

2010

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Bluebook Citation

Clark B. Lombardi, *Can Islamizing a Legal System Ever Help Promote Liberal Democracy?: A View from Pakistan*, 7 U. St. Thomas L.J. 649 (2010).

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ARTICLE

**CAN ISLAMIZING A LEGAL SYSTEM
EVER HELP PROMOTE
LIBERAL DEMOCRACY?:
A VIEW FROM PAKISTAN**

CLARK B. LOMBARDI*

I. INTRODUCTION¹

Over the past twenty-five years, academics have written a great deal about the relationship between Islam and democracy and between Islam and human rights. In the course of the scholarly discourse, debate has emerged as to whether the thickly liberal rule of law can survive in a society where the legal system is undergoing Islamization. Commentators can generally be divided into pessimists and cautious optimists. Pessimists suggest that, regrettably, Islamic values are essentially incompatible with the thickly liberal rule of law.² The cautious optimists disagree.³ Cautious optimists argue

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1. The research for this article grows out of an earlier research project whose findings were published in Clark B. Lombardi, *Islamism as a Response to Emergency Rule in Pakistan: The Surprising Proposal of Justice A.R. Cornelius*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 436, 436–65 (Victor V. Ramraj & Arun K. Thiruvengadam eds., 2009). Some of the passages in Section II of this article appeared first in that piece. The author thanks Cambridge University Press for permission to republish those passages and both the Carnegie Corporation of New York’s Carnegie Scholar’s Program and the University of Washington for support while doing new research. The opinions expressed herein are entirely the author’s own and not those of these organizations. The author thanks also John Bowen, Michael Feener, Ellis Goldberg, Jonathan Kang, Tayyab Mahmud, Feisal Naqvi, Victor Ramraj, and Arun Thiruvengadam for valuable comments as well as the staff of the *University of St. Thomas Law Journal* for thoughtful editing. All errors that remain are the author’s.

2. See, e.g., BERNARD LEWIS, WHAT WENT WRONG?: THE CLASH BETWEEN ISLAM AND MODERNITY IN THE MIDDLE EAST (Harper Perennial ed., HarperCollins 2003) (2002); Samuel P. Huntington, *The Clash of Civilizations*, 72 FOREIGN AFF. 22, 22–49 (1993). But see, e.g., Daniel Pipes, *Distinguishing Between Islam and Islamism*, CENTER FOR STRATEGIC INT’L STUD. (1998), available at <http://www.danielpipes.org/954/distinguishing-between-islam-and-islamism>. For an analysis of this type of literature, including discussions of other works, see Frédéric Volpi, *Politi-*

that the pessimists tend to define “Islam” in reductive terms—ones which correspond to the views of some Islamists, but certainly not all. Muslims embrace differentiated views of Islamic law, and some Islamists seem to see Islam as largely consistent with the liberal rule of law. If Islamization is led by this type of Islamist, the cautious optimists argue, it can be consistent with the rule of law. I have myself argued in favor of the cautiously-optimistic position, basing my position on the experience of Egypt. In that nation, the legal system underwent a process of constitutional “Islamization,” and to date, this development has not caused the liberal rule of law to diminish to any appreciable degree.⁴

A few optimists have suggested that a stronger claim might possibly be made: that under some circumstances, Islamization can actually help *strengthen* the thickly liberal rule of law.⁵ In this article, I will discuss an unlikely and particularly interesting proponent of this position. I will then describe the circumstances under which this thinker believed Islamization would have a liberalizing effect and will consider whether there is any evidence to support his position.

The thinker at issue is the eminent Catholic Pakistani judge A. R. Cornelius, who served on Pakistan’s Supreme Court during that country’s post-independence slide into authoritarianism and who died in 1991.⁶ Once skeptical about arguments that Pakistan’s law should be self-consciously measured against Islamic norms, Cornelius lived through the establishment of secular military dictatorship. As I will explain, he came to believe that

cal Islam in the Mediterranean: The View from Democratization Studies, 16 DEMOCRATIZATION 20, 22–24 (2009).

3. See, e.g., Nathan J. Brown et al., *Islamist Movements and the Democratic Process in the Arab World: Exploring Gray Zones* (Middle East Series No. 67, Carnegie Endowment for Int’l Peace & Herbet-Quandt-Siftung 2006); Mark Tessler, *Islam and Democracy in the Middle East: The Impact of Religious Orientations on Attitudes Toward Democracy in Four Arab Countries*, 34 COMP. POL. 337, 337–54 (2002). For commentary on this type of work and an identification of multiple, quite distinct strains within it, see Volpi, *supra* note 2, at 25–31.

4. As I have shown, the Egyptian legal system underwent a process of constitutional “Islamization” during the 1970s and ’80s, and to date, this development has not caused the liberal rule of law to diminish to any appreciable degree. See CLARK B. LOMBARDI, *STATE LAW AS “ISLAMIC” LAW IN MODERN EGYPT: THE INCORPORATION OF THE SHARI’A INTO EGYPTIAN CONSTITUTIONAL LAW* (Stud. in Islamic L. & Soc. Ser. No. 19, Brill Acad. Pub. 2006); Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Shari’a Threaten Human Rights? How Egypt’s Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT’L L. REV., 379, 379–435 (2006).

5. See, e.g., NOAH FELDMAN, *THE FALL AND RISE OF THE ISLAMIC STATE* 125 (2008) (noting the presence of optimists about the role of Islam who believe that “it has taken the Islamists . . . to get beyond the state-centered form of governance associated with corrupt executivism”); *id.* at 148–49 (suggesting that Islamism, “both as an actual set of historical practices and as a contemporary ideology, can provide the necessary resources” for the establishment of the rule of law in countries that have, in the modern era, been relentlessly autocratic).

6. For biographical information about Cornelius, see RALPH BRAIBANTI, *JUSTICE CORNELIUS OF PAKISTAN: AN ANALYSIS WITH LETTERS AND SPEECHES* 1–66 (1999); S.M. Haider, *Preface to A.R. CORNELIUS, LAW AND JUDICIARY IN PAKISTAN* 1–45 (S. M. Haider ed., 1981).

Islamization might be a necessary precondition for the reestablishment of the liberal rule of law in Pakistan.

In Part II, I give a brief biography of Cornelius. As I note, he is the most unlikely champion of Islamization that one could hope to find. Cornelius was a life-long Christian and zealous champion of liberal constitutionalism. A Cambridge-educated member of both colonial India and Pakistan's legal elite, Cornelius was appointed to the Supreme Court during a period in which the executive was beginning to aggrandize its powers at the expense of the legislature and, eventually, the judiciary. This process would lead eventually to the abolition of Pakistan's constitution and the installation of an authoritarian military regime. In a series of famous dissents and speeches, Cornelius resisted this trend. He consistently argued for the merits of liberal common law constitutional theory and, in particular, for the position that governments can never legitimately violate fundamental rights.⁷

In Part III, I discuss some trends that led the Catholic judicial liberal Cornelius to believe that Islamization, or at least a certain type of Islamization, might be a useful, even necessary, step toward re-establishing the rule of law in Pakistan.

In Part IV, I will analyze a number of speeches and articles that Cornelius wrote between 1960 and his death in 1991. In them, Cornelius argued that the only hope for re-empowering the Pakistani judiciary and, ultimately, for re-establishing the liberal rule of law was to be found in a process by which the judiciary and bar systematically made an "Islamic" argument for liberal democracy.

As I discuss in Part V, Cornelius's writings about Islam have, at least in recent decades, received little serious scholarly attention either in Pakistan or in the United States.⁸ No one has systematically asked whether the history of Pakistan or of other countries supports his hypothesis that in a country like Pakistan, the best hope for establishing a liberal judicial check

7. Cornelius was particularly famous, both in Pakistan and internationally, for a series of judicial dissents in the 1950s protesting the majority's decision to approve expansive claims to executive power. For a discussion of these dissents, see PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* 48–49, 61, 76–77 (Cambridge S. Asian Stud., Ser. No. 59, 1995); Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225, 1234–42 (1993). For a sense of the importance of these dissents in the minds of contemporary Pakistani champions of the rule of law, see Nasir Iqbal, *Disqualification Clause Doesn't Hit Musharraf*, DAWN (Karachi), Sept. 28, 2007, available at http://karachipage.com/news/Sep_07/092807.html#CJ. This article, from one of Pakistan's leading papers, describes the arguments on Sept. 28, 2007, before the Supreme Court of Pakistan during the so-called "Lawyers' Revolt," in which liberal lawyers challenged the expansive claims of power made by a military dictator. It recounts how the liberal President of the Supreme Court Bar Association is said to have described Justice Cornelius in oral arguments as "one of the most outstanding, dynamic and independent judges in the history of Pakistan" and urged them to make the choice to protect the principle of democracy which he characterized as a choice to follow Justice Cornelius. *Id.*

8. For an analysis of why this might be, see Lombardi, *supra* note 1, at 461–62.

on secular or Islamic autocrats might lie in a two-pronged program of supporting Islamization while, at the same time, actively pushing for a liberal interpretation of *Shari'a*. I will argue, however, that recent scholarship provides some provocative, though ambiguous, evidence that seems to support this hypothesis.

In my conclusion, I will point out that Cornelius's hypothesis has significant policy implications not only for Pakistan, but also for the United States and other nations that have made rule of law promotion a major part of their foreign policy.⁹ I argue that it is time for scholars and policy makers to grapple with his thinking and to do the research necessary to determine whether it may be even partly true. In this short article, I can do no more than introduce Cornelius, his hypotheses, and the evidence for and against these hypotheses. Even in this short discussion, however, I hope to raise awareness about the full range of sophisticated views that have been articulated over the past fifty years about Islam and constitutional liberty. I hope also to highlight the need for more systematic and nuanced studies of the role, or rather the different possible roles, Islam can play in determining the level of constitutional liberty in contemporary Muslim societies.

II. A. R. CORNELIUS: THE UNLIKELY ISLAMIST

Alvin Robert Cornelius was born in 1903 in Allahabad, in British India, to a family of Indian Christian academics.¹⁰ Cornelius's family had converted to Protestantism in the early nineteenth century and had prospered under the British. As a young adult, Cornelius married a Catholic and converted to Catholicism. From that point forward he remained a practicing, and apparently devout, Catholic his whole life.¹¹

Cornelius was marked early for success in British India. After a superb undergraduate career in India, he was sent on a scholarship to Cambridge University for further education. He entered Selwyn College, which, at the time, was Cambridge's newest college.¹² Selwyn was created in the nineteenth century to honor one of Victorian England's most notable churchmen and missionaries, Bishop Selwyn. Bishop Selwyn was famous for explaining Britain's success as a nation and as a colonial power by reference to its integration of Christian ideals into its legal and political culture.¹³ Not surprisingly, although it was a college devoted to general education rather than theology, Selwyn had a far more "Christian" tone than most other colleges

9. See discussion *infra* Part VI.

10. Much of the biographical information in this section initially appeared in Lombardi, *supra* note 1. Most of the facts discussed there (and here) are drawn from BRAIBANTI, *supra* note 6, at 21–31, and Haider, *supra* note 6, at 1–10.

11. BRAIBANTI, *supra* note 6, at 22, 31.

12. SELWYN COLL., SELWYN COLLEGE 1882–1973: A SHORT HISTORY (1973), available at <http://www.sel.cam.ac.uk/college/history1973/>.

13. *Id.*

and trained a disproportionate number of clergymen.¹⁴ Judging from his later writings, Cornelius was probably impressed at Selwyn by the idea that a society's stability, strength, and liberty depended upon its maintaining a connection between the nation's law and the religion of the people. While at Selwyn, Cornelius also enjoyed some diversions, including cricket, which remained a lifelong passion.¹⁵

After finishing at Selwyn, Cornelius took a commission in the powerful and prestigious Indian Civil Service (ICS). The ICS was a crucial institution within the British imperial structure, regularly known as the "steel frame" of the British empire.¹⁶ It was composed of a small cadre of carefully selected and highly trained officials—some British expatriates and some native Indians. British and Indian members of the ICS served on equal terms, promoted (or not) on the basis of a strict meritocratic system. The ICS provided the Raj with its administrative and judicial elite.¹⁷

Like most of the native Indian members of the service, Cornelius was appointed to serve within the judicial rather than the administrative branch of the ICS.¹⁸ Those in the judicial branch served in both legal advisory roles and as judges in every level of the judicial system. As part of his early service, Cornelius rotated through trial courts in Punjab Province,¹⁹ where he was struck by the practical difficulty of applying a body of law that, however good he believed it to be, was understood to be "foreign" and was resisted by the people.²⁰

After his regional service, Cornelius was eligible for a position in British India's higher judiciary. In the 1940s, he was appointed to the prestigious High Court in Lahore,²¹ which had final jurisdiction over disputes from the Punjab, one of India's wealthiest provinces.²² Cornelius enjoyed his

14. *Id.*

15. A passionate cricketer, he had been captain of his cricket team in India and maintained this interest his whole life. See BRAIBANTI, *supra* note 6, at 30.

16. The image was one first used to describe the ICS by Prime Minister Lloyd George in a 1922 speech. For a discussion, see DAVID C. POTTER, *INDIA'S POLITICAL ADMINISTRATORS 1919–1983*, at 88 (1986). Since then, it has entered into common parlance.

17. See STEPHEN COHEN, *THE IDEA OF PAKISTAN* 41 (2004). For histories of the ICS and its role in the governance structure of colonial India, see generally ROLAND HUNT & JOHN HARRISON, *THE DISTRICT OFFICER IN INDIA: 1937–47* (1980); BANKEY B. MISRA, *THE BUREAUCRACY IN INDIA: AN HISTORICAL ANALYSIS OF DEVELOPMENT UP TO 1947* (1971); Potter, *supra* note 16.

18. See Arudra Burra, *The ICS and the Raj: 1919–1947*, at 26–28 (Feb. 11, 2007) (unpublished academic paper, Princeton University), available at <http://www.princeton.edu/~aburra/bv11feb07v1.2.pdf> (analyzing the ICS Judicial Branch and explaining why a disproportionate number of native Indian, as opposed to English-born, officers ended up in this branch). See generally *id.* at 94–100.

19. For a discussion of his postings, see Haider, *supra* note 6, at 2–5.

20. See *infra* text accompanying notes 158–60.

21. For an exhaustive history of the Lahore High Court, see *History of Lahore High Court, Lahore*, LAHORE HIGH COURT, <http://www.lhc.gov.pk/hstry/history.php> (last visited Aug. 2, 2010).

22. Letter from A.R. Cornelius to Ralph Braibanti (Nov. 14, 1977), in CORNELIUS, *supra* note 6, at 193.

work on the Court and was extremely happy living in Lahore.²³ His satisfaction with his job and his location would affect his life in important ways.

