

Chapter 2

Law in the Era of Capitalist Modernization (1947–1960s)

From the 1940s to 1960s, Pakistan moved from being under British colonial rule to coming under the influence of the United States (U.S.). Jinnah, the ‘founder’ of Pakistan was a Lincoln’s Inn graduate, as was his successor and the first Prime Minister, Liaquat Ali Khan. The major jurists in Pakistan were either British lawyers hired by the government or local barristers who trained at Lincoln’s Inn and cited Privy Council decisions. The colonial state legacy continued to affect the civil servants who served in the judiciary, the number of these rising to 65 members in 1964. Pakistan at this point experienced the imposition of modernization under the guidance of experts from Harvard and Massachusetts Institute of Technology (MIT). The transition was seamless and the existing judiciary facilitated the assimilation of ‘modern’ U.S. legal norms in Pakistan. After the writing of the 1956 constitution, judicial decisions in Pakistan started leaning towards U.S. Supreme Court precedents on the issue of the arbitrary use of administrative and legislative powers against fundamental rights, claiming it was because of the written constitution. Politically, Pakistan adopted a presidential system in the 1962 constitution.

This chapter will argue that during this period of transition, the juridico-bureaucratic structure came to undermine the legislature, not because “it did not like politicians” as is commonly stated,¹ but rather because it surmised that the legislature could not be trusted to control the population. The general thrust of legal discourse in the 1950s was in support of a move from Privy Council decisions to ‘modern’ U.S. legal norms as a way of accommodating political and economic change. The main legal issue raised before the courts in this period was not regarding the supremacy of the legislature or bureaucratic dictatorship (as goes the common explanation), but rather, which arrangement could best keep the structure of the government intact against popular struggle. Navigating through the confusion of the 1950s, legal discourse and constitutional arrangements in Pakistan ended

¹The particular instance referred to is Ayub’s action against politicians by creating a parallel system of Basic Democracies (BD System). See *Elective Bodies (Disqualification) Order 1959*, President’s Order No 13 of 1959, PLD (1959) Central Statutes 101.

with a set of institutions not dissimilar to that of the U.S. presidential system, with indirect elections, controlled democracy, and rights as a substitute for this democratic deficit. The idiom of Islam was deployed both as a cohesive force for the nation-building project and as a substitute for ‘morality’ in U.S. legal discourse. But in its ‘particular’ materiality, it was to achieve the same end along with the U.S. type of legal system, that is to stop deeper and broader democracy unleashed by anti-colonial struggle and socialist ideas. The judiciary, drawn from the civil bureaucracy and leading the process of modernization, was an indispensable part of the project.

Before moving on, let us briefly unpack the use of the terms ‘capitalist modernity’, ‘socialist modernity’, and ‘modernization theory’. At the end of the first quarter of the twentieth century, world politics saw two competing models of political modernity, namely socialist and capitalist models. Most anti-colonial struggles came to be inspired by the experience of socialist modernity in the middle of the twentieth century. These national mobilizations hoped for real democracy, economic and political, in the newly independent countries. To counter these hopes, the capitalist bloc, under the hegemony of the U.S., theorized its own experiences of ‘colonization’ into what it pushed as ‘modernization theory’, or the material benefits of the capitalist path to modernity.

Both models were linked to different laws and development theories, as theorized by David Trubek.² For the socialist model, law was an instrument of a vanguard party and legitimacy came from faith in the vanguard and/or from popular participation, rather than constitutional fidelity. Both models assumed a dissolution and transformation of pre-capitalist society and social structures.³ Hamza Alavi, the best-known Pakistani theorist, was clear that theories of “modernization” are implicitly or explicitly theories of capitalist development because they were based on the premises of capitalist societies, such as private property and mass consumption. He wished for Pakistan to see a ‘revolutionary change’, to break with its internal feudal structures as well as from the encompassing global capitalism. He wished, in other words, for a version of a socialist modernization model.

2.1 Law and State During Colonial Rule

Legal literature by academic historians about the process, nature and affect of British legal codification of Indian law during the colonial era, differs from the understanding of legal commissions and jurists in postcolonial Pakistan. The latter outrightly admired the legal system they inherited, the detail to follow in a while.

²DM Trubek, *The Owl and the Pussy-cat: Is there a future of Law and Development*, 25 *Wis Int LJ* (2007) 235, 237.

³H Alavi, *State and Class Under Peripheral Capitalism*, in, H Alavi & T Shanin (eds) *Introduction to the Sociology of “Developing Societies”* (Monthly Review Press, New York and London, 1982) 289.

The former category of historians on colonial India had divergent views about the codification of laws in British India accommodating traditional laws.

The ‘expropriation’⁴ of law in India, but as a decisive step towards a modern system went through three stages, according to Marc Galanter. The first was Warren Hasting’s re-organization of the state in 1772 in Bengal, which was a general expansion of the government in isolation from courts and legislation; the second, after 1860, with extensive codification of laws and rationalization of the court system, where legislation provided the laws; and third, the post-independence stage.⁵ Apart from continuity and discontinuity from the traditional Mughal era laws, the colonial system came to be based on the extraction of taxes with the state’s penetration in society working through the land revenue system. Existing social structures at all district and sub-district levels were given meaning through legal protection of landed property and its lawful usage exercised by the formal state structure. In West Bengal, the British East India Company (EIC) introduced the Law of Permanent Settlement and created a rural elite to extract surplus from the peasantry.⁶ Addressing the issue of accommodating traditional law, for David Washbrook, that ‘pseudo-traditionalism’ was a reintroduction of more hierarchical and feudal structures.⁷ Later, the state protected this class from moneylenders who had been strengthened due to increases in usury in the agrarian economy. Landowners were converted into landlords and preserved through legislation.⁸ According to Waseem, society was connected with the new state through the revenue bureaucracy mediated by the rule of law.⁹ It was the law that tied India to the British Empire, both politically and economically.¹⁰

Current Foucauldian translated these colonial indulgences in legal formations as ‘discourse formations’ by the ‘power-knowledge’ paradigm¹¹ and the building of ‘pan opticon’ prisons¹² and ‘rationalization’ of administrative bureaucracy as

⁴Weber used this term and according to him, through ‘expropriation’ the monopoly of the Govt declared, and applied the law, see M Weber (1958), *Politics as a Vocation*, in, HH Gerth & CW Mills (eds) *From Max Weber: essays in sociology* (Routledge & K Paul, London, 1970) as cited by M Galanter, *The Displacement of Traditional Law in Modern India*, in, Rajeev Dhavan (ed) *Marc Galanter: Law and Society in Modern India* (Oxford University Press, Delhi, 1989) 17.

⁵*Ibid* 17, reprinted from 24 *J Soc Issues* 65.

⁶M Waseem, *Politics and the State in Pakistan*, 3rd edn (NIHCR, Islamabad, 2007) 29.

⁷DA Washbrook, *Economic Depression and Making of Traditional Society in Colonial India 1820-1855* in 3 *Trans Royal Hist Soc*, (1993) 237, 239.

⁸Like, *the Punjab Alienation of Land Act 1901* and *Sindh Encumbered Estates Act 1878*, see I Habib, *Essays in Indian History: Towards a Marxist Perception* (Tulika, New Delhi, 1995).

⁹Waseem, *supra* note 6, 45.

¹⁰Waseem, *supra* note 6, 21.

¹¹BS Cohen, *Colonialism and its Forms of Knowledge: The British in India* (Princeton University Press, Princeton, 1996).

¹²M Kaplan, *Panopticon in Poona: An Essay on Foucault and Colonialism*, 10:1, *Cult. Anthropol* (1995) 85.

‘techniques of disciplining power’.¹³ Where were the excluded, dispossessed and the marginalized in these legal formations? The motives behind laws, i.e. to protect British trade and industry, were equally behind the crafting of trade union and workers’ legislation. After the Ghadr (revolt) of 1857, the wage-related disputes in public sector came within the ambit of jurisdiction of magistrates under The Employers and Workmen Dispute Act of 1860. The Act criminalized breach of contract by an employee but not employer.¹⁴

Exclusion by the East India Company was racial, placing British civilian bureaucracy on the top administratively. ‘Difference’ and ‘separation’ sharpened identities and added fears in the minds of the marginalized and excluded, dividing them further.¹⁵ Chief Justice Munir of Pakistan (29 June 1954 to 2 May 1960) noted that legal codifications in British India sharpened divisions. For example, the Government of India Act, 1919 presumed communal electorates and diarchy, and the classification of subjects into ‘reserved’ and ‘transferred’.¹⁶

The relationship of the local polity with law-making, meanwhile, went through two phases. Before the extensive *Ghadar* (revolt) of 1857, military struggle and occupation were followed by colonial laws, such as the Permanent Settlement laws. In the second phase, after 1857, the relation of the polity to laws changed and protests followed law-making. For example, *The Government of India Act*, 1858 came just after the revolt (Ghadar) of 1857 and was a constitutional document for colonial India, which transferred the administration territory under East India Company to the Crown.¹⁷ The *Indian Council Act* of 1861 further deepened the local administration in colonial India.¹⁸ Still, the local population was not included in the administration. Later, the formation of the Indian National Congress created a cadre of native politicians to include in the administration in 1892.¹⁹ It expanded the Council of the Governor-General. Muslim minority consciousness was triggered, resulting in demand of separate electorate and formation of the Muslim League (ML) in 1906, leading to the Minto-Morley Reforms 1909.²⁰ Afterwards, the politics of Congress and Muslim League followed the indigenization of Indian politics through *The Government of India Act*, 1919²¹ and finally *The Government*

¹³P Chatterjee, *The Nations and its Fragments: Colonial and Postcolonial Histories* (Princeton University Press, 1993).

¹⁴F Mohammed, Protecting Pakistani Labourers Post-Eighteenth Amendment: Recognizing Rights after the Devolution of Power, 9:2 *Loy U Chicago LJ* (2012) 265, 269.

¹⁵F Robinson, *Separatism among Indian Muslims: The Politics of the United Provinces Muslims, 1860-1923* (Oxford University Press, Delhi, 1993); see also, A Jalal, *Self and Sovereignty: Individual and Community in South Asian Islam since 1850* (Routledge, New York, 2000).

¹⁶M Munir CJS (Ret as he then was), *From Jinnah to Zia* (Vanguard, Lahore, 1979) 6.

¹⁷*The Government of India Act 1858*, in, Constitutional Documents (Pakistan), Vol I, (Law Div, Ministry of Laws & Parliamentary Affairs, Karachi, 1964) 332.

¹⁸*The Indian Council Act 1861*, in, *supra* note 17, 399.

¹⁹*The Indian Councils Act 1892*, in, *supra* note 17, 408.

²⁰*The Indian Councils Act 1909*, in, *supra* note 17, 413.

²¹*The Government of India Act 1919*, in, *supra* note 17, 513.

of *India Act*, 1935.²² Eventually, we see the ‘constitutional’ or ‘legal birth’²³ of two independent states in subcontinent in 1947.²⁴ Pakistan was arguably created through an Act of the British Parliament and not through a prior existence of a ‘revolutionary’ movement as in other colonized countries.²⁵

2.2 Did Pakistan Inherit a Good Judicial System?

As already explained, after the defeat of Ghadar, the local polity followed the legal and constitutional changes introduced by the British authorities. These new ideas of ‘constitutionality’ and ‘legality’ became the dominant mode for legal policy at the national level (both Congress and Muslim League-ML), with exception of the Ghadar Party (1913), Bhagat Singh’s movement (1930) and finally Subhash Chandra Bose (1940s).²⁶ The rule of law became so pervasive that by the 1950s, the dominant opinion was that Pakistan had inherited a good judicial system.²⁷ The Law Reforms Commission (1967–1970) found that the essential principles of the Mughal system of administration of justice were sound and efficient and that the British had only changed the system in those areas which were previously unregulated. According to the commission, British influences on India were assimilated and were no longer foreign.²⁸ Even the critique of this view of the ‘inherited good

²²*The Government of India Act 1935*, in, *supra* note 17.

²³H Khan, *Constitutional and Political History of Pakistan*, 2nd ed. (Oxford University Press, Karachi, 2009) 41.

²⁴Pakistan was arguably created through an Act of the British Parliament, and not through a prior existence of a ‘revolutionary’ movement as in other colonial countries, See *The Independence Act 1947*, in, *supra* note 17.

²⁵*The Independence Act 1947*, *supra* note 17.

²⁶The Ghadar party was formed by the Punjabi Indians in 1913 in U.S. and Canada to liberate India. Bhagat Singh (1907-1931) was a socialist in United British India struggling for independence. He was accused of murdering British police officer Saunders by throwing a bomb in the Punjab Legislative Assembly. A trial by Special Tribunal and appeal at Privy Council in England found him guilty. He was hanged on March 23, 1931. Subhash Chandra Bose was an Indian nationalist who formed the Indian National Army (INA) to liberate India out of the British Indian Army in the battle of Singapore during the Second World War. Bose was assisted by Germany. The British Raj charged 300 INA soldiers for treason. Bose escaped but died in a plane crash in Taiwan.

²⁷S Anwar-ul-Haq CJSC (Ret, as he then was), Administration of Justice.

PLJ (1983) Journal Section 42; See SA Haque, *Laws Delays - A Study: Diagnosis and Cure*, XXVIII *PLD* (1976) Journal Sections 64, 65.

²⁸S Anwar-ul-Haq has summarized the report, see Anwar-ul-Haq, *ibid* 50. He is also of the view that Civil Services should not be discarded as “ruling elite” which is a relic of the colonial past and he resented Yahya’s Civil services reforms in 1970-71, see S Anwar-ul-Haq, *Revolutionary Legality in Pakistan* (Pakistan Writers’ Co-operative Society, Lahore, 1993) 303; This opinion was shared by Justice (Ret) Saiduzzaman Siddiqui in a speech delivered at National Defense College, Islamabad to the Senior Cadre Officers of the Armed Forces of Pakistan and Friendly Countries in

judiciary’ only extended to the issue of appointment of British only judges.²⁹ The profound social and political changes that had accompanied the transplantation of British law went unremarked upon, and little was changed by the successive governments in two decades after independence.³⁰

The only exceptional voice in this regard was that of Chief Justice Cornelius. He discussed the diversity of the courts and laws before the British arrival. According to Cornelius, during the period of Hindu rulers, there was also a gradation of courts. Landowners or *Zamindars* had jurisdiction over the population in the courts of the territories. Gradually, in his view, British rule displaced the prior forms of justice and discriminated against the locals, as they could not sue any British person. All of the judges were European, with the East India Company having jurisdiction all over the subcontinent. Few locals served as judges in these courts, those who did were called ‘Black Judges’. The Indian Civil Services, after the Parliamentary Act of 1761, were exclusively British.³¹ Cornelius also pointed out that it was the beneficiaries of the system, like certain judges and lawyers, who believed in the British system.³²

And yet, Cornelius did not extend his critique to more fundamental questions such as the purpose and function of the British legal system in India in terms of exploitation or oppression. While he did not indulge with the hierarchies and exploitation within the legal system in British or pre-British India, he never asked if independence would mean delinking from the colonizers, or how the state and legal structure might have to change. This reflected a lack of a critique of neo-colonialism and it was no accident he became one of the main architects of U.S. modernization project in Pakistan under Ayub. Cornelius also did not mention the nature of indignity and the extent of exploitation in the informality which for him was ‘Islam’.

To sum up, Pakistan not only inherited a colonial state apparatus and the personals on the key posts in judiciary, military and civil services, but also a consciousness accepting modernity and enlightenment as a part of colonial conquest.

(Footnote 28 continued)

Asia, Africa, Europe and North America, see Justice (Ret) S Siddiqui, *Judiciary in Pakistan: An Overview* *PLD* (2000) Journal Section 52, 53.

²⁹A Ahmad, *Judicial Review of Administrative Actions and Independence of Judiciary in Pakistan*, XXII *PLD* (1970) Journal Section 135, 139.

³⁰S Ahmed, *Administration of Justice- A Hoax*, (1971) XXIII *PLD* 123.

³¹AR Cornelius, *Restoration of Judicial Responsibility to People; Repairing Damage Done to National Character During Period of Subjugation* XV *PLD* (1963) Journal Section 7, address delivered at a gathering of Military officials at G. H. Q., Rawalpindi on 11 July 1962.

³²*Ibid* 3.

2.3 Modernizers Even Before Modernization

As a rapidly constructed state, Pakistan did not inherit a centralized state machinery.³³ It could have experimented with new forms of governance, but did not. What are the explanations for this? One may be that the founding father had internalized the ideas of the colonizers.³⁴ The founding father of Pakistan, Jinnah, was a Lincoln Inn's graduate, and under the influence of liberal British parliamentarians.³⁵ The first Prime Minister of Pakistan, Liaquat Ali Khan, was also a student of Exeter College, Oxford. He completed his studies in law and was called to the bar of the Inner Temple in 1922. Jinnah was a lawyer of outstanding eminence.³⁶ Munir CJ's claim is that Jinnah was secular and against theocracy.³⁷ Most of these claims of Jinnah are based on his speech addressing the constituent assembly on the 11th of August 1947.³⁸ Sharifuddin Pirzada, one of the most prominent jurists of Pakistan, rejected this view that Jinnah wanted a secular state³⁹ but a modern state which was neither a Western type or nor a theocratic state.⁴⁰ For Nasim Hassan Shah CJ, Jinnah's vision of Pakistan was as a liberal democratic Islamic welfare state.⁴¹ Since socialist ideas were also prominent at the time, Jinnah also offered a haphazard condemnation of landlords and capitalists.⁴² He stated that major key industries and public utility services would be socialized.⁴³ Jinnah wanted socialist

³³As opposed to India, Pakistan started with a completely new state, See SJ Burki, *A Revisionist History of Pakistan*, (Vanguard, Lahore, 1998).

³⁴F Fanon. *The Wretched of the Earth* (Grove Press, New York, 2004); See, Also, F Fanon. *Black skin, white masks* (Grove Press, New York, 1968) as cited by A Khan (2012) 33, 45. See TA Khan, *The Post-Colonial State in The Era of Capitalist Globalization: Historical, Political, and Theoretical Approaches to State Formation* (Routledge, New York, 2012).

³⁵As a student in England, Jinnah used to visit Hyde Park Corner to listen to Soap Box orators and he was a regular visitor of the House of Commons to listen to the speeches of Gladstone, Lord Morley, Joseph Chamberlain, Balfour, etc. See S. Anwar-ul-Haq "Quaid-i-Azam as a Constitutionalist" (1976), a paper read at the Third Jurist Conference held on 9 December, 1976 at Karachi, in Anwar-ul-Haq, *supra* note 28, 251.

³⁶For a detailed account of Jinnah's legal cases and achievements, See SS Pirzada, *Quaid-i-Azam Muhammad Ali Jinnah: As a Lawyer* (Nazaria-i-Pakistan Trust, Lahore, 2000).

³⁷Munir, *supra* note 16, ix.

³⁸Jinnah's speech on 11 August on his election as first president of the Constituent Assembly of Pakistan, See *Quaid-i-Azam Mohammad Ali Jinnah, Speeches and Statements as Governor General of Pakistan 1947-48* (Government of Pakistan, Ministry of Information and Broadcasting, Directorate of Films & Publications Islamabad, Islamabad, 1989) 42.

³⁹SS Pirzada, Pirzada's interview with MH Faruqi, Jinnah's Pakistan: Islamic or Secular? in *supra* note 36, 22.

⁴⁰*Ibid.*

⁴¹Shah, *infra* note 103, 140.

⁴²Jinnah addressing Muslim League on 24 April 1943.

⁴³Jinnah talking to the Associated Press of America on 8 November, 1945.

modernization but Munir CJ made it clear ‘immediately’ that he wanted to combine the moral principles of Islam and socialism and did not mean a practicing theory of socialism.⁴⁴

Apart from Jinnah’s position on Islam and Pakistan, one thing is certain, after 1857 Ghadr, Muslims of the subcontinent had a fear of exclusion at a political level. Materiality of the idiom of Islam or Muslim identity was only to that extent and should be traced in those class formations. Munir is right that Jinnah was not a communalist.⁴⁵ Then what about two-nation theory he espoused, that Muslims are a separate ‘nation’ from Hindus? This was a later development in its ‘particular’. To understand the later developments of the grafting of Islam on the modernist constitutionalist version of Jinnah’s state, there is a need to explore the class formations under Liaqat Ali Khan after Jinnah’s sudden death in September 1948.

2.4 Class Formation Behind ‘Overdeveloped’ State

After independence, state formation and legal/constitutional formation did not change under Jinnah. Indian Act of 1935,⁴⁶ with a few modifications, became the constitution of the newly independent Pakistan. Jinnah became Governor-General with 3 out of 4 provincial governors as British technocrats. All British chiefs of armed forces stayed in their offices and the important ministries of finance and foreign affairs were given to Ghulam Muhammad and Muhammad Zufrullah Khan, who were technocrats of international reputation and had ‘connections’. Whereas the delinking of the colonial hegemony was not substantial, rather non-existent leading to deep centre–periphery relations of Pakistan, the reigning class in post-colonial Pakistan was in transition. A number of key political and economic figures of the time concurred, including Iskandar Mirza, Akhtar Hussain, Amjad Ali, Yousaf Haroon and Chaudhri Salahuddin. Amjad Ali and Haroon (Karachi) were from influential business families, and Salahuddin was the General Secretary of the Muslim League. Habib Bank gave Rs. 80 million as a loan equal to half of the revenue.⁴⁷ The statement of Industrial Policy came in 1948. This was the beginning of a capitalist class. In the 1950s, 99% of the growth was through Import

⁴⁴M Munir, *Stateless and Classless Society*, in NH Chaudhry, *Chief Justice Muhammad Munir: his life, writings and judgments* (Research Society of Pakistan, Lahore, 1973) 170, 176, first published in *Pakistan Times*, 23–24 March, 1972, 170, 176.

