This was evident from the provincial elections in East Pakistan held in 1954 wherein Jugtoo Front was able to capture thumping majority in the Assembly, so much so that even late Noor-ul-Amin, the Chief Minister of East Pakistan, and a senior Muslim League leader, was defeated by a student.

On the other hand, N.W.F.P., Sindh, and Baluchistan took no step in the direction of abolition of *Zamindari* System. Only the Punjab Provincial Tenancy Act of 1887 was amended which proved to be of no consequence so far as the *Zamindari* system was concerned. It may be added that the first Chairman of the Pakistan Planning Commission, late Zahid Hussain — who was also the first Governor of the State Bank of Pakistan — in his report on the first Five Years Plan had opined that it was necessary to abolish the *Jagirdari/Zamindari* system for strengthening the economic, political, and democratic system in the country.

In India, by passing of the Abolition of *Zamindari* Act, 1953, all the *Zamindaris* and *Jagirdaris* (including over five hundred states of *Jagirdars* and *Nawabs*) were abolished, except that *Khud Kasht/Seer*, under self cultivation to the extent of about 16 or 17/30 acres, all the lands were resumed by the Government of India. *Zamindars* were issued Money Bonds in consideration of the lands resumed, payable in eight equal yearly installments. These Bonds were made negotiable and transferable in open market. This Abolition of *Zamindari* Act of India 1953 influenced a great deal the political climate of the country. Democracy was strengthened and the country became self-sufficient in food in about a decade.

In Pakistan, “Land Reforms” has been a soaring subject. No elected Government, so far, could dare to go against the interests of the Feudal Lords as they formed and still form majority or at least have a sizeable number in the National Assembly as well as in all the Provincial Assemblies. The first step was, however, taken by Gen. Mohammad Ayub Khan under the cover of Martial law by promulgating M.L.R. 64 in

1959 for resumption of land for distribution among landless peasants, by setting the ceiling of land at 500 acres for irrigated land and 1000 acres for un-irrigated land. This ceiling was, in fact, very high; nevertheless, all kinds of leases were exempted from the operations of M.L.R. 64. According to Shaikh Rashid of Pakistan People's Party, the said law reform was merely an eyewash.

In 1972, Z. A. Bhutto — who took reins of power from Gen. Yahya Khan in December 1971 after the debacle of East Pakistan — appointed his own-self as President and Chief Martial Law Administrator of Pakistan with the connivance of Army Generals who felt demoralized for unprecedented defeat in the entire Muslim history. Bhutto promulgated again under the cover of Martial Law, Land Reforms Ordinance 1972 (Martial Law Regulation 115) whereby a land-owner could retain up to 150 acres of irrigated land and 300 acres of un-irrigated land. Later on by Act 2 of 1977 the ceiling of irrigated land was reduced to 100 acres, but the laws were not enforced in their true spirit, perhaps due to political pressure, deceit, maneuverings, and undue influence of all concerned.

In 1979, Gen. Zia-ul-Haq promulgated an Ordinance whereby Shariat Benches were constituted in all the four High Courts and the Supreme Court of Pakistan; 67 Shariat petitions were filed in 1979-80 challenging the M.L.R. 115 and the law reforms Act 2 of 1977 before the said Benches. After about 15 months, the Federal Shariat Court was constituted on June 26, 1980. The FSC started hearing of these petitions in right earnest in August 1980 and after hearing very long arguments of all the parties, a detailed judgement was pronounced by it on December 13, 1980.

The majority judgement of Federal Shariat Court (Mr. Justice Karimullah Durrani, *contra*) in Muhammad Ameen Vs. Islamic Republic of Pakistan (P.L.D. 1981 F.S.C. 23) held that the 1973 Constitution takes away power of the Court to declare invalid laws providing for acquisition of any class of property for certain purposes and fixing limits as to the ownership of property notwithstanding any provisions having not been made in such laws for payment of compensation. It was thus observed that things declared valid by Constitution can not be declared invalid or bad by Courts, nor can the Court declare any provision of Constitution as repugnant to Islamic injunctions. Declaration of repugnancy with Shariah of the provision of law placing ceiling on ownership or reducing same amounts to declaration of such constitutional provisions as bad which declare such law either valid or untouchable by the Courts. What cannot be done directly cannot also be done indirectly. Thus, the ceiling placed

on property validated by Article 253 of the Constitution and Land Reforms Regulation 1972 and Land Reforms Act 1977 were held to be immune from challenge to such extent in courts including Federal Shariat Court.

The Federal Shariat Court, however, by majority judgement (Mr. Karimullah Durrani *contra*) held that even otherwise on merits the provisions relating to fixing ceiling of land and taking over the land by governments in excess of such ceiling were not repugnant to the injunctions of Islam. (For details, see PLD 1981 FSC 23).