In 1947, the British decided to leave India and agreed to carve their Indian possessions into two states. The new state of India was to be a multi-ethnic democracy with an overwhelming Hindu majority. The new state of Pakistan was to be a majority Muslim state.²⁴ Pakistan would be carved out of areas with an overwhelming Muslim majority, including much of the Punjab and the entire city of Lahore. It would be a place where Muslims could go if they did not want to be governed by a Hindu majority in India.²⁵

That Pakistan was to have a Muslim majority did not mean that it was supposed to be an “Islamic state.” Those most active in the formation of Pakistan were “secular” Anglophone members of British India’s Muslim elite.²⁶ Having prospered under the British regime, they worried that a Hindu-majority state would discriminate against them and deny them the access to power and prestige that they had previously enjoyed.²⁷ These figures had a democratic and liberal vision for their new state. They imagined Pakistan as a country where a Muslim majority would use representative political mechanisms to determine the types of law that would be applied, with a judiciary ensuring that majoritarian laws did not violate the natural rights of citizens in the minority.²⁸ These rights were understood in essentially common law terms. Figures espousing these views were the leading proponents of Pakistan and, at independence, they dominated its military, bureaucratic, and economic elites.²⁹

23. *Id.* at 23.

24. Discussions of the way in which Colonial India came to be divided into two nations are found in any history of modern India or modern Pakistan. For one cogent discussion, see COHEN, *supra* note 17, at 2–42.

25. See IAN TALBOT, PAKISTAN: A MODERN HISTORY 4–5 (1998) (noting that Pakistan was initially to be a “Muslim” state and only under General Zia in the 1970s did elites try to reconceptualize it as an “Islamic” one). See generally CHAUDHRI MUHAMMAD ALI, THE EMERGENCE OF PAKISTAN 39 (1967).

26. For an account by two secularist members of the colonial and immediate post-colonial elite of their own understanding of the views of Pakistan’s founders, see MUHAMMAD MUNIR & M.R. KAYANI, REPORT OF THE COURT OF INQUIRY CONSTITUTED UNDER PUNJAB ACT II OF 1954 TO ENQUIRE INTO THE PUNJAB DISTURBANCES OF 1953 (1954) [hereinafter THE MUNIR REPORT], available at <http://aaail.org/text/books/others/misc/munirreport/munirreport.shtml>. For a largely consistent historian’s view, see Tayyab Mahmud, *Freedom of Religion & Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT’L L.J. 40, 51–62 (1995). For a discussion, however, of the nuances and ambiguities latent in the supposedly “secular” Muslim political philosophy that animated figures like Muhammad Ali Jinnah, the leading figure in the creation of Pakistan, see LEONARD BINDER, RELIGION AND POLITICS IN PAKISTAN 61–69 (1961).

27. For a discussion of the pressures and political calculations that led some (but not all) Muslim members of India’s elite to support the call for a separate state, see generally ALI, *supra* note 25.

28. See *id.* at 238–39 (describing the views of Pakistan’s founder Muhammad Ali Jinnah regarding minorities and citing his speeches).

29. See COHEN, *supra* note 17, at 161–63.

Opposed to the champions of a “secular” Muslim Pakistan was the group I call “Islamists.”³⁰ They argued first that the new state should be required to apply the *Shari’a*. More important, they insisted that (a) people could not necessarily be trusted democratically to adopt rules consistent with Islamic law and (b) there might be circumstances under which liberal rights principles might be inconsistent with *Shari’a*, in which case *Shari’a* principles should trump. Courts or some other expert institution must be empowered to strike down un-Islamic legislation—including, possibly, some legislation that recognized rights that Islamic law did not recognize.³¹ It took some years for Islamists to present a serious challenge to the stability of the state.

Like all native Indian members of the ICS, Cornelius was given a choice at Partition:³² he could move to the territories that would become part of India and remain a member of the Civil Service of India or, alternatively, he could stay in the territory that would become Pakistan and become a member of the Civil Service of Pakistan.³³ Happy in Lahore and comfortable with the philosophy of Pakistan’s secular elites (most of whom came from the same class and educational background as he did), Cornelius chose to serve the new Pakistani government.³⁴ He continued to serve on the Lahore High Court and advised the new government on legal issues—immediately becoming an important member of the legal elite in the new country.³⁵ Ever the cricketer, he also volunteered to write the Constitution of the Pakistan Cricket Board and helped to found a cricket team.³⁶

Cornelius’s decision to take Pakistani citizenship was highly unusual.³⁷ Notwithstanding Pakistan’s leaders’ commitment to establishing a “secular” Muslim state, many non-Muslims living in the areas slated to become part of Pakistan were concerned about their prospects in an explicitly “Muslim” state. Presumably, they were also concerned that the state would evolve into a more “Islamic” one. As a result, most non-Muslims in the ICS chose to serve the Indian government—if necessary, by moving out of Pakistan.³⁸

Having made the unusual decision to stay in Pakistan, the Catholic Cornelius had some misgivings about his choice, particularly as he noted

30. See discussion *infra* notes 44–49 and accompanying text.

31. See discussion *infra* notes 52–57 and accompanying text.

32. See BRAIBANTI, *supra* note 6, at 4, 24.

33. *Id.*

34. See *id.* at 193.

35. See *id.* at 24; Haider, *supra* note 6, at 3.

36. See BRAIBANTI, *supra* note 6, at 30.

37. Ralph Braibanti, who was a leading expert on the Indian Civil Service and the Civil Service of Pakistan, notes that at Partition the majority of ICS officers chose to serve the Indian government. More striking, only two Indian Christian members of the ICS chose to serve Pakistan. See *id.* at 4, 24.

38. On the small number of ICS members who chose to serve Pakistan and the important role they immediately played in establishing the new state, see COHEN, *supra* note 17, at 41.

the growing importance of Islamist political discourse in his new home.³⁹ He remembered late in life the distaste with which he viewed the calls for the new nation to be an “Islamic” state. This was a position that he, at the time, found “repellent.”⁴⁰ At the time Cornelius opted to become a citizen of Pakistan, then, there was nothing to suggest that he had any personal sympathy for Islam or any political commitment to Islamism (by which I mean the idea that the state has a constitutional obligation to ensure that its laws are consistent at all times with Islamic law). Yet within fifteen years, he would join those who called for Pakistan to systematically Islamize its legal system. To understand the evolution in his thinking about Islamization, it is important to understand some trends that were taking place in Pakistan and around the world.

III. CONTEXTUALIZING CORNELIUS’S TURN TO ISLAMISM: PAKISTAN IN THE 1950s

Three developments during the 1950s seem to have pushed Cornelius along the unlikely path towards an idiosyncratic modernist form of Islamism. Two were unique to Pakistan and one global. The first development was the growth of Islamist political power in Pakistan. The second was the collapse of the secular, liberal democratic constitutional order in Pakistan and its replacement by a secular illiberal autocracy. The third was the apparent success of Arab Middle East programs of legal reform that reconceptualized “European” legal systems in Islamic terms.

A. *The Growing Power of Islamists in Pakistan*

As already noted, the drive to create a Muslim state in the subcontinent was led by “secular” Muslim members of the Indian economic and administrative elite.⁴¹ The British acts that granted independence to Pakistan left these secular elites in control. They inherited great problems, including a severe challenge to their secular vision of the state.

At the time of independence, Pakistan was composed of two non-contiguous bodies of land: West Pakistan (now Pakistan), and East Pakistan (since 1971, the independent nation of Bangladesh). These two entities were very different from each other and there were tensions between the populations of Pakistan’s two wings.⁴² Among the many challenges the government faced was that of creating a national ideology that would hold

39. During Pakistan’s early years, one of the things that Cornelius claimed particularly to dislike was the fact that Pakistani political and legal discussions turned so often to the question of what role Islam should play in the Pakistani state. At that time, such discussions were, he said, “repellent.” See BRAIBANTI, *supra* note 6, at 193–94.

40. See *id.*

41. See BINDER, *supra* note 26, at 117.

42. See TALBOT, *supra* note 25, at 24–25 (describing how different the societies of West and East Pakistan were).

the nation together.⁴³ After independence, Islamists quickly demonstrated their broad popularity among the many segments of the Pakistani polity. To the distress of many in the secular elite, no alternative ideology appeared with the same motivating and potentially unifying power.

Before going on, it is important to note that the term “Islamist” is currently a fraught one. Some use it to refer only to people who believe that the government must govern in a manner that is consistent with a highly illiberal interpretation of Islamic law and who favor authoritarian governance and the application of laws that are inconsistent with Western liberal values.⁴⁴ For reasons that I have discussed in other publications, I find that problematic.⁴⁵ I use the term “Islamist” in this article to refer to *anyone* who believes that state action (including state law) must respect supra-legislative principles of Islamic law and thus that courts, or some other forms of independent institutions, will be empowered to review and void any un-Islamic laws that misguided elites or majorities might from time to time try to impose.⁴⁶ They are “Islamists” irrespective of whether their interpretation of Islam is liberal or illiberal.

Although British India, and later Pakistan, contained important liberal Islamist thinkers,⁴⁷ *illiberal* Islamists, in the years immediately following Partition, established themselves as the Islamist voices with the greatest popular support in Pakistan.⁴⁸ These illiberal Islamists in Pakistan did not, however, speak with a single voice. Competing factions disagreed in significant ways about *who* could authoritatively interpret Islamic law, about *how* interpreters should interpret it, and ultimately about *what* rules precisely an Islamic government actually had to apply.⁴⁹

Many of Pakistan’s most powerful Islamist groups subscribed to a “traditionalist” interpretation of Islam. Traditionalists posited that only classically-trained scholars belonging to established (and generally con-

43. See *id.* at 25 (particularly the quote from East Pakistani representatives during the debates over Pakistan’s first constitution).

44. See, e.g., Pipes, *supra* note 2. But see COHEN, *supra* note 17, at 162.

45. See Lombardi & Brown, *supra* note 4, at 412–25.

46. See BINDER, *supra* note 26, at 102–08, 138–41.

47. Among the most famous examples historically were Sayyid Ahmad Khan, Amir Ali, Muhammad Iqbal and, more recently, Javed Ghamidi. For a discussion of the first three, see generally WILFRED CANTWELL SMITH, *MODERN ISLAM IN INDIA: A SOCIAL ANALYSIS* 7–135 (1946). For a discussion of Ghamidi’s thought on one area where liberals and non-liberals tend to divide, see Muhammad Khalid Masud, *Rethinking Shari’a: Javed Ahmad Ghamidi on Hudud*, 47 *DIE WELT DES ISLAMIS* 356 (2007).

48. For a description of some of the Islamist actors who would move to Pakistan and become active in Islamic politics, and a description of their earliest activities in post-Partition Pakistan, see BINDER, *supra* note 26, at 26–33, 70–108.

49. For an overview of the tensions, see Leonard Binder, *Problems of Islamic Political Thought in the Light of Recent Developments in Pakistan*, 20 *J. POL.* 655 (1958), which itself draws upon an analytic framework set out in SMITH, *supra* note 47.

servative) scholarly guilds could properly interpret Islam.⁵⁰ The institutions entrusted with the duty of performing Islamic review would have to be staffed primarily or entirely by these classically trained scholars. In Pakistan, these scholars tended to favor interpretations of Islamic law that were in tension with Western, liberal notions of justice.⁵¹ Traditionalist Islamists thus espoused a vision of the state that seemed irreconcilable with the secular elite's vision at almost every level.

Other Islamist groups, such as Maulana Mawdudi's small but extremely powerful Jama'at-i-Islami, championed what might be termed "lay" Islamism.⁵² Lay Islamists championed a different method of legal interpretation than the traditionalists, insisting that people without a classical Islamic education could interpret Islamic law—indeed they might be better at doing it than traditionalists.⁵³ Unlike traditionalists, lay Islamists were comfortable with the idea that Islamization would be managed through a modified form of the current governmental structure. Breaking with traditionalist Islamist groups,⁵⁴ the Jama'at-i-Islami proposed that Pakistan revise its current constitution as follows—it should maintain in most respects its existing structure of government, but add a constitutional amendment requiring all law to be consistent with Islamic law.⁵⁵ The sitting judiciary would be entrusted the responsibility to exercise judicial review of legislation to guarantee that all law satisfied this provision.⁵⁶

50. On traditionalist scholars and their supporters, see BINDER, *supra* note 26, at 25–33. For more detailed studies, some critical of Binder's analysis, see, for example, BARBARA DALY METCALF, *ISLAMIC REVIVAL IN BRITISH INDIA: DEOBAND, 1860–1900* (1982) (studying the evolution of the institutions and thinking of traditionalist Islamist scholars in late nineteenth century British India) and MUHAMMAD QASIM ZAMAN, *THE ULAMA IN CONTEMPORARY ISLAM: CUSTODIANS OF CHANGE* (2002) (analyzing the philosophy and activities of traditionalists in, *inter alia*, Pakistan).

51. I would like to highlight the guardedness of this comment. "Tended to be" does not mean "were always" and "in tension" with does not mean "irreconcilable" or even "inconsistent" with. For a nuanced view of the 'ulamā's construction of authority, their commitment to a discursive tradition with roots in the pre-modern position, and the tensions that this can lead to with respect to modernist or liberal thought, see ZAMAN, *supra* note 50, at 17–37. This is a useful corrective to more categorical statements such as those found in BINDER, *supra* note 26, at 10–33. Binder's view was shaped by the fact that he lived in Pakistan during a period in which, as a practical matter, notwithstanding the possibility of liberal thought among the Pakistani 'ulamā, their most visible spokespeople did, in fact, take illiberal positions. Even he ended on a more cautious note. See *id.* at 377–78. This fact certainly impressed most Pakistani secularists and liberals.

52. On the phenomenon of "lay Islam," see generally MODERNIST ISLAM, 1840–1940: A SOURCEBOOK 8 (Charles Kurzman ed., 2002); for an explanation of the social and political forces that led it to emerge in the Middle East, see LOMBARDI, *supra* note 4, at 59–77.

53. On the evolution of lay Islamism in India and its further evolution in Pakistan, see BINDER, *supra* note 26, at 70–108. The tensions between the lay Islamists and the traditionalists are also described in ZAMAN, *supra* note 50, at 102–05.

54. Traditionalist and lay Islamists struggled to develop compromise ideas in which hybrid scholarly/judicial institutions would carry out Islamization. See BINDER, *supra* note 26, at 259–92.

55. Maulana Mawdudi, *Some Constitutional Proposals for the Consideration of the C.A.P.*, in BINDER, *supra* note 26, at 265.

56. *Id.*

This proposal appeared to offer Pakistan's current elites a compromise. Islamists would enshrine in the Constitution an enforceable counter-majoritarian guarantee that all law be consistent with Islamic law. As everyone knew, however, members of the contemporary "secular" elite still dominated the judiciary. So long as this group maintained their control over the judiciary, they would be able to shape the interpretation of Islamic law that informed court decisions, and, at least in the short term, ensure that Pakistani laws were measured against liberal interpretations of Islamic law.⁵⁷

As both Mawdudi and liberals also realized, however, the "secular" elite might not be able to maintain its control over the judiciary indefinitely. The growing political power of illiberal Islamists might soon give them significant control over education and possibly judicial appointments. Accepting Mawdudi's proposal would likely usher in a period of struggle between liberals and illiberals to shape the popular and judicial understanding of Islam. Mawdudi and his Islamist allies believed that he would win this struggle.⁵⁸ Many secular Pakistanis feared Mawdudi was correct and, in any case, did not want to take the chance.