⁴⁵Munir, *supra* note 16, 20.

⁴⁶*The Government of India Act 1935*, in, *supra* note 17.

⁴⁷Shahid-ur-Rehman, *Who owns Pakistan?* (Mr Books, Islamabad, 1998) 9.

Substitution Industrialization (ISI).⁴⁸ We can see, therefore, how “the alliance between big business and the bureaucratic-military axis was already well-established in the 1950s”.⁴⁹ Unlike India’s congress, the Muslim League had thin roots in the territory which became Pakistan. Internally, the Muslim League was facing pressure for land reforms from Doltana and left-wing Mian Iftikhar-ud-din. In 1947, the Government Hari Committee was formed, which declared landlords as friends of the peasants, whereas a dissenting opinion of an ICS Muhammad Masud portrayed the real miseries of the peasantry in Sindh and recommended urgent land reforms. The report was stopped and not published till 1949. The Muslim League had to make an agrarian Reforms Committee under Mumtaz Daultana in February 1949. The East Bengal Land Acquisition and Tenancy Act, 1950 abolished large land holdings by fixing a ceiling of 33 acres self-cultivated land.⁵⁰ Landlords started ejecting tenants, so the situation began to deteriorate and took on ‘semi-revolutionary’ proportions.⁵¹ Hence, the agrarian question continued to be volatile. According to Toor, the ruling classes were concerned with an increasingly unruly populace and were determined to expel socialism/communism from the realm of legislative politics. The left was seeking to articulate an alternate narrative of nationalism and the nation-state project on the basis of ‘vision’ of progressive society as opposed to liberal anti-communists. She has discussed this conflict between the liberal capitalist vision and socialist progressive vision in 1950–1960s in detail.

After Jinnah’s death, under the leadership of Liaqat Ali Khan, the Muslim League was not united and lost popular support.⁵² This led to a process of creating parties internally from within state which Waseem called as ‘official’ parties. These were to counter an emerging anti-colonial popular alliance of ethno-nationalist (Bengali, Pashtoon and Baluchi) and socialists.⁵³ To make it possible, Liaqat Ali Khan took two steps; first, he decided to rely on West Pakistan’s landed elite as his natural constituency as a big landlord; second, he brought the Objectives Resolution

⁴⁸AR Kemal, Patterns and growth of Pakistan’s Industrial Sector, in, SR Khan (ed) *50 Years of Pakistan’s Economy: Traditional Topics and Contemporary Concerns* (Oxford University Press, Karachi, 1999) 152.

⁴⁹A Jalal, *The State of Martial Rule: The Origins of Pakistan’s Political Economy of Defense* (Vanguard & Cambridge University Press/UK, Lahore, 1991) 176 fn 122.

⁵⁰Hari Enquiry Committee, Govt of Sindh, *Minutes of Dissent* by M. Masud (Karachi), See, Also *Report of the Agrarian Committee appointed by the Working Committee of the Pakistan Muslim League* (S. Shams-ul-Hasan, 1949).

⁵¹The report of AR, Preston, American Consul General, as cited by Ayesha Jalal, see Jalal, *supra* note 49, 105.

⁵²M Munir CJSC (Ret, as he then was), *Highways and Bye-ways of Life* (Law Publishing Company, Lahore, 1978) 74.

⁵³For example, National Awami Party-NAP, which was formed after 1956 and started representing communists, nationalists, and masses outside the state formation which Waseem called as an external party, see Waseem, *supra* note 6, 118.

to please Mullahs, who had already opposed land reforms declaring them as un-Islamic.⁵⁴

The vulnerability of the feeble reigning class of Pakistan made it dependent on neo-colonial powers also. Liaquat's 1950 visit to the U.S., ostensibly in response to President Truman's Point IV Program to let the developing world benefit from the technical advances of the U.S., was a starting point for this. It was the acceptance of the new hegemonic project of the U.S. by the reigning class. Liaquat's request for private investment from the U.S.⁵⁵ in 1950 was for Pakistan to catch up and make up for lost centuries within the shortest possible time.⁵⁶ One can note that this rhetoric of 'catch up' fits with the rhetoric of Truman's speech and with the dominant modernization approach to development. He was convinced that the modernization of Pakistan could not be accomplished without the help of advanced countries like the United States.⁵⁷ Thus, he took a clear stand in the Cold War, siding with the U.S. He predicted that 'liberal civilization' and its institutions were under attack by 'dark forces' and identified the U.S. as the torchbearer of 'civilization'.⁵⁸ He emphasized the common values of individual enterprise, civil liberties and private ownership as opposed to distribution.⁵⁹ In his formation of modernization for Pakistan, he replaced U.S. morality with Islam as "the best security of law and the surest pledge of freedom" for Pakistan. According to Ali Khan, Islam was a necessary supplement due to the "mental confusion of the colonial world or their struggle".⁶⁰

Soon after this came the support of Pakistan in Korean War and joining of the Southeast Asia Treaty Organization (SEATO) and later CENTO (the Baghdad Pact). In the wake of these moves, Pakistan lost the sympathy of the Soviet Union.⁶¹ So far, the imperialist bloc wanted to use the legislature as a seat of power under the leadership of Liaquat Ali Khan and not military. Therefore, the *Pindi conspiracy* case was to clear communists from the military. Later, Nixon found the military under the leadership of Ayub to meet the daunting needs of cold war and

⁵⁴Jammat-e-Ahmadiya's second caliph Mirza Bashiruddin Mahmud Ahmad wrote a book titled "*Islam and Masala Malkiat-e- Zamin*" in 1950. He rejected the recommendations of land reforms by Doltana Report. Muslim League formed this committee in response to the volatile question of land in the country. Similarly, Maulana Moudodi of Jammat-e-Islami also wrote a book in 1950 titled "*Masala Malkiat-e-Zameen*." He strongly opposed land reforms, see M Naim-Ullah, *Pakistan in the Stranglehold of Feudalism [Pakistan Jagirdari Zamindari Nizam Ke Shikaney Men]* (Jumhoori Publications, Lahore) 186.

⁵⁵LA Khan, *Pakistan: The Heart of Asia: speeches by Liaquat Ali Khan* (Royal Book Company, Karachi 1989) 62, speeches delivered in 1950 but first issued in Pakistan in 1989.

⁵⁶*Ibid* 30.

⁵⁷*Ibid* 30.

⁵⁸*Ibid* 22.

⁵⁹He assured Americans that "we as Muslims believe in private ownership as opposed to Hindus whose laws were designed to promote the distribution of wealth and discourage vast unearned accumulation", see *Ibid* 56, 62.

⁶⁰*Ibid* 45.

⁶¹MA Khan, *Friends not Masters: A Political Autobiography* (Oxford: London, 1967) 16.

Pakistan as a front line state. Nixon, after meeting with General Ayub in 1953 in Pakistan, described him in his memoirs as, "one Pakistani leader who was more anti-communist than anti-Indian".⁶² Ayub credited himself as promoting U.S.–Pakistan relations. Jalal is of the opinion that the entry of Pakistan into Middle East defense pacts re-established the dwindling influence of the government.

To sum up, the state formation in Pakistan, from the outset, was a class formation, which included an alliance between three fundamental classes (metropolitan bourgeoisie, landed elite and an emerging merchant and industrial class). But the reigning class was unable to control the masses and fulfill the emerging needs of the cold war. Long before joining SEATO and CENTO, the reigning class under the leadership of Liaqat went through the test of the *Pindi Conspiracy* case and later, the consequent banning of the Communist Party and Progressive Association (PWA) and the take over of Progressive Papers Ltd.⁶³ Toor also connects this struggle with the McCarthy era, liberal anti-communist consensus.⁶⁴

2.5 Pindi Conspiracy Case

All liberals take the defeat of democracy by dictatorship in the *Tamizzuddin* case of 1955 as the starting point of constitutional history of Pakistan. However, as the book will argue, the *Pindi Conspiracy* case can explain how the legal and constitutional institutions in Pakistan respond to class formations, irrespective of whether the country is governed by democracy or dictatorship. Askar Ali Shah of the Criminal Investigation Department (CID) of North Western Frontier Province of Pakistan—NWFP⁶⁵ disclosed a conspiracy in the military on 19 Feb 1951. Between 4 and 7 March, Major-General Akbar Khan and Latif Khan were dismissed and arrested under Bengal Regulation III of 1818. The charge against all of the accused was a conspiracy to wage war *against the King* [emphasis is mine].⁶⁶ The trial was held *in camera* in Hyderabad Jail. The accused were found guilty and convicted. The judgment, authored by Justice Abdur Rehman, pronouncing guilt, comprised of 852 pages along with 41 appendices.

⁶²As quoted by M Hussain & A Hussain, *Pakistan: Problems of Governance* (Vanguard, Lahore, 1993) 30.

⁶³S Toor, *The State of Islam: Culture and Cold War Politics in Pakistan* (Pluto Press, London 2011) 52; Kamran Asdar Ali also gave an account of communist perspective as a contesting voice on the intellectual and cultural scene in the early days of Pakistan, see KA Ali, Communists in a Muslim Land: Cultural Debates in Pakistan's Early Years 45:3 *Mod Asian Stud* (2011) 501.

⁶⁴*Ibid* 79.

⁶⁵Currently province of Khyber Pukhtunkhwa.

⁶⁶H Zaheer, *The Times and Trial of the Pindi Conspiracy Case 1951: The First Coup Attempt in Pakistan* (Oxford University Press, Karachi, 1998) 248.

What was the context for this case, and what was its direct impact? General Gracy, while transferring to Ayub his position as Commander-in-Chief of the Army on 17 January 1951, informed him about a ‘Young Turk’ Party in the army. General Ayub himself had always been suspicious of Major-General Akbar Khan, his ambitions and his ‘political leaning’⁶⁷ and hence the conspiracy was about class politics.⁶⁸ Zaheer (1998) insisted that the Communist Party was involved in the conspiracy.⁶⁹ General Akbar had been under the observation of U.K. intelligence agencies during his training there. He was seen with Andrew Roth, a leading American Communist intellectual.⁷⁰ Before his arrest under the conspiracy charges, Akbar Khan met with the Russian Progressive Writers’ delegation between 19 and 20 November 1950. He was introduced to the delegation as the next Commander-in-Chief of Pakistan.⁷¹ Based on the reports of intelligence agencies, the Communist party lost many of its cadre during partition, but in three years “a powerful party machine had emerged”. The budget of the party was second to that of the ruling Muslim League and had more paid workers than any other party. It had many front organizations in powerful sections of the society, including those for journalists and students. It had an upward mobility with leaders such as Mian Iftikhar-ud-din, who moved into the upper layers of Pakistani society. The Party was remarkable in a feudal and tribal society.⁷² This was also the early period of the Cold War.

The following legal account will explain how an elected government under one of the founding fathers of Pakistan, Liaqat Ali Khan, not necessarily a dictatorship, responded to the class struggle. Prime Minister Liaqat informed the constituent assembly that the conspiracy plan within the military was spearheaded by the support of Communists and revolutionary forces. He argued that the plan involved implementing a communist dictatorship. A bill was put forth in the national assembly on 13 April 1951 and was passed the same day after an intense debate.⁷³

⁶⁷He did not state it clearly here, but obviously these were communists, see Khan, *supra* note 61, 35.

⁶⁸For Zaheer, the Left intellectuals propagated that there was actually no conspiracy, and that it was a conspiracy engineered by intelligence agencies of the Anglo-Saxon American bloc, see Zaheer, *supra* note 66, x-xi. He also disagrees with the position of Ayesha Jalal throwing blame on ‘complex influence’ like asserting the government to form a policy independent of Anglo-Saxon bloc, see Jalal *supra* note 49, 121, 3.

⁶⁹He insisted this based on ‘A long interview with Major Ishaq,’ 6 May 1972, ‘What was the Rawalpindi Conspiracy Case? A Staff Study’, 11 November 1972; ‘Was the Rawalpindi Conspiracy a Myth?’ Air Commodore M. K. Janjua (Ret) 13 January 1973, *The Outlook*, Karachi. Based on interview with Eric Cyprian, Islamabad 18 January 1995, the writer claimed that he criticized the adventurous steps of Sajjad. Hasan Zaheer himself threw the blame on the few rich feudal families of Lahore espousing the Russian model of economic and social progress, “without of course, missing out on the good things of life”. See Zaheer, *supra* note 66, x, xi.

⁷⁰*Ibid* 224, 25.

⁷¹*Ibid* 169.

⁷²*Ibid* 207, 08.

⁷³*The Rawalpindi Conspiracy (Special Tribunal) Bill* 1951.

Provisions of the Act were at variance with prevailing laws. The rights of the accused were abrogated explicitly by relaxing the standard of the prosecution's evidence and procedural requirements, and ignoring principles of administration of criminal justice. This law set an example of 'bad governance' and 'disregard of fundamental rights'.⁷⁴ Under the Act, statements made before the police were admissible and conclusive without cross-examination.

Four main areas violated the norms of natural justice, namely, the right of inquiry was waived, no appeal was allowed, a person's statement was admissible as evidence without cross-examination and even the statement before an investigating officer was admissible under Section 5(2) of the Act. The tribunal could convict any person, even if they were not charged on the basis of evidence produced before it. No appeal was allowed under Section 10 of the Act. This removal of the right to appeal was unprecedented in the history of British India.⁷⁵

Section 2 of the *Rawalpindi Conspiracy (Special Tribunal) Act*, 1951, empowered the central government to set up a Tribunal in which to try the accused. Section 4 of the Act gave the Special Tribunal all the powers of a High Court in relation to a criminal trial. But, the Tribunal could not take the bail of any accused person. Under Section 5, the Tribunal could also try offences falling under the Army Act. The Tribunal consisted of Justice Amir-ud-din of the Dhaka High Court, Justice Sharif of the Lahore High Court and Justice Abdur Rahman of the Federal Court (as Chairman) of the Tribunal. Mr. A.K. Brohi, Advocate General, conducted the prosecution.

Through the *Pindi conspiracy* case, the Communist Party's underground apparatus was completely devastated due to large-scale arrests of all leadership and sympathizers and the seizing of documents, including records and bills, etc. All mass fronts of the party were also destroyed and the communist influence among the Trade Unions, Progressive Writers' Association P.W.A. and students decreased sharply. The Communist Party of Pakistan itself was banned in 1954.⁷⁶

The long-term outcome of the case is even more interesting than the direct impact of the case, and this proves this case to be a decisive turning point in the 'constitutional' history of Pakistan. General Ayub strongly disliked defence counsel Suhrawardy's cross-examination of the army officers, but found himself helpless against a 'passive court' at the time. When Suhrawardy was going to be appointed as Prime Minister after the 1954 dismissal of the legislature, President Iskandar Mirza appointed Ayub as a defense minister. Ayub told Suhrawardy that he did great damage to military at the trial. Mirza advised Suhrawardy to negotiate, but never to interfere in the matters of the Army.⁷⁷ From *Pindi Conspiracy case* to the movement against him, Ayub's major anxiety was the rise of socialism.

⁷⁴Zaheer, *supra* note 66, 18.

⁷⁵*Ibid* 20.

⁷⁶I Leghari, *The socialist movement in Pakistan: an historical survey - 1940-1974*, PhD Dissertation, Université Laval, Québec City 1979, 69.

⁷⁷Khan, *supra* note 61, 37.

Even after the *Pindi conspiracy* case, the ban of the Communist Party and its fronts, PWA and DSF in 1954, reigning class under the banner of Muslim League could not stop its down fall and needed a reshuffling. This led to the dissolution of non-representative legislature and hence the *Tamizuddin* case.

2.6 Moulvi Tamizuddin Khan Case

On 24 October 1954, the first Constitutional Assembly was dissolved by Governor-General Ghulam Muhammad.⁷⁸ The grounds for dissolution were that the constitutional machinery of the country had broken down and the Assembly had lost the confidence of the people. According to Jan Mohammed Dawood (1994), the Assembly did not have a representative character. Most of the members did not have a constituency of their own in Pakistan. The fact was proved in the elections of 1954, when only 14 were re-elected. From West Pakistan, 28 out of 40 were landlords, whereas in East Pakistan, 20 out of 40 were lawyers.⁷⁹ This assembly had been making a constitution for the newly independent country since 1947 and meanwhile, the country was being run under an interim constitution which was an adaption of the Government of India Act, 1935. The president of the Constitutional Assembly, Moulvi Tamizuddin Khan, challenged this dissolution before the Sindh Chief Court (which later became Sindh High Court) as unconstitutional, illegal, *ultra vires*, without jurisdiction, inoperative and void. Moulvi requested that the court restrain the government from interfering under a writ of *mandamus*, and to determine the validity of certain appointments of the Governor-General's Council of Ministers under a writ of *quo warranto*. The lawyer for Moulvi Tamizuddin, Mr. I.I. Chundrigar, stated before the court that "the constituent assembly is a sovereign and sacred body, it can only be extinguished by a revolution or a *coup d'etat*".⁸⁰ The Sindh High Court decided unanimously in favour of Moulvi Tamizuddin Khan.⁸¹ The court accepted the sovereign and supreme power of the Constitutional Assembly regarding the constitution and law-making and found no powers were vested in the Governor-General to dissolve the Constitutional Assembly in the *Indian Independence Act*, 1947. The decision was challenged in an appeal by the government in Federal Court. On 21 March 1955, the Federal Court, under the leadership of Chief Justice Munir, decided the case in favour of the government and against Moulvi by a majority of four to one. The court reversed the judgment of the Sindh High Court on technical grounds without addressing the question of whether

⁷⁸Order No F 81/Pres./58, text of the proclamation is produced in J Ahmad (ed) *Constitution-Making in Pakistan* (National Assembly of Pakistan, Islamabad, 1973) as Annexure V 41; Order of the dissolution is partly produced in *infra* note 81.

⁷⁹JM Dawood, *The Role of Superior Judiciary in the Politics of Pakistan* (Royal Book Company, Karachi, 1994) 17, 211.

⁸⁰Shah, *infra* note 103, 57.

⁸¹*Moulvi Tamizuddin Khan v Federation of Pakistan*, PLD 1955 Sindh 96.

the assembly was rightly dissolved or not.⁸² The dissenting judge in this case was Justice A.R. Cornelius. He placed the Constitutional Assembly above the Governor-General and found it to be a sovereign body.

As a result of the above judgment, 46 of the Acts on the statute's books became invalid. The Governor-General promulgated the Emergency Powers Ordinance IX of 1955 to frame the constitution, validate the laws already made by the Constituent Assembly and make central budgets.⁸³ This ordinance was challenged in the Federal Court. Chief Justice Munir, heading a full Federal Court bench in *Usif Patel case*, declared on 13 April 1955, that powers to make provisions to the constitution of the country could not be exercised by the Governor-General through an Ordinance.⁸⁴ After this declaration, the government requested that the Federal Court detail the constitutional steps to come out of this constitutional crisis in a Reference.⁸⁵ The courts had to fall back on the doctrine of state necessity to address the constitutional impasse by the Emergency Powers Ordinance, 1955.

The prompt statement from leading jurists against the original Federal Court judgment was that it paved the path of future "arbitrary, malicious and capricious acts of the executive on hyper technical grounds or self-serving theories or concepts".⁸⁶ Hamid Khan (2001) declared Chief Justice Munir, on this decision, as a "supporter of the feudal-bureaucratic establishment of West Pakistan which was headed by his old friend Ghulam Muhammad".⁸⁷ For Waseem, the decision 'over-expanded' the judiciary's institutional resources and established the tenacity of the rule of law for the time to come.⁸⁸ For Mir Khuda Bakhsh Marri CJBHC, Munir CJ could have stood like Abu Hanifa and Thomas More, which means uprightness and truth.⁸⁹

Cornelius is portrayed as a savior of 'democracy' and protector of fundamental rights in the later touted liberal dichotomy of dictatorship versus democracy. There is a need to discuss the ideas of political change/development in the minds of Munir and Cornelius CJs in a coherent way connecting their legal decisions and writings after the *Dosso case* which adjudicated upon the 1958 coup. This is important right now to explore how *Tamizuddin case* tried to address the ongoing crisis in the political formations of postcolonial Pakistan.

Because the Constituent Assembly did not make a new constitution in seven years, the statutes available to the judges of Sindh Chief Court were old colonial

⁸²*Supra* note 81.

⁸³*Emergency Powers Ordinance of 1955* (Ordinance IX of 1955) PLD 1955 Central Acts and Notifications.

⁸⁴*Usif Patel v Crown*, PLD 1955 FC 387.

⁸⁵*Reference by His Excellency The Governor General*, 1955 PLD Federal Courts 435.

⁸⁶Khan, *supra* note 23, 84.

⁸⁷*Ibid* 235.

⁸⁸Waseem, *supra* note 6, 129.

⁸⁹MKB Marri CJBHC (Ret, as he then was), *A Judge May Speak* (Ferozsons (Pvt) Ltd, Lahore, 1990) 17, 18.

Acts or Independence Act of 1947 to address that ongoing transition from colonial to independence. Constantine CJ and Justice Villani of Sindh Chief Court thought that the prerogative of dissolution of assembly by His Majesty were in Governor-General, because he represented him. On the other hand, Justice Muhammad Bakhsh's comments were a full assertion of independence for the people of India "to do what they liked with their own Constituent Assembly". In an appeal in the Federal Court of Pakistan (which later became Supreme Court of Pakistan), Munir CJ, and Justices A.S.M. Akram, Muhammad Sharif and S.A. Rahman found the Crown as a constituent part of the parliament in U.K. and all Dominion Legislature and his assent a necessity. Judges considered any possibility of the Constituent Assembly as a sovereign body 'a mistake' and that it was supposed to function within the confines of the Indian Independence Act, 1947. The word 'independence' was meaningless in this Act.