In Appeals by the Petitioners in 1981 and few others the matter was taken up by the Supreme Court Shariat Appellate Bench which held by its majority judgement, after about *nine* years, on August 10, 1989, made effective from March 23, 1990. (Mr. Justice Nasim Hasan Shah, *contra*) that “prescription of maximum ceiling of land-owner’s holding was un-Islamic. It was thus held by the Supreme Court that the Provisions of the Land Reforms Regulation of 1972 and the Land Reforms Act of 1977 whereby the maximum holding which a landowner could own and provision for the vesting of all land in excess of the aforesaid ceiling in the Government were invalid and the restrictions were repugnant to the injunctions of Islam.

In accordance with the opinion of the majority, it was held that following provisions of the Regulation, the Act and the Punjab Tenancy Act 1887 to the extent indicated against each, are repugnant to the Injunctions of Islam:

1. “Paragraph 2 clause (7) of the Regulation (which defines the term “person”) in so far as it includes Islamic Wakf for the purposes of other paragraphs of the Regulation which are being held wholly or partly repugnant in injunctions of Islam.
2. The whole of Paragraph 7 (declaring void transfers of land or areas in excess of 150 acres held by a land-owner), 8 (fixing a ceiling of 150 acres as the maximum holding of an individual), 9 (surrender of *Shamilat* land or share in *Shamilat* in excess of maximum holding of 150 acres), 10 (fixing maximum of 100 acres of civil servants), 13 (vesting of excess land in Government) and 14 (resumption of land obtained in exchange of land allotted in the border area) and consequentially paragraph 18 (land granted to tenants out of the excess land vested in Government) of the Regulation.
3. Paragraph 15 (dealing with stud and livestock farms), 16 (dealing with *Shikargahs*), 19 (dealing with utilization of land under orchards,

studs or live stock farms) and 20 (utilization of land under resumed *Shikargahs*) in so far as they ignore the rights and obligations, the terms and conditions of the grant, lease, as the case may be, in resuming the stud and livestock farms, *Shikargahs* and Orchards and dealing further with them under Paragraphs 19 and 20 thereof.

4. Paragraph 17 of the Regulation (relating to religious charitable and educational societies) in so far as it relates to Wakf and all other institutions which can validly fall within the definition of Islamic Wakf, and consequential to that extent paragraph 21 (which relates to utilization of land resumed from religious, charitable and educational societies also.” (Qazalbash Waqf’s Case PLD 1990, S C, 99).

It may, however, be stated that the Supreme Court’s findings are based on the assumption that the ownership of the landlords on all fours was legally valid. Legally, the Shariat Appellate Bench could not go into the factual questions of and mode of the acquisition of ownership, whether valid or not in the eye of *Shari’ah*. Thus the Government is likely to face difficulties in resuming the land under the provisions of MLR 115 and Act 2 1977 as announced by the Prime Minister Nawaz Sharif, in view of the above findings of the Supreme Court, unless possession has already been taken over by the Government prior to March 23, 1990. Or the Government files a Review Petition against the said judgement in the Supreme Court and is able to obtain an order in its favor, or make suitable amendments in the Constitution to overcome the said difficulties. However, there seems to be no impediment in setting up a high powered National Commission for Lands with some knowledgeable person to head the same, to make country-wide inquiries and investigations as to the mode of acquisition of the lands by the landlords and their predecessors-in-interest, whether valid or not in the eye of *Shari’ah*. The Supreme Court has also observed about the formation of a Commission in its judgement (see PLD 1990 S.C., 99, p. 263).

And now to conclude, here is a very important point: The terms of reference for the above said Commission may include to inquire into the legal position in the light of *Shari’ah*, about the status of land or creation of Pakistan whether the land was *Kharaji* or *Ushri*? In case the Commission gives a finding that on August 14, 1947, the status and nature of the agricultural lands, within the territory of Pakistan, was *Kharaji*, the land will be treated as State-owned, and the problem will stand solved. Only the necessary amendment in the Constitution will have to be made and new law shall have to be enacted accordingly.

Absentee Landlordism

A most pertinent question that is being agitated in Pakistan print media in relation to our agricultural economy is that of “Absentee Landlordism,” which has proved itself to be the greatest impediment to our agricultural progress and development.

This has given birth to another question whether agricultural land can be leased out against specified rent or against a fixed part of the produce of land, or against a fixed sum of money. This question, in fact, dates back to the early formative period of Islam. There are found two divergent views as emerged out of interpretation of *ahadith* on the subject known as *muzara'ah*, (lease of bare land for a certain part of its produce) which has been discussed in detail in almost every compilation of *ahadith* and every authentic book on *fiqh*, in separate chapters to denote its importance.