Mistrust between secular liberals and Islamists grew in the early 1950s after a spate of Islamist violence directed against members of the Ahmadi sect of Islam, a small and highly controversial Islamic sect, whose members included powerful members of Pakistan's Anglophone elite.⁵⁹ In 1952, parties led by classically trained religious scholars but supported by the Jama'at-i-Islami attacked the Ahmadi sect of Islam, declaring it heretical and asking the government to ban the propagation of its doctrines.⁶⁰ When the government refused to accede to these demands, some Islamist parties began to promote violence. Taking advantage of a food shortage and broader political discontent, Muslim politicians cynically used anti-Ahmadi rallies to muster support for broader anti-government, pro-Islamist positions—a pattern that ultimately led to destructive riots and eventually martial law in parts of Pakistan.⁶¹

In 1954, after re-establishing order, the government created a special Court of Inquiry tasked to look into the disturbances. The Court was headed by two respected members of the legal elite, both, like Cornelius, members of the ICS. The President of the Court was Justice Muhammad Munir of Pakistan's highest court (the Federal Court, which was soon to be renamed the Supreme Court).⁶² The Deputy was Justice M. R. Kayani of the Lahore

57. See BINDER, *supra* note 26, at 285–92; ZAMAN, *supra* note 50, at 88–89.

58. See BINDER, *supra* note 26, at 285–92.

59. For an exhaustive history of Ahmadism, see generally YOHANAN FRIEDMANN, *PROPHECY CONTINUOUS* (1989).

60. See BINDER, *supra* note 26, at 259–96; Mahmud, *supra* note 26, at 65–66. For an exhaustive account, see also THE MUNIR REPORT, *supra* note 26, at 1–181.

61. See BINDER, *supra* note 26, at 292–95.

62. See generally NAZIR HUSSAIN CHAUDHRI, *CHIEF JUSTICE MUHAMMAD MUNIR: HIS LIFE, WRITINGS AND JUDGMENTS* (1973).

High Court, one of Pakistan's most zealous champions of liberal constitutionalism and a good friend of Cornelius.⁶³ The Court's report, sometimes called the "Munir Report,"⁶⁴ noted that Islamic rhetoric seemed to have remarkable power to motivate the masses in Pakistan.⁶⁵ It also lamented that Pakistanis seemed overwhelmingly to find illiberal versions of Islamism more compelling than liberal ones.⁶⁶ The Munir Report authors warned that liberals were naïve if they thought that Islamism would evolve in the near future into a philosophy that was consistent with modern modes of state structuring or with the principles of Western liberal philosophy.⁶⁷ Arguably going beyond the scope of their assignment, Justices Munir and Kayani opined in their report that Pakistani liberals should resist any attempt to formally modify their existing "secular" but democratic mode of governance. Islamism, as Pakistanis actually understood it, was entirely inconsistent with the operation of a modern, liberal state:

[I]rreconcilables remain irreconcilables even if you believe or wish to the contrary. As long as we rely on the hammer when a file is needed and press Islam into service to solve solutions it was never intended to solve [i.e., the question of what laws to apply in a modern state] frustration and disappointment must dog our steps.⁶⁸

63. After Pakistan's 1958 coup, Kayani became one of the military's chief critics and is today lionized, along with Cornelius, as one of Pakistan's two most fervent judicial champions of the rule of law. Unlike Cornelius, however, he never came to believe that Islamists could be useful allies in the project to build the rule of law or that Islamization could ever advance the cause of liberalism. See Muhammad Munawar, *Foreword* to M.R. KAYANI, *LETTERS BY JUSTICE KAYANI* iii-iv (M. Bashir Hussain ed., 1974); Justice S.A. Rahman, *Foreword* to M.R. KAYANI, *HALF TRUTHS* iv-v (1st ed. 1966); *Foreword* to M.R. KAYANI, *THE WHOLE TRUTH* 1-21 (1st ed. 1988); M.R. KAYANI, *THE WHOLE TRUTH* 40-43 (1st ed. 1988). Most extraordinarily, if elliptically, see the foreword to a posthumous collection of Kayani's writings, written by Field Marshal Ayub Khan, the dictator who was the subject of many acid comments by Kayani. M. Ayub Khan, *Foreword* in M.R. Kayani, *NOT THE WHOLE TRUTH*, I (2d ed. 1962).

64. THE MUNIR REPORT, *supra* note 26.

65. *Id.* at 231 ("If there is one thing which has been conclusively demonstrated in this inquiry, it is that provided you can persuade the masses to believe that something they are asked to do is religiously right or enjoined by religion, you can set them to any course of action, regardless of all considerations of discipline, loyalty, decency, morality or civic sense."). See also JOHN ESPOSITO, *ISLAM AND POLITICS* 115, 281-82 (3d ed. 1991); BARBARA DALY METCALF, *ISLAM IN SOUTH ASIA IN PRACTICE* 424-28 (Barbara D. Metcalf ed., 2009); SEYYED VALI REZA NASR, *THE VANGUARD OF THE ISLAMIC REVOLUTION* 139 (1994).

66. THE MUNIR REPORT, *supra* note 26, at 200-31.

67. *Id.* at 232 ("Nothing but a bold re-orientation of Islam to separate the vital from the lifeless can preserve it as a World Idea and convert the Musalman into a citizen of the present and the future world from the archaic incongruity that he is today. It is this lack of bold and clear thinking, the inability to understand and take decisions which has brought Pakistan [into] confusion . . .").

68. *Id.* See also the discussion in BINDER, *supra* note 26, at 342-44. Note also the extreme skepticism with which Kayani and others later viewed Cornelius's eventual call for judges to Islamize Pakistani law, discussed in BRAIBANTI, *supra* note 6, at 47.

We have no record of Cornelius's views during the early 1950s about whether Islamization should be viewed as a threat to the inherited political system and to the liberal rule of law. Cornelius in 1954 may have agreed with the authors of the Munir Report that Islamism was a tiger that no liberal should try to ride.⁶⁹ If so, however, Cornelius's opinion gradually began to change by the early 1960s.

By the early 1960s, Cornelius was arguing that those committed to uphold the liberal democratic rule of law should support a constitutional structure that looked in some ways like the one Mawdudi had proposed in the early 1950s.⁷⁰ He called on legal professionals and judges and others with a vested interest in the preservation of the liberal rule of law to support the Islamization of the legal system so long as they, the judiciary, retained the authority to define the government's official interpretation of Islamic law. However, he also stressed that liberal legal professionals on the judiciary and in the bar should undertake a systematic effort to study Islamic law and to articulate liberal democratic philosophy in Islamic terms so that they could win those inclined to Islamism over to a liberal rather than an illiberal interpretation of Islamic law. In short, Cornelius advocated the abandonment of secular liberal democracy in favor of an Islamist system that he (contrary to Munir and Kayani) thought might conceivably embrace liberal democratic ideals.

To understand the evolution in Cornelius's thinking, we need to consider two factors. The first is Cornelius's distress about the rise of secular authoritarianism in Pakistan and his skepticism that secular government in Pakistan could ever govern effectively under a secular liberal constitutionalist philosophy. The second is Cornelius's growing awareness of liberal Islamic legal reforms in the Arab Middle East. The first trend made him realize that secularism in post-colonial Pakistan could never be as liberal as the Munir Report's authors had hoped. The second made him think that Islamism in Pakistan could be implemented in a fashion that was more liberal than they had feared.

B. The Collapse of Secular Liberal Democracy and the Rise of Secular Autocracy in Pakistan

In the years after the publication of the Munir Report, Pakistan went through a period of constitutional turmoil. At the time of independence, Pakistan did not have a constitution and chose to retain, for the most part, the existing colonial governmental structure.⁷¹ Pakistan's inherited legisla-

69. Indeed, he strongly implied as much in a letter to his friend Ralph Braibanti. See BRAIBANTI, *supra* note 6, at 193.

70. See discussion *infra* Part IV.

71. See, e.g., NEWBERG, *supra* note 7, at 36–37; DONALD WILBUR, PAKISTAN: YESTERDAY AND TODAY 120 (1964); Mahmud, *supra* note 7, at 1231–34.

ture, the Constituent Assembly, struggled for years to draft a new Constitution.⁷²

Pakistan's elites strove from the time Pakistan gained independence to develop a constitutional ideology that would generate broad popular support, hold the state together, and provide popular support for the government as it struggled with massive challenges. The most promising unifying ideology, at least from the perspective of mass mobilization, seemed to be Islamism. As we have seen, however, many members of Pakistan's military, bureaucratic, and judicial elites found Islamism a highly problematic basis on which to ground their state. If these figures had been confident that Islam would always be interpreted in a liberal fashion, they might have been comfortable with the popular call for Islamization. As noted already, however, popular Islamism tended to take an illiberal form, and secularists feared that the most powerful Islamists had a potentially totalitarian vision of the state.⁷³ Particularly after the shock of the anti-Ahmadi riots, powerful members of Pakistan's secularist elite proved unwilling to maintain a constitutional order in which illiberal Islamists could democratically take power.

By the mid-1950s, however, the existing secular, quasi-liberal, quasi-democratic constitutional regime that Pakistan had inherited from the British had begun to come under pressure. By 1958, it had collapsed and was replaced by an unapologetically secularist, authoritarian, praetorian regime.⁷⁴

Pakistan's slide into military rule began in the mid-1950s, when Pakistan's executive branch, the branch most firmly under the control of Pakistan's secular elites, began to aggrandize itself at the expense of the Constituent Assembly, which was seen as increasingly sympathetic to regionalists and Islamists.⁷⁵ Ascending to the Supreme Court in 1954, Cornelius immediately found himself among a minority of justices disturbed by the executive's increasingly authoritarian claims to power.

The division among the justices became clear when the Court, over Cornelius's vigorous dissents, approved the Governor General's claim to expansive powers—including power to unilaterally declare a state of emer-

72. See, e.g., ENCYCLOPEDIA OF WORLD CONSTITUTIONS 689–90 (Gerhard Roberts ed. 2007); NEWBERG, *supra* note 7, at 36–42.

73. See discussion *infra* Part III.A.

74. I and others have analyzed elsewhere the history of Pakistan's drift into authoritarianism and the cases in which the Court, with Cornelius dissenting, approved the executive's ever more ambitious claims to power. See NEWBERG, *supra* note 7, at 35–68; Lombardi, *supra* note 1, at 436–65; Mahmud, *supra* note 7, at 1225–52.

75. See analysis in NEWBERG, *supra* note 7, at 35–60; Lombardi, *supra* note 1, at 442–44; Mahmud, *supra* note 7, at 1233–34.

gency and, during a state of emergency, to legislate.⁷⁶ In 1954, a state of emergency was declared. Shortly after constitutional government was restored, in 1956, Pakistan finally enacted its first Constitution.⁷⁷ The 1956 constitution tried to balance popular Islamist pressures and liberal concerns of the elite, establishing a representative form of government, and requiring the government both to respect Islam and protect fundamental rights.⁷⁸ This Constitution was short-lived.

In 1958, the government scheduled its first set of elections under the new Constitution. Powerful members of the secular elite quickly became nervous about the growing power of both regionalists and Islamists in the popular sphere. Their dissatisfaction grew as the 1958 elections approached, in part because regionalist and Islamist parties were likely to come to power. Ultimately, secularist elites acted decisively to prevent the democratic rise of regionalists and Islamists. First, the Constitution was suspended by the President. Within days, the President was himself removed in a military coup staged by secularist military officers.⁷⁹

The military junta quickly made clear that they were not imposing a temporary state of emergency. Rather, they were bringing to a close Pakistan's experiment with representative parliamentary democracy and imposing an indefinite period of "guided democracy."⁸⁰ In one of its first acts, the military issued an order abrogating the 1956 Constitution and all laws enacted pursuant to it.⁸¹ The military stated that, at some point in the indefinite future, a new constitution would be promulgated by military order and this new constitution would establish a form of secular guided democracy. In the meantime, to prevent a complete legal vacuum, courts were instructed to enforce all laws that were in force before the coup, except for constitutional provisions protecting fundamental rights and laws that were inconsistent with military orders.⁸²

76. *The Federation of Pakistan v. Moulvi Tamizuddin Khan*, (1955) PLD (FC) 240 (Pak.); Special Reference #1 of 1955 (Referenced by His Excellency, the Governor General), (1955) PLD (FC) 435 (Pak.).

77. PAKISTAN CONST. OF 1956, reprinted in G.W. CHOUDHURY, DOCUMENTS AND SPEECHES ON THE CONSTITUTION OF PAKISTAN 395 (1967).

78. The 1956 Pakistan Constitution (1) explains that the President shall be elected by an electoral college, *id.* at art. 32, § 1; (2) describes that the National Assembly members shall be elected by the constituencies, *id.* at art. 4; (3) requires that the state support Muslim citizens and their religious beliefs, *id.* at art. 25; and (4) defines the fundamental rights of the citizens, *id.* at Part III.

79. For a brief description of this period, see COHEN, *supra* note 17, at 56–68.

80. For a discussion of guided democracy as a concept, see Jose Arsenio Torres, *The Political Ideology of Guided Democracy*, 25 REV. POL. 34 (1963). As this article makes clear, it is most commonly used to refer to Indonesian authoritarian government during the post-war era, but Pakistan's military promoted a very similar type of rule. See *id.* at 50–53.

81. Laws (Continuance in Force) Order, No. 1 of 1958, THE GAZETTE OF PAKISTAN EXTRAORDINARY, Oct. 10, 1958.

82. *Id.* (providing that "all courts in existence immediately before the Proclamation shall continue in being and, subject further to the provisions of this Order, in their powers and jurisdic-

The courts were quickly asked to rule on the legality of both the coup and the military's claim that, during the period between two constitutions, a military could rule with unchecked power. Cornelius was the only member of the Supreme Court willing to challenge the military's claim that it could rule with entirely unchecked power.

In *State v. Dosso and Another*,⁸³ several convicted criminals challenged their convictions on the ground that their trial had violated fundamental rights traditionally protected at common law and specifically protected under the allegedly abrogated 1956 Constitution.⁸⁴ The military ordered the Court not to hear the claim, asserting that the government was no longer bound to respect fundamental rights and that, accordingly, the citizens had no justiciable claim.⁸⁵ Over Cornelius's lone dissent⁸⁶ the majority agreed with the military and dismissed the case.⁸⁷ According to the majority, a usurping, unelected government could rule indefinitely without recognizing any legal obligation to protect fundamental rights.⁸⁸ A year later, in *Province of East Pakistan v. Mehdi Ali Khan*,⁸⁹ a new plaintiff asked the court to overrule its earlier *Dosso* ruling and assert that henceforth the government would have to permit courts to issue binding orders protecting citizens from violations of their fundamental rights. Cornelius was the only judge who agreed with the plaintiff.⁹⁰

I have elsewhere described in depth Cornelius's opinions in *Dosso* and *Mehdi Ali Khan*, which must be read together.⁹¹ As I point out there, his theories demonstrate a commitment to contractual theories of constitutional law. Citing traditional common law authorities, Cornelius insisted that whenever a people agrees to form a nation, its members give their conditional assent to be governed and set about determining the type of govern-

tions."). However, the courts had no power to compel "the Chief Administrator of Martial Law or the Deputy Chief Administrator of Martial Law or any person exercising powers or jurisdiction under the authority of either" to respect their interpretation. *Id.* Instead of compulsive writ power against the executive, the Courts maintained only the right to issue a non-binding advisory opinion. *Id.*

83. *State v. Dosso and Another*, (1958) PLD (SC) 533 (Pak.).