On the other hand, Cornelius J tried to interpret the "degree of independence" in 'independent Dominion' of Pakistan more than which was given in the Statute of Westminster, 1931 to other 'Dominions'. For Cornelius J, the Governor-General was only 'faithful' to Her Majesty and no one else. Similarly, the 'Constituent Assembly' was not the creation of British Parliament but a body which was representative of the "will of the people in relation to their future mode of Government". Cornelius was trying to break the colonial chains 'constitutionally', whereas political and economic formations in postcolonial Pakistan had taken neo-colonial turns under the cold war as explained above. For Paula Newberg, Cornelius's views about 'the will of the people' were an attempt to establish a link of legislative power with popular sovereignty.⁹⁰ I disagree. There is no such thing as 'popular sovereignty' in Cornelius's views. He was strongly against 'popular democracy' and details to follow in the coming section. In the absence of a new constitution, Munir CJ was compelled to rely on colonial statutes and available in Common Law to address this situation was the doctrine of necessity, though 'technically' for him.⁹¹ Justice Cornelius did not challenge the doctrine of necessity but tried to limit the discretion derived from it. He pointed out that this principle should be the maxim, '*salus populi suprema lex*' (the welfare of the people shall be the supreme law). Apart from the books (constitution) and the courts (institutions), Munir's mind was in the reason outside the courts. Enforcement of law in this case was against the sovereign and such cases are political or military for him. Therefore, the court should not decide in favour of one and against another, which may cause bloodshed.⁹² He was clear about the 'disastrous' consequence of the judgment in the *Tamizuddin case* and he repeated the same in the *Reference* also. For him,

⁹⁰For Newberg, "Justice A.R. Cornelius offered the equally forceful alternative notions of *popular sovereignty* and constitutional government" [emphasize is mine], See PR Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge University Press, New Delhi, 1995) 45.

⁹¹Munir, *supra* note 52, 251, 271.

⁹²Munir's comments while addressing High Court Bar Association, see Chaudhry, *supra* note 44, 22.

responsibility rested on the legislature because it thoughtlessly proceeded with its business and assumed itself in the position of an irremovable Legislature. The Muslim League had lost in provincial elections of 1953 to the United Front⁹³ and won in Punjab with the help of landed aristocracy. Suhrawardy did not have the support to make the Muslim League a popular party.⁹⁴ Furthermore, Anti-Ahamdi disturbances and religious riots in 1953 had an impact on Munir as he headed the Commission made to resolve that issue.⁹⁵ He was very clear that law and order should be separate from politics because a district magistrate was enough to control the Anti-Ahamdi disturbances.⁹⁶ On the face of rising socialism, this disturbance could be fatal.

One thing is very certain, that Ayub was behind this dissolution.⁹⁷ Ayub's opinion was that the Constituent Assembly had lost its prestige and the demand for its dissolution was gaining support. Moreover, he believed that 'unfettered democracy' would be dangerous on the face of rising communism. Munir CJ warned that communism from within and without is quick to make use of this weakness of political governance.⁹⁸ Communism and sectarianism (Bengali) was connected in this dangerous political formation in the mind of Munir,⁹⁹ which emerged as National Awami Party—NAP in the years to come.

The fears of Munir and Cornelius, as well as other jurists were real and more detail about them is to come. Right now, it is suffice to argue that the *Tamizuddin case* can be connected with the *Pindi Conspiracy case* in structural terms. Whereas the weak and feeble reigning class comprising Constituent Assembly was unable to delink from the colonial relation, and they were equally fearful to go to people and re-elected. In that scenario, the hegemonic neo-colonial elite decided to use the civil and military bureaucracy as a seat of power to keep the exclusion of the masses. Landed and merchant elite happily accepted their reigning positions under this hegemony. This class formation gave birth to different state formations in Pakistan, which were the subject of legal and constitutional explanation. While liberal explanations give considerable attention to the dissenting judgment of Cornelius in this case, my own view is that there was no hero in this judicial battle. Rather, the judiciary in this case revealed itself to be part of the juridico-bureaucratic structure of the state. I will develop this explanation in the following section.

Before we conclude this case, it is not irrelevant to have a cursory look on the views of Maulvi Tamizuddin Khan, the petitioner who came 'to rescue' democracy. Maulvi Tamizuddin argued that he was against the presidential system based on

⁹³Munir, *supra* note 52, 77.

⁹⁴Munir, *supra* note 52, 85.

⁹⁵For detail of the relation of religion, law and order and state in this report, see Chaudhry, *supra* note 44, 183, 190.

⁹⁶Chaudhry, *supra* note 44, 200.

⁹⁷Munir, *supra* note 52, 92.

⁹⁸Khan, *supra* note 61, 188.

⁹⁹Chaudhry, *supra* note 44, 20.

fear, due to the history of a one-man rule in Muslim states. Ayub's logic was that a presidential system like that of the U.S. was not a monarchical system and with so many political parties, a parliamentary system was not feasible. Tamizuddin responded by asking for a decree of law allowing only two parties. The response from Ayub was that "you cannot control people's conscience by legal contrivances".¹⁰⁰ We can see how each of these accounts do not represents a democracy which considered peoples representation as the basis. Munir CJ decision was not a deviation from an ideal type of 'independent' and 'neutral' judiciary, nor it was a 'historical' accident that the judiciary stood with the civil-military bureaucracy. Rather, in the first two decisive decades of the newly independent Pakistan, the judiciary was the part-state structure leading political development more than any other developing country in that age of decolonization.

2.7 The Judiciary as a Part of Juridico-Bureaucratic State Structure

Just like the civil-military bureaucracy, judiciary in Pakistan not only had a colonial legacy but also participated in the neo-colonial formations and political developments after independence. After partition, there were English judges and the foremost jurists in the leading cases in the 1950s were either British lawyers hired by the Pakistani government or local barristers trained at Lincoln's Inn.¹⁰¹ Both judges and jurists continued to cite Privy Council decisions as "the expositions of the law by one of the highest judicial tribunals in the world composed of distinguished men".¹⁰² As a result, most cases cited were from the United Kingdom or the United States, English continued to be the language of courts and judgments, and as in the English tradition, the judges would refer to one another as "my brother" and counsel would refer to the judges 'my Lord'. The "English concept of

¹⁰⁰Khan, *supra* note 61, 205, 206.

¹⁰¹As in the first leading constitutional case of *Maulvi Tamizuddin*, the judges of the Sindh High Court deciding in favour were Chief Justice Constantine, Justice Bachal and Justice Vellani, who were all English judges. Sir Ivor Jennings and Sir Kenneth Diplock, Queen's Counsel, were engaged by the government of Pakistan in this case. British judges of the 1950s were Sir Edward Snelson, KBE, Joint Secretary of Law from 1947 to 1958. He served as Federal Law Secretary till 1961. He resigned after the conviction in the Snelson case, detail of the case to follow. There were nine appointments of judges or registrar in 1947 and were reduced to two in 1961. Sir George B. Constantine, KBE, and J. Orthenon, CBE, from Lahore High Court retired in 1962 and 1965 respectively. From the ICS (Indian Civil Service) and IPS (Indian Police Service) a total of 158 officers opted for Pakistan, out of which 36 in the ICS and 17 in IPS were British. Even in 1951, out of 202 officers, 23 were British. Five Britishers were in the judiciary. See Braibanti, *infra* note 104.

¹⁰²Comments of CJ Munir in *Noor-ul -Hassan and others v The Federation of Pakistan*, PLD 1956 SC 331.

justice remained the dominant factors in Pakistan's higher judiciary, and indeed these are the part of the Pakistani culture".¹⁰³ It took 50 years for Pakistan to abandon the wigs of English justices and the phrase 'your Lordship'. Indeed, barristers are still required to say 'my Lord' when addressing the court.¹⁰⁴ The traditions were so powerful that all the related political activities were also understood as "mere motions in a foreign mode,"¹⁰⁵ as we will see.

The judiciary itself arrived in two streams—from the Indian Civil Services (ICS, officially known as Imperial Civil Services),¹⁰⁶ and the Lincoln Inn Barristers.¹⁰⁷ The close entanglement of the judiciary and bureaucracy in Pakistan's early years was greater than in any other developing country.¹⁰⁸ Civil Servants could, and frequently did, opt for judicial service. In 1961, eight officers of the Civil Service of Pakistan (CSP) were justices of the courts, namely M. Shahbuddin, Sir George Constantine, A.R. Cornelius, S.A. Rehman J. Ortcheson, M.B. Ahmad, A.R. Khan, M.R. Kayani, Sheikh Anwar-ul-Haq. In 1964, there were 65 such members. Three hundred and sixty-six officers of the Civil Services were presided over by Chief Justices Kayani of Lahore High Court, followed by Supreme Court Chief Justices S.A. Rahaman and M. Shahabuddin. The judiciary also headed all administrative reform commissions.¹⁰⁹

By 1958, the year of coup, the hegemonic shift in Pakistan's politics from the U.K. to the U.S. was happening. At the same time new deepening relation of judiciary with the establishment and the U.S. were developing. This culminated in a

¹⁰³NH Shah, *Memoirs and Reflections* (Alhamra Printing, Islamabad, 2002) 138.

¹⁰⁴R Braibanti, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Oxford University Press, Karachi, 1999) xxiii.

¹⁰⁵Cornelius, *supra* note 31, 11, address delivered at a gathering of Military officials at G H Q, Rawalpindi on 11 July 1962.

¹⁰⁶Chief Justices Muhammad Shahabuddin (3 May 1960 to 12 May 1960), AR Cornelius (13 May 1960 to 29 Feb 1968) and SA Rahman (01 March 1968 to 03 June 1968) were from this category. The point to remember is that they all served in the 1960s, the era of modernization in Pakistan.

¹⁰⁷Chief Justices Sir Abdur Rashid (07 June 1949 to 29 June 1954) and Muhammad Munir (29 June 1954 to 02 May 1960) came before the start of modernization. Fazal-e-Akbar (04 June 1968 to 17 Nov 1968) and Hamood-ur-Rahman (18 Nov 1968 to 31 Oct 1975) also served in the post-capitalist modernization period and even in socialist modernization period of 1970s.

¹⁰⁸Braibanti, *supra* note 104, 109, see the detail of this relationship in R Braibanti, Public Bureaucracy and Judiciary, in, Pakistan in Palombra, *infra* note 122, 360, see, also, R Braibanti, The Socio-Judicial Context of the Cornelius Era – 1950-70 in Braibanti, *supra* note 104. This essay was first published in Braibanti, *Research on the Bureaucracy of Pakistan* (NC Duke University Press, Durham, 1966).

¹⁰⁹Justice Munir JSC headed the First Pay and Service Commission of 1949-50. Justice Cornelius headed the second Pay and Service Commission from August 1959 to 28 May 1962 and completed a 300-page report in 1962. See Government of Pakistan, Report of the Pay and Service Commission (Manager of Publications, Karachi, 1969). An important point to note here is that SM Haider reviewed this report in 1970, see SM Haider, *A Review of the Cornelius Report* (National Institute of Public Administration, Lahore, 1970).

close relation of Ralph Braibant and Cornelius CJ.¹¹⁰ Braibanti became the Chief Advisor and Professor of the Civil Services Academy in 1960, Lahore. At the time he was on leave from Duke University and was on contract with United States Agency for International Development. I consider him the main architect of the liberal legal and administrative project to this date. By the 1960s, the judiciary became influenced by the U.S. legal tradition.

2.8 The Significance of the Shift in Hegemonic Influence from U.K. to U.S.

According to Jalal, the “Polite British and American rivalry in South Asia” began in the early 1950s and was accompanied by the declining prestige of the U.K. in the Middle East and South Asia with the increasing influence of the Soviet Union.¹¹¹ According to Bhutto, initially Pakistan gave considerable importance to the Commonwealth, without considering the waning British influence in the world. Upon realizing the change in the global power structure, it began to lean towards U.S. influence.¹¹² It was clear to Ayub that the situation had changed and the United Kingdom could no longer give military and economic cover to the members of the Commonwealth.¹¹³ Soon, the military was replacing Sandhurst-trained generals with American-trained ones. This continued throughout the 1950s and 1960s under the auspices of the American Military Assistance Program (MAP).¹¹⁴

¹¹⁰Cornelius passed the Indian Civil Service examination, did two years of study in Selwyn College, Cambridge UK, and joined the ICS in 1926. He opted for judicial services in 1930. He was Justice in Lahore HC in 1946 to 1950, Secretary of law 1951, elevated to Federal/Supreme court, and became the CJSC in 1960-1968. After retirement, he was the Law minister of Yahya Khan from 1969 till Bangladesh independence. He joined a law firm, Lane and Mufti. For writings on Cornelius, see SM Haider (ed) *A.R. Cornelius, Law and Judiciary in Pakistan* (Lahore Law Times Publications, Lahore, 1981); See, H Khan, In Memory of Justice (Retd) A R Cornelius- A Great Judge, Magazine Section, *PLJ* (1992) 70; See also, NH Shah, A Salute to the SC (A Tribute to the Cornelius Court) *PLD*, Journal Section (1992) 17; also Braibanti, *supra* note 104.

¹¹¹Jalal, *supra* note 49, 126, 137, 171.

¹¹²ZA Bhutto, *Political Situation in Pakistan* (1968), in, H Jalal and K Hasan (eds) *The Politics of the People- Awakening the People, Vol. Two, 1966-69* (Classic, Lahore, 1969) 89, 98. This speech was first published as a pamphlet. Bhutto served as a Foreign Minister in the 1960s under General Ayub.

¹¹³A letter on the Future of the Commonwealth to the PMs of UK, Australia, and New Zealand, in, Baxter, *infra* note 138, 93.

¹¹⁴The number of these trained officers was very high. For example, in 1967-69 alone, 60 officers were trained under this program, see SP Cohen, *The Pakistan Army*, (University of California Press, Berkeley, Los Angeles & London, 1984); See also, W Miles D, *Military Aid and Counterrevolution in the Third World* (Lexington Books, Lexington & Massachusetts, 1972).

Similarly, a substantial U.S. intellectual and financial investment was allocated to train the bureaucracy.¹¹⁵

The transition from the U.K. to the U.S. tutelage was tricky and the tension could be seen in the connection of the upper brass of the civil and military bureaucracy. The first Commander-in-Chief of Pakistan was British General Gracy. When he was leaving, Liaqat Ali Khan decided to appoint a Pakistani General as Commander-in-Chief, but not the senior most one. General Iftikhar was backed by the British,¹¹⁶ however, it was General Ayub Khan who was appointed the first Pakistani Commander-in-Chief on 16 January 1951. Ayesha Jalal notes the detail of this “subtle but significant British-American rivalry”. By early 1951, it was decided by American policy makers to bypass the British and directly contact the Pakistani establishment, for the defense of the Gulf.¹¹⁷

The transition away from under the influence of the U.K. was also tricky in terms of legal and constitutional arrangements. Dr. S.M. Haider (1988) has elaborated on the process of assimilation of ‘modern’ U.S. legal norms in Pakistan. In the beginning, the judges relied on British court decisions, but they also relied upon U.S. precedents. After the 1956 constitution, the court decisions began to reflect the U.S. Supreme Court, regarding arbitrary use of administrative powers against fundamental rights. Another factor, which made this task easy, was the already present legal institutional arrangement of the British.¹¹⁸ Braibanti found a shift from the U.K. to U.S. precedents due to the change to the presidential system and federalism,¹¹⁹ as well as the written constitution and a chapter on Fundamental Rights. English courts do not have a written constitution and their fundamental rights were assured through Common Law and legislators. The quickly growing appreciation of U.S. tradition, with the help of academics, can be explained as part of an active modernization project and an understanding of the role of law in this project.¹²⁰ Thus, judicial approaches started tilting more toward the U.S. judicial

¹¹⁵In 1960, under US guidance and assistance, the Administrative Staff College was established in Lahore. In 1961, three National Institutes for Public Administration were established in Karachi, Lahore and Dhaka.

¹¹⁶Khan, *supra* note 61, 34.

¹¹⁷A Jalal, *Democracy and Authoritarianism in South Asia* (Sang-e-Meel Publications, Lahore, 1995) 37.

¹¹⁸SM Haider, American Constitution and Assimilation of Modern Legal Norms in Pakistan, XL *PLD* 1988 Journal Section, 121, 126.

¹¹⁹Braibanti, *supra* note 108; See also R Braibanti, The Higher Bureaucracy of Pakistan, in, Braibanti et al. (ed) *Asian Bureaucratic Systems Emerging from the British Imperial Tradition* (N. C.: Duke University Press, Durham, 1966).

¹²⁰SM Haider was Braibanti’s student and on his advice wrote a dissertation on the writ jurisdiction in Pakistan. He worked for Law Reform Commission till his death. Braibanti, *supra* note 104, xxii.

system.¹²¹ The judiciary at that point was led by Indian Civil Services judges, who were not only aware of the ongoing modernization project led by the civil bureaucracy, but were bringing interpretation to help the project and at the same time to reduce its excesses. The judiciary was the point of permeation of American norms of administrative techniques but also of its review and future reforms.¹²² So until the end of the Cold War, the impact of American law was pronounced on the Pakistani legal system.¹²³ Ayesha Jalal explained, it as a presidential form of government based on the American pattern, the framers of the constitution had ingeniously superimposed it on a distorted version of the British's parliamentary system. She explained how it veered but could not deviate from a U.K. or U.S. model.¹²⁴ In my view, Jalal correctly pointed out the *form*, but does not adequately account for the *content* of this move from the U.K. to the U.S. legal system. It is the objective of my analysis in this dissertation to demonstrate how it was that the law took on a central role in this transition, from modernization to the failing of the modernization project and a rising participatory popular democracy. I will briefly elaborate on the U.S. modernization school alluded to above. The political dimensions of the modernization project, according to Michael Adas, were felt in China, the Philippines, Caribbean and Latin America even before World War I. The focus was to create a middle class committed to both democracy and supportive of continuing ties with the United States.¹²⁵ There was a consensus on some version of social democracy as the only way to organize society¹²⁶ and a basic political liberalism. Democracy was to follow, 'the elite theory of democracy' led by a rational, coherent, self-confident elite, as stated by political scientists David Easton and Robert Dahl.¹²⁷ Morris Janowitz appreciated the role of third world militaries in

¹²¹Ralph Braibanti, an American political scientist and Duke Prof Emeritus at Duke University, studied the judiciary in Pakistan in the 1950s until 2005. From his writings, AR Cornelius, Dr. SM Haider, and Justice Kayani are found as close to the US judicial system. This was at its height when the Cornelius was chief justice in 1960s. Ralph Braibanti's book on AR Cornelius reflects implicitly on the relation of the modernization project under way in Pakistan and the changing approach of the judiciary, see Braibanti, *supra* note 104.

¹²²R Braibanti, Public Bureaucracy and Judiciary in Pakistan, in, Joseph La Palombra (ed) *Bureaucracy and Political Development* (Princeton University Press, Princeton NJ, 1967) 360-440

¹²³SM Haider, American Constitution and Assimilation of Modern Legal Norms in Pakistan, XL *PLD* (1988) 121, 125.

¹²⁴Jalal, *supra* note 49, 215.

¹²⁵M Adas, Modernization Theory and the American Revival of the Scientific and Technological Standards of Social Achievements and Human Worth, in, DC Engerman, N Gilman, MH Haefele & ME Latham (eds) *Staging Growth: Modernization, Development, and the Global Cold War* (University of Massachusetts Press, Amherst, 2003) 25, 26.

¹²⁶E Shills, The End of Ideology? (1955) 5 *Encounter* 55, 58.

¹²⁷N Gilman, Modernization Theory, the Highest Stage of American Intellectual History, in, DC Engerman, N Gilman, MH Haefele & ME Latham (eds) *Staging Growth: Modernization, Development, and the Global Cold War* (University of Massachusetts Press, Amherst, 2003) 59.

the managing of the affairs of the countries.¹²⁸ A concrete and decisive step towards this U.S. type political and constitutional system in Pakistan was the 1958 *coup*.

2.9 1958—General Ayub’s Coup (Dosso Case)

After the dissolution of the 1954 assembly as explained above, the second constitutional assembly came with a constitution instituting a parliament in 1956, but with more powers to the president. This constitution only lasted for two and a half years and no elections were held under it. Eventually there was a *coup* in 1958 and the abrogation of the 1956 constitution by the president, Iskander Mirza.