According to the first point of view, *muzara'ah* is invalid in Islamic Law. Imam Abu Hanifah, Imam Auza'i, and Imam Ibn Hazam hold this view. They maintain that if the landlord gives to the tenant bare land for one-third or one-fourth of the produce, it is a case of hazard, chance, or risk, as the crop sometime is abundant and sometime it fails.

This point of view, which invalidates any lease of agricultural land under the Islamic law, is reported to be based on various *marfu' ahadith* — traditions whose chain of transmission is directly linked to the Prophet (SAW). Following are the main traditions in this respect, as quoted in *Landlord and Peasant in Early Islam* by Dr. Ziaul Haque (Islamabad, 1977):

1. Jabir (RAA) says that the Prophet (SAW) said: One who owns land must cultivate it himself, or bestow it free, i.e., lend it to another person to let him cultivate it. If he does not do this, he must retain his land. (Sahih Muslim, Kitab Al-Buyu')
2. Jabir (RAA) says that the Prophet (SAW) prohibited lease of land against any rent or part of land's produce. (Ibid.)
3. Abu Al-Najashi, mawla (client) of Rafi' bin Khadij (RAA) reports that Rafi' bin Khadij says that Zuhayr bin Rafi', his uncle, said that the Prophet (SAW) had forbidden them from a matter which was very beneficial for them. Rafi' asked him about this matter, saying that whatever the Prophet (SAW) had said must be right. Zuhayr said that the Prophet (SAW) had asked him as to what they were doing with their agricultural lands. He told the Prophet (SAW) that they were leasing them against whatever grew on the rivulet or the

streamlet; or against camel loads of dates or barley. The Prophet (SAW) thereupon forbade them saying that they should cultivate their lands themselves, or they should let some other people cultivate them (free of charge), or they must simply withhold the lands. (Ibid.)

4. Nafi' (RAA) stated that Abdullah bin Umar (RAA) used to lease his land. Ibn Umar went to see Rafi' (RAA) to ask him about the problem of land lease, and he (Nafi') also accompanied him. When Ibn Umar asked him about the problem, Rafi' replied that the Prophet (SAW) had banned it. (Ibid., another variant in Sahih Bukhari)
5. Abu Hurayra (RAA) said that the Prophet (SAW) declared: One who owns land must till it himself or give it free to his brother, or otherwise he must withhold it. (Sahih Muslim, Kitab Al-Buyu' and Sahih Bukhari, Kitab Al-Ijarah)
6. Abu Sa'eed Al-Khudri said that the Prophet (SAW) had banned *muzabana* and *muhaqala*. He explained that *muhaqala* was lease of land. (Sahih Muslim, Kitab Al-Buyu')
7. Abdullah bin Umar (RAA) said that the Prophet (SAW) prohibited lease of land. (Ibid.)

Ibn Hazam says that all these Companions (RAA) transmit the categorical ban on lease of land. This is tantamount to *tawatur*, the transmission of *ahadith* on the authority of numerous Companions (RAA) about whose reliability a presumption is attached that they all cannot tell lie. For detailed discussion, see *Nizam-i-Zamindari aur Islam* by Maulana Muhammad Tasin (Majlis-e-Ilmi, Karachi)

On the other hand, a majority of jurists hold a different view. According to them, *muzara'ah* is legal and permissible against a certain part of its produce, cash or kind. The jurists rely upon the following *ahadith* in support of justification for the practice of *muzara'ah*. They have been recorded in Sahih Bukhari and Sahih Muslim and other standard compilations of *ahadith*.

1. Nafi' bin Umar (RAA) says that the Prophet (SAW) made an economic transaction with the farmers of Khaybar with the stipulation that they would pay half of the produce of grain and fruit. (Sahih Bukhari, Kitab Al-Muzari'ah)
2. Abdullah bin Umar (RAA) says that the Prophet (SAW) gave Khaybar to the Jews on the condition that they would cultivate it and work on it, and would get half of the produce. (Ibid.)

3. Nafi' bin Umar (RAA) says that the Prophet (RAA) gave to the Jews of Khaybar the date-palms and land of Khaybar, that would cultivate it with their own capital and would pay to the Prophet half of the produce. (Sahih Muslim, Kitab All-Buyu')
4. Nafi' bin Umar (RAA) says that when the Prophet (SAW) had conquered Khaybar, he wanted to expel the Jews from the land. They asked him to let them stay on the land on the condition that they would cultivate it and would retain half of the produce for themselves. The Prophet (SAW) approved of this and said, "we shall, as long as we wish, let you stay on the land." They were thus allowed to stay until the time of Umar bin Khattab (RAA) who exiled them. (Sahih Bukhari, Kitab Al-Muzari'ah)
5. Ibn Abbas says that the Prophet (SAW) gave the lands and date-palms of Khaybar for half of the produce. (Sunnan Ibn Majah, Kitab Al-Ruhun and Ibn Hanbal, IV, no. 2255)

Imam Abu Yusuf gives five forms of *muzara'ah-tenure* in his famous book *Kitab Al-Kharaj* which, according to him, are valid in *Shari'ah*.