84. *Id.*

85. NEWBERG, *supra* note 7, at 72–78; Mahmud, *supra* note 7, at 1248–49.

86. *See Dosso*, (1958) PLD (SC) at 553–62 (Cornelius, J. concurring). Note, for example, that Cornelius's opinion in *Dosso* was technically a concurrence rather than a dissent. Cornelius thought that the military could not take away courts' inherent, supra-legislative power to enforce citizens' rights against governmental abuse; however, he thought the petitioners' claims, though they could be heard, would fail on the merits. *Id.* at 533.

87. *Dosso*, (1958) PLD (SC) at 533. The opinions in this case have been analyzed in many places. *See, e.g.*, NEWBERG, *supra* note 7, at 73–76; Lombardi, *supra* note 1, at 446–50; Mahmud, *supra* note 7, at 1244–51.

88. *Dosso*, (1958) PLD (SC) at 541.

89. *Province of East Pakistan v. Mehdi Ali Khan*, (1959) PLD (SC) 387 (Pak.).

90. *Id.* at 435–40 (Cornelius, J., dissenting).

91. *See Lombardi*, *supra* note 1, at 446–53.

mental structure that they trust to govern them.⁹² The people may disagree about the precise nature of the government that takes power. If so, they create the possibility that different types of government might be able to legitimately rule. The people will nevertheless agree on certain core principles, and, from that time forward, whatever government is formed must respect those core principles.⁹³ Drawing (without citation) on a thinker that he had long admired, the American judge and constitutional theorist Thomas Cooley,⁹⁴ Cornelius insisted that no government can contravene the “settled expectations” that the people hold for any government that asserts power over them.⁹⁵

In Cornelius’s mind, then, the military could legitimately dissolve an old constitutional regime and had considerable discretion in shaping a new regime. Like all governments, however, the new regime was always obliged to respect the “settled habits and sentiments” of the people. These included the expectation that the executive would respect common law fundamental rights as they had been elaborated by the judiciary.⁹⁶ Thus, Cornelius insisted, the Supreme Court must creatively interpret the Order so as to not strip judges of their power to protect fundamental rights from executive abuse.⁹⁷

Cornelius’s view was rejected by his colleagues. Speaking for the majority, Chief Justice Munir decisively rejected Cornelius’s basic constitutionalist premise—the idea that the people of a nation, at the time of its creation, establish principles that act as a limit on the powers of all future rulers of the nation, and that judges must interpret and apply law to ensure that it is consistent with those principles.⁹⁸ Rather, Munir and the majority adopted a positivist doctrine of revolutionary legality that they attributed (perhaps unfairly) to Hans Kelsen.⁹⁹ As Munir saw it, any military govern-

92. See *Mehdi Ali Khan*, (1959) PLD (SC) at 439 (Cornelius, J., dissenting) (asserting that the government of any nation is bound by “that body of rules and maxims in accordance with which the powers of Sovereignty are *habitually* exercised.”).

93. *Id.*

94. Cooley was clearly important to Cornelius and Cornelius had previously cited him in his dissent in *The Federation of Pakistan v. Moulvi Tanzumiddin Khan*, (1955) PLD (FC) 240, 363, 365, 395, 399 (Pak.) (Cornelius, J., dissenting). Compare *Mehdi Ali Khan*, (1959) PLD (SC) at 439 (Cornelius, J., dissenting) (asserting that the government of any nation is bound by “that body of rules and maxims in accordance with which the powers of Sovereignty are habitually exercised.”), with THOMAS MCINTYRE COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 2 (2d ed. 1871).

95. See *Mehdi Ali Khan*, (1959) PLD (SC) at 439 (Cornelius, J., dissenting).

96. See *id.*

97. See *id.* at 441.

98. *Id.* at 398–414 (majority opinion).

99. See *Dosso*, (1958) PLD (SC) at 539. For a summary of later Pakistani judicial opinions challenging Munir’s interpretation of Kelsen’s philosophy and Western academic commentary that makes similar criticisms, see A. B. M. MAFIZUL ISLAM PATWARI, *PROTECTION OF THE CONSTITUTION AND FUNDAMENTAL RIGHTS UNDER THE MARTIAL LAW IN PAKISTAN 1958–1962*, at 60–72 (1988).

ment that had the power to put down resistance wrote on a blank slate. If the Pakistani military had demonstrated the ability to forcibly “require the inhabitants of the country to conform to [its] new regime,” then the only laws in force were those that the military created.¹⁰⁰ Courts must recognize that they had no power to enforce any constitutional principles, including principles protecting citizens’ fundamental rights, unless the new regime granted the courts this power.¹⁰¹

Munir’s argument appalled Cornelius. For the rest of his life, he argued against the positivist claims that Munir had made in *Dosso* and *Mehdi Ali Khan*. Cornelius urged lawyers and judges to think of ways that they could more effectively articulate their claim that governments were morally bound to respect supra-legislative constitutional principles, including natural rights principles. His call to Islamize the Pakistani legal system must ultimately be seen as part of this project.

After Chief Justice Munir’s retirement in 1960, Cornelius found himself the most senior justice on the severely weakened Supreme Court. In keeping with Court tradition, he became its new Chief Justice.¹⁰² In that capacity, Cornelius wrote to the head of the army, Field Marshal Ayub Khan, and insisted that *Dosso* and *Mehdi Ali Khan* were wrongly decided, and posited that he might be able to muster the votes to overturn them. Cornelius believed the government should see itself as bound to respect fundamental rights as traditionally articulated by courts and to avoid conflict with the courts.¹⁰³ He suggested that if the military was worried about an open-ended guarantee of “fundamental rights,” it might actually include a bill of rights modeled on the U.S. Bill of Rights.¹⁰⁴ His suggestions fell on deaf ears. In 1962, the President of Pakistan, by executive order, promulgated a praetorian constitution which did *not* contain a provision permitting courts to enforce fundamental rights.¹⁰⁵

Perhaps anticipating this rebuff, Cornelius had already begun to reflect more deeply on natural rights theory and on the reasons why it had collapsed and not been re-established in Pakistan. In a remarkable 1960 speech, Cornelius commented sourly that he and many other Pakistani liber-

100. See *Dosso*, (1958) PLD (SC) at 539. See also the analysis in NEWBERG, *supra* note 7, at 72–78, 86–88, and Lombardi, *supra* note 1, at 447–50.

101. See *Mehdi Ali Khan*, (1959) PLD (SC) at 406. It is unclear why Munir and his colleagues had adopted the extreme positivist position that they did, one that Pakistani legal historian Tayyab Mahmud described as “as complete an abdication of judicial power” as one could imagine. Mahmud, *supra* note 7, at 1245.

102. It may seem surprising that the military allowed its only serious critic on the court to rise to the position of Chief Justice. Clearly, the military felt that the judiciary had been subjugated and it could simply ignore Cornelius if he proved troublesome. Indeed, that is exactly what it found itself doing.

103. See A.R. Cornelius, *Some Constitutional Proposals for Pakistan*, in CORNELIUS, *supra* note 6, at 184–201, particularly the discussion tactfully put towards the end at 187–88.

104. *Id.* at 198.

105. PAKISTAN CONST. of 1962.

als had been too quick to assume that fundamental British common law rights principles would continue to be respected by the non-British rulers who replaced them.¹⁰⁶ This was because they had forgotten to ask *why* Britons had accepted judicially articulated natural rights principles as legally binding principles independent from (and superior to) positive law. Cornelius suggested that British judges had taken steps to justify their claim to be authoritative interpreters of supra-legislative norms. Based on his reading of British legal history, Cornelius argued that judges had convinced Britons and the British king to recognize the supra-constitutional power of fundamental rights only after those judges had convincingly described judicially articulated fundamental rights principles as norms that reflected the command of Christian law. British judges, he claimed, had described their rulings as justified in an unwritten law that was consistent with “the dictates of the religion they [the British] professed.”¹⁰⁷ Precisely because British judges in the past had been able to establish judicial notions of justice as ones with a divine pedigree, contemporary Britain enjoyed a society in which, “it can be said with pride that the function of justice claims a higher origin than mere law.”¹⁰⁸ By tying “their obligations to a higher power than any which they see around them, the [British] Judges afford, and will continue to afford, a strong guarantee, that, be the law what it may, they will not hesitate to view it as favouring liberty for the public.”¹⁰⁹

Repeatedly thereafter, Cornelius gave speeches to members of Pakistan’s Anglophone liberal elite, most of them inclined to secularism, and reminded them that (as he understood it) British judges had learned how to articulate their notions of “justice” in religious terms that impressed both rulers and the ruled. In a 1964 speech he told his audience:

In the year 1653 a Judge in England did not hesitate to pronounce that: “There is no law in England, but is as really and truly the law of God as any Scripture phrase, that is by consequence from the very texts of Scripture: for there are very many consequences reasoned out of the texts of Scripture; so is the law of England the very consequence of the very Decalogue itself: and whatsoever is not Consonant to Scripture in the law of England is not the law of England . . . be it Acts of Parliament, customs or any judicial acts of the Court, it is not the law of England.” That was said at a stage when the Courts of England being dissatisfied with the legislation of the time, were searching for grounds on which they could declare the legislative dictates as invalid.¹¹⁰

106. A.R. Cornelius, *Law and Liberty*, Speech at the Inauguration of the Political Science Society of Edwardes College at Peshawar (Nov. 3, 1960), in CORNELIUS, *supra* note 6, at 47–52.

107. *Id.* at 51.

108. *Id.* at 52.

109. *Id.*

110. A.R. Cornelius, *Function of Law as a Link Between Nations*, Speech at Pakistan Institute of International Affairs (June 4, 1964), in CORNELIUS, *supra* note 6, at 147.

Cornelius also pointed out that obedience to these religiously-grounded rule of law principles became so habitual that judges stopped having to justify their laws in religious terms. Furthermore, even after judges had come to formally recognize the supremacy of parliament, no one challenged them when they interpreted statutes creatively so as to ensure that they never violated judicial notions of justice.¹¹¹

It is not hard to see where Cornelius's thinking was going. In 1958, the courts were struggling to get Pakistan's leaders to recognize a *moral* obligation to respect natural rights as articulated by courts. Courts trying to justify natural rights in the language of common law constitutional theory had failed to do so. Four years earlier, in 1954, the Munir Report had concluded, "If there is one thing which has been conclusively demonstrated in this inquiry, it is that provided you can persuade the masses to believe that something they are asked to do is religiously right or enjoined by religion, you can set them to any course of action"¹¹² Cornelius seemed to be wondering whether Pakistani judges could follow the lead of British judges centuries earlier and convincingly argue that violation of court orders represented a repudiation of God's command. If so, the Pakistani government might come to obey judicial orders protecting fundamental rights in the same way that the British government did. Ideally, obedience would be out of moral conviction, but could also arise out of fear that violations of orders that were understood to reflect Shari'a principles might lead the public to revolt. As Cornelius put it a few years later, fundamental rights principles had come to be recognized as "higher law" in early modern Britain as binding on rulers and ruled alike only because judges had successfully "sanctified" them in religious terms.¹¹³ Fundamental rights principles might achieve the same status in Pakistan if they were "re-sanctified" in the eyes of Pakistan's Muslim rulers and masses—through a process of connecting them to the religion not of the departed colonial master but of their own indigenous Islamic beliefs.¹¹⁴

Was it realistic to hope that judges could convince people Islam required governments to respect liberal rights principles? In 1954, Munir and Kayani had suggested that it was not. Whether or not Islam could be interpreted in a manner consistent with liberal philosophy, these two judges suggested that the public would always trust illiberal Islamist thinkers more

111. *See id.* at 147–48. This last observation was freighted with significance, for it was precisely this type of creative, justice-promoting statutory interpretation that a majority of judges on the Supreme Court had found themselves unwilling (or unable) to do in *Dosso* and *Mehdi Ali Khan*.

112. THE MUNIR REPORT, *supra* note 26, at 231.

113. *See* BRAIBANTI, *supra* note 6, at 193 (suggesting that if Pakistan went through a process of establishing the consistency of its law with Islamic principles, the law would come to be "resanctified").

114. *Id.*

than liberal ones.¹¹⁵ In the early 1960s, however, Cornelius began to think that Munir and Kayani might be wrong, in part because of legal developments in the Arab Middle East.

C. *Liberal Middle Eastern Legal Reform and the Rise of the Sanhūrī Codes*

It is unclear when A. R. Cornelius first became interested in the history of modern Arab legal reform or how deep his studies of it were.¹¹⁶ All we can say for sure is that in the 1960s, he began publicly to argue that the liberal rule of law became established in Britain through a process of sanctification. In those same speeches, he began to draw attention to recent programs of Arab legal reform in the Middle East, Egypt, and North Africa. To Cornelius, the experience of those countries demonstrated that, contrary to the fears expressed in the Munir Report, lawyers with “secular” legal training could be taken seriously by the masses as Islamic thinkers and could push the law in a liberal direction. Arab legal reformers trained in both Islamic texts and in transplanted colonial “law” had reconceptualized inherited colonial laws and legal principles as “Islamic” legal principles.¹¹⁷ Just as British judges had been able to sanctify the common law in Christian terms, these reformers, Middle Eastern judges and lawyers, had been able to sanctify progressive modern codes of law in Islamic terms. To understand Cornelius’s speeches, it is important to be familiar with the work of the influential Egyptian lawyer, judge, and academic Abdel Razzaq al-Sanhūrī, and, in particular, with the spread throughout the Arab world of so-called “Sanhūrī Codes.”

In the 1930s, Egypt had faced a political situation similar, in many ways, to the situation facing Pakistan in the ’50s. The British invasion of Egypt in 1882 led to the abolition of Egypt’s Ottoman-style, explicitly Islamic legal system, and its replacement by, ironically, a French-style civilian legal system.¹¹⁸ In the 1920s, after Britain unilaterally granted

115. See discussion *supra* notes 62–68 and accompanying text.

116. Braibanti suggests that it was only in 1964 that Cornelius received as a gift from the Iraqi Ambassador to Pakistan his first copy of the Ottoman Majalla. See Braibanti, *supra* note 6, at 34. The Majalla was a late nineteenth-century attempt to “codify” traditional Islamic legal principles in a manner that would allow these principles to govern the civil law of a modern country. BRINKLEY MESSICK, *THE CALLIGRAPHIC STATE: TEXTUAL DOMINATION AND HISTORY IN A MUSLIM SOCIETY* 54–55 (1993). He had, however, already given speeches urging Pakistan’s government and its bar to take lessons from the recent history of Arab legal reform. See *infra* text accompanying notes 155–59. It is thus likely that Cornelius received the Majalla from someone who was aware of Cornelius’s interest in Arab legal reform and wanted to inform him about its deeper history.

117. See, e.g., A.R. Cornelius, Introduction of Islamic Law Principles into Statutory Structure of Pakistan, Speech at Pakistan Legal Aid Society Meeting (Mar. 12, 1964), in CORNELIUS, *supra* note 6, at 384 (arguing that based on the experience of Middle Eastern lawyers, Pakistani lawyers should be able to help legislators develop “Islamic” versions of existing laws that would leave intact the current practice of the courts). For other examples, see the discussion below.