On 8 October 1958, President Mirza declared Martial Law. On 10 October 1958, the Law (Continuance in Force) Order was promulgated which was drafted by Snelson.¹²⁹ It restored the jurisdiction of all courts (along with writs of *Habeas Corpus*, *Mandamus* and *Certiorari*, however, not against Chief Martial Law Administrator), and directed the government to adhere “as close as possible to the late constitution”.¹³⁰ The above order was challenged in the Supreme Court of Pakistan and decided in the *Dosso Case*. The Supreme Court, headed by Chief Justice Munir, upheld the Martial Law and the Law (Continuance in Force) Order.¹³¹ The court, using Hans Kelsen’s *General Theory of Law and State*, declared that a successful *coup d’état* or a victorious revolution is an internationally recognized method of regime and constitutional change. Chief Justice Munir’s position was that there can be a writ in the High Court on the basis of fraction of law but not on the basis of so called fundamental rights which are in the late Constitution of 1956.¹³² For Munir, Amir-ud-din, Shahab-ud-din JJ, due to the phrase in the Order “the country should be run as nearly as may be in accordance with the late Constitution of 1956”, means only structure and manner of government and not fundamental rights and the whole Constitution. How come, for them, an Order on one hand is abrogating a Constitution and on the other hand restoring it, that is, giving fundamental rights. Interesting fact is that Supreme Court was in a hurry to give legitimacy to this dissolution which was not even asked. It is pertinent to mention here that Cornelius disagreed about the consent of the Governor-General

¹²⁸M Janowitz, *The Professional Soldier: A Social and Political Portrait*, (Free Press, New York, 1960). For literature emphasizing military’s superiority as socio-economic modernizers, see SP Huntington, *The Political Order in Changing Societies* (Yale University Press, New Haven, 1968) 203, see A Stepan, *The Military in Politics: Changing pattern in Brazil* (Princeton University Press, Princeton & NJ, 1971) 9.

¹²⁹As claimed by Munir CJ after his retirement in a newspaper article, see M Munir, Days I Remember, Pakistan Times, 11 November 1968 in Chaudhry, *supra* note 44, 87.

¹³⁰*President’s Order (Post-Proclamation)*, No 1 of 1958, *Laws (Continuance in Force) Order*, PLD 1958 Central Statutes 497.

¹³¹*The State v Dosso*, PLD 1958 SC 533.

¹³²*Ibid* 535.

in the 1955 *Tammizudin case* but he agreed with the doctrine of necessity in 1958 in *Dosso case*.¹³³

After few months in *Mehdi Ali Khan case*, though implicitly, Cornelius pushed fundamental rights as a substitute for the deficit of democracy caused in *Dosso case*. In the *Dosso Case*, Article II of the Order mandated the government to follow the late constitution, but not to restore fundamental rights. After nine months in *Mehdi Ali Khan's case*, the Dhaka High court issued a writ of Mandamus against the provincial government not to take *Waqf* properties as the right of communities to organize their religious institutions. In an appeal by the provincial government, the Supreme Court followed its previous decision in the *Dosso case* and reiterated that no law could be declared void merely because it came into conflict with fundamental rights.¹³⁴ Shahab-ud-din and Rehman JJ kept their position in *Dosso case*. Cornelius once again emphasized that the words that the country “shall be governed as nearly as may be in accordance with the late Constitution (of 1956)” is ‘undervalued’ He based his opinion on the observation of the last nine months and found no threat posed by fundamental rights in writs, other than preventive detention, to the paramount authority of the new regime.¹³⁵ In a way, Cornelius was trying to ease/minimize the anxiety of the military about fundamental rights. Cornelius wanted fundamental rights in the constitution to be present so that their existence could make them enforceable. For Munir, the Constitution is abrogated and not repealed. Sovereignty is not deriving its authority from the Constitution but from outside.¹³⁶

Who dissolved the assembly and why? What new role was given to the judiciary after this outright exertion of hegemonic power to kick start modernization so as to reshuffle the class formations in Pakistan? To understand this we are to dialectically connect these decisions with changes in the structures outside these decisions.

2.9.1 *Revolution/Evolution or Preventing ‘Revolution’*

The secondary literature suggests that President Mirza dissolved the 1958 assembly, and the courts justified it on the basis of doctrine of necessity.¹³⁷ But, who advised the president to dissolve the assembly? According to Ayub’s diary (2007), CJ Munir was under the impression that General Ayub advised Iskander Mirza to do so. Later, during his exile, Mirza told Munir CJ (then retired) that Ayub was not consulted. Ayub was under the impression that Munir was responsible for that.

¹³³Marri, *supra* note 89, 16.

¹³⁴*Province of East Pakistan v Md. Mehdi Ali Khan*, PLD 1959 SC 387.

¹³⁵*Ibid* 396.

¹³⁶*Ibid* 413.

¹³⁷ZK Maluka, *The myth of Constitutionalism in Pakistan*, (Oxford University Press, Karachi, 1995) 175.

Munir explained that he advised Mirza to allow elections to take place and let inevitable chaos develop so that he could declare emergency. Mirza was not sure he would be elected again and hence he abrogated the constitution.¹³⁸ For Munir, Ayub was not only behind the 1954 dissolution of assembly but the 1958 coup as well.¹³⁹ Mohammad Ali gave an interview to Shorish Kashmiri (that appeared in *The Pakistan Times*) wherein he said that Ayub was over-ambitious and conspired with Ghulam Muhammad and Mirza to diminish constituent assemblies. Of course, Ayub denied this in his diary.¹⁴⁰ Apart from Ayub's denial about any involvement, it is clear that Ayub was in the U.S. when the assemblies of 1954 were dissolved. Upon hearing the news, he wrote a full program of an alternative system.¹⁴¹ He did not like the constitution and political system as the 1956 Constitution was a "hotch-potch of alien concepts" and brought confusion by distributing power between the Prime Minister and President and having no focal point of authority.¹⁴² Even the Justice Shahab-ud-din Commission Report (Constitution Commission)¹⁴³ was against the dismissed legislature of 1958 as there was political interference in administrative matters rather than interference with the legislature. This caused failures of parliamentary democracy.¹⁴⁴ We see the nexus of civil-military bureaucracy and judiciary throughout this case. Though relevant and extensively debated, our quest has to go beyond Mirza's dishonesty, Ayub's ambitions, and Munir's wrong decision, to ask, why did they all agree to dissolve that assembly?

There was a strong decision by the hegemonic block (metropolitan bourgeoisie) under the leadership of U.S. imperialism to advance vigorously the modernization project in developing countries. The hegemonic class started bringing the fragmented and weak reigning under its control. Ayub was in U.S. at that time and Muhammad Ali Bogra an ambassador in the U.S. for several years came with American aid as prime minister from 17 April 1953 to 11 August 1955. Ch Muhammad Ali as prime minister (11 August 1955 to September 1956) extended reliance on hegemonic class very fast. After this H.S. Suhrawardy (13 September 1956 to 18 October 1957) as the Prime Minister attached great importance to SEATO and the Baghdad Pact and lent unqualified support to the West's policies in Hungary and Middle East.¹⁴⁵

¹³⁸C Baxter (ed) *Diaries of Field Marshal Mohammad Ayub Khan: 1966-1972* (Oxford University Press, Karachi, 2007) 116.

¹³⁹Munir, *supra* note 52, 92, see M Munir, Days I Remember, *Pakistan Times* (11 November 1968), in Chaudhry, *supra* note 44, 89.

¹⁴⁰Baxter, *supra* note 138, 322.

¹⁴¹Khan, *supra* note 61, 188.

¹⁴²*Ibid* 188, 54.

¹⁴³This commission was formed by Ayub after his overthrow to propose a new political set up. It was headed by Justice Muhammad Shahb-ud-din and its members were Azizuddin Ahmad, Muhammad Sharif, Naseer A Seikh, Abu Sayeed Chowdhary, DM Barori, Arbab Ahmad Ali Jan, Aftabuddin Ahmad, Sardar Habibullah, and Obeid-ur-Rahman Nizam.

¹⁴⁴Report of the Constitution Commission, 1961 (Karachi, 1962) 6.

¹⁴⁵Munir, *supra* note 52, 84.

But all these arrangements to use civil and military bureaucracy by the hegemonic bloc was due to the thin mass base of the reigning class. Waseem explains that the Muslim League split into many groups, the last one being the Republican Party, which was formed in 1957. The Republican Party (180 members) and the Awami League (120 members) were the ‘statist’ parties, which dominated the legislature, and gave legitimacy to the parliamentary arrangement, without having a mandate from the masses. Indeed, the dominant political parties were reluctant to go to the masses, and were instead, born and reborn within the legislature.¹⁴⁶ The assembly was no more than a battlefield of the dominant parties. Between 1956 and 1957, 72 bills passed out of which 50 were ordinances.¹⁴⁷ The class base of the legislature was the landed elite with almost no capitalist class, at least in West Pakistan.¹⁴⁸ The main concerns of these parties were the control of the population and the discrediting of the Communist Party, rather than gaining legitimacy with voters.¹⁴⁹ The bureaucracy had even less concern with legitimacy. It wished only to acknowledge representatives who could control the population. This form of governance was easily justified by the U.S. approach to modernization, which supported a concept of elite democracy as an appropriate countervail to the upsurge of popular participation and democracy unleashed by anti-colonial struggles.

The reigning class, consisting dominantly of landlords from West Pakistan, were trying to unite under Liaquat Ali Khan and his assassination in 1951 deprived them of a leadership to bring other classes from East Pakistan under its hegemony and pose a challenge to imperialist hegemony or reach a better compromise. There had not been a majority party with a recognized leader in National Assembly.¹⁵⁰ The government changed six times in seven years after Liaquat. The Republican Party of landlords existed only in 1956 National Assembly under the leadership of Malik Feroz Khan Noon’s government (December 1957 to October 1958). Under his leadership, the landed class justified the existence of landlordism and stopped land reforms.¹⁵¹

According to Waseem, the 1958 coup was not a military but rather a civilian arrangement to stop the 1958 elections. However, it did not carry any ideological content.¹⁵² Newberg has also discussed the lack of serious ideological questions in

¹⁴⁶Waseem, *supra* note 6, 118.

¹⁴⁷M Ahmad, *Government and Politics in Pakistan* (Space Publishers, Karachi, 1970) 120.

¹⁴⁸Habib Bank gave Rs. 80 million as a loan equal to half of the revenue, see Rehman, *supra* note 47. The statement of Industrial policy came in 1948. This was the beginning of a capitalist class. In 1950s, 99% growth was through Import Substitute Industrialization (ISI), see AR Kemal, *Patterns and growth of Pakistan’s Industrial Sector* in Khan, *supra* note 48.

¹⁴⁹Waseem (2007) thesis is that the bureaucracy cannot rule without legitimacy, and it did not trust that the political leadership could preserve the state’s legitimacy, see Waseem, *supra* note 6, 87.

¹⁵⁰Munir, *supra* note 52, 83.

¹⁵¹Munir, *supra* note 52, 89, 91.

¹⁵²Waseem, *supra* note 6, 143.

Pakistan's constitution. In her analysis, the conflict is between the vice-regal system and the liberal conflict within the elite.¹⁵³ Chief Justice Munir, according to her, was secular but pro-establishment, whereas Cornelius was in favour of Islamic jurisprudence but was against the establishment. She concludes, "[a]lthough the regimes would change from civilian to military and from populist to authoritarian to dictatorship, the question they posed about democracy and equality were similar". That is why each regime with each new constitution only puts forward a "slightly revised role for the superior courts".¹⁵⁴ Newberg did not provide any details of Munir being secular or that Cornelius was religious. Similarly, she could not articulate the model of political development in the theory and practice of Cornelius and Munir CJs which connected to their decisions and writings. Above all, this is not particular to Newberg, quest for 'ideological' content definitely is confusing within the liberal framework or an 'institutionalist-functionalist' understanding. However, it can be explained in terms of class formation (as result of class struggle), a particular state form with an ideological content.

Departing from above analyses, the toppling of the 1958 election must be understood 'ideologically', as an attempt at the imposition of a controlled democracy. Key here is that the Communist Party of Pakistan (CPP), Progressive Writers Association (PWA) and Democratic Students Federation (DSF) had been banned; the communists had gone underground and taken refuge in the National Awami Party, and the NAP was definitely going to win the elections.¹⁵⁵ As explained above, the reigning class was fragmented and dispersed, unable to combat that challenge. By preventing the elections, the hegemonic imperialist class placed the juridico-bureaucratic structure as its seat of power ensuring the smooth steering of political development. This ensured that the communist movement would have no space from which to emerge.

The judiciary agreed with this arrangement. For Anwar-ul-Haq CJ the founding father Jinnah also praised 'evolution and not revolution'.¹⁵⁶ According to Newberg, Chief Justice Munir's persistent question during the hearing reflected serious worries about the prospect of violent upheavals in Pakistan. Interestingly, while mentioning the 1953 riots, Newberg ignores the *Pindi Conspiracy case* and the banning of CPP, PWA and DSF. Chief Justice Munir repeatedly pointed out that if there is no power of dissolution of the assembly, only revolution is left. In the *Maulvi Tamizuddin Khan* case, a concern was raised: what would be the position of

¹⁵³PR Newberg, *supra* note 90, 10.

¹⁵⁴*Ibid* 119.

¹⁵⁵National Awami Party (NAP) was formed in 1957 in Dhaka. It was predominantly a Left wing party. NAP, in alliance with Awami League (a party of Bengali nationalism) was going to win the scheduled elections of 1959.

¹⁵⁶S Anwar-ul-Haq, Quaid-i-Azam as a Constitutionalist, a paper read at the Third Jurist Conference held on 9 December, 1976 at Karachi, in Anwar-ul-Haq, *supra* note 28, 255.

the court if the assembly got inoculated by communist ideas? Chief Justice Munir's prompt response was 'Revolution with a capital R'. To this, the Advocate General responded 'Dissolution with a capital D'.¹⁵⁷ This clearly shows the concerns of the executive and judiciary in Pakistan.¹⁵⁸ Bureaucracy, according to Braibanti (1999) was very clear that "all were united, self-preservation if for no other reason, in their belief that the Civil Services of Pakistan-CSP was an elite group whose destiny, inherited from the ICS, was to govern Pakistan. Virtually all were opposed to radical reform".¹⁵⁹

Chief Justice Munir also expressed these feelings on his retirement in the 1960s, saying the country was on the brink of a revolution and hence the court had to decide between anarchy and order. The bias of the Pakistani judiciary against the prospect of revolution was so extreme that one of the justices, who later became Chief Justice of the Supreme Court, Anwar-ul-Haq, announced while addressing the world delegates in Ghana that there is nothing revolutionary in his paper as no judge has so far been awarded the Nobel Prize for his revolutionary ideas.¹⁶⁰ For him, the changes in the existing laws in developing countries are an instrument of social revolution, "so as to forestall violent and abrupt changes".¹⁶¹ The anti-communist ideas of Munir, Cornelius, S.A. Rahman CJs and other cold warrior jurists like A.K. Brohi, Sharifuddin Pirzada are discussed in the next chapter when they came strongly to the surface of intellectual combat seeing socialism as a successful political slogan in late 1960s and throughout 1970s.

The point made so far is that the 'ideological content' of the 1958 coup was to stop revolution,¹⁶² a desire for a deeper and broader democracy that had been unleashed by anti-colonial struggle. Here, Chief Justice Munir and Justice Cornelius both stood against 'revolution' (socialist modernization) in spite of dissenting opinions. They stood for a state-formation of nation-building under capitalist modernization and a consequent model of 'political development', not for democracy versus dictatorship. For this, one is to look beyond the legal decisions to their ideas and involvement with 'modernization'.

Before we conclude this part, it is important to note here that other Commonwealth countries also 'benefitted' from the *Dosso case* as they were

¹⁵⁷Newberg, *supra* note 90, 48.

¹⁵⁸It is pertinent to note that up until this point, under the excuse of *Pindi Conspiracy* case, all the Communist Party leadership had already been arrested and in 1954 the Communist Party and its fronts like Progressive Writers' Association and Democratic Students Federation had been banned.

¹⁵⁹Braibanti, *supra* note 104, 46.

¹⁶⁰S Anwar-ul-Haq, Role of Law in a Developing Society, in, Anwar-ul-Haq, *supra* note 28, 83. This essay was a lecture delivered at the State House, Accra, on 7 October 7 1976 in connection with the Centenary Celebrations of the Supreme Court of Ghana.

¹⁶¹*Ibid* 92.

¹⁶²Even if the anti-establishment/Left forces were not as strong, they did create fear in the elite. This was exaggerated in the overall cold war environment.

passing through similar problems in the nation-building project.¹⁶³ Nigeria faced the same type of military coups and used the same justification through the doctrine of necessity as Pakistan.¹⁶⁴ India used this justification during the emergency imposed by Indira Gandhi.¹⁶⁵ Munir clearly used it as a legal principle of common law countries.¹⁶⁶ As far as the doctrine of necessity is concerned, Dieter Conrad notes that the political question was how the court should react to the suspension of the constitution and revolutionary changes in the constitution. For him, looking at cases in Commonwealth,¹⁶⁷ there are two basic types of cases; first are 'necessity' cases¹⁶⁸ and second are Kelsen cases.¹⁶⁹ Historically, for the writer, the doctrine of necessity was not a novel doctrine in Anglo-American and Continental European jurisprudence. British courts recognized the 1976 Revolution and German Reichsgericht recognized the November Revolution of 1918 as both these established the valid order.

But there was a need to have an arrangement more than the doctrine of necessity. The Ayub and Cornelius nexus brought this in Pakistan in the form of 1962 Constitution as a local variant of U.S. constitutional model during the decade of modernization in Pakistan.

¹⁶³A list in this regard is given by Attorney General of Pakistan in *Begum Nusrat Bhutto v The Federation of Pakistan and others*, PLD 1977 SC 657. see L Wolf-Phillips, Constitutional Legitimacy in Pakistan 1977-82, in, WP Zingel, Stephanie Zingel, & Ave Lallemand (eds) *Pakistan in the 80s: Law & Constitution* (Vanguard, Lahore, 1985) 37, 70.

¹⁶⁴P EhiOshio, Esq, Military Coups D' Etat in Nigeria: Rationale, Legality and Effects on Constitutionalism *PLJ* 1986 Journal Section 37, See D Conard, In Defense of the Continuity of Law: Pakistan's Courts in Crisis of State XIII *PLD* Journal Section (1985) 2.

¹⁶⁵Emergency imposed by Indira Gandhi from 1975 to 1977 (21 months) under Article 352 (1) of the Indian Constitution.

¹⁶⁶While commenting on *Nusrat Bhutto case* 1977, 22 years after the *Dosso case*, Chief Justice Munir made clear that he treated the doctrine of necessity as a common law principle applicable to all civilized governments. He rejected prefixes or suffixes of 'extra', 'supra' with constitutional as all were authorized by the constitution, see Munir, *supra* note 52, 256, 271; See also, MM Stavsky, The Doctrine of Necessity in Pakistan, 16 *Cornell Int' LJ* (1983) 341.

¹⁶⁷Like *Madzimbamuto v Lardner- Burke of Rhodesia*; Discussions with reference to the Pakistani cases are also cited by Dieter Conrad, for example C Palley, The judicial process: U. D. I. and the Southern Rhodesian Judiciary (1967) *Mod L Rev* 263, see A de Smith, Constitutional law years in revolutionary situations *West Ont L Rev* (1968) 93, see also RWM Dias, Legal politics: norms behind the Grundnorm 26 *Cambridge LJ* (1968) 233, see also FM Brookfield, The courts, Kelsen, and the Rhodesian revolution 19 *University of Toronto Law Review* (1969) 326, see also RS Welsh, The function of the judiciary in a coup d'etat 87 *SALJ* (1970) 168, see also A Ojo The search for a Grundnorm in Nigeria-The Lakanmi case 20 *ILCQ* (1971) 117, see also JM Eekelaar, Principles of revolutionary legality in *Oxford Essays in Jurisprudence*, 2nd Series, (Oxford, 1973) 22, see also TKK Iyer, Constitutional Law in Pakistan: Kelsen in the courts 21 *Am J Comp L* (1973) 759, see Conrad, *supra* note 164, see LW Phillips, Constitutional Legitimacy in Pakistan 1977-82, in, Zingel, Zingel, & Lallemand, *supra* note 163, 123, 168 fn 2.

¹⁶⁸*Special Reference case* (1955), *Mir Hasan case* (1969), *Asma Jilani case* (1972), *Begum Nusrat Bhutto case* (1977) as will be cited and discussed in their order.

¹⁶⁹Like the *Dosso case*.

2.9.2 Ayub ‘the Modernizer’ and Pakistan as the Experimental Lab

The late 1950s through the 1960s was the era of modernization theory taking root in Pakistan. It was led by Ayub politically and Cornelius judicially with the bureaucracy implementing modernization. According to Ayub, in his design of political development, people and their opinion were irrelevant and a “responsible government” should not be “prisoner of wayward public opinion”.¹⁷⁰ Pakistan needed a strong, not popular government, Ayub argued.¹⁷¹ His idea of ‘basic democracy’ (BD system) was to develop a controlled democracy with which the landed elite of Sindh and Punjab, as a reigning’ class could also be controlled. In entering rural politics, he had to contend with the issue of land reform. Ayub stated that big land holdings impeded the free exercise of political institutions and could not flourish in democracy as landlords enjoyed protected constituencies. So in fixing a ceiling of landownership, the target was to build a strong middle class and land reforms as the ‘*Magna Carta of Rights*’ for peasants. But private ownership was not to be destroyed.¹⁷² He thus connected the democratic content of the new Constitution with land reforms.¹⁷³

Munir called it a ‘controlled democracy’.¹⁷⁴ Ayesha Siddiqi argues that the threat of land reforms were a coercive tool to discipline the landlords.¹⁷⁵ I agree with this position but its theoretical explanation is that through the threat of these reforms, the juridico-bureaucratic structure got the consent of the reigning class for the hegemony of the metropolitan bourgeoisie. That is why these land reforms were halfhearted. Capitalist agriculture was part of modernization, and the landed class greatly benefitted from it. The state also created an industrialist class that had no political power but relied entirely on state bureaucratic power.¹⁷⁶ I argue that these three classes, plus the metropolitan bourgeoisie were the classes behind the state formation as led by Ayub. Ayub only targeted politicians who were part of the urban-based Jamat-e-Islami and the nationalist and communist alliance (National Awami Party).