1. Free-tenure, in which landlord gives his land free to his brother without charging him any rent; the cultivator uses his own seed, animals and instruments; the entire crop belongs to him. If this is a *kharaji* land, the landowner will pay the *Kharaj*, if an *ushri* land, the tiller will pay the *ushr*. This was also stated to be the opinion of Abu Hanifa.
2. Partnership-tenure, in which the landlord and the cultivator cooperate and share the expenses and seed and till the land together; they share the produce equally. If this is an *ushri* land, *ushr* will be paid from the produce, if *kharaji* land, *kharaj* will be borne by the landowner.
3. Lease of bare land for money, in which bare land is leased for a fixed sum of money for one year or two, and which is currently known in Pakistan as *muqala'ah*. This is valid in law. The landlord will pay the *kharaj*, if this is a *kharaji* land. If it is an *ushri* land, landowner will pay the 'ushr. This is also the opinion of Abu Hanifa. According to Imam Abu Hanifa if it is a *kharaji* land, *ushr* is paid by the person who owns the crop, viz., the tenant in this case.
4. *Muzara'ah-tenancy*, in which land is given for one third or one fourth of its produce. Abu Hanifa does not allow it, for it is a *fasid* or irregular tenancy; in his opinion, if any laborer is employed for such a tenancy he must be given a definite wage equivalent to his labor

(and not an indeterminate share in the crop); thus the *kharaj* (or the *ushr*) is paid by the landlord. Abu Yusuf disagrees with him; he says that this type of *muzara'ah* is valid if all the conditions relating to it are fulfilled. *Kharaj* will be paid by the landlord if it is a *kharaji* land. In case of its being an *ushri* land, *ushr* is paid by both of them.

5. Labor-tenancy, in which the landlord who owns also animals and seed calls upon a laborer or tiller to till the land for one sixth or one seventh share of the crop. For Abu Hanifa, again, this type of hiring labor for indeterminate wages is improper (*fasid*) because the crop belongs to the landlord and the laborer must be paid his wages commensurate with his labor. Abu Yusuf insists that this is all valid because their stipulations are based on traditions (*aathar*) of the Companions (RAA).

Now, we have seen as stated above, the two divergent views of the jurists, based on two versions of *ahadith*, on the question of *muzara'ah*. In Pakistan, the second view prevails in actual practice. I have suggested above the formation of a National Commission for Lands to determine the nature of agricultural land in Pakistan as on August 14, 1947, in the eye of *Shari'ah* whether it is *kharaji* or *ushri*. It may now be added that in case the said Commission concludes that the lands in Pakistan are *ushri*, as held by Mufti Muhammad Shafi in his book *Islam Ka Nizam-e-Arazi*, it may address to itself the question of *muzara'ah* in the eye of *Shari'ah*. The question may, however, be determined after recording the statements of various *Ulama* (having juristic acumen) of Pakistan and India and, if needed, from other Muslim countries.

However, let it be noted that the problem can be resolved only if a critical analysis of the traditions is made taking full account of the history of the doctrine. Only that set of hypotheses is possible which can be verified with adequate evidence. The proposed Commission's main task will be to investigate and give all the available evidence both in points of *isnad* and of history to find out which of these versions has greater antecedent probability than the other, not in sense that a certain hypothesis stands confirmed, if particulars are found, but rather in the sense of making positive *a priori* judgment which can adequately provide explanation more than the other possible alternative assumptions. (*Landlord and Peasant in Early Islam*, by Dr. Ziaul Haque, Islamabad, 1977). If it is deemed necessary, resort may be had to *collective ijihad*, by the pious jurists (*Al-Fuqaha Al-Abideen*) as narrated by Ali (RAA). In case the Commission comes to the conclusion that *muzara'ah* tenancy is valid in Islam, preferring the second version of *ahadith*, it may make necessary recommendations for eradicating the

vices that have crept in the system, after examining the existing laws on the subject in the light of the injunctions of Islam as laid down in the Holy Qur'an and *Sunnah* of the Prophet (SAW). In the present economic scenario, it is imperative that overall and multi-dimensional reforms are made in the agricultural sector.

There is, however, a very big question here: Will the present Government, or for that matter any future Government dominated by the Feudal Lords, undertake this Hallunstic task? The answer perhaps obvious.