118. Lombardi, *supra* note 4, at 69–72.

independence to Egypt, Egyptians began to debate the possible reform of the Egyptian legal system. One of the burning questions was whether Egypt should try to return to some form of “Islamic” legal system.¹¹⁹ Secularists debated with Islamists about whether Egypt should try to apply some form of “Islamic” law. Islamists, in turn, debated among themselves about what a new “Islamic” state should look like.¹²⁰ As would later be the case in Pakistan, Islamist factions were divided between traditionalist Islamists who followed interpretations of Islam established by classically trained scholars and lay Islamists who believed that Muslims without classical training could be trusted to discern “Islamic” law from un-Islamic law. Among the latter were leading members of Egypt’s most powerful lay Islamist party, the Muslim Brotherhood.¹²¹

In this fractured political environment, an idiosyncratic member of the Europeanized elite, Abdel Razzāq al-Sanhūrī, proposed a grand bargain.¹²² A brilliant comparative lawyer, Sanhūrī had completed a Ph.D. in France. During his studies, he had become familiar with (and sympathetic to) some leaders of the “social law” movement then becoming influential among progressives in both the common law and civil law worlds.¹²³ Sanhūrī was also an Islamic modernist. In his French Ph.D. dissertation,¹²⁴ he had proposed a novel method of Islamic legal interpretation that could be used by legal professionals as well as classically trained scholars.¹²⁵ He had then, in

119. For a description of the environment, see GUY BECHOR, *THE SANHURĪ CODE AND THE EMERGENCE OF MODERN ARAB CIVIL LAW (1932 TO 1949)* 21–26 (Ruud Peters & A. Kevin Reinhart eds., 2007).

120. For an analysis of these debates, see LOMBARDI, *supra* note 4, at 116–18.

121. *Id.* at 118.

122. For a biography of Sanhūrī, see generally ENID HILL, *AL-SANHURĪ AND ISLAMIC LAW (1987)*, reprinted as *Al-Sanhuri and Islamic Law: The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzāq Ahmad al-Sanhuri, Egyptian Jurist and Scholar, 1895-1971*, Part I, 3 ARAB L. Q. 33 (1988), Part II, 3 ARAB L. Q. 182 (1988). Other discussions appear in FARHAT J. ZIADEH, *LAWYERS, THE RULE OF LAW AND LIBERALISM IN MODERN EGYPT* 136–60 (Hoover Inst. on War, Revolution and Peace ed., 1968). Recently, two scholars have uncovered previously unexplored sources, including Sanhūrī’s journals, and have explored in more detail than previous scholars the relationship of Sanhūrī with progressive European and American legal thinkers. See BECHOR, *supra* note 119; Amr Shalakany, *Between Identity and Redistribution: Sanhūrī, Genealogy and the Will to Islamise*, 8 ISLAMIC L. & SOC’Y 201 (2001).

123. See generally BECHOR, *supra* note 119; Shalakany, *supra* note 122.

124. Subsequently published as ABD AL-RAZZĀQ AL-SANHURĪ, *LE CALIFAT* (1926).

125. The method was first articulated in SANHURĪ, *supra* note 124, at 570–81 and later elaborated in Abd al-Razzāq al-Sanhūrī, *Le droit musulman comme élément de refonte du code civil égyptien*, 3 RECUIL D’ÉTUDES EN L’HONNEUR D’ÉDOUARD LAMBERT, 3 (Paris: L.G.D.J., 1938), 621–42. For works in which he actually employed his method of Islamic legal reasoning to identify what he saw as the core principles of Islamic law, see, for example, Abd al-Razzāq al-Sanhūrī, *La responsabilité civile et pénale en droit musulman*, 15 MAJALLAT AL-QANUN WA AL-IQTISAD 1 (1945), and ABD AL-RAZZĀQ AL-SANHURĪ, *MASĀDIR AL-HAQQ FI AL-FIQH AL-ISLĀMI* (1956). For a discussion of Sanhūrī’s approach to Islamic legal interpretation, see LOMBARDI, *supra* note 4, at 92–99. For different analyses of his approach, see, for example, HILL, *supra* note 122, at 45–51, and Shalakany, *supra* note 122, at 228–33. The one found in BECHOR, *supra* note 119, at 75–89, strikes me as problematic.

his dissertation, argued that Muslims could accept modern “Islamic” governments that would ally themselves under the aegis of an Islamic League of Nations, and would apply newly re-imagined and progressive forms of “Islamic” law.¹²⁶

Upon his return from France, Sanhūrī taught at Cairo University Law School and eventually became its Dean.¹²⁷ Like many legal professionals he also became active in politics.¹²⁸ His progressive political and economic views alienated many of Egypt’s elites.¹²⁹ Sanhūrī knew, however, that they were more afraid of populist Islamists than they were of him.¹³⁰ In a series of speeches and articles, Sanhūrī played on fears of Islamist unrest in order to get the elites to accept progressive legal reform.

Sanhūrī convinced the Egyptian parliament that it should commission him to revise the Egyptian civil code, promising that his Code would retain much of the current legal system and yet would be accepted by the public as Islamic.¹³¹ In drafting the new Code, he reviewed the existing code and kept the rules that could be justified as both progressive and “Islamic” (according to the modernist method he had developed in his dissertation). Sanhūrī also borrowed from the legal codes of successful European states’ rules that (according to his interpretation of Islamic law) were consistent with principles of justice common to both the European and Islamic traditions.¹³² In order to ensure that the Code remained flexible enough to adapt to evolving circumstances, he deliberately left some areas of life to be regulated by judge-made law. Judges were instructed to fill in “gaps” in the

126. See generally SANHŪRĪ, *supra* note 125. For a summary of the work, see, for example, HILL, *supra* note 122, at 44–51, and Shalakany, *supra* note 122, at 211–15.

127. HILL, *supra* note 122, at 36.

128. On this trend and Sanhūrī’s trajectory within it, see *id.* at 42–43, 53–64.

129. In a recent study of Sanhūrī’s private journals, his scholarly articles, and his legal drafting, Guy Bechor has eloquently described Sanhūrī’s frustration with Egypt’s political and economic elites—and, in particular, with their unwillingness to adopt progressive legislation of the type then being developed by European jurists such as Roscoe Pound, legislation that would have harmed their economic interests. See BECHOR, *supra* note 119, at 94–97. To Sanhūrī’s mind, elites would only make significant legislative compromises if they felt it was necessary to avoid destabilizing social unrest. See LOMBARDI, *supra* note 4, at 25, 32–35.

130. For an overview of the broader political environment during the time Sanhūrī was seeking an assignment to draft the new Egyptian Civil Code, see LOMBARDI, *supra* note 4, at 101–10.

131. Sanhūrī argued that even if many Islamists championed an illiberal vision of Islam, the public was prepared to recognize a liberal, modern body of law as “Islamic”: “We should not be led astray by this superficial argument leveled from some quarters against the Islamic Sharī`a, as though it is unfit and frozen, since this is an erroneous theory. The Islamic Sharī`a has developed greatly, and may still develop in order to adapt to existing civilization.” Abd al-Razzaq al-Sanhūrī, *Wujūb Tanqīh al-Qānūn al-Madanī al-Misrī wa Āala ‘Ay Asā Yakūn Hadha al-Tanqīh*, in 6 *Majallat al-Qānūn wa-al-Iqtisād* 114 (1936), translated in BECHOR, *supra* note 119, at 49–50. See also *id.* at 87–89.

132. See ABD AL-RAZZAQ AL-SANHŪRĪ, 1 AL-WASIT 61 (1988); BECHOR, *supra* note 119, at 88.

Code by creating new rules consistent with both “Islamic” principles and with justice.¹³³

The Code contained many rules that were found in European codes of law and many rules that progressive European jurists would have been happy to include in European codes of law. After completing his Code in 1942, Sanhūrī spent years trying to convince the public that such a collection of rules could be conceptualized as “Islamic.”¹³⁴ After spirited public debate with both traditionalist clerics and representatives of the Muslim Brotherhood, Sanhūrī convinced the parliament that his Code was consistent with core Islamic principles and indeed had a good argument that it was more consistent with these principles than the far more radical codes being championed by traditionalist clerics. More important, he convinced the parliament that the polity was ready to accept his Code as “Islamic.”¹³⁵ In 1949, the Code was adopted.¹³⁶

Sanhūrī never convinced *all* Egyptians to recognize his Code as an “Islamic” one.¹³⁷ However, he convinced many, and once the Code proved effective and popular, much of the remaining Islamist opposition to the Code dissipated. Islamists continued to call for changes focused on a few provisions, such as those permitting creditors to charge interest.¹³⁸ By and large, however, Islamist groups that had initially criticized Sanhūrī’s Code seemed to grow comfortable with the Code and more generally with the idea that a code which shared rules with European codes could be accepted as legitimately Islamic. They also came to accept that judges without classi-

133. See Shalakany, *supra* note 122, at 233–35. Hill suggests that Sanhūrī’s interest in this subject dates back to his graduate research while in France into the history of English law. See HILL, *supra* note 122, at 44.

134. See HILL, *supra* note 122, at 182–84; Shalakany, *supra* note 122, at 218–19.

135. See BECHOR, *supra* note 119, at 87; HILL, *supra* note 122, at 182–84; ZIADEH, *supra* note 122, at 135–47; Shalakany, *supra* note 122, at 226–28.

136. See LOMBARDI, *supra* note 4, at 108–10; ZIADEH, *supra* note 122, at 143 (citing *al-Muhamah*, Mar. 1948); see also BECHOR, *supra* note 119, at 87 (citing Sanhūrī, *Al-Qanun al-Madani, Majmū’at al-‘Amāl al-Tahdiriyya*, vol. 1 (Cairo: Matbat al-Kitāb al-‘Arabī, 1949)).

137. Intriguingly, another group that he had trouble convincing was European academics. See, most notably, J.N.D. Anderson, *The Shari‘a and Civil Law*, 1 ISLAMIC Q. 29 (1954); see also, N.J. COULSON, A HISTORY OF ISLAMIC LAW 153 (1964); Joseph Schacht, *Problems of Modern Islamic Legislation*, 12 STUDIA ISLAMICA 99, 122 (1960).

138. See, e.g., Bruce K. Rutherford, *The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World* 327 (May 1999) (unpublished Ph.D. dissertation, Yale University) (on file with the Yale University Library) translating portions of ABD AL-QADIR AWDA’, AL-ISALM BAYN JAHL IBNA’IHI WA ‘AJZ ULAMA’IHI 36 (1951). Rutherford translates passages from an important work in which Awda’, the Muslim Brotherhood’s chief ideologue (who was soon to be executed by the Egyptian Government) opined that “most of Egypt’s codes are compatible with Shari‘a.” Those that permitted adultery and the drinking of alcohol were the only clear exceptions. He did not even mention the laws permitting interest, showing that even this became controversial only later after the rise of Islamic finance in the 1970s.

cal training could be trusted to interpret Islamic law for the purpose of filling in gaps in “Islamic” statutes.¹³⁹

Sanhūrī and other liberal modernist Arab legal writers in Egypt and abroad celebrated the success of the Code and proselytized throughout the Muslim world for Sanhūrī’s project of re-conceptualizing in Islamic terms those modern institutions and rules that had proved effective in Europe. The commentary of such thinkers helped to shape many Arabs’ understanding of Islamic law.¹⁴⁰ Indeed, Islamists began to incorporate aspects of Sanhūrī’s method into their own ongoing interpretation of Islamic law.¹⁴¹ Among the influential champions of Sanhūrī’s project was the Lebanese lawyer Sobhi Mahmassani, a thinker whom Cornelius was reading as early as 1964 and citing in his speeches.¹⁴² The proselytization was effective. In short order, numerous post-colonial Arab states struggling to legitimize an inherited legal order also decided to adopt versions of the Sanhūrī Code.¹⁴³ Bechor comments, “[I]t is impossible to relate to civil law in the Arab world without an acquaintance with the New Egyptian Civil Code.”¹⁴⁴

In the early 1960s, many in the Arab world believed that the spread of Sanhūrī Codes demonstrated the following core point: rules developed in European countries and imported into Muslim countries by colonial powers could be re-conceptualized as rules consistent with core Islamic principles. By 1964, Cornelius had begun to talk about recent Arab legal reform with Arab judges and had read Mahmassani—the only leading Arab champion of

139. At the time of its adoption, Sanhūrī’s code had been controversial among both Egypt’s classically trained religious scholars based at al-Azhar and Egypt’s most powerful law Islamists, most of whom were members of the Muslim Brotherhood. When these figures re-emerged in the 1970s as potent political forces in Egypt, they demanded “Islamic” reforms to Egypt’s laws. Amazingly, at this point, they demanded almost no changes to Sanhūrī’s Egyptian Civil Code—explicitly stating that most of its provisions were consistent with Islamic law. They demanded, instead, changes to the laws of personal status and criminal codes.

140. As Baber Johansen has pointed out: “Even the Islamicist movement of the late eighties and nineties who often criticize Sanhūrī’s or Chehata’s conceptions do apply their methods, mostly with much less skill, when they produce projects of new codes.” BABER JOHANSEN, *CONTINGENCY IN A SACRED LAW* 59 (Ruud Peters & Bernard Weiss eds., 1999). See generally Lombardi & Brown, *supra* note 4, at 433–34 (discussing how the Supreme Constitutional Court of Egypt’s interpretation of Islamic law draws heavily upon Sanhūrī’s theories, among others, and has been accepted by the public as appropriate).

141. JOHANSEN, *supra* note 140, at 59. See also, generally, Lombardi & Brown, *supra* note 4, at 433–34.

142. A.R. Cornelius, Speech at Pakistan Legal Aid Society Meeting, in CORNELIUS, *supra* note 6, at 381.

143. On the influence of the code, see generally BECHOR, *supra* note 119, at 57 (listing the countries that adopted Sanhūrī codes) and Nabil Saleh, *Civil Codes of Arab Countries: The Sanhūrī Codes*, 8 ARAB L. Q. 161 (1993). Syria adopted a version in 1949, and Libya followed suit in 1953. Sanhūrī drafted the 1951 Iraqi civil code modifying (and, he thought, improving upon) his Egyptian Code. The Egyptian Civil Code indirectly influenced numerous other codes, serving as “the principal basis of reference” for the civil codes of Jordan (1976), Yemen (1979), and Kuwait (1981). *Id.*

144. BECHOR, *supra* note 119, at 57.

“liberal Islam” whose work had been translated into English.¹⁴⁵ In speeches, he began to cite the recent history of Arab legal reform (and the writings of Mahmassani) to support his claim that in countries where Islamist pressure was strong, liberal legal professionals with proper training and drive could build popular support for progressive legal rules. To do so, they would have to reconceptualize those rules in Islamic terms as rules consistent with core Islamic principles and then “sell” their interpretation of Islamic law to the public.

IV. CORNELIUS’S ARGUMENT FOR LAWYER-LED ISLAMIZATION IN PAKISTAN

In 1962, Cornelius began explicitly to argue that the only hope for a re-empowerment of the judiciary and the legal profession and the re-establishment of liberal constitutionalism would come through liberal Islamization. Pakistani liberals, particularly those in the legal profession, should engage in a two-part program. First, they should use their institutional prestige to support Islamization by arguing that it was only through Islamization that a stable legal order could emerge. At the same time, they should establish themselves as legitimate interpreters of Islamic law and establish fundamental rights principles as essential principles of Islamic law.