How is the judiciary connected with this project of capitalist modernization in Pakistan? How were legal decisions, discourse, and the judiciary a crucial link in this project?

¹⁷⁰Khan, *supra* note 61, 206.

¹⁷¹*Ibid* 213.

¹⁷²I will evaluate this claim later.

¹⁷³Khan, *supra* note 61, 87.

¹⁷⁴Munir, *supra* note 52, 99.

¹⁷⁵A Siddiqi, *Military Inc.: Inside Pakistan’s Military economy* (Oxford University Press, Karachi, 2007) 75.

¹⁷⁶H Alavi, Class and State in Pakistan, in, H Gardezi & J Rashid (eds), *Pakistan: The Unstable State* (Vanguard Books, Lahore, 1983).

2.9.3 *Judiciary's Modernization 'Coalition'*

Ralph Braibanti, a modernization theorist in the tradition of Huntington, met CJ Cornelius at a conference of the Southeast Asia Treaty Organization (SEATO) in 1958. He returned to Pakistan to become the Chief Advisor and Professor of the Civil Services Academy in 1960 in Lahore. At the time, he was on leave from Duke University and was on contract with United States Agency for International Development (USAID).¹⁷⁷ In his memoirs, he mentions Kyani CJ of West Pakistan High Court, Cornelius CJ, Nasim Hassan CJ, Mahmud Ali Qasuri and Rabia Sultana Qari from the judicial side and Mian Aminuddin (the first local head of civil services after 13 years of independence) and Agha Hamid (who succeeded Amiruddin).

When Braibanti returned to the U.S. in 1964, he gathered 26 scholars and government officials interested to work on Pakistani issues and launched the American Institute of Indian Studies. His students included Craig Baxter, Charles Kennedy, Afak Hayder and Lawrence Ziring. S.M. Haider was Braibanti's student and on his advice wrote a dissertation on the writ jurisdiction in Pakistan. He worked for the Law Reform Commission until his death. All above jurists and social scientists wrote extensively about judiciary and state of postcolonial Pakistan.¹⁷⁸ From Braibanti's account along with the speeches of A.R. Kayani and Cornelius CJ, one should not doubt the strong influence these jurists had on the civil and military bureaucracy leading modernization in Pakistan.

Chief Justice M.R. Kayani of Lahore High Court, who served as a judge from 1958 to 1962, headed the Civil Services Association for 7 years, which were crucial in terms of political and economic restructuring under modernization.¹⁷⁹ After him, Chief Justices S.A. Rahman and Shahabuddin headed the association, both from ICS. The judiciary was in a marriage of convenience with the bureaucracy in the first two formative decades (1947–1967) of Pakistan. Chief Justice Anwarul Haq (1970), hailing from CSP himself, mentioned how civil services produced men of judicial acumen like Shahabuddin, Cornelius, Rahman and Kayani.¹⁸⁰ The Chief Justice of the East Pakistan High Court, Amin Ahmad, also commented on the bureaucratic–judicial relation, explaining in 1970 that the Pakistani judiciary never interfered with the executive.¹⁸¹

Braibanti found that the Civil Services Academy was divided in two groups, old-line conservatives (pre-partition Indian Civil Servants) and new entrants

¹⁷⁷Braibanti, *supra* note 104, xix.

¹⁷⁸Discussion about their writings is in the coming chapters.

¹⁷⁹See the presidential address delivered at the seventh annual dinner of the CSP Association in MR Kayani, Half Truths, in, MR Kayani, *The Whole Truth*, 39.

¹⁸⁰S Anwar-ul-Haq (1970), Civil Service of Pakistan and its Critics, in, Anwar-ul-Haq, *supra* note 28, 301, address of welcome to the president of Pakistan, General Yahya Khan, on the annual dinner of West Pakistan Civil Services of Pakistan-C S P on 10 April 1970.

¹⁸¹JA Ahmad, Independence of Judiciary in Pakistan XXII *PLD* (1970) Journal Section 135, 138.

post-partition. Kayani CJ represented the old conservatives who considered themselves as custodians of the ‘steel frame’ of this service and, and hence unsupportive of reforms. Cornelius CJ was with new entrants wanting reforms to accommodate the needs of modernization. Kayani CJ wanted more civil services officers to join the judiciary¹⁸² so as to make a liaison to correct the errors of administration.¹⁸³ Administration here represents popular ministries and politicians/administration¹⁸⁴ who were busy ‘reforming’ bureaucracy and Kayani resisting their undue transfers, appointments as officer on special duty—OSDs, and salaries in this process.¹⁸⁵ He strongly defended bureaucracy and held contempt for ministers.¹⁸⁶ For Kayani, the roots of political prejudices against civil services lies in the rivalry between bureaucracy as British period ‘frame of imperialism’ and political ambitions of politicians.¹⁸⁷

On the other hand, Cornelius CJ was of the view that the CSP had been compartmentalized and was caste-structured.¹⁸⁸ As a result, it was not advancing beyond a certain level. He wanted it to be restructured, in order to be attuned with the political philosophy of the new state. Cornelius was part of a group of new reform-minded young Civil Service students, looking to establish a national character to the Service. He grafted Islam to the British-oriented structure as a way of bringing this national character. Kayani criticized, rather ridiculed, Government of Pakistan, Report of the Pay and Service Commission, 1962 written by Cornelius.¹⁸⁹ He showed how there was a connection between Cornelius report and the Constitution of 1962 by Ayub.¹⁹⁰

How should the judiciary, being the dominant part of the bureaucracy, scrutinize the actions of the administration/politicians against bureaucracy? Justice Munir

¹⁸²MR Kayani, Half Truths, in, Kayani, *supra* note 179, 34.

¹⁸³MR Kayani, Not the Whole Truth, in, Kayani, *supra* note 179, 22, address of welcome to Major-General Sikander Mirza, President of Pakistan, at the 2nd annual dinner of C.S. P. Association on 17 March 1957.

¹⁸⁴Comments of Justice SA Rahman in the foreword of MR Kayani, Half Truths, in, Kayani, *supra* note 179, iii; Kayani strongly defended bureaucracy and contempt for ministers, see page 24.

¹⁸⁵MR Kayani, Half Truths, in, Kayani, *supra* note 179, 12.

¹⁸⁶MR Kayani, Not the Whole Truth, in, Kayani, *supra* note 179, 24, address of welcome to Major-General Skander Mirza, president of Pakistan, at the 2nd annual dinner of C.S. P. Association on 17 March 1957.

¹⁸⁷MR Kayani, Half Truths, in, Kayani, *supra* note 179, 7.

¹⁸⁸AR Cornelius, Equality of Opportunity in Public Service, in, Braibanti, *supra* note 108. This is also included in speeches as Appendices 10-15 in Braibanti, *supra* note 104, 466. This was an address before the Rotary Club of Lahore on 1 September 1961. This fact is described by Braibanti also in 1999, see Braibanti, *supra* note 104, 44.

¹⁸⁹Presidential address titled “Use Your Intelligence Occasionally” delivered at the annual dinner of CSP Association on the 8 April 1961, the Nawab of Kalabagh being the guest of honour, see MR Kayani, Half Truths, in, Kayani, *supra* note 179, 38.

¹⁹⁰An address delivered on 29 October at a dinner given by C SP Association titled “The Pay Commission and the Religious Consciousness of Islam, see MR Kayani, Half Truths, in, Kayani, *supra* note 179), 63.

believed in judicial restraint. The writ jurisdiction of the superior courts introduced in 1954 was retained in the 1956 Constitution. The power to issue writs of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari* were vested with High Courts.¹⁹¹ But the courts, even the Supreme Court, only used writ jurisdiction in those matters which were judicial in nature.¹⁹² The first case was *Muhammad Saeed v Election Petitions Tribunal*,¹⁹³ where an effort is made to create a formula of judicial resistance by Munir. The *Tariq Transport Company case*¹⁹⁴ is an example of said judicial restraint. Chief Justice Munir made clear that pure administrative actions do not come under the control of the judiciary with the power conferred by Article 70 of the 1956 Constitution. Only actions of *ultra vires*, refusal to exercise jurisdiction and deviation from prescribed procedure, can come under judicial control. From 1955 to August 1962, 14,000 writs were filed in two High Courts and many reached the Supreme Court. This made Pakistan “the most litigious society in the world” at that time.¹⁹⁵

Kayani wanted to develop writ jurisdiction in British tradition. He was aware of the power of writ jurisdiction and found it as the flowers of paradise.¹⁹⁶ For him, after 1955 *Tamizuddin Khan case*, writ was taken away but we brought it back.¹⁹⁷ These dynamics were commented upon in *Snelson's case*.¹⁹⁸ Mr Snelson's talk titled ‘The Transitional Constitution of 1958’ was distributed during his address to section officers in Secretariat Training Institute Karachi. He remarked that the High Courts, while exercising the prerogative writs, were interfering with the government and causing “chaos, disruption, friction, usurpation of function, uncertainty, and public confusion”. These remarks were found to be in contempt of court by the Lahore High Court of Chief Justice Kayani. The Supreme Court of Cornelius CJ upheld the decision. Snelson was fined, which was later suspended by the governor. For Kayani, Snelson gave poor advice to suspend writ jurisdiction.¹⁹⁹ But Kayani's advice was resisted by his colleagues also. Justice Syed Ikhtlaque Hussain, Justice West Pakistan High Court, while reflecting on this controversy around writ jurisdiction warned about restraints which judiciary should observe. He added that this power is discretionary not obligatory, it should be used judicially.²⁰⁰

¹⁹¹ Articles 22, 163, 170 of the 1956 Constitution, see Khan, *supra* note 23, 108.

¹⁹² *Tariq Transport Company v Sargodha Bhera Bus Service* 2 PSCR (1958) 71. A decision by a Regional Transport Authority about granting a route to a bus company without authority came under review for *certiorari* and HC nullified the decision of RTA.

¹⁹³ PLD 1957 SC 91.

¹⁹⁴ *Tariq Transport Company v Sargodha Bhera Bus Service* 2 PSCR (1958) 71.

¹⁹⁵ Braibanti, *supra* note 104, 42.

¹⁹⁶ MR Kayani, Not the Whole Truth, in, Kayani, *supra* note 179, 41, 61, 87.

¹⁹⁷ MR Kayani, Not the Whole Truth, in, Kayani, *supra* note 179, 18.

¹⁹⁸ *The State v Sir Edward Snelson*, PLD 1961 Supreme Court 237.

¹⁹⁹ MR Kayani, A judge May Laugh, in, Kayani, *supra* note 179, 7, reply to farewell address by the Karachi High Court Bar Association, Nov 1962.

²⁰⁰ SI Hussain, Justice West Pakistan High Court, Writ Jurisdiction of Superior Courts in Pakistan PLD (1958) Journal Section, 1, 7.

In 1960, after the retirement of three of the five judges of Munir's Court and with the new Constitution of 1962, the old terminology was abandoned and judicial review jurisdiction was re-defined in clear and precise terms in Article 98 which has continued in Article 199 of the present Constitution.²⁰¹ Cornelius gave a summary of development of writ jurisdiction in the *Merajuddin case*.²⁰² Elsewhere he stated that the British did not grant writ jurisdiction to the Indians, which was there for seven centuries. Rather, they used Confucian paternalism to rule through local rulers with uncontrolled power to "put up people right".²⁰³ He acknowledged how superior courts in Pakistan developed it, particularly late CJ Kayani. But Cornelius was also in favour of *droit administratif* with its *Conseil d'Etat* (administrative tribunals of French Administrative Law). Kayani ridiculed the concept of *Conseil d'etat* of Cornelius.²⁰⁴ Furthermore, these disputes generally do not merely involve a question of fact or of law, but one of policy as well. Cornelius put forth such a proposal in the 1959 convocation of Punjab University Law College and then in 1960 at a Rotary Club function in Lahore, and finally in the form of a full analysis addressing the All Pakistan Lawyer's Association. He expressed appreciation for such a system in the *Farid Sons Ltd. Case*. It is pertinent that Cornelius did not find Supreme Court prerogative powers to confine public officials inappropriate as it had been found in Great Britain.²⁰⁵

S.M. Haider explained this scheme of A.R. Cornelius towards the administration tribunals in Ayub's era. According to Cornelius, the state's involvement in social development projects made doctrines and precedents of ordinary law inappropriate. If disputes arising from an increase in the role of the state were to go through ordinary courts, they would be choked full. Whereas, S.M. Haider continued developing this concept of administrative tribunals, and succeeded to convince Bhutto. Nasim Hassan Shah was also a great admirer of this scheme.²⁰⁶

It is not irrelevant to know Haider's position on this development of writ jurisdiction to judicial review to administrative tribunals in relation to the requirements of modernization, nation-building and institutional restructuring in Pakistan. Quite in line with the functionalist position of Parson, influenced by Lucian Pye, Haider is very clear that Max Weber is applicable with vigour on

²⁰¹S Ahmed Justice (2006) *Good Governance and the Role of Judiciary*, International Jurists Conference, Islamabad on 50th birthday anniversary of the Supreme Court of Pakistan in the year 2006, last visited 27 Nov 2013, <<http://www.supremecourt.gov.pk/ijc/ijc.htm>>.

²⁰²*State of Pakistan v Mehrajuddin*, PSCR 1959 SC 34.

²⁰³AR Cornelius, Public Administration and the Law, *PLD* (1964) Journal Section, 1, 6, 7, address to the participants of third advance management course of National Institute of Public Administration (NIPA), Karachi, on 30 November 1963; See also AR Cornelius, Writ Jurisdiction of Superior Courts, *PLD* (1964), Journal Section 73, speech delivered at Civil Services Academy, Lahore on 25 April 1964.

²⁰⁴As claimed by Ralph Braibanti, see Braibanti, *supra* note 104, 47.

²⁰⁵SM Haider, Plea for Administrative Tribunals: Scheme Visualized by Justice AR Cornelius, XXI *PLD* (1969) Journal Section 164, See *Farid Sons Ltd v Govt of Pakistan*, *PLD* 1961 SC 537.

²⁰⁶NH Shah, *Droit Administratif-A Study*, *PLD* (1964) Journal Section 45.

Pakistan bureaucracy.²⁰⁷ Being an instrumentalist, he thought that public administration as an instrument- and most important is how “it is used and for what purposes”.²⁰⁸ CSP needed technocrats for modernization, but they were looked down upon by the general cadre of civil services officers.²⁰⁹ To pacify Kayani's resistance, he argued that the administrative law emphasizes on function and not on the structure of the bureaucracy.²¹⁰ Cornelius' report for him is well known all over the world for its ‘realistic and pragmatic recommendations’.²¹¹ Though Cornelius' report seems to be against ‘colonial rule’ legacy in civil service, but showing its immediate connection with modernization exposes its neo-colonial nature. Other comments about his anti-colonial nature are just opposition to ‘western’ as a cultural instant of social formation and not the economic and political ones. To sum up, the judiciary has induced administrative reforms very effectively through a number of cases.²¹²

The positions of both these justices, Cornelius and Kayani CJs leading and resisting reforms in civil services, respectively, in the era of modernization, were related to the place of bureaucracy in their respective model or understanding of political development. In Kayani's formation, bureaucracy was trusted as a colonial perception as well as the U.K. tradition where bureaucracy was dominantly from landed aristocracy and respectable. As opposed to this, Cornelius' formation seemed to be the pressure of modernization with his own grafting of ‘Islam’ and ‘national’ character on it. This distrust of state and bureaucracy and the so-called ‘constitutional limitations’ are very particular to U.S. model of political development.

So far book discussed the close relation of the judiciary with civil and military bureaucracy. The difference in Kayani and Cornelius CJs understanding was the reflection of how they wanted to address the demands for reforms under modernization. What is the place of democracy and in favour of fundamental rights in their models of political development? In the following section we are going to challenge the common liberal understanding that Cornelius CJ was pro-democracy and fundamental rights as compared to Munir CJ based on the *Tamizuddin case* and the *Dosso case* of 1950s and later Cornelius' rights cases like the *Moudoodi case* etc. against Ayub. Similarly, Kayani is portrayed as pro-democracy, as opposed to Ayub. We will see that all of them were against the legislature and people and their opposition to dictators was only to the ‘degree of dictatorship’. They all wanted controlled democracy. Above all, rights in this formation by Cornelius were a substitute for democratic deficit.

²⁰⁷ SM Haider, *Public Administration and Administrative Law* (Law Times Publications, Lahore, 1973) 37.

²⁰⁸ Haider, *supra* note 207, 42.

²⁰⁹ SM Haider, Administrative Modernization, A Design for in Pakistan Academy for Rural Development, Peshawar (1968) 189, in, Haider, *supra* note 207, 12.

²¹⁰ Haider, *supra* note 207, 134.

²¹¹ Haider, *supra* note 207, 40; for complete evaluation of Cornelius report see page 90.

²¹² Haider gave a full list of these cases, see Haider, *supra* note 207, 85.

2.10 Democracy and Fundamental Rights in Political Development: A Critical Appraisal of Munir, Cornelius and Kayani CJs

2.10.1 *Presidential System Like U.S.: Elite Democracy or Controlled Democracy?*

Ayub was an advocate of the presidential system and argued that even the founding father of Pakistan, Jinnah, did not want a parliamentary system. In light of this, he set up a Commission to deliberate on the issue in 1959, and promised to accept their recommendations. Justice Muhammad Shahbuddin, from the Indian Civil Services, headed the Commission; he later became Chief Justice of the Supreme Court (3 May 1960–12 May 1960) after Munir CJ. Hamid Khan presents the head of this Commission as a person with high integrity but one under severe pressure from the Ayub.²¹³ On the other hand, W.G. Choudhry stated that the Commission was free from any duress,²¹⁴ the Commission admitting the same.²¹⁵ The Constitution Commission of 1960 headed by Justice Shahabuddin, while in favour of a parliamentary form of government, recommended a presidential form of government like in the U.S. The reasons were parliamentary failures, due to the absence of well-organized parties. The outcome of the recommendations of the Commission was the constitution of 1962, which allowed a strong president and indirect franchise, quite contrary to the requirement of parliamentary system. Ayub called it “a blending of democracy with discipline—the two prerequisites to running a free society with stable government and sound administration”.²¹⁶

In the minds of the judiciary, like that of executive and bureaucracy, the idea was not the project of securing democracy but of planting a democracy that would slowly emerge. Cornelius’ later court decisions can be better understood in their relation to the Basic Democracy system. According to him, the Basic Democracies Order of 1959 gave power to the people who were supportive of the 1962 Constitution, and would get rid of the colonial legacies of ancestry, wealth and class. This is the core of Cornelius’ political theory.²¹⁷ He was expecting Churchill’s to emerge from BD system.²¹⁸ There was nothing democratic in the BD system but apart from its explanation as a form of controlled democracy, its only

²¹³Khan, *supra* note 23, 138.

²¹⁴As claimed by Khan (2009), See Khan, *supra* note 23, 41, 136.

²¹⁵Constitution Commission Report (Government of Pakistan, Karachi, 1961) 2.

²¹⁶Broadcast on 1 March 1962 in Khan, *supra* note 61, 216.

²¹⁷AR Cornelius, Constitution of Pakistan *PLD* (1967) Journal Section, 78, The essay was an address to the Pakistan Council for National Integration, Dacca, 15 June 1967.

²¹⁸AR Cornelius, Power of the “word” in Context of National Leadership: Need for Expressing Fundamental Rights in Language of Islamic Scriptures, *PLD* (1965) Journal Section 37, 42, speech at the inauguration ceremony of Silver Jubilee function of the rotary club of Hyderabad on 13 February 1965.

connection with Cornelius seems administrative reforms modernization.²¹⁹ Cornelius also appreciated the most controversial constitution of 1962 as an ‘Act of Faith’.²²⁰

The involvement of the entire population in political life in post-colonies was a serious issue for modernization scholars. This participation of the population in the social order in the form of ‘popular sovereignty’ is usually called power sharing, power diffusion, politicization, mobilization or participation explosion. According to Braibanti, the ruling elite had no concern about the quality of participation in regards to “literacy, responsibility, understanding of issues, to the quality of civic culture generally”.²²¹ The only emphasis was on increasing participation. Participation as power sharing was good but “nevertheless, we cannot overlook the stress and crisis caused by accelerated power-sharing”.²²² Braibanti is very clear, the collapse of systems of newly independent states are not caused by corruption or infiltration or even institutional weakness but accelerated participation. He called it ‘demand-conversion crises’. The solution is either to control this demand-conversion crisis through the bureaucracy and increasing the strength of the judiciary to handle crises like in Pakistan or prevent them as in India. In India, according to Braibanti, demand is contained, diffused and spatially diverted by a competent single mass party.²²³ Ayub and Cornelius in Pakistan faced the same problem.

How did Chief Justice Cornelius view democracy? He found that elections, which raise ideological differences, were dangerous, for there was the “virus of revolution just below the surface”.²²⁴ Socialism was not an option for him, as Muslims did not have freedom there. Though socialism in USSR provided consumer goods, the main issue was that Marxism/socialism is “totally divorced from religious belief”.²²⁵ Cornelius found the armed forces had a distinguished position among ‘responsible’ (not representative-my comments) sections of the community.²²⁶ The Basic Democracy model of Ayub seems perfectly suited to his philosophy.

²¹⁹AR Cornelius, Issues of Theory, *PLD* (1967) Journal Section, 104, paper read at the International Conference on Theoretical Problems of Administrative Reforms in Developing Countries held at the Rockefeller Foundation Villa Serbelloni, Bellagio, Lake Como, Italy.

²²⁰AR Cornelius, Spirit of the Pakistan: An “Act of Faith”, *PLD* (1967) Journal Section 78, 90 speech at the Dacca Center of Pakistan Council for National Integration on 15 June 15 1967.

²²¹R Braibanti (1964), The Role of Law in the Political Development of Pakistan, in, Braibanti, *supra* note 104, 95. This essay was first published in RR Wilson (ed) *International Comparative Law of the Commonwealth* (NC: Durham University Press, Durham, 1968).

²²²*Ibid.*

²²³R Braibanti (1964), The Role of Law in the Political Development of Pakistan, in Braibanti, *supra* note 104, 95. This essay was first published in Wilson, *supra* note 221.

²²⁴AR Cornelius (1978), Letter to Braibanti, in, Braibanti, *supra* note 104, 196, 198.

²²⁵AR Cornelius, Role of Religion in Social Welfare as Enjoyed by the Constitution, *PLD* (1965) Journal Section 127, 129, speech delivered at the inauguration of first in-service training course for social welfare offices at NIPA, Lahore, 7 July 7 1965.

²²⁶Cornelius, *supra* note 31, 11, address delivered at a gathering of Military officials at GHQ, Rawalpindi on 11 July 1962.

One should not be mistaken that Kayani CJ was against Ayub and hence was a democrat. He looked down upon the legislature, voters and the people and only CSP in leading the country for him.²²⁷ In his political hierarchy there was contempt for the assembly. Courts are better and should exercise writ jurisdiction against administration/executive- who are politicians and technocrats. The Bar was worse than the administration in this formation.²²⁸ We'll see how the bar was the most potent voice for participation, which annoyed juridico-bureaucratic structure. Kayani was not hopeful about the BD system, which was trying to bring "Churchills to the forefront".²²⁹ Apart from Munir CJ's decisions against democracy, he believed that there could not be a participatory democracy due to lack of education etc. Therefore a form of government, which can promote growth, should be the priority that can bring conditions for the change in the form of government.²³⁰

To sum up, during modernization, all the jurists, including Cornelius, supported the notion of a controlled democracy—a version of U.S. liberal democracy with, indirect elections of the president, a strong presidential system like the U.S., bureaucracy leading modernization and judicial review vested in Superior Courts, and fundamental rights as a substitute for the deficit in the above controlled democracy.

2.10.2 *The Cornelius 'Rights' Approach to Substitute for the Democratic Deficit?*

This part of the book will attempt to understand the exaggerated difference of the Cornelius Courts with Ayub on the issue of fundamental rights, which is widely cited in regards to cases like the *Moudoodi case* and *Shorish Kashmiri case*.²³¹

Ayub's modernization was liberal and some of its aspects were not liked by the Islamic forces, such as the family ordinance. Reacting to this, Ayub condemned the Jamaat-e-Islami leader, Maulana Abul Ala Maudoodi, and declared the Jamaat-e-Islami as an 'unlawful association' under section 16 of the Criminal Law Amendment Act, 1908 as amended by Ordinance of XXI of 1960. This declaration

²²⁷MR Kayani, Not the Whole Truth, in, Kayani, *supra* note 179, 12, 35.

²²⁸MR Kayani, Not the Whole Truth, in, Kayani, *supra* note 179, 43.

²²⁹MR Kayani, Not the Whole Truth, in, Kayani, *supra* note 179, 106.

²³⁰M Munir, Days I Remember, *Pakistan Times*, 11 November 1968 in Chaudhry, *supra* note 44, 94.

²³¹Hamid Khan's (2009) analysis of Cornelius court is that his court kept its independence and gave a ruling to protect fundamental rights which set the path of future judicial activism, constitutional interpretation under judicial review, and due process of law, Khan, *supra* note 23, 187. According to SM Haider (1967), a balance was struck between public order concerns and individual liberty by the Cornelius courts while using judicial review of administrative tribunals, see SM Haider, Judicial Review of Administrative Discretion in Pakistan *PLD* (1967) Journal Section as cited by Newberg (1995), see also, Newberg, *supra* note 90, 106.

was challenged in the West Pakistan High Court, as well as by Maudoodi in the Dhaka High Court. The former dismissed the petition, whereas the latter accepted the petition and declared the notification to be without binding effects.²³² In appeals against both the decisions, the Supreme Court accepted Maudoodi's appeal and rejected the government's appeal unanimously.²³³

There are some other cases where the judiciary's defence of fundamental rights is exaggerated under the leadership of Chief Justice A.R. Cornelius, like in the *Malik Ghulam Jilani's* case, *Shorish Kashmiri's* case and *Abdul Baqi Balooch* case. Through these cases, according to Hamid Khan, a strong foundation of 'judicial review' and 'due process of law' was laid down by the courts of Pakistan.²³⁴ During protests against the Tashkent Declaration,²³⁵ many political leaders like Jilani, Nawabzada Nusrullah and Sardar Shaukat Hayat Khan were kept in detention under the Defence of Pakistan Rules and the Defence of Pakistan Ordinance of 1965. The West Pakistan High Court rejected their petitions. The Supreme Court, in its judgment, accepted Nawabzada's appeal and rejected that of Hayat and Jilani.²³⁶ Here, the court laid down some broad principles and guidelines for cases of political detainees. Against the detention of a known journalist, Shorish Kashmiri, the High Court of West Pakistan accepted the petition and the Supreme Court upheld this judgment.²³⁷ Abdul Baqi Balooch, as a Baloch activist and a strong opponent of Ayub, was under detention. West Pakistan High Court (Karachi Bench) rejected his appeal.²³⁸

These judgments defended against the arbitrary use of laws like the Defence of Pakistan Ordinance. But this does not explain what was really going on. Let us discuss the nature of rights in these cases as it evolved from courts proceeded by Chief Justice Munir to Chief Justice Cornelius. The 1956 constitution used the term 'fundamental rights' and these rights were justiciable.²³⁹ On the other hand, the 1962 constitution did not use the words fundamental rights but included a few of these rights (speech, association and religion) in a chapter titled 'Principles of Law Making and Policy'; however, they were not justiciable. Later, with an amendment, the label 'fundamental rights' was given to these rights and their enforcement was assured through courts.²⁴⁰ It was claimed as a form of the Bill of Rights by the Law

²³²*Tamizuddin Ahmad v The Government of East Pakistan* PLD 1964 Dhaka 795.

²³³*Maulana Abul Ala Maudoodi v Govt of West Pakistan*, PLD 1964 SC 673.

²³⁴Khan, *supra* note 23, 187.

²³⁵Ayub signed this declaration after the 1965 war with India and politicians presented this agreement as losing after winning the war.

²³⁶*Malik Ghulam Jilani v The Government of West Pakistan*, PLD 1967 SC 373.

²³⁷*Govt of Pakistan v Begum Shorish Kashmiri*, PLD 1969 SC 14.

²³⁸*Abdul Baqi Balooch v The Govt of Pakistan*, PLD 1968 SC 313.

²³⁹Articles 5(1), 5(2), 6, 22, 14, 16, 17, 15, 8, 10, 11, 18, 13, 20.

²⁴⁰*Constitution [First Amendment] Act*, 1963, According to Hamid, it was due to pressure of the people, restoration of political activities and the election of Moulvi Tamizuddin as speaker and Muhammad Ali Bogra as Prime Minister; (Remember Prime Minister Bogra was a staunch supporter of US type constitutional arrangements), see Khan, *supra* note 23, 157.

Minister, Chief Justice (Ret. as he then was) Munir. Placing it in a modernization design, we can understand that the judiciary had already been empowered to check the excesses of the administration or executive under Article 98, and through this amendment the legislature was made subordinate to courts.

First of all, the strong presidential design of the constitution half-heartedly wanted a legislature and now the grip around it was tightened by the juridico-bureaucratic design of fundamental rights. Second, this ‘supremacy of judiciary’ is a part of political but not economic modernization. This means that the judiciary was tied with a ‘qualifying clause’ not to interfere in economic modernization, which included the ordinances and regulation regarding land reforms, family ordinance, and other socio-economic concerns within the design of capitalist modernization. The interesting point to be noted here is the perceived contrast in the views of Chief Justices Munir and Cornelius around their approaches towards rights and democracy. Both were the part of the same project of political development from Ayub to Yahya. After retirement, Chief Justice Munir became the Law Minister for Ayub’s government and Cornelius was the Chief Justice. Cornelius was law minister of the next dictator, Yahya Khan. Probably, S.M. Haider is the architect of certain position about Cornelius as the promoter of rights and democracy in Pakistan vis-à-vis Munir CJ which later is towed by Cornelius collectives in the years come. For him, Cornelius established the standards of ‘reasonable restriction’, ‘reasonable suspicion’ and ‘reasonable satisfaction’ in the *Mouddodi case*, *Jilani case* and above *Shaukat Ali case*.²⁴¹ Maybe, but the connection of fundamental rights with democracy in Cornelius formation as described by Haider and later Lombardi is problematic. Haider thought that Cornelius wanted the consent of the governed and that “the government should be by popular consent”.²⁴² Similarly, toeing the same line, Lombardi tried to find some insights for the U.S. even in Cornelius’s connection Islam and liberal democracy.²⁴³ I have a different take on this issue.

First of all, the nature of rights in Cornelius’s Court is not very different from that of Munir’s Courts. In the *Dosso case*,²⁴⁴ Cornelius believed that the natural rights theory in the absence of fundamental rights guarantees a positivist form in a constitution. He found rights apart from the 1956 constitution. Chief Justice Munir, on the other hand, relied on legal positivism, but did not refute Cornelius’s concept of natural rights. What happens when the constitution is abrogated? Munir was of the opinion that these rights are fundamental, cannot be taken away and do not need the law. Justice Shahabuddin, Amiruddin Ahmad and Cornelius agreed on that point, but Cornelius wrote a separate opinion. He based his opinion on natural

²⁴¹Haider, *supra* note 207, 13.

²⁴²Haider, *supra* note 207, 203.

²⁴³CB Lombardi, Can Islamizing a Legal System Even Help Promote Liberal Democracy?: A View from Pakistan, 7:3 *U St Thomas LJ* 649.

²⁴⁴*Supra* note 131.

rights but noted that when the constitution is not in force, there is concern about violation. This position is not very different than Munir's.

The difference between the Chief Justices became clearer in the *Mehdi Ali Khan* case. The courts retained the position in regards to fundamental rights established in the *Dossocase* and declined to review it.²⁴⁵ Justice Cornelius accepted the presence of fundamental rights as natural rights in the *Dosso* case, but argued they were not justiciable. They could only be justiciable when present in a constitution. Chief Justice Munir was clear not to challenge the regime and allowed it to alter the state structure. Thus, the court accepted the presence of fundamental rights but absence of judicial powers. This shows the extent of the difference between Cornelius and Munir's courts. Even in the *Mia nIftikhar-ud-din* case,²⁴⁶ courts refused their power to challenge the regime. In appeal, Justice Kaikaus accepted the plea of the government to amend and interfere with the fundamental rights and gave immunity to those acts from judicial scrutiny, stating, "[e]ven if the central government did contravene a principle of natural justice, its order would not be liable to challenge in a court".²⁴⁷

After the promulgation of the 1962 constitution, the Cornelius court began a review of cases involving justiciable rights.²⁴⁸ S.M. Haider showed, by statistical analysis, how the rights cases based on natural justice doctrine increased under Cornelius courts after the 1962 constitution.²⁴⁹ The first case was *Fuzlul Quader Chowdhury* wherein the court looked at the power of the president to amend the constitution. Ayub wanted his members of the executive body to speak in the National Assembly though they were not members, and hence he tried to amend the constitution accordingly. A member of the assembly moved the point in the Dacca High Court as to whether the president can make such amendments. The Dacca High Court held that the constitution should not be so easily changed.²⁵⁰ The Supreme Court did not accept the appeal and Chief Justice Cornelius warned the government about the powers of the courts to judicially review any changes in the constitution.²⁵¹

To sum up our departing position, the nature of the controversy was that the judiciary should act more as a custodian of the operational form of the Constitution than as the guardian of fundamental rights. Chief Justice Cornelius strongly defended the presidential form of the government against 'anomalous Parliamentary form' or a 'semi-Parliamentary form of Government'. For the judges, according to

²⁴⁵*The Province of East Pakistan v Md Mehdi Ali Khan Panni*, PLD 1959 SC 387.

²⁴⁶The Progressive Papers Ltd (PPL), a privately owned newspaper, was led by leading socialist writers like Faiz Ahmad Faiz, Syed Sibte Hassan, and Ahmad Nadeem Qasmi. It was taken under government control by Ayub.

²⁴⁷*Mian Iftikhar-ud-din v Muhammad Sarfraz*, PLD 1961 SC 585.

²⁴⁸see discussion in Tamizuddin Khan case and Dosso case.

²⁴⁹Haider, *supra* note 207, 178.

²⁵⁰*Muhammad Adbul Haq v Fuzlul Quader Chowdhury*, PLD 1963 Dacca 669.

²⁵¹*Fuzlul Quader Chowdhury v Muhammad Adbul Haq* PLD 1963 SC 486.

the ‘main fabric’²⁵² in the presidential form, a government minister should not be a member of the House, cannot have the right to vote, does not depend upon support of the assembly, nor are they responsible to the assembly. The point I want to make is that the Justice Cornelius, who later became the Chief Justice of the Supreme Court in cases regarding such rights, protected the presidential form of the government and the consequent necessary rights for democratic deficit in this form of government, and not the rights themselves.

Now let me move to the next level of evaluating these rights, that is procedural and substantive rights. The courts in the *Moudoodi case* and the *Sorish Kashmiri case*, according to Newberg, differentiate between procedural right of review and how the protection provided to substantive rights is possible with this review. Then, in *Ghulam Jilani*, *Fazlu lQauder Chowdhry*, and *Sirajul Haq Patwari* cases, the courts stood away from contestable substantive rights guarantees and only extended judicial review in formal sense. In a way, the judiciary stuck to procedural rights and refused to enter the domain of substantive rights, seeing that domain as an exclusive arena of legislature and politics.

Newberg objected to this ‘deliberate judicial strategy’ to use judicial review as “strange and twisted compact as any attempt to build democracy from authoritarianism without revolution must surely be”,²⁵³ and “courts put reform before revolution as an acceptable mode for political change”.²⁵⁴ Disappointed, Newberg came to the conclusion that “while an independent judiciary might be a prerequisite for the life and sustenance of a developing country, it could neither create the conditions for equity and development nor guarantee those results”.²⁵⁵ Newberg is correct here but this rubs against her problematic regret that the judiciary could not properly judge the state. The evidence so far shows that the judiciary (in the Cornelius tradition) aimed only to protect the presidential form of constitution and rights. Let us explore the nature of politics underlying these rights cases.

2.10.3 *The Nature of Politics in Rights Cases*

In order to add some structural context to this rights discourse, it is necessary to study the nature of the political and economic evolution behind Ayub’s opposition. Islamists were among the ‘cultural’ opposition to the modernization project. During Ayub’s regime, the All-Pakistan Women Association started a campaign against polygamy and for the right to divorce. The response was the *Family Laws Ordinance* of 1961. Its evaluation is a compromise between Ayub’s liberal agenda and the religious opposition. The legal system was split: issues regarding the personal status

²⁵²Comments of AK Brohi on behalf of the respondent in the *Fuzlul Quader Chowdhury case*.

²⁵³*Ibid* 105.

²⁵⁴*Ibid* 106.

²⁵⁵*Ibid* 108.

of women such as marriage, divorce, inheritance and custody of the child were included under Islamic Law, whereas all other issues came under secular legal tradition.²⁵⁶ Maulana Maudoodi, the founding leader of Jamaat-i-Islami, opposed the 'enlightened modernization' of Ayub. The government used the Political Parties Act of 1962 and the Criminal Amendment Act of 1908 to ban the party. Jamaat-i-Islami contested this decision in East as well as West Pakistan in criminal and civil petitions. The West Pakistan High Court dismissed the criminal petition,²⁵⁷ but the East Pakistan High Court admitted the appeal.²⁵⁸ The Supreme Court heard both in a joint appeal. The court upheld the rights of forming a political party and particularly the right to do the activities for which the party is formed. The court examined the nature of new ongoing political developments under Basic Democracy, a kind of guided and controlled democracy. The court looked at the cases in terms of rights, and how these rights allow political parties and their activities and the courts' role in protecting these rights. Courts were confronted between the controlled nature of democracy and the absolute nature of these rights. Cornelius was of the opinion of an independent judicial investigation into government complaints about Jamaat-i-Islami and hence, probably wanted a context for these absolute rights on which they could be evaluated and tested. The court did not accept this proposal. In the *Moudoodi* case, not only was the right of judicial review of legislative acts was asserted by courts, but the principles in this regard were enumerated.²⁵⁹ Thus, from a political analysis, the *Moudoodi* case represented the mild opposition against Ayub by Islamists and an inclination of Chief Justice Cornelius towards Islamization. This may not be irrelevant to make connection of Moudoodi's model of political development and constitutional understanding with that of Cornelius and his collective. This does not mean political agenda and politics.

Leonard Binder elaborated Moudoodi's importance for the controversy he created over an Islamic constitution. Moudoodi sidelined the orthodox *ulema* and modernist secular politicians and forced the Constituent Assembly to consider four points which became the basis of Objectives Resolution in 1949. When Jinnah's speech to the Constituent Assembly left confusion,²⁶⁰ Moudoodi came out with his four points of Islamic law and constitution in early 1948 in his address to law students. These four points became the basis of Objectives Resolution.²⁶¹ In his model of political development, 'nationalism' is the anti-thesis of Islam. The

²⁵⁶S Rouse, Liberation from Above or Within: Nationalism, Gender, and Space in Pakistan (March-April 2002) 97 *Against the Current* 14.

²⁵⁷Criminal Appeal No. 43, 1964.

²⁵⁸Civil Appeal No. 19-D, 1964.

²⁵⁹Braibanti, *supra* note 108, in, Braibanti, *supra* note 104, 153. This essay was first published in R Braibanti, (N. C. Duke University Press, Durham, 1966).

²⁶⁰For Martin Lau, Jinnah though a jurist, did not give a clear vision of the constitution of the new state. See M Lau, Pakistan: before 1947, in, Kazim Hassan et al. (ed), *Law in a World of Change: Selected essays in memory of Justice Sabihuddin Ahmed* (Pakistan Law House, Karachi, 2012) 167, 195.

²⁶¹L Binder, *Religion and Politics in Pakistan* (Berkley: University of California, 1963) 103.

community had the right to rule, but through believers of Sharia and un-believers were not allowed to influence state policy. At the same time there was an *amir* (ruler), advisory council, and ‘limited government’ by elected representatives.²⁶² Readers will see these ideas common to the understanding of Cornelius collective comprising Hamoodur Rahman, A.K. Brohi, Sharifuddin Pirzada, and Khalid M. Ishaque. Opposition to this project is ‘secular’ Munir and Kayani but within liberal tradition. Sharifuddin Pirzada wrote in 1995 that Mouddodi relied on his book to challenge the banning of Jamaat-e-Islami in the *Mouddodi case*.²⁶³

Actual opposition to Ayub since 1958 came from the National Awami Party, which was an alliance of communists and nationalists. These two forces were resisting the state-building project of the juridico-bureaucratic structure as we have already discussed. So in the *Siraj Pitwari case*, the Cornelius court failed the test of fundamental rights as the attack was on the constitutional design and BD system. Chief Justice Cornelius and Justice Hamood-ur-Rahman of the Supreme Court defended the Basic Democracy (BD) system, while Chief Justice Murshad of the East Pakistan High Court reflected the unrest of East Pakistan. The division of provincial and legislative powers in the BD system and the executive were the issue in the *Sirajul Haq Patwari case* in East Pakistan High Court in 1965.²⁶⁴ Chief Justice Murshad of the East Pakistan High Court made clear the separation of central and provincial powers in the 1962 constitution and argued that the Act of 1965 transgressed these powers. He relied on the *Fazlul Qauder Chowdhry* case and exercised the power of judicial review. The court decision strongly protected provincial autonomy. In an appeal in 1966, the Supreme Court of Chief Justice Cornelius reversed the judgment.²⁶⁵

I agree with the Newberg that, “when the court took on Ayub Khan, it was for his transgression of private rights, not the organization of his state”.²⁶⁶ But one can add that both of these are not separate, for we keep emphasizing ‘more rights’ in exchange for the lack of democracy. The Cornelius tradition of judicial review and rights discourse proved antithetical to the notion of a broader and deeper popular democracy, which could not accommodate other, small and oppressed nationalities. Actually, the Islamic ‘national’ spirit of Cornelius and his ‘collective’ could not accommodate the nature of contradiction involved in politics of suppressed nationalities. Justice Murshad resigned on 6 January 1967. Ayub received his resignation through the law minister and commented that he was brilliant but ‘impulsive and unstable’ and that he was very doubtful from the beginning of his success as a Chief Justice of East Pakistan.²⁶⁷ Later, Chief Justice Murshad entered

²⁶²Binder, *supra* note 261, 91.

²⁶³See the preface of the second edition in 1995, in, SS Pirzada, *Evolution of Pakistan* (Royal Book Company, Karachi, 1963).

²⁶⁴*Sirajul Haque Patwari v Sub-divisional Officer, Chandpur*, PLD 1966 Dacca 331.

²⁶⁵*Province of East Pakistan v Sirjul Haq Patwari*, PLD 1966 SC 854.

²⁶⁶Newberg, *supra* note 90, 101.

²⁶⁷Baxter, *supra* note 138, 45.

Bengali politics and participated in the negotiations of the independence of Bangladesh.