Cornelius unveiled his new thinking in a daring fashion in 1962 when, as Chief Justice, he was asked to address a hostile military command at its headquarters in Rawalpindi. In his speech, Cornelius urged the military to commit itself to respecting the fundamental wishes of the people—including respect for their fundamental rights and Pakistani law that is demonstrably consistent with Islamic law.¹⁴⁶

Cornelius suggested to the assembled officers that unless the new Pakistani Constitution reflected the fundamental moral beliefs of the people, the Constitution, the laws created pursuant to the Constitution, and the orders of courts administering these laws were all likely to be viewed as illegitimate. The people, he implied, would disobey them whenever they could. Asking the assembled officers to reflect on their own attitudes towards “law,” he pointed out that laws perceived as illegitimate tend to be disobeyed whenever the people can get away with disobedience.¹⁴⁷ If a con-

145. Sanhūrī and Chehata wrote in Arabic and French. An important treatise of Mahmassani’s was translated in 1961 into English. See SOBHI MAHMASSANI, *FALSAFAT AL-TASHRĪ’ FĪ AL-ISLĀM* [THE PHILOSOPHY OF JURISPRUDENCE IN ISLAM] (Farhat Ziadeh trans., 1961). It is this version that Cornelius seems to have read and referred to.

146. A.R. Cornelius, Address to Officers of the Pakistan Army at General Headquarters in Rawalpindi (July 11, 1962), in CORNELIUS, *supra* note 6, at 201. This was a speech that he would regularly refer back to in later speeches. See, e.g., A.R. Cornelius, Crime and Punishment of Crime, Speech to the Third Commonwealth and Empire Law Conference (Aug. 27, 1965) in CORNELIUS, *supra* note 6, at 80.

147. A.R. Cornelius, Address to Officers of the Pakistan Army at General Headquarters in Rawalpindi, in CORNELIUS, *supra* note 6, at 201 (“The mere fact that cases are decided does not

stitution does not include a mechanism to ensure that laws are perceived as legitimate, social stability and public order are threatened and the nation may ultimately become ungovernable. “The machinery of popular representation, the technique of law-making, all the familiar activities of politicians have come to be understood as mere motions in a foreign mode. The more vigorously they are pursued, the nearer the infant State is brought to the point of dissolution.”¹⁴⁸

What was to be done? Drawing upon the writings of another Catholic, Simone Weil, Cornelius argued that after conquering a country, a military could only establish the legitimacy of its rule (and that of its successors) by demonstrating respect for the contractual nature of effective governance.

The men who offer their service to the country to govern it will have to publicly recognize certain obligations corresponding to essential aspirations of the people eternally inscribed in the depths of popular feeling; the people must have confidence in the work and in the capacity of these men, and be provided with means of expressing the fact; they must also be made to feel that, in accepting these men, they give an undertaking to obey them.¹⁴⁹

In Pakistan, Cornelius said, this principle would require the new military government to establish a regime that respected the people’s commitment to Islamic law.¹⁵⁰ Although the people disagreed about what Islam required, they insisted that the government demonstrate a good faith attempt to comply with God’s law. It was thus a matter of “political therapeutics”¹⁵¹ that the military government demonstrate its good faith by recognizing the authority of independent judges and instruct them to issue orders consistent with Islamic law. Legitimacy will come only after a

search for the true roots of the nation’s being, and following immediately after, there must be restoration of local liberties and powers, as nearly as possible on traditional lines, so that the national character may be rebuilt, in an atmosphere of freedom, under the age-old incentives and controls. The most important of these [restored] powers, in my opinion, is the judicial power. . . .

necessarily mean that the system followed is fully adapted to the understanding and sentiment of the people. We all know of civil cases where after getting a decision from the final Court, the parties have to go home and make a compromise so as to produce a practical result more in consonance with what they know to be the natural justice of the matter.”).

148. *Id.* at 218.

149. *Id.* at 219–20 (“The point is put very clearly by a notable French woman writer, Simone Weil, in a book entitled *The Need for Roots*, written during the years 1940-45 when France lay under German occupation. . . . This is what she has to say: ‘Seeing that we have, in fact, recently experienced a break in historical continuity, constitutional legality can no longer be regarded as having an historical basis; it must be made to derive from the eternal source of all legality.’”).

150. *Id.* at 219 (“It is in this sense that the demand often heard in Pakistan, for restoration of traditional Islamic institutions should be understood. It is the natural cry of a strong organism to be connected once again with its original and proper roots. The matter lies in the field of political therapeutics.”).

151. *Id.*

It is necessary only to re-devise for them [in Islamic terms] the basic principles and procedures of the laws they administer. This is a matter of fundamental importance.¹⁵²

If the assembled military officers wondered why this Cambridge-educated, Catholic liberal champion of natural rights was developing a strategy by which a military government could legitimize its rule through a process of Islamization, it soon became clear. In his speech to the military, Cornelius did not discuss the content of the law that would be equally applied. In speeches to other less dangerous audiences, however, he made clear that this law should enshrine liberal values that would place limits on executive discretion.

In that same year, 1962, Cornelius gave a speech to Pakistan's national bar association, which was made up primarily of Anglophone secular members of Pakistan's middle class.¹⁵³ In it, he argued that it was counter-productive for lawyers to ignore the popular calls for Islamization even if they found most Islamists' understanding of Islamic law to be repugnant. Repeating the point that he made to the military, Cornelius contended that, like it or not, Pakistanis would only respect a body of law that was understood to be "Islamic":

There is great weight in the popular demand to bring all laws into conformity with the dictates of religion. Whatever immediate form the demand may take, and from whatever angle it may be represented, it represents the feeling of a people who are seeking to shape their lives according to Quran and Sunnah. We cannot take refuge behind the argument that the people are already equipped with a thorough complex of laws under which they have lived successfully for many decades. It is not enough to point out that these laws are in line with the laws prevailing in advanced countries. In many essential respects, the Western pattern of laws shows fundamental differences from those which arise out of the great civilizations and religions of the Middle East. It is to those cultures that the people of Pakistan owe allegiance. Until the essence of laws to which those cultures have given rise is assimilated into the legal structure of our country, there will be no cessation of this demand.¹⁵⁴

Cornelius recalled the futility with which the British government tried to end, by force alone, the practice of honor killing in rural Pakistan. Whatever Cornelius's views on the morality of honor killing, he came to feel that it was foolish to believe one could simply legislate it out of existence. When a government criminalized acts that "are esteemed among the highest in their community," it inspired disrespect for both the law and for

152. *Id.* at 220.

153. A.R. Cornelius, Integration of Nation Through Law, Presidential Address at the All-Pakistan Lawyers' Convention (Dec. 23, 1962), in CORNELIUS, *supra* note 6, at 57.

154. *Id.* at 58.

judicial orders that applied the law. Ultimately, “[t]his type of capital punishment [has been] administered for over a century. It has not resulted in the diminution of intensity of the sentiments with which the code of honour is maintained. On the contrary, it is the deterrent effect of the death sentence which has been dulled.”¹⁵⁵

If the state did not Islamize its law, then the law was likely to lose its authority, as would the lawyers and judges who were specialists in the law. Disorder would likely result. If the state *did* Islamize the law, then one might see the re-establishment of at least the thin rule of law, where the citizenry and the government all respected “the law” as articulated in written laws and elaborated by judges:

The people will regard their laws with respect, and will implement them in their lives with honesty and reverence only when they come to recognize the laws as deriving from a true source of Sovereignty. . . . If that ideal is achieved, the laws would have a natural force to project and sustain them in the same way as principles are maintained and universally accepted. It will become the delight of the community to live according to their laws.¹⁵⁶

But what would the content of this new, “Islamized” law be? Cornelius suggested that it was still evolving and could develop in a liberal fashion. Pakistanis were vigorously debating basic questions of Islamic legal authority, Islamic interpretive theory, and, thus, questions of Islamic law. If lawyers took the initiative to engage in Islamic debate, they would be able to influence the public’s understanding of Islamic law, making the changes less wrenching. To support this claim, Cornelius directed his audience’s attention to the recent experience of Arab countries, many of which had (or would soon) adopt Sanhūrī Codes:

I would particularly recommend the study of the historical development and the present condition of the principal laws in force in Middle Eastern countries, in Egypt and in North Africa. It is not generally known that the Codes there prevalent, while based on true Muslim legal concepts, and being fully adapted to the Muslim way of life, are also steadily assuming a modern form suitable for communities which are emerging into the world of today. Studies of this kind would serve to provide the basis upon which concepts of Middle Eastern fundamental law, being well-adapted to the culture and sentiments of our people, could be built into the structure of our laws, in replacement of English Common Law principles.¹⁵⁷

Lawyers and judges would be able to influence people’s views about what Islamic law required. They did not, however, have infinite ability to

155. *Id.* at 59.

156. *Id.* at 62.

157. *Id.*

do so. Cornelius admitted that in harmonizing the state's official version of Islamic law with modern economies and with the liberal norms to which most judges were personally committed, they would be constrained by deeply embedded cultural assumptions about what God had commanded—assumptions which could evolve only slowly.

Cornelius thus urged lawyers to accept that a good faith program of Islamization might require some reforms that they would find personally distasteful. For example, Cornelius suggested that if the assembled members of the Bar really wished to re-establish the primacy of law, they should argue for a reform of the criminal codes.¹⁵⁸ Specifically, they should push for abolition of the death penalty in cases of “honor killings”—homicides carried out to uphold traditional notion of family “honor”—that the masses (rightly or wrongly) considered to be grounded in Islam.¹⁵⁹ In later speeches, Cornelius also controversially pushed for greater recognition, in certain areas, of traditional modes of dispute resolution—notably, under some circumstances at least, the traditional Pushtun *jirga*.¹⁶⁰ He created an international uproar in Australia¹⁶¹ when, at a conference of commonwealth judges, he stated that he could imagine circumstances under which traditional Islamic punishment, including amputation, might be seen as no more cruel than traditional British punishments for the same crime.¹⁶²

Some liberal lawyers and jurists found Cornelius's position to be ill considered—arguing that it tried to impose a “rule of law” without asking if that rule of law might not be worse than autocracy.¹⁶³ But such criticisms were unfair. Cornelius had indeed thought about this. He argued that concessions to popular understandings of Islam were generally no more offensive to basic morality than concessions that the common law already made to reflect the realities of human behavior.

With respect to honor killings, Cornelius pointed out, British criminal law already recognized mitigation of punishment for certain reasons, including temporary insanity. As he saw it, social pressures were such that, in

158. *Id.* at 59.

159. *Id.* at 62.

160. A.R. Cornelius, Speech to the Third Commonwealth and Empire Law Conference, in CORNELIUS, *supra* note 6, at 261–68.

161. See *An Account of the Third Commonwealth and Empire Law Conference Held in Sydney, Australia from 25 August to 1 September 1965*, PLD 1965 Journal, 172–78. For a discussion of this piece and an explanation of its authorship, see BRAIBANTI, *supra* note 6, at 35–36, 76 n.53.

162. A.R. Cornelius, Speech to the Third Commonwealth and Empire Law Conference, in CORNELIUS, *supra* note 6, at 268–71.

163. For a discussion of the criticisms of Cornelius by Justice Kayani (co-author of THE MUNIR REPORT) and I.A. Khan, see CORNELIUS, *supra* note 6, at 46–47. Some Pakistani intellectuals still are skeptical. A few years ago, a conversation with an older secularist Pakistani intellectual turned to the subject of Justice Cornelius. My interlocutor remembered the Justice Cornelius well, he said: “But which one are we talking about?” he asked with a smile. “The liberal hero? Or Justice Chop-off-the-Hand?” Private Conversation Between the Author and a Pakistani Who Wishes to Remain Anonymous (Feb. 2008).

some parts of Pakistan, people might reasonably be expected to be driven to homicide by overwhelming, culturally reinforced social shame. Mitigating punishment for a person who carried out an honor killing was thus analogous, he argued, to the British refusing to put to death people who killed when overcome by what the British called “temporary insanity.”¹⁶⁴ Similarly, Cornelius’s support for amputation was conditioned on a Panglossian assumption that doctors, if they put their mind to it, would be able to preserve and reattach amputated body parts.¹⁶⁵ In other words, he supported amputation insofar as it would be temporary. As Cornelius saw it, instead of temporarily losing his liberty, a person convicted of theft in a modern Islamic state would temporarily lose his hand, which could be reattached after a period of time.¹⁶⁶ His defense of the *jirga* was also qualified. Indeed, in some ways, it anticipates the analysis that mainstream American think tanks have recently employed to argue that limited recognition of *jirgas* would help improve efficiency and trust in the legal system of post-conflict Afghanistan.¹⁶⁷ For Cornelius, then, the imposition of Islamic law would require changes that might be uncomfortable but did not cut into the core values promoted by the common law legal system. At the same time, Islamic law allowed for the re-establishment of core principles of common law justice that secular dictators had recently cast aside and were unlikely to be re-established under any government committed to secularism.

As Cornelius saw it, the people demanded Islamization. As a result, any government that wished to apply only secular law would have to resort to denying the popular will and, likely, suppressing dissent. Secularist government in Pakistan was doomed to be undemocratic and likely to devalue natural rights. Conversely, Cornelius believed that if they devoted themselves to the task, liberal lawyers and judges would be able to argue convincingly that Islamic law demanded respect for fundamental liberal principles. This point, already implicit in Cornelius’s 1962 speeches, was made explicit in numerous later ones. In a 1964 speech, he cited Iqbal, one of the modern Islamic thinkers most revered among Pakistanis for the proposition that a “republican form of government” was “not only thoroughly consistent with the Spirit of Islam, but also with the new forces that are set

164. See A.R. Cornelius, Presidential Address at the All-Pakistan Lawyers’ Convention, in CORNELIUS, *supra* note 6, at 59; see also A.R. Cornelius, Speech to the Third Commonwealth and Empire Law Conference, in CORNELIUS, *supra* note 6, at 254–57, for a much more elaborate treatment of the issue.

165. A.R. Cornelius, Speech to the Third Commonwealth and Empire Law Conference, in CORNELIUS, *supra* note 6, at 269–70.

166. See *id.*; see also BRAIBANTI, *supra* note 6, at 35–36, for Prof. Braibanti’s recollections of a discussion he had with Cornelius on this subject.