A further test came for the Cornelius court in the *Roshan Khan* case.²⁶⁸ Here, once again, the court was to decide between public order and individual rights. Chief Justice Cornelius was of the opinion that if a bona fide arrest is made, there is no question of individual rights and judicial review. Justice S.A. Rahman thought that executive action should be within constitutional and legal confines. Justice Hamood-ur-Rahman and Justice Kaikaus dismissed the case. Herein, the court hardly passed its own test established in the *Moudoodi* case.

But the judiciary failed the test in the *Malik Ghulam Jilani* case.²⁶⁹ Ayub signed the Tashkent Declaration with India after the 1965 war. The opposition protested and arrests were made. The Lahore High Court considered police action justified in light of concerns of public order. The Supreme Court also upheld detention to prevent disturbance in public order but found the Lahore High Court's approach restrictive, as it should have looked into the reasonableness of the government action. The decision in the *Shorish Kashmiri* case²⁷⁰ upheld its right to review executive actions that are arbitrary, unguided and uncontrolled. Two points are worth mentioning here, one that Shorish Kashmiri was a right wing anti-communist like Moudoodi of Jamaat, and secondly, Chief Justice Cornelius had now retired. Ayub's protective constitutional structure was deteriorating with his downfall.

Again in the *Agarhala conspiracy* case, the judiciary was tested around nationality politics. Mujeeb-ur-Rahman (who was leading the movement for Bangladesh), was accused of revolting and was taken into custody under DPR, along with 35 other individuals. Ayub's intention was to try such people under Court Martial. Ayub immediately called General Yahya and informed him that DPR had been destroyed by the Supreme Court at the behest of Cornelius, and Yahya should take them in military custody lest the High Court will let them go.²⁷¹ No one was convicted as the trial was not completed after Ayub Khan resigned. Mujeeb was tried by a special tribunal, headed by Chief Justice S.A. Rahman, and Chief Justices M. Khan and Muksumul Hakim of East Pakistan. The making of this tribunal under the 1968 Special Criminal Law Amendment (Special Tribunal) ordinance was challenged in High Court and refused.

The judiciary also supported Ayub in this most aggressive anti-communist act after the *Pindi Conspiracy* case. In the *Mian Iftikhar-ud-din* case, the Progressive Papers Ltd (PPL), a privately owned newspaper, was led by left-leaning socialists including landmark writers like Faiz Ahmad Faiz, Syed Sibte Hassan and Ahmad

²⁶⁸*The Government of Pakistan v Mrs Rowshan Bijaya Shaukat Ali Khan* PLD 1966 SC 286.

²⁶⁹*Malik Ghulam Jilani v The Govt of West Pakistan*, PLD 1967 SC 373.

²⁷⁰*The Government of West Pakistan. Begum Agha Abdul Karim Shorish Kashmiri* PLD 1969 SC 14.

²⁷¹Baxter, *supra* note 138, 203.

Nadeem Qasmi.²⁷² The government removed the owners and director of the newspaper on the ground of 1952 Security of Pakistan Act.²⁷³ The High Court accepted the order of the Govt under the *Dosso* case and *Mehdi Ali Khan* case.²⁷⁴ S.M. Haider, being the main proponent of Cornelius' tradition of rights, accepted that the doctrine of natural justice "lost its prestine vigor" in this case.²⁷⁵

Newberg's analysis is worth summarizing to properly evaluate the rights discourse under Chief Justice Cornelius and later in a brief period of Chief Justice S.A. Rahman. For her, it was a mixed bag of decisions oscillating between judicial reviews of constitutional rights and accepting state limits on politics. Chief Justice Cornelius did not go beyond constitutional limits while defining natural rights. S.A. Rahman was more into positive rights and judging the law by its letters. On the civil liberties front, Cornelius was in favour of the Frontier Crimes Regulations, which were ruthlessly used by Ayub to suppress opposition, particularly for the nationalists and the communists in National Awami Party—NAP. Similar provisions were in the Criminal Code of West Pakistan. This means that rights protections and procedures are not guaranteed if not applied fairly.²⁷⁶

The analysis so far tried to establish how the debate and liberal analyses around the rights discourse in these cases hides the politics behind them (by omitting any analysis of class formations and class struggle), but also obscures what is going on with state apparatuses and their politics.

Chief Justice Cornelius's position on rights can also be understood from his speeches.²⁷⁷ He criticized the universality of the United Declaration of Human Rights (UDHR) and its authoritative form and found that some of its Articles were explosive.²⁷⁸ He rejected Article 21 of the UDHR, which declared the will of the people as the basis of authority of the government and this will is only made possible through free, secret voting in periodic general elections. Cornelius's objection to this was its validity as a human right being questionable and that people could be and had been happier and well governed under other modes of governance than democratic systems. He objected to the fact that the UDHR ignored a nation's right to choose its own form of government and ideologies

²⁷²Here again, Newberg (1995) did not comment on this ideological position of the newspaper and just mentioned that its publications were outspoken and against the government.

²⁷³*Security of Pakistan (Amendment) Ordinance*, 1959 (XXIII of 1959), *Security of Pakistan (Amendment) Ordinance* 1961 (XIV of 1961).

²⁷⁴*Mian Ifkhar-ud-din v Muhammad Sarfraz*, PLD 1961 Lahore 842.

²⁷⁵Haider, *supra* note 207, 176.

²⁷⁶Newberg, *supra* note 90, 104.

²⁷⁷AR Cornelius CJSC (Ret, as he then was), Islam and Human Rights, in, Braibanti, *supra* note 104, 278. Address delivered at the Pakistan Academy for Rural Development, Peshawar, 8 November 1977.

²⁷⁸*Ibid* 280.

(political and economic).²⁷⁹ He went further and declared this type of democracy as divisive and in opposition to integration.²⁸⁰ Article 19 (freedom of opinion and expression), Article 13 (freedom to leave the country) and Article 14 (right to seek asylum) were also contentious for him. For him, these Articles were aversive to the concept of loyalty with country and community. In the Articles of the UDHR, Cornelius found “over-stress on the freedom of the individual citizen” at the price of the individual’s obligations to the state or nation to which he or she belongs.²⁸¹

Cornelius did not accept the U.S. human rights discourse. His view was that the inclusion of human rights in written constitutions was a local phenomenon of democracy and not necessarily based on the Magna Carta and the Bill of Rights of 1688 in England, for those were between kings and privileged nobles. Based on the work of A.K. Brohi, Cornelius made it clear that fundamental rights in the written constitution are meant to stop the interference of majority rule in individual matters, as the people are distrustful of legislative supremacy in newly independent countries. It seems that the greater rights in the hands of the courts were another form of stress on the already weak legislature, as in Pakistan.

As far as the relation of rights with popular democracy is concerned, the position of Chief Justice Cornelius is illustrative and very conclusive for our proposed analysis. It speaks for itself. For Cornelius, the rights in the constitution of newly independent countries like Pakistan are remedies “necessary for dealing evils that follow on each other, all stemming from the same source, namely, popular democracy”.²⁸² For him, democracy based on the social contract and participation in representative government was an illusion. He wrote, “[t]he price of democracy is partisan politics”.²⁸³ Cornelius is very clear that developing countries had shown that self-government per se is no substitute for good governance. He claimed further that good government cannot be assured under self-government but only under autocratic rule.²⁸⁴

In a nutshell, we can see that the rights discourse of Cornelius courts stood behind the nation-building project in postcolonial development. Due to his religious inclination, he stood for the rights of the Right wing opposition. His rights discourse failed when the rights of the oppressed nationalities were presented. After reading his views on rights, we can see that he places rights above popular democracy. This is done under the veneer of Islamism. Let me show more closely the manifestation of Islam with a controlled liberal democracy. This way we can understand the rights discourse as a stopgap remedy for a democratic deficit. Let us add another cultural layer to this formation.

²⁷⁹*Ibid* 283.

²⁸⁰*Ibid* 281.

²⁸¹*Ibid* 283.

²⁸²*Ibid* 287.

²⁸³*Ibid* 288.

²⁸⁴*Ibid* 291.

2.10.4 *Islam and Jirga System in Nation-Building*

The nation-building project under modernization in post-colonies lacked the cohesion that underpinned the West during the Industrial revolution.²⁸⁵ To create this cohesion, Cornelius, in line with Liaquat's Objectives Revolution,²⁸⁶ used Islam. In order to accommodate local hierarchies, the Jirga (in the North West Frontier Province) or the Panchayat (in Punjab-Sindh) was kept intact. This is the judicial system Cornelius had in mind under the Basic Democracy system. It is best illustrated in his essay about giving judicial responsibility to the people.²⁸⁷ He concluded that the best arrangement would be a mix of the Jirga system and Islam.

First of all, he appreciated communal or village courts as they could dispose of cases without any expense and enforce a solution that was purely punitive or a deterrent. Imprisonment was needed only in cases of serious nature or public danger. He complained that British colonizers took away this judicial responsibility of the people suddenly, rather than in stages, as had been the case in England. Later, political responsibility was returned, though only partially, in the Reforms Act of 1919, but judicial responsibility was never returned to the people of India, for instance, the jury system was never tried in India.²⁸⁸

Ayub's Basic Democracy system, for Cornelius, was the only attempt made to return justice to the people.²⁸⁹ Cornelius found an 'indigenous' justice system in the Panchayat system, which offered a design of a controlled democracy. He appreciated the Jirga system in the Northwest Frontier Crimes Regulation, which he had appreciated seven years earlier in the *Dosso case*.²⁹⁰ At that time he valued the patriarchy in the Jirga system and kinship system as leading to less juvenile crimes. Similarly he found that "there are restraints imposed upon the freedom of behavior of women, which are effective to lessen the need for law to intervene for the purpose of checking excesses by both".²⁹¹ He admired the work of British legal

²⁸⁵Modernization was an imperialist project, while Enlightenment modernity was an indigenously European project, and contributed to the expansion of European colonization of Asia and Africa.

²⁸⁶The Objective Resolution was a part of the preamble of the Constitution and could not control the constitution. Later Zia made this Objective Resolution as the part of the constitution.

²⁸⁷Cornelius, *supra* note 31, 11.

²⁸⁸*Ibid.*

²⁸⁹*Ibid.*

²⁹⁰He gave the example of the Frontier Crimes Regulation enacted in 1872 by British deriving its history from Sir Olaf Caroe's book, "The Pathans".

²⁹¹AR Cornelius (1965) CJSC, Crime and the Punishment of Crime, in, Braibanti (1999) 249, 259; speech delivered at the Third Commonwealth and Empire Law Conference in Sydney, Australia 27 August 1965.

commissions to codify these laws.²⁹² But, the critique of Cornelius remained, namely that the justice system was imposed upon the people and “did not derive from the life of the people themselves”.²⁹³

Rather than looking at the culture of his own country and its people, he saw the roots of culture in the ‘universality’ of Islam and hence the Middle East.²⁹⁴ He confused the concept of Islam with that of culture. His quest for the roots of the culture led him to “the external source of all legality”, that is, *wahdat* (oneness of God) and Islam,²⁹⁵ as opposed to his own claim of the law as growing out of the society, he found the sources of Muslim Common Law (Sharia) in ‘advanced’ middle Eastern Countries. The Iraqi ambassador pointed him to *Mujallah* and gave a copy. Cornelius started translating it in English.²⁹⁶ This was an effort of the Turkish Sultans in the nineteenth Century to frame a general law of the Empire on the lines of the Napoleonic Code of France. *Mujallah* was abolished after the secular revolution of Atta Turk. Cornelius thought that this spirit was the basis of *Sharia* and was uncommon in our law as it was based on British Common law.²⁹⁷ He went to the extent of favouring the amputation of hands as a deterrent, which according to him, could be done with a small surgery instead of by cutting the hand. He appreciated the Saudi system of criminal justice administration on the ground of deterrence. He also advocated the Jirga system, amputation, and Zakat.²⁹⁸

On the other hand, the Jirga system, for Braibanti, was a blending of the elite and popular will and spheres of juridical norms.²⁹⁹ The Frontier Crimes Regulation of 1901 was not a ‘return’ to simple tribal justice, but according to Braibanti, the “institutional and normative adjustment” of tribal law and British criminal law.

²⁹²Communal courts, for him, were not at all organized. They worked in highly irregular fashion, and the conception of laws administered in these courts was not great. Four British law commissions were made with British personnel from 1834 to 1879 to codify these laws. He admired the work of British jurists who for 200 years had endeavored to figure out how the system should work. Cornelius, *supra* note 31, 8, address delivered at a gathering of Military officials at G H Q, Rawalpindi on 11 July 1962.

²⁹³*Ibid.*

²⁹⁴Cornelius, *supra* note 291, 249, 262, 63; speech delivered at the Third Commonwealth and Empire Law Conference in Sydney, Australia 27 August 1965.

²⁹⁵Justice Cornelius (1963) CJSC, *supra* note 23, 13.

²⁹⁶AR Cornelius, The *Mujallah*: Forward and the Hundred Maxims Rendered into English, *PLD* (1966) Journal Section 49, later Nasim Hasan Shah appreciated him as a highly developed legal system see NH Shah, *Mujallah* and its For-runners, *PLD* (1966) Journal Section 104.

²⁹⁷AR Cornelius (1968), Paramountcy of Islam: The Example of Majelle (*Mujallah*) of Turkey, in, Braibanti (1999) *supra* note 61 272, addressing the Karachi High Court Bar Association Dinner, 15 February 1968.

²⁹⁸AR Cornelius (1969) CJSC (Ret, as he then was), A Plea to Introduce Zakat, in, Haider, *supra* note 110, 360. Address in Peshawar, 2 May 1969.

²⁹⁹He based his opinion on the work of JND, Anderson, LC Green, and SA de Smith, The Frontier Crimes Regulation of 1901 was not a “return” to simple tribal justice, but according to Braibanti, “institutional and normative adjustment” of tribal law and British criminal law. Here normative content is more western than tribal. See Braibanti, *supra* note 104, 95.

Here, normative content is more western than tribal. One of the problems of a written constitution based on western values for nation-building was its confrontation with indigenous values.³⁰⁰ This grafting of Islam onto the justice system paved the way for a state-Islamization by Zia in the 1980s and onward.³⁰¹

Apart from this, did Cornelius really want to return justice to people? His slogan of “Justice of the People, By the People, for the People”³⁰² seemed a counter narrative of ‘judicial democracy’ as opposed to ‘people’s democracy’. He placed judicial conscience above social and political conscious. Rejecting political conscious meant individual rights ranked superior to political and economic rights (rights of the people).³⁰³ To make this proposition clearer, he stated in another speech that the law is made by the Legislature or Ordinance, but “it is only in the hands of Superior Judges, that such a rule takes the *authentic shape*, which is the hall-mark of *pure law*.” [my emphasize]³⁰⁴ But how do judges decide and where are the people in this picture? People only come, for him, as clarifying commercial, social, public interests in courts, then a spark from the light of God while delivering judgment as a manifestation of Divine purpose of the Universe. For him, fundamental rights in 1962 Constitution on *American pattern* were “for the implementation of the whole principles of the *Objectives Resolution*.” [my emphasis].³⁰⁵ He felt sorry that in Pakistan’s superior courts, judges were facing hundreds of cases of fundamental rights but they did not understand them in the lights of Holy Scriptures of Islam. In that sense there is a conflict between foreign interpretation of these FRs and their true interpretation according to the dictates of Islam.³⁰⁶ As opposed to foreign countries like U.S., who use in the expression ‘moral responsibility’ to differentiate it from natural justice which is based on religious conscience, Cornelius used natural rights theory.

To sum up Munir (1950s) and Cornelius (1960s) CJ courts, analysis in this chapter tried to debunk the famous liberal position that Cornelius CJ defended democracy and rights as opposed to Munir CJ. Analysis tried to show how Cornelius was against popular democracy and favoured of a very controlled democracy with a strong presidential system and limited electorate under BD

³⁰⁰*Ibid.*

³⁰¹Braibanti (1999) found it a process that was “relatively insulated from politics.” But we will see how this tradition continued as a part of juridico-bureaucratic structure.

³⁰²AR Cornelius CJSC, Justice of the People, By the People, for the People, *PLD* (1963) Journal Section 39, speech delivered at dinner meeting of the Rotary Club, Karachi, on 2 April 1963.

³⁰³Cornelius, *supra* note 302, 43; speech delivered at dinner meeting of the Rotary Club, Karachi, on 2 April 1963.

³⁰⁴AR Cornelius CJSC, Objectives Resolution and Duty of Man of Law: Need to Expand Law according to the True Philosophy of Pakistan, *PLD* (1965) Journal Section 45, Inaugural address at second law conference of SM Law College Karachi, 11 March 1965.

³⁰⁵Cornelius, *supra* note 304, 47, Inaugural address at second law conference of SM Law College Karachi, 11 March 1965.

³⁰⁶Cornelius, *supra* note 304, 49, Inaugural address at second law conference of SM Law College Karachi, 11 March 1965.

system. In this political formation, strong emphasis on rights is to address this democratic deficit. In the presence of a weak legislature, the judiciary's use of Islam as law in the name of Sharia and right of its interpretation above legislature added to this democratic deficit. Cornelius also included the patriarchy of Jirga system in his political and legal formation. To counter the pressure of land reforms and nationalist cum socialist forces, an alliance of Muslim clergy and feudals under Liaquat Ali Khan in the form of Objectives Resolution finally adopted an intellectual political discourse in the leadership of Cornelius. But this use of Islam led to confusion as per Munir CJ.³⁰⁷ Cornelius' tradition had to be defensive in the face of rising socialism after the overthrow of Ayub in 1968 but it strongly continued under Chief Justices S.A. Rahman, Hamoodur Rahman and leading jurists like A.K. Brohi, Sharifuddin Pirzada, and Khalid M. Ishaq. I call this Cornelius collective. Resisting and overthrowing Bhutto in the 1970s, this tendency got an official legal and constitutional position under Zia dictatorship when parliamentary democratic constitution of 1973 was turned into a presidential one and the Objectives Resolution became the substantive part of the constitution along with other Islamization clauses (details to be followed in the next chapter). Later in the 1980s and 1990s, CJs Anwar, Haleem, Afzal Zullah, Nasim, Ajmal continued this quasi-liberal tradition. We saw that Munir and Kayani CJs, though gave decisions against legislature and fundamental rights, yet they were secular and liberal. As a whole, Munir and Cornelius CJs were within the liberal tradition of law standing together against socialist modernization, popular democracy, and deeper and broader participation of masses. Both of these CJs and the courts under them worked with the civil-military bureaucracy in advancing the hegemonic project of capitalist modernization. That is why I call it juridico-bureaucratic structure. But this project failed to stop popular participation and made modernization theorists like Huntington to re-evaluate the role of law in political development.

2.11 The Collapse of Modernization and Revisiting the Role of Law

For liberals, one of the many reasons for the downfall of Ayub was the inter-elite conflict.³⁰⁸ As a whole, there were three problems with Ayub's modernization that led to its collapse: (1) The concentration of wealth as patronage was confined to industrialists; (2) Benefits only went to big landlords, and; (3) Ayub did not

³⁰⁷Munir, *supra* note 16, 50, 113.

³⁰⁸R La Porte, Succession in Pakistan: Continuity and Change in a Garrison State, 1969 *Asian Survey* 835, see F Ahmed, Structure and Contradiction in Pakistan, in, K Gough and H Sharma (eds) *Imperialism and Revolution in South, Asia* (Monthly Press Review, New York, 1973) 179, as cited by Waseem, *supra* note 6, 223.

accommodate the new middle classes in the political process.³⁰⁹ As far as inter-elite struggles are concerned they are not violent and mostly take legal and constitutional forms. This is always only a situation that weakened the unity of the hegemonic bloc of the dominant classes and make possible for the subordinate classes to exert themselves. Ayub's policies, such as that which promoted the Green Revolution, resulted in growing class conflict. The rural inequality in terms of availability of cash, agricultural inputs, tube wells and tractorization was more visible and widespread as only the big landlords could afford these resources but not small farmers. The urban inequality was far greater than the rural one in real terms, at least in the industrial sector. The green revolution changed the landscape of social formation and gave birth to new subordinate classes, which changed the political landscape. Ayub's industrial policy was completely for industrialists, thus against workers. He brought forth the Industrial Dispute Ordinance, 1959, which made strikes impossible in public utility (sugar mills, textiles and many other sectors were included in the public utility). Instead of neutral labour courts having jurisdiction in industrial disputes, employer's representatives were made to sit on tripartite principle (employee and employer's representatives and a chairman). Above all, labour union leaders had no immunity from termination. These repressive policies resulted in the working class joining hands with students and un-employed, creating a major force against Ayub.³¹⁰ But the most vocal in these unrests were lawyers along with students. For Braibanti, the legal community was probably the most powerful elite group, outside government services in Pakistan.³¹¹ He wrote, "[a]t the pinnacle of prestige were the barristers who studied in England at one of the Inns-of-Court".³¹² The community also had "close identification with the ideology and techniques of modernization".³¹³ Another source of strength of the legal community was that most of the leading political leaders, including H.S. Suhrawardy of East Pakistan, Khan Abdul Qayyum Khan of the Frontier province, Mian Mumtaz Daultana and Mahmud Ali Qasuri were lawyers. Later in the country's development, however, it was possible to have too many lawyers in politics and hence the "consequent disproportionate emphasis on legal modes of thought as antithetical to the needs of development".³¹⁴

Cornelius advised lawyers to stay away from politics. He gave an example of England, that those lawyers who are political were a class apart and fewer in numbers there.³¹⁵ Comments by the Bar Association on political matters irked Chief

³⁰⁹Burki (1980) as cited by Waseem, *supra* note 6, 223.

³¹⁰Mohammad, *supra* note 14, 265, 272, 274.

³¹¹R Braibanti (1963), The Socio-Judicial Context of the Cornelius Era – 1950-70, in, Braibanti (1999), *supra* note 58, 108, 113. This essay was first published in Braibanti, *supra* note 108.

³¹²*Ibid* 115.

³¹³*Ibid* 119.

³¹⁴*Ibid* 118.

³¹⁵AR Cornelius, Unity of Lawyers in Essential Function of Law, *PLD* (1965) Journal Section 55, 56.

Justice Cornelius.³¹⁶ The erstwhile ‘democrat’ against Ayub, Chief Justice Kayani, had contempt for the bar vis-à-vis administration and bench because only the CSP had the right to rule in Pakistan in his proposition.³¹⁷ As opposed to this, S.M. Murshed, CJ East Pakistan High Court, though was in favour of the judiciary being granted an important position in regards to constitutional interpretation, yet warned against mistakes that the judiciary could make in this process. To correct this, he stressed the need of an active role of resistance by lawyers.³¹⁸ Ayub was also annoyed with the legal profession, which he found ‘overmanned’ but producing poor material.³¹⁹ He looked at the judges from a military perspective.³²⁰ He selected three judges out of 11 and found practicing lawyers impressive, but session judges a poor lot. He wanted ‘justice’ instead of courts of law.³²¹ Supreme Court Chief Justice Fazal-e-Akbar requested and asked Ayub to give administrative powers to the Supreme Court over High Courts as High Courts were delaying decisions, granting stay orders automatically, even on false allegations about works on projects, leaving Fazal-e-Akbar helpless. Ayub told Fazal-e-Akbar that he wanted to grant these powers at the time of framing the constitution but ‘legal pundits’ found it against the independence of judiciary. Ayub then said that he made a supreme judicial body, which judges were reluctant to use. They would imprison and hang other people but dare not lift a finger against each other.³²² Before swearing in Supreme Court Chief Justice Hamood-ur-Rahman, he had separate talks about discipline in courts and bureaucracy, and about the language of Article 98 of the constitution, which gave unlimited powers to the courts. Ayub wanted to deal with it by legislation, otherwise he argued there would be utter lawlessness. But the cabinet advised him not to do so and to rather use security acts and provincial detention laws.³²³

Ayub was frustrated with lawyers because he argued that as a class they were ready to listen to any nonsense.³²⁴ It was observed that the lawyers’ role as gentlemen pursuing justice was no longer possible. The legal profession was close to a business and for some people was a ‘dying institution’.³²⁵ Chief Justice Anwar

³¹⁶AR Cornelius, Speech at Annual Dinner of High Court Bar Association, PLD (1969) Journal Section, 107, 110. Addressing Karachi High Court Bar Association on June 1964, in R Braibanti, The Socio-Judicial Context of the Cornelius Era – 1950-70, in, Braibanti, *supra* note 104, 123. This essay was first published in Braibanti, *supra* note 108.

³¹⁷MR Kayani, Not the Whole Truth, in, Kayani, *supra* note 179, 12, 28, 35, 124, 30, 141.

³¹⁸SM Murshed Justice East Pakistan High Court, PLD (1964) Journal Section 81, 84, Speech delivered at the full Court Reference on 15 May 1964.

³¹⁹After interviewing judges for the West Pakistan High Court, See Ayub Khan Diaries, *supra* note 105.

³²⁰Talking to the Lahore High Court Chief Justice Inamullah 1965-67, See Baxter, *supra* note 138.

³²¹Addressing West Pakistan High Court Centenary by reception of HCBA, See Baxter, *supra* note 138.

³²²Baxter, *supra* note 138, 264.

³²³Baxter, *supra* note 138, 284.

³²⁴Response to Bhutto’s speech, see Baxter, *supra* note 138, 282.

³²⁵W Farooqi, Dimensions of the Legal Profession, XX PLD (1968) Journal Section 73, 78.

ul Haq found that lawyers predominantly defended the established order, as their principal clients were mostly individuals with property or corporate owners.³²⁶ On the opening ceremony of the High Court building, Ayub repeated the slogan that the rule of law and independence of the judiciary was not an issue but what was real was the suffering of the people due to the legal system. After the ceremony, the Chief Justice accepted that the legal profession had become sordid, and proposed an idea to appoint a legal advisor to guide litigants at the union council level. Ayub liked the idea but thought that lawyers would become further alienated from him.³²⁷ What was Ayub's explanation?

Amjad Ali told Ayub that the problems he faced were due to the lack of inclusion of the intelligentsia and rising prices. Ayub responded that prices seemed comparable with other countries, whereas the intelligentsia did not feel participation without a direct vote.³²⁸ This seems nuanced and compatible with the above analyses to understand political development and reflected the analyses in those days of dying capitalist modernization. The crux was popular participation and its expression under socialist modernization, which capitalist modernization under Ayub could not control. All the key commentators: Huntington, Braibanti, Cornelius and even Ayub, were aware of this. This realization is the key to understand the current emphasis of the centrality of law by good governance paradigm of the World Bank and institutionalists.

Law as a part of the modernization project³²⁹ was in infancy when modernization came under crisis. This cast doubts on the role of law to the extent that Manzor asked "Is law dead?"³³⁰ This raised concern about the role of law in political and economic development in Third World countries and hence demanded a social theory of law. Trubek's diagnosis was that the Eurocentric evolutionism and generalization in theory behind liberal legalism was a reason behind this fall.³³¹ Connected to this, according to him, was the creation of a strong central state under liberal legalism in modernization and the wish to govern social life by purposive rules.³³² For Trubek, this is statist legal instrumentalism, looking towards bureaucratic-administrative entities. He concluded that the economy and polity merged together to some extent in a developmental state. Law in an authoritarian regime for him is not supportive of democracy, rather the opposite. It resulted in the

³²⁶S Anwar-ul-Haq, Role of Law in a Developing Society, in, Anwar-ul-Haq, *supra* note 28, 96.

³²⁷Baxter, *supra* note 138, 258.

³²⁸Baxter, *supra* note 138, 93, 297.

³²⁹Trubek has cited an extensive list of the work in this area of law and development. Trubek, Towards a Social Theory of Law: An Essay on the Study of Law and Development, 82:1 The Yale Law Journal (1972).

³³⁰Manzor, The Crisis of Liberal Legalism 81, Yale Law Journal 1032 (1972) as cited by Trubek (1972), *ibid*.

³³¹*Ibid* 1.

³³²As far as the relation of law and political development is concerned, he is convinced that the core conception is based on D Apter, *The Politics of Modernization* (1965) and S. Huntington *Political Orders in Changing Societies* see Trubek, *supra* note 329, 35.

legalization of politics and politics came in the hands of the specialized elite. As opposed to this type of functionalism, Trubek suggested that legal purposiveness itself is not enough to explain the relationship between law and politics.³³³ So we need varying degrees of purposiveness in law and hence pluralist legal instrumentalism, which should be more competitive and representative. Trubek correctly critiqued the functionalism of Parsons, and the problems of liberal legalism. But to accommodate increasing competitiveness and representation does not solve the problem. It seems that the problem identified by Trubek that the law stops representation—was found as a solution by institutionalists in the aftermath of collapsing modernization. Let me expand this argument.

Furthermore, the argument this book wants to advance is that the ‘institutionalism’ (particularly legal institutions) came as a response to failed modernization and the consequences of increasing political participation. The behavioural aspect of institutions was brought to functionalism to deal with the crisis of excessive participation. Based on Huntington’s approach,³³⁴ Braibanti was worried about the declining role of law in modernization project.³³⁵ He argued political development treated the law in its institutional aspect and did not try to find functional or behavioural schools of jurisprudence. He did not agree with the dichotomy between institutions and functions and thought institutions perform functions and affect behaviour. There was a need for institutions as was emphasized by Huntington. For Braibanti, the decline of institutional study and importance of law was due to the expansion of political participation and popular sovereignty, which relies on extra-legal norms.³³⁶ He accused social scientists of devaluing law through their involvement in social activism and physical agitation called ‘confrontation politics’ for immediate change. For him “agitation minimizes and eventually corrodes the vitality of law and institutions”.³³⁷

The suppression of popular sovereignty and the restructuring of the center-periphery relation of Pakistan were the focus of Ayub’s reforms. For this, as I have explained, he relied on controlled democracy and controlled participation. Ayub also noted that the attempt to bridge the gap between the state and society through the Basic Democracy system did not work. He wanted the science of social

³³³Trubek, *supra* note 329, 37.

³³⁴Braibanti also claimed that Huntington (who in turn used the criteria of Ward and Rustow, Emerson, Pye, and Eisenstad) is behind his analysis, see R Braibanti, The Role of Law in the Political Development of Pakistan, in, Braibanti, *supra* note 104, 82, 90, See Also SP Huntington. Political Development and Political Decay, XVII *World Politics* (1965) Journal Section 386.

³³⁵*Ibid* 84.

³³⁶In spite of the efforts of John Commons and Wesley Mitchel, Old Institutional Economics was a marginal theory until the 1960s. Until this time, Marxism and institutionalism were totally hostile. Kirsten Ford, “The Veblenian Roots of Institutional Political Economy”, Working Paper No. 2011-07, Department of Economics Working Paper Series, University of Utah, 11.

³³⁷R Braibanti (1968), The Role of Law in the Political Development of Pakistan, in, Braibanti, *supra* note 104, 82, 87.

behaviour to develop first.³³⁸ Social restraints are deeply embedded in habits of the people in accepted social arrangements. He correctly referred to these social arrangements as ‘institutions’. For him, “[h]abits of thought and conduct are the most stubborn obstacles to development”.³³⁹ What can give stability in the meanwhile? For him, it was the constitution, law and the Supreme Court. He accepted that he could have lifted the emergency after the 1965 war was over and particularly after the judgment of the Supreme Court to insist on scrutinizing the emergency laws. He did not follow the courts and there emerged the rights cases as we discussed above. For Ayub, the Constitution was amended so that there was no need of Martial Law and emergency laws could be enough. Ayub thought about this but the law minister insisted on amending the law rather than the constitution, so the Supreme Court struck down those laws.³⁴⁰ The political situation did not let Ayub amend the constitution, as the members of the parliament were scared of victimization and terrorization of agitators.³⁴¹ The point I want to make is that Ayub shared the same values and approach as that of Cornelius towards the citizenry. The difference was that Cornelius believed in conditional individual liberty to avoid social unrest, which Ayub did not understand.³⁴²

Braibanti called the problem of popular will and its accommodation in modernization the ‘demand-conversion crisis’.³⁴³ This needed a demand-diversion method. Some of this adjustment could be found in law and legal institutions. The political system tried to create ambiguity to blunt the demands of the presidential and parliamentary system in Pakistan and to create ambiguity around detention laws. The judiciary tried to decrease the ambiguity and helped the political system to adjust to demands. But, Braibanti was not sure how the law could increase or decrease ambiguity. Furthermore, the natural justice approach of the law as applied by the Pakistani judiciary helped in silencing these demands. In that sense, the political system is like a 12-cylinder engine with noisy tappets and a gummed-up cylinder and the natural justice approach of law is like foam on it, covering those noises, “quieting the noises and smoothing the ride”.³⁴⁴ Braibanti was scared of the risks of artificially removing law from its contextual tissues in this process. The reason behind his doubt could be that law, as a means of social change and engineering, had not yet been set up. The Law and Society Review had not yet

³³⁸Baxter, *supra* note 138, 93, 129, 297.

³³⁹Baxter, *supra* note 138, 93, 297, 322.

³⁴⁰This was the background of most of the “rights” cases in the Cornelius Courts.

³⁴¹Baxter, *supra* note 138, 93, 297, 331.

³⁴²Interestingly, after his downfall, Ayub realized that he could have accepted the idea of civil liberties, see Baxter, *supra* note 138, 93, 297, 331.

³⁴³Burki (1998) also found that the 1960 s development created a divide deepening between the social and political realms, giving birth to a crisis of political participation. Ayub’s political engineering (BD system) narrowed the political base while allowing social and economic development see Burki, *supra* note 34, 57.

³⁴⁴R Braibanti (1968), The Role of Law in the Political Development of Pakistan, in, Braibanti, *supra* note 104, 82, 100.

started.³⁴⁵ My argument is that one should not assume the central role of law in this stage of modernization, but rather that it was the collapse of this phase of modernization led to the idea of using law and institutions to ‘prevent’ democracy. This was not clear to Braibanti at that time.

It is yet too early in the story to understand how legalism and institutionalism would pacify the rising lawyers and middle class in the years to come. In this chapter, I have argued that ‘institutionalism’ (particularly legal institutions) was a response to failed modernization. In the next chapter on the 1990s, we will see that institutionalism acted as a continuity of modernization in the age of globalization.

The analysis so far adheres to the view that the ethos of capitalist modernity (modernization in 1950–1960s) rested on an elitist democracy, which required controls on democracy. The law was a tool, only to support such capitalist economic and political (under) development. However, when capitalist modernization was challenged in postcolonial states in the 1970s, but the socialist bloc was also unstable, the architects of modernization theory now chose law (working through rules and institutions) as a response to the popular challenges. Capitalist modernization was to work through the imposition of legal, enforceable rules, where the spread of market economic and social values had failed. This was a new kind of modernization, which is pervasive to this day in our common understanding of the centrality of ‘rule in law’ in a democracy. Samuel Huntington and Douglas North were the architects of this new order.

With this background in mind, we will first show the place of law in the experiment of socialist modernity by Prime Minister Zulfikar Ali Bhutto in the 1970s. We will then see how the law was re-deployed upon the demise of popular aspirations for a deeper democracy.

References

- A Jalal, *Democracy and Authoritarianism in South Asia* (Sang-e-Meel Publications, Lahore, 1995).
- A Jalal, *Self and Sovereignty: Individual and Community in South Asian Islam since 1850* (Routledge, New York, 2000).
- A Jalal, *The State of Martial Rule: The Origins of Pakistan’s Political Economy of Defence* (Vanguard/Cambridge University Press, London/Lahore, 1991).
- A Ojo, The Search for a Grundnorm in Nigeria - The Lakanmi case, 20 *ILCQ* (1971).
- A Siddiq, *Military Inc.: Inside Pakistan’s Military economy* (Oxford University Press, Karachi, 2007).
- A Stepan, *The Military in Politics: Changing pattern in Brazil* (Princeton University Press, Princeton, 1971).
- AD Smith, Constitutional Law Years in Revolutionary Situations, 7 *West Ont L Rev* (1968).

³⁴⁵Nov 1966 saw the first issue, see R Braibanti (1968), The Role of Law in the Political Development of Pakistan, in, Braibanti, *supra* note 104, 82. This essay was originally printed as a chapter in RR Wilson (ed) *International and Comparative Law of the Common Wealth* (NC, Duke University Press, Durham, 1968). The writer has modified the title of this essay.

- BS Cohen, *Colonialism and its Forms of Knowledge: The British in India* (Princeton University Press, Princeton, 1996).
- C Baxter (ed), *Diaries of Field Marshal Mohammad Ayub Khan: 1966–1972* (Oxford University Press, Karachi, 2007).
- C Palley, The Judicial Process: U. D. I. and the Southern Rhodesian Judiciary, *Mod L Rev* (1967).
- D Conrad, In Defense of the Continuity of Law: Pakistan's Courts in Crisis of State, in, *of Pakistan and others*, PLD 1977.
- DA Washbrook, Economic Depression and Making of Traditional Society in Colonial India 1820–1855, 3 *Trans Royal Hist Soc* (1993).
- DC Engerman, N Gilman, MH Haefele & ME Latham (eds), *Staging Growth: Modernization, Development, and the Global Cold War* (University of Massachusetts Press, Amherst, 2003).
- DM Trubek, The Owl and the Pussy-cat: Is there a future of Law and Development, 25 *Wis Int'l LJ* (2007).
- F Fanon. *Black Skin, White Masks* (Grove Press, New York, 1968).
- F Fanon. *The Wretched of the Earth* (Grove Press, New York, 2004).
- F Mohammed, Protecting Pakistani Labourers Post-Eighteenth Amendment: Recognizing Rights after the Devolution of Power, 9:2 *Loy U Chicago LJ* (2012).
- F Robinson, *Separatism among Indian Muslims: The Politics of the United Provinces Muslims, 1860–1923* (Oxford University Press, Delhi, 1993).
- FM Brookfield, The Courts, Kelsen and the Rhodesian Revolution, 19 *University of Toronto Law Review* (1969).
- H Alavi & T Shanin (eds), *Introduction to the Sociology of "Developing Societies"* (Monthly Review Press, New York/London, 1982).
- H Gardezi & J Rashid (eds), *Pakistan: The Unstable State* (Vanguard Books, Lahore, 1983).
- H Jalal & K Hasan (eds), *The Politics of the People- Awakening the People, Vol. Two, 1966–69* (Classic, Lahore, 1969).
- H Khan, *Constitutional and Political History of Pakistan*, 2nd edn (Oxford University Press, Karachi, 2009).
- H Zaheer, *The Times and Trial of the Pindi Conspiracy Case 1951: The First Coup Attempt in Pakistan* (Oxford University Press, Karachi, 1998).
- HH Gerth & CW Mills (eds), *From Max Weber: Essays in Sociology* (Routledge/K Paul, London, 1970).
- JM Dawood, *The Role of Superior Judiciary in the Politics of Pakistan* (Royal Book Company, Karachi, 1994).
- KA Ali, Communists in a Muslim Land: Cultural Debates in Pakistan's Early Years, 45:3 *Mod Asian Stud* (2011).
- L Binder, *Religion and Politics in Pakistan* (University of California, Berkley, 1963).
- LA Khan, *Pakistan: The Heart of Asia: speeches by Liaquat Ali Khan* (Royal Book Company, Karachi 1989).
- M Ahmad, *Government and Politics in Pakistan* (Space Publishers, Karachi, 1970).
- M Hussain & A Hussain, *Pakistan: Problems of Governance* (Vanguard, Lahore, 1993).
- M Janowitz, *The Professional Soldier: A Social and Political Portrait* (Free Press, New York, 1960).
- SP Huntington, *The Political Order in Changing Societies* (Yale University Press, New Haven, 1968).
- M Kaplan, Panopticon in Poona: An Essay on Foucault and Colonialism, 10:1 *Cult. Anthropol* (1995).
- M Munir, CJSC (Ret, as he then was), *From Jinnah to Zia* (Vanguard, Lahore, 1979).
- M Munir, CJSC (Ret, as he then was), *Highways and Bye-ways of Life* (Law Publishing Company, Lahore, 1978).
- M Waseem, *Politics and the State in Pakistan*, 3rd edn (NIHCR, Islamabad, 2007).
- MA Khan, *Friends not Masters: A Political Autobiography* (Oxford: London, 1967).
- MKB Marri, CJBHC (Ret, as he then was), *A Judge May Speak* (Feroz Sons (Pvt) Ltd, Lahore, 1990).

- NH Chaudhry, *Chief Justice Muhammad Munir: His life, Writings and Judgments* (Research Society of Pakistan, Lahore, 1973).
- NH Shah, CJSC (Ret, as he then was), *Memoirs and Reflections* (Alhamra Printing, Islamabad, 2002).
- Oxford Essays in Jurisprudence*, 2nd series, (Oxford, 1973).
- P Chatterjee, *The Nations and its Fragments: Colonial and Postcolonial Histories* (Princeton University Press, 1993).
- PR Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge University Press, New Delhi, 1995).
- R Braibanti, *Chief Justice Cornelius of Pakistan: An Analysis with Letters and Speeches* (Oxford University Press, Karachi, 1999).
- RS Welsh, The Function of the Judiciary in a Coup d'état, 87 *SALJ* (1970).
- RWM Dias, Legal politics: Norms Behind the Grundnorm, 26 *Cambridge LJ* (1968).
- S Anwar-ul-Haq, CJSC (Ret, as he then was), *Revolutionary Legality in Pakistan* (Pakistan Writers' Co-operative Society, Lahore, 1993).
- S Toor, *The State of Islam: Culture and Cold War Politics in Pakistan* (Pluto Press, London 2011).
- Shahid-ur-Rehman, *Who owns Pakistan?* (Mr Books, Islamabad, 1998).
- SM Haider, *Public Administration and Administrative Law* (Law Times Publications, Lahore, 1973).
- SM Haider, American Constitution and Assimilation of Modern Legal Norms in Pakistan, *XLPLD* (1988) Journal Section, 121, 126.
- SR Khan (ed), *50 Years of Pakistan's Economy: Traditional Topics and Contemporary Concerns* (Oxford University Press, Karachi, 1999).
- SS Pirzada, *Quaid-i-Azam Muhammad Ali Jinnah: As a Lawyer* (Nazaria-i-Pakistan Trust, Lahore, 2000).
- TA Khan, *The Post-Colonial State in The Era of Capitalist Globalization: Historical, Political, and Theoretical Approaches to State Formation* (Routledge, New York, 2012).
- TKK Iyer, Constitutional Law in Pakistan: Kelsen in the Courts, 21 *Am J Comp L* (1973).
- WP Zingel, S Zingel & A Lallemand (eds), *Pakistan in the 80s: Law & Constitution* (Vanguard, Lahore, 1985).
- ZK Maluka, *The myth of Constitutionalism in Pakistan*, (Oxford University Press, Karachi, 1995).

Law, State and Inequality in Pakistan

Explaining the Rise of the Judiciary

Azeem, M.

2017, XVIII, 278 p., Hardcover

ISBN: 978-981-10-3844-0