167. See, e.g., THOMAS BARFIELD, NEAMAT NOJUMI & ALEX THEIR, U.S. INST. FOR PEACE, THE CLASH OF TWO GOODS: STATE AND NON-STATE DISPUTE RESOLUTION IN AFGHANISTAN (2006), http://www.usip.org/files/file/clash_two_goods.pdf; JOHN DEMPSEY & NOAH COBURN, U.S. INST. FOR PEACE, TRADITIONAL DISPUTE RESOLUTION AND STABILITY IN AFGHANISTAN (2010), <http://www.usip.org/resources/traditional-dispute-resolution-and-stability-in-afghanistan>.

free in the word of Islam.”¹⁶⁸ In another speech, he discussed the classical Islamic legal and political thinkers Ibn Khaldun, Ibn Sina, and Ibn Rushd, and concluded:

It is remarkable that of these great thinkers, the two latter had absorbed to the full all that was of meaning and excellence in the Platonic philosophy, on which our modern concepts of democracy are based, but nevertheless they adhered to the view that the integrity of the Muslim State is bound up with adherence to the *Shariah*.¹⁶⁹

In yet another speech, Cornelius insisted that Islamic law could be interpreted to command respect by the government for all of the natural rights revered by liberal common law thinkers.¹⁷⁰

In short, Islamization, and only Islamization, left open the possibility that Pakistan could re-establish a judicially-supervised and at least partially liberal democracy. Islamization carried risks and would certainly require non-trivial concessions to illiberal popular beliefs about God’s command. Nevertheless, it would leave lawyers considerable power to shape people’s understanding of what Islamic law required. If they pushed for Islamization and, at the same time, promoted a liberal interpretation of Islamic law, liberal judges and lawyers might produce in Pakistan a modified, but recognizably liberal, version of the rule of law.¹⁷¹

The new Constitution in its Preamble declares that sovereignty over the entire Universe vests in Almighty Allah alone, and that Pakistan is to be a democratic State based on Islamic principles of social justice. The lawyers of Pakistan are capable of giving a practical shape to these high principles with the aid of their knowledge and study. The people will regard their laws with respect, and will implement them in their lives with honesty and reverence only when they come to recognize the laws as deriving from a true source of Sovereignty [i.e., Islam]. . . . If that ideal is achieved the laws would have a natural force to project and sustain them in the same way as principles are maintained and universally accepted. It will become the delight of the community to live according to their laws.¹⁷²

From 1964 on, Cornelius continued relentlessly to stress three themes. First, Pakistanis had demonstrated a fundamental desire for the law to be

168. A.R. Cornelius, Iqbal’s Political Message, Speech at the University of the Punjab (Apr. 21, 1964), in CORNELIUS, *supra* note 6, at 374.

169. A.R. Cornelius, *Function of Law as a Link Between Nations*, in CORNELIUS, *supra* note 6, at 149.

170. A.R. Cornelius, *Leadership Needs to Promote the Ethos of the Constitution*, Speech at the Hyderabad Rotary Club in Hyderabad, India (Feb. 13, 1965), in CORNELIUS, *supra* note 6, at 215.

171. See A.R. Cornelius, *Integration of Nation Through Law*, in CORNELIUS, *supra* note 6, at 57.

172. *Id.* at 62.

Islamic. The only way to suppress this was to impose an authoritarian regime that repudiated the liberal tradition that liberals and much of the legal profession claimed to hold dear. For example, in a 1964 speech at the prestigious University of the Punjab, Cornelius reminded his audience that post-colonial governments all over the world were failing to honor the liberal rule of law.¹⁷³ This concern haunted many of his speeches.

Second, Pakistan's Islamists did not all demand that the state incorporate an interpretation of law developed by classical scholars. Lay Islamists, like Mawdudi, explicitly recognized the ability of people without classical training to interpret the law. The recent history of the Middle East also suggested that the public would accept thoughtful and informed interpretations of Islam produced by lawyers with secular "legal" training, rather than muftis with classical Islamic training. In a 1964 speech to the Pakistan Legal Aid Society, Cornelius stressed:¹⁷⁴

I take it for granted that none of the audience present here would wish that the system of justice that we follow here should be altered in such a way that we should go back to the ancient practice of having Juris Consult, have persons to whom we could go for *fatwas* and decide cases like that. I think the people are now, through nearly two centuries of acquaintance with the British mode, absolutely accustomed to a system in which there are three tiers [of courts: trial, appellate, and final appellate] . . . Neither the people nor the lawyers would ever wish that our system as we practise it today should be altered. But the people may also wish that the Courts constituted as they are today should be applying in everything that they do, the law according to the Quran and the Sunnah—as required by the Constitution.¹⁷⁵

In another speech, Cornelius elaborated on his ideal of preserving both the essentials of the existing legal system and the public recognition of the law as "Islamic":

In our own State, I hope there will be none to deny that sovereignty lies in the law and the Constitution, and while administration is for the Executive, and law-making for the legislature, yet what is constitutional and legal, and what is not, should be declared in independence, bearing in mind only the high interests of the State, by the Courts alone.¹⁷⁶

Legal professionals could be given training in the Islamic tradition so that they can dispute credibly with madrasa-trained Islamic scholars and

173. A.R. Cornelius, *Iqbal's Political Message*, in CORNELIUS, *supra* note 6, at 374.

174. A.R. Cornelius, *Introduction of Islamic Law Principles into Statutory Structure of Pakistan*, in CORNELIUS, *supra* note 6, at 384.

175. *Id.* at 381–82.

176. A.R. Cornelius, *Function of Law as a Link Between Nations*, in CORNELIUS, *supra* note 6, at 147.

win support not only for lay interpretations but for liberal lay interpretations of Islam:

In our Universities there should be set up an Honours School of Islamic Jurisprudence where the instruction would be at an extremely high level. It should be different from what is taught in our Law Schools today, which are practically nothing more than technical schools enabling persons to gain entry to Courts and make a living.¹⁷⁷

Third, the history of law reform in Arab countries suggested that if lawyers showed good faith and training, they *could* successfully articulate an argument for liberal legality in an “Islamic” mode. In a 1964 speech,¹⁷⁸ Cornelius cited Mahmassani for the proposition that people who favored the liberal rule of law must be prepared to reconceptualize it in a way that took account of core Islamic beliefs while harmonizing them with core liberal values.¹⁷⁹ If they were willing to do this, he insisted, they had the ability to build a thickly liberal system that would maintain the core features of British constitutionalism and also command the obedience of both the ruler and the ruled. In another speech to an audience of political scientists, Cornelius optimistically put it this way: if lawyers took the time to express, as they clearly could, the genius of liberal democracy in Islamic terms, then

enlightenment would follow and thus the way of appreciation and adoption of the basic norms which are the requisite of our Constitution will be cleared and made to appear easy. . . . Where [the] law has grown out of the religious consciousness of the peoples, a tie would emerge which no one could possibly break.¹⁸⁰

Cornelius thus concluded that if the assembled lawyers wanted to re-establish the liberal rule of law, they could. To succeed, however, they would have to be prepared to embark on a Sanhūrī-like exercise of re-casting the legal institutions and principles they admired in an Islamic language:

[D]emocracy in Islam can never be merely secular but is essentially an exercise in the organisation of the people in accordance with the fundamental beliefs of their faith. That by itself will furnish the necessary incentive to the people to be true to the dictates of the Constitution and the laws under which they live, in the hope of an eternal reward.¹⁸¹

177. CORNELIUS, *supra* note 6, at 384.

178. *Id.* at 381.

179. *Id.* at 383 (“[Islamic] jurists and philosophers alike, however varied their conclusion might be in regard to matters of political philosophy or even the structure of the State at the highest level, nevertheless repeatedly return to the norm or ultimate measure of the *Sharia* for whatever they say.”).

180. A.R. Cornelius, *Function of Law as a Link Between Nations*, in CORNELIUS, *supra* note 6, at 147.

181. A.R. Cornelius, *Iqbal’s Political Message*, in CORNELIUS, *supra* note 6, at 374.

In 1964, some began to suggest that Cornelius's radical argument for Islamization was superfluous. In that year, the government amended the Constitution to make fundamental rights justiciable—thus apparently recognizing the binding quality of natural rights. While Cornelius welcomed the move, he was clearly skeptical about the government's *bona fides*. Having lived through the imposition of both emergency rule and martial law, he was clearly concerned that respect for fundamental rights would cease whenever the military found respect to be inconvenient.

Thus, even after these changes, Cornelius continued to argue that, in Pakistan, judges would not be able to ensure ongoing respect for fundamental rights listed in the Constitution *unless* they could connect fundamental rights to religious values shared by both the government and the governed. By embedding rights principles in an "Islamized" legal discourse, judges would be able to generate moral pressure on rulers to respect orders protecting citizens' fundamental rights and force rulers to recognize the real risk of popular outrage if rulers violated these orders:

[T]he Constitution lays down in the Fundamental Rights, the path which leadership is to follow, the over-riding principles that are to govern thought and behavior and policy. It is a misfortune that these are expressed in terms derived from other Constitutions which have been in existence for perhaps half a century. It may be convenient for purposes of judicial interpretation that the expression should be in the English language, but from the point of view of making these amendments a matter of conscience, would there not be in Pakistan enormous advantage to be gained from setting them out in a Scriptural language, that is in the Arabic language? I conceive that each Fundamental Right can be shown to derive from the dictates contained in the Holy Scriptures of Islam. If expressed in Arabic, in suitable terms, would they not be invested with overtones of undeniable obligation? Would not their assimilation into the public conscience be vastly enhanced thereby?¹⁸²

Cornelius's enthusiasm for liberal Islamization did not wane after he left the bench. In 1969, after retiring from the Court, he was asked to teach officers' training for the Civil Service of Pakistan (the successor to the ICS).¹⁸³ He reflected upon the British ideal of the rule of law and insisted that, paradoxically, no rule of law could be established in Pakistan unless these principles were translated into an Islamic idiom:

182. A.R. Cornelius, *Leadership Needs to Promote the Ethos of the Constitution*, in CORNELIUS, *supra* note 6, at 215.

183. For the relationship of the CSP to the ICS and the tensions it caused, see Garth Jones, *Pakistan: A Civil Service in an Obsolescing Imperial Tradition*, 19 ASIAN J. PUB. ADMIN. 321 (1997), available at <http://sunzi.lib.hku.hk/hkjo/view/50/5000141.pdf>. See also DAVID C.E. CHEW, *CIVIL SERVICE PAY IN SOUTH ASIA* (1992).

Reverting now to the proposition that an integrated idea of Right or Law pervading the entire community is essential for the healthy operation of a democratic society which observes the Rule of Law, there is no escape from the conclusion that the Ethical System of Islam must provide the medium through which [in Pakistan] the body of laws and institutions together with the moral conscience of the citizens is to function.¹⁸⁴

Cornelius's commitment to this project was such that he continued until his death to study Arabic and Islamic law and to write works trying to demonstrate points of continuity.¹⁸⁵

Interestingly, over time, Cornelius came to frame the need for Islamization in Pakistan in terms of a broader global need. While international human rights documents drafted by Western democracies reflected universally applicable principles, they were drafted in a language that made them unrecognizable and arguably unattractive to the masses in many post-colonial countries. People around the world should strive to translate human rights concepts into a form that resonated with the religious principles that were revered by the majority of the people in a particular country. If they did, the rulers would be more inclined to obey, and if they failed to, the people would be more likely to hold them accountable.¹⁸⁶

Organized and established religion, such as we are familiar with, still remains the most powerful safeguard against man's inhumanity to man. It is a question which I find of profound interest, whether, if South Africa were to become a religious state, there would not be that shift of opinion among the ruling class, who all profess Christianity, in favor of free and equal treatment to the underprivileged persons in their midst, which the recently reported resolution of the General Assembly seems scarcely capable of accomplishing.¹⁸⁷

184. A.R. Cornelius, *Judicial System of Pakistan*, Speech at the National Institute of Public Administration at Lahore (May 12, 1965), in CORNELIUS, *supra* note 6, at 274–75.

185. See A.R. Cornelius, *The Concept of Islamic Justice*, Speech (c. 1977), in BRAIBANTI, *supra* note 6, at 297–314; A.R. Cornelius, *Morals: The Islamic Approach* (c. 1983), reprinted in BRAIBANTI, *supra* note 6, at 315–31 (essay written for the Hamdard Foundation in Karachi). Braibanti reports that the latter essay was published in *VOICE OF MORALITY* 148–67 (Hakim Mohammad Said ed., 1985). *Id.* at 315.

186. A.R. Cornelius, *Islam and Human Rights*, Speech Delivered at the Pakistan Academy for Rural Development, Peshwar (Nov. 8, 1977), in CORNELIUS, *supra* note 6, at 278–96 (“I submit that this Universal Declaration is founded too exclusively on the concept of the secular state. . . . [T]he future calls for a great deal of consideration whether this Declaration would not be more effective over large parts of the earth's surface, if it gave a real place to religion in its formulation.”).

187. *Id.*

V. MIGHT CORNELIUS HAVE BEEN ONTO SOMETHING? THE
AMBIGUITIES OF ISLAMIZATION IN PAKISTAN
IN THE 1970s, '80s, AND '90s.

A. R. Cornelius was a Catholic liberal jurist who had once found public discussions of Islam's role in the state "repellent." In the 1950s, however, Cornelius watched as Islamists demonstrated the popular appeal of Islamic discourse. He drew from this a very different lesson than judicial colleagues like Justice Munir and Justice Kayani. In the Munir Report, Munir and Kayani suggested that Pakistan could not commit to Islamization so long as its leading proponents were illiberal populists. This was true even if a majority of Pakistanis demanded Islamization. Although they did not say as much, they seemed to imply that, if necessary, secularists had the right (and possibly at times the duty) to violate the fundamental civil rights of citizens. Cornelius saw this as self-defeating. Munir's opinions in *Dosso* and *Mehdi Ali Khan* only confirmed him in this view. As he saw it, secularists had no liberal constitutionalist ideology that they could use to replace the common law constitutionalism. When secularists rejected the idea that the government was unconditionally bound to respect the settled expectations of the people, they left the government effectively unbounded. If lawyers wanted to maintain the liberal rule of law in an Islamizing world, they should not reject their obligation to respect the people's core demand for Islamization. Rather, lawyers should try to influence people's understanding of Islamic government and Islamic law. They should try to establish judges in the popular mind as interpreters and elaborators of a liberal "Islamic" body of law—both a statutory law that they ensured was consistent with Islamic principles and a body of judge-made law that represented a judicial elaboration of Islamic principles. Cornelius was comfortable taking this position in part because he had learned that liberal lawyers in the Arab Middle East had established themselves as legitimate interpreters of Islamic law and gained popular acceptance by Islamists for a body of "European" law that they had reconceptualized in Islamic terms.

Cornelius's proposal was nothing if not ambitious. He thought that legal professionals should take part in a systematic program to study Islamic law and particularly to study liberal interpretations of Islamic law. They should learn to articulate and proselytize for the values they cherished (efficient governance, protection of fundamental rights) in Islamic terms. They should then use their knowledge of Pakistani law, where possible, to justify existing laws in Islamic terms and, where not possible, to propose amendments to Pakistani law to ensure that it is recognized by the Public as consistent with Islamic law.

In promoting his vision, Cornelius freely admitted that he was optimistic about two issues. First, he was optimistic that liberal Pakistani legal professionals would be willing to engage in a time-consuming process of

legal re-conceptualization. Second, he was optimistic that these legal professionals would be able convincingly to connect liberal constitutional principles to Islamic principles and to develop “Islamic” justifications for the enforcement of liberal rights.

Initially, most liberals overwhelmingly resisted Cornelius’s appeal on behalf of Islamization. Even those who were distressed about the illiberal direction that secularism had taken were skeptical about the idea that lawyers in Pakistan could win the public over to a liberal interpretation of Islamic law that would allow for a modern government and would serve as a bulwark of traditional fundamental rights.¹⁸⁸ They continued to accept the position articulated by Munir and Kayani in the 1950s that Islamization would never empower liberal Pakistani voices but, rather, would always empower illiberal voices. Islamization, the skeptics believed, would always tend to lead to a net loss of constitutional liberties.

At first glance skeptics might seem to have been proved right. During a period of Islamization in the 1970s, a populist president, Zulficar Ali Bhutto and, after him, a military dictator, Zia al-Haq, each cooperated with reactionary elements in Pakistani society to impose some self-styled “Islamic statutes” that were profoundly illiberal.¹⁸⁹ Amendments to the constitution empowered a special branch of courts to strike down laws on grounds of repugnancy to Islam.¹⁹⁰ A notorious statute declared the Ahmadi sect of Islam to be un-Islamic,¹⁹¹ criminalized blasphemy,¹⁹² and imposed traditional Islamic punishments for fornication.¹⁹³ Much of the commentary on these statutes declares them to be disastrous from a human rights perspective.¹⁹⁴

188. See BRAIBANTI, *supra* note 6, at 46–47, for a description of criticisms leveled at Cornelius by Justice Kayani and I.A. Khan.

189. See, e.g., TALBOT, *supra* note 25, at 240, 270–83.

190. *Id.* at 273–74.

191. Ordinance XX: Anti-Islamic Activities of Quadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance (1984), 36 PLD 102 (Pak.). For a discussion of this ordinance and of court decisions upholding its constitutionality, see generally Tayyab Mahmud, *Freedom of Religion and Religious Minorities in Pakistan: A Study of Judicial Practice*, 19 FORDHAM INT’L L.J. 40 (1995).

192. 295-C, Act XLV of 1860, PAK. PENAL CODE (1860), amended by The Criminal Law (Amendment) Act, No. III of 1986, THE GAZETTE OF PAKISTAN EXTRAORDINARY (Oct. 12, 1986). For critiques, see discussion in AMNESTY INTERNATIONAL, PAKISTAN: USE AND ABUSE OF BLASPHEMY LAWS (1994) and Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT’L L. 305 (2008).

193. Offense of Zina (Enforcement of Hudood) Ordinance, No. VII of 1979, PAK. PENAL CODE (1979), reprinted in 31 PLD (Statutes) 51 (Pak.).

194. See, e.g., ASMA JEANGIR & HINA JILANI, THE HUDOOD ORDINANCES: A DIVINE SANCTION? (1990); Rashida Patel, *Islamization of Laws in Pakistan?*, in ISLAMIC REASSERTION IN PAKISTAN (Anita Weiss ed., 1986); WOMEN OF PAKISTAN: TWO STEPS FORWARD AND ONE STEP BACK? (Khawar Mumtaz & Farida Shaheed eds., 1987). But see for a contrasting view Charles Kennedy, *Islamization in Pakistan: Implementation of the Hudood Ordinances*, 28 ASIAN SURV. 307,

Even if, however, General Zia's Islamization program and the legal reforms incident to them had a detrimental effect on constitutional liberties and women's rights, this does not disprove Cornelius's hypothesis. Cornelius always understood that Islamization could take place in an illiberal form and recognized as well that illiberal Islamization is precisely what many in Pakistan hoped to see. He made only the narrow claims that (a) liberal Islamization was a realistic possibility in Pakistan, (b) judges and lawyers could, he believed, develop and proselytize for liberal interpretations of Islam, and (c) in Pakistan, a liberal *Islamic* regime was the only type of liberal regime that could withstand the illiberal pressures generated both by illiberal factions of secularists and illiberal factions of Islamists.

Recent studies suggest that if we understand his claim in these narrow terms, Cornelius may, in fact, have been onto something. Although the elite judiciary was initially hostile to Cornelius's claims, some elite judges came over time to believe that Cornelius was right. These judges eventually tried to use liberal interpretations of Islamic law to promote the democracy and the rule of law in Pakistan.

Islamization in Pakistan from the 1970s through the present day thus turned out to be a multi-faceted process. General Zia's promulgation of apparently illiberal "Islamic" constitutional amendments and statutes constituted one facet. Liberal judicial interpretation of these amendments and statutes constituted another. As Charles Kennedy has shown, court records suggest that some of Bhutto and Zia's "Islamic" statutes had less of an impact on people's lives than critics claimed. This is apparently because judges harnessed procedural safeguards to avoid implementation and also employed progressive interpretations of Islamic law to give creative interpretations of the statutes and to limit the impact of the Islamic amendments and statutes.¹⁹⁵ For example, one of the biggest complaints about the Islamization programs involves the enactment of laws banning fornication, which have a disparate impact on women. Evidence regarding the enforcement of these laws suggests that their impact on women, while still problematic, was less serious than sometimes assumed. Though there were a

312–13 (1988) [hereinafter Kennedy, *Islamization in Pakistan*] (challenging the claims of these other authors).

195. See, e.g., Kennedy, *Islamization in Pakistan*, supra note 194, at 315–16 ("Despite widespread misgivings and conjecture both in Pakistan and the West that the execution of hadd penalties (amputations, stonings to death) would become commonplace in Pakistan, as of February 1988 no hadd penalty had been meted out in the state. Indeed, only two hadd convictions (both for theft) had ever been upheld by the FSC. The Supreme Court later overturned both convictions. Similarly, the implementation of the Hudood Ordinances has not had a significantly adverse impact on the status of women in Pakistan, as has been often alleged; nor has the implementation of the law significantly altered the relationship between judicial and political institutions; nor has it significantly changed judicial procedure in Pakistan."); see also Charles Kennedy, *Islamization and Legal Reform in Pakistan, 1979–1989*, 63 PAC. AFF. 62, 72–77 (1990) [hereinafter Kennedy, *Islamization and Legal Reform*].

number of problematic convictions, judges in the higher judiciary seem systematically to have overturned these on appeal.¹⁹⁶

Adding further complexity, Martin Lau has argued that whatever negative impact the statutes had on the liberal rule of law, they may have been offset by the positive impact of court decisions in which judges used the power of Islamic review to increase judicial power and to employ that power in the service of liberal values.¹⁹⁷

Lau's work is based on an exhaustive survey of all published Pakistani court cases from the 1960s to the present in which judges cite "Islamic law" as a ground for decision. Lau identifies a trend that seems to have begun shortly after Cornelius left the bench but before the rise of General Zia's praetorian Islamization program. According to Lau, judges increasingly used Islamic arguments to justify opinions that boldly asserted the power of judges to protect natural rights, notwithstanding military attempts to restrict their powers. As judges struck down those statutes as un-Islamic or re-interpreted them to conform to a more liberal Islamic vision, they also continued to expand the power of judges and the scope of fundamental rights in areas not governed by Islamic statute. Lau's conclusion is unequivocal:

The Islamisation of laws in Pakistan has been primarily a judge-led process, which was initiated to enhance the power of the judiciary and to expand the scope of constitutionally guaranteed fundamental rights. . . . [T]he role of judges in the Islamization of the [Pakistani] legal system has been largely obscured by the more visible manifestations of Islamisation, namely the promulgation of the infamous Hudood Ordinances and other isolated pieces of Islamic legislation [T]he judicial appropriation of Islam and its integration into the vocabulary of courts was a conscious process aimed not only at the fulfillment of a general desire to indigenise and Islamise the legal system after the end of colonial rule, but it was also a way of enhancing judicial power and independence. The Islamisation of law did, perhaps ironically, not only predate Zia-ul-Haq's regime, but was used to challenge him. . . . [It] has become an integral part of the legal discourse being relied on in the context of a wide range of issues, from the permissibility to erect high rise buildings in Karachi to the dismissal of a Prime Minister.¹⁹⁸

Cornelius, intriguingly, is barely mentioned in Lau's study, which is understandable in light of the limited scope of Lau's book. As Lau explicitly notes in his book, the study is meant to be an exhaustive doctrinal legal study analyzing the outcomes in Pakistani cases from the 1960s through the 1990s that refer to Islamic law. It was thus beyond the scope of his project

196. Kennedy, *Islamization and Legal Reform*, *supra* note 195, at 62, 65 n.9.

197. MARTIN LAU, *THE ROLE OF ISLAM IN THE LEGAL SYSTEM OF PAKISTAN* 1-3 (2006).

198. *Id.* at 1.

to explore *why* judges began to use Islam in the instrumentalist and progressive way that they did. From the information presented here, however, it seems highly likely that the trend that Lau identifies was influenced by the work of Cornelius.¹⁹⁹

Lau's study provides evidence to support Cornelius's hypothesis that the public would respect a liberal interpretation of Islamic law developed by judges and that this could be used to empower the judiciary *vis à vis* the executive. Indeed, it might protect natural rights not only from predatory secular powers, but from illiberal and autocratic Islamic powers.

Although Lau's work only covers cases through the early 2000s, judges have continued to use liberal interpretations of Islamic law as a tool to protect constitutional liberties. An examination of Pakistani newspapers reveals that courts today continue to cite Islamic law to justify important rights-protecting decisions.²⁰⁰ Notably, as illiberal Islamists have become powerful in recent years, judges have been striking down self-styled "Islamic" laws that are based on illiberal interpretations of Islam.²⁰¹ They do so by arguing that such laws are inconsistent with Islamic justice, properly understood.²⁰²

Pakistan is not the only country in which judicial application of Islamic legal principles has occasionally been used to protect natural rights from both secular and religious enemies. My own research on Egyptian

199. Many of the judges Lau studied came of age during the period that Chief Justice Cornelius was arguing that the judiciary (and contemporary judges' liberal vision of law) could *best* be promoted by judge-led liberal Islamization. Without more research into the judges who pushed this development, it is impossible to determine exactly how much Cornelius inspired their activity, but he certainly must have played a role.

200. For example, the Federal Shariat Court (the FSC) recently issued a judgment on prisoners' rights. The FSC handles crimes under "Islamic" criminal laws but also has jurisdiction to hear challenges to laws on the grounds of their repugnancy. While AAJ News, somewhat mockingly, focused on a provision suggesting that some prisoners be granted "conjugal rights," the decision actually orders broad changes to alleviate what it describes as inhuman treatment. *See Married Prisoners: FSC Calls for Giving Conjugal Rights*, AAJ NEWS (Aug. 29, 2009), <http://www.aajt/2009/08/married-prisoners-fsc-calls-for-giving-conjugal-rights/>.

201. The FSC recently overturned article 154(4) of the Qanun-e-Shahadat Law, which was an Islamized version of the law of evidence. The FSC handles crimes under the "Islamic" criminal laws governing, *inter alia*, rape or sexual harassment and has jurisdiction to hear challenges to laws on the grounds of their repugnancy. The overturned article permitted men accused under the "Islamic" criminal laws governing rape or sexual harassment to bring in evidence of the woman's character. Although the law was consistent with some widely held interpretations of Islam, the FSC overturned the law on the ground that this interpretation relied on misinterpretations of the Islamic tradition. *See Shahadat Law Against Quran, Sunna: FSC*, S. ASIA F. (Feb. 12, 2009), <http://www.south-asiaforum.org/2009/02/12/shahadat-law-against-quran-sunna/>.

202. *See id.* The article notes, intriguingly, that the only government body that sent representatives to defend the sub-article in question was the government of the North West Frontier Province. This was a province under the control of a political party dominated by conservative traditional Islamists. The article notes that "the Court observed that it had failed to comprehend . . . what wisdom had prevailed upon lawmakers to add sub-article 4," commenting that it served no useful purpose and that, if one understood properly the broad moral principles announced in the Qur'an, one would see that the sub-article in question contradicted them.

constitutional court cases involving Islamic law also shows that in Egypt, too, liberal judges have successfully used Islamic legal arguments to justify a policy of expanding the scope of constitutional rights.²⁰³

Thus, the rise of popular piety and governmental programs to Islamize society have undoubtedly led to illiberal treatment of people and human rights abuses in Pakistan and Egypt.²⁰⁴ At the same time, however, liberal judges in both countries have been able to develop Islamic arguments both to forestall abuses by secular government and, more intriguingly, to resist abuses carried out by citizens or government officials claiming to be acting according to “Islamic” principles.

None of this proves conclusively that Cornelius was correct to hypothesize that liberalization ever *requires* Islamization. It is counterfactual whether judicial empowerment and judicial liberalization would have taken place in Pakistan and Egypt anyway, even if judges had not chosen to harness Islamic arguments in favor of their liberal vision. The evidence is, however, suggestive. At the very least, the recent histories of Pakistan and Egypt do not *disprove* Cornelius’s hypothesis that in some countries there is a particular type of Islamization that is helpful—and indeed may be a necessary precondition—for the establishment of liberal democracy. It is thus worth considering the ramifications of Cornelius’s hypothesis.

VI. CONCLUSION

We live in an age in which democracy and rule of law promotion are not only objects of academic study²⁰⁵ but are also explicit foreign policy goals of the United States, the European Union,²⁰⁶ and powerful multilateral institutions such as the World Bank.²⁰⁷ Billions of dollars are spent every year with the explicit goal of promoting the rule of law, often defined in thick terms as the practice of governance that provides people equal treatment under a thickly liberal conception of law. A crucial question is

203. See generally LOMBARDI, *supra* note 4; Lombardi & Brown, *supra* note 4.

204. See the works discussed *supra* note 4.

205. For an early academic discussion of the emergence of Rule of Law promotion as a foreign policy objective in multiple countries, see, for example, Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998). For a discussion of U.S. efforts in the larger context of U.S. programs to promote “Democracy,” see, for example, SUSAN B. EPSTEIN ET AL., DEMOCRACY PROMOTION: A CORNERSTONE OF U.S. FOREIGN POLICY (2007), available at <http://www.fas.org/sgp/crs/row/RL34296.pdf>.

206. See, e.g., Patrícia Galvão Teles, Ministry of Foreign Aff. of Port., Rule of Law at the National and International Levels, Statement on Behalf of the European Union, United Nations 62nd Session of the General Assembly, 6th Committee (Oct. 25, 2007), available at http://www.europa-eu-un.org/articles/en/article_7569_en.htm.

207. See, e.g., David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 74, 74 (David M. Trubek & Alvaro Santos eds., 2006) (“In the 1990s, there was a massive surge in development assistance for law reform projects in developing and transition countries. These projects involve investments of many billions of dollars. The World Bank alone reports it has supported 330 ‘rule of law’ projects and spent \$2.9 billion dollars on this sector since 1990.”).

how such actors should promote the rule of law in countries where secular actors have historically been illiberal and the alternative is some self-consciously Islamic form of governance.²⁰⁸ Should countries like the United States promote liberal secularism—notwithstanding the fact that it was (because liberal) un-compelling to the illiberal elites and (because secular) un-compelling to a polity inclined to Islamism? Or should these countries instead promote Islamization while at the same time engaging in an active project to have legal professionals promote an interpretation of Islam in which judges would (a) have the final say in applying Islamic law and (b) from the bench, promote a liberal interpretation of Islam? Cornelius argued that in post-colonial Pakistan, the first approach was doomed to fail. Under the circumstances, he thought, it would be very wise to try the second.

If Cornelius was correct, the United States and others involved in the progress of building constitutionalism in the Muslim world should treat Islamization as a double-edged sword. Under some circumstances, Islamization should result in the application of laws repugnant to liberal understandings of law. Under other circumstances, however, it should help support the liberal rule of law. In a world that is struggling to understand the implications of the global Islamic revival, scholars should be encouraged to do whatever research is necessary to determine whether Cornelius's intuition was correct. Until that research is done, we should admit the provocative possibility that in some countries, under some circumstances, Islamization, or at least *a certain type of Islamization*, might be something not simply to tolerate, but rather something to encourage and facilitate.

208. See, e.g., JAN MICHIEL OTTO, SHARIA AND NATIONAL LAW IN MUSLIM COUNTRIES: TENSIONS AND OPPORTUNITIES FOR DUTCH AND EU FOREIGN POLICY 11–14 (2008).

