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A Transnational Actor on a Dramatic Stage – Sir Ivor Jennings and the Manipulation of Westminster Style Democracy: The Case of Pakistan

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Across first Asia and then Africa new states rose from colonial rule in the post-war era that sought to build New Westminster constitutions. The Westminster model was the transnational trend after 1945 in constitution-making for much of the world emerging from colonial rule and was promoted by the Colonial Office, Indigenous leaders and constitutional advisers such as the ubiquitous Sir Ivor Jennings. However, this flexible and ambiguous regime type caused many political and constitutional crises that questioned the wisdom of applying Westminster to these states. Jennings worked across Africa and Asia including in Ceylon, Nepal, Malaya, Singapore, the Maldives, Sudan, Ethiopia, South Africa, and the Federation of Rhodesia and Nyasaland. It is Pakistan, however, that sticks out as Jennings's most controversial role where he effectively, legally and politically, contentiously defended a "constitutional coup" by the Governor-General against the Constituent Assembly in 1954. The case also serves to demonstrate how the manipulation and divisive interpretations of Westminster conventions and institutions in the first decade of Pakistan led to the breakdown of democracy and laid conspicuous precedents for dictatorship and military rule, which have explanatory value in understanding the country's prevalent fragility in embedding accountability and democracy.

"[W]e shall have to go far back in history and to trace the origin and subsequent development of the British Empire itself."¹ So stated the opinion of the Chief Justice of Pakistan, Muhammad Munir, when searching for the legal justification of the controversial dissolution of the Constituent Assembly on October 24, 1954 by the Governor-General to forestall the adoption a new constitution that would have curbed his powers. In a context where the country was

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1. Federation of Pakistan v. Moulvi T. Khan, (1955) 240 PLD (SC) (Pak.).

attempting to craft a republic based on Islamic principles in South Asia, the case and crisis it passed judgment on relied on templates from the settler states where few Muslims resided. Decisions and actions of English monarchs stretching back to the seventeenth century were employed. It was Halsbury's, not Hammurabi's laws that guided the proceedings.² It remains the most dramatic court case in Pakistani history following one of the most controversial constitutional crises in the common law world. Sir Ivor Jennings believed the case "dealt with fundamental principles of constitutional law of interest throughout the Commonwealth."³ Jennings would know. Not only was he the world's foremost expert on the constitutions of the Commonwealth at the time, he also played a direct role in Pakistan as adviser, advocate and author of critical legal, political, and academic writings on the crisis. Many Pakistani scholars angrily denounce the crisis as the real beginning of that country's descent into dictatorship and its ruling elites' enduring attraction to martial rule.

Jennings, as the Governor-General's adviser, colluded to ex post facto justify a constitutional coup d'état that crushed democratic saplings, ridiculed the rule of law, and exposed the dangers of adopting the Westminster model and the conventions and prerogatives that came with it.⁴ As a constitution-maker of transnational influence and scope, the role of Jennings in Pakistan provides an insight into how selective precedents and interpretations from across the British Empire and Commonwealth were used to justify what appeared unjustifiable. In turn, the "Pakistan Formula," as Jennings confidentially called his contentious fix there, was drawn upon for other states around the world that he advised—primarily, as was the case in Pakistan, to frustrate, if not suspend, the will of parliament to the advantage of unelected elites.⁵ The actions of Jennings in Pakistan, using Halliday and Shaffer's Transnational Legal Order definition, are that of an actor who, with the wilful cooperation of bureaucratic and judicial officers, authoritatively forged the understanding and practice of transnational common law for employment in Pakistan. The consequences of this enhanced a socio-legal environment that dented the rule of law and re-orientated it towards more illiberal "behavioural" ends and impacting on legal orders in the country ever since.⁶

Sir Ivor Jennings was one of the twentieth century's most influential constitutional scholars and became, from the 1940s till his death in 1965, one of its most established "constitution-makers."⁷ Before the term was employed, Jennings

2. Multiple editions of *Halsbury* were used in these cases before the Pakistani courts.

3. IVOR JENNINGS, *CONSTITUTIONAL PROBLEMS IN PAKISTAN* vii (1957).

4. H. Kumarasingham, *Exporting Executive Accountability? Westminster Legacies of Executive Power*, 66(3) *PARL. AFF.* 579 (2013).

5. For example in Nepal.

6. *See*, *TRANSNATIONAL LEGAL ORDERS* 8-11 (Terence C. Halliday & Gregory Shaffer, eds., Cambridge Univ. Press 2015).

7. *See generally* H. KUMARASINGHAM, *CONSTITUTION-MAKER: SELECTED WRITINGS OF SIR IVOR JENNINGS* (2015); H. KUMARASINGHAM, *CONSTITUTION-MAKING IN ASIA* –

was undoubtedly transnational in his scholarship and had near omnipresence across the British world. The vast British domains in Asia proved his most important and significant arena for constitution-making.⁸ Starting from his arrival in Colombo in March 1941, to head what would become the University of Ceylon, he soon became an unofficial adviser to D.S. Senanayake, the preeminent political leader in the island destined to be its first prime minister. Jennings, with Senanayake and the local panjandrum, O.E. Goonetilleke, formed the “nucleus of a Reforms Ministry.” Here the new Vice-Chancellor acted as the constitutional adviser “on tap” giving expertise that unquestionably improved Ceylon’s (and especially Senanayake’s) case.⁹ This famous trio relied on each other and, with near exclusivity, conducted and formulated the Ceylon side of the negotiations with the British. Jennings, just thirty-eight when he arrived, played a major role in the articulation of Ceylon’s independence demands and relished it. Jennings’s role went well beyond the academic and ventured into the political. It was a role he craved, but also one that elicited jealousy and deep suspicion as to how much this Englishman was influencing high politics, especially when not only the citizenry, but even the leading local politicians were kept out of deciding Ceylon’s future. Jennings had, in fact, no formal role. As he admitted “Officially I did not exist.”¹⁰ Official or not, locals noted his presence and sway.¹¹ Prominent Ceylonese journalist Mervyn de Silva sardonically penned a portrait of Jennings in the press, which some Pakistanis could well have recognized.

As Vice-Chancellor Jennings went from success to success in this country, from Commission to Commission, and finally to the exalted position of one of the architects of Ceylon’s independence, and thence to a knighthood, the patronising air with which he looked upon the campus was extended to cover the whole nation. And when, with Ceylon as a base, his influence broadened out to cover neighbouring countries Pakistan, Malaya, the Maldives which consulted him on constitutional matters, he found it possible to patronise a whole continent. It is a fact that at least two of these countries have been riddled with constitutional crises and catastrophes since Sir Ivor left their shores. But to match Sir Ivor’s own manifest modesty if for no other reason, we refuse to credit our ex-Vice-Chancellor with responsibility for these historic events!¹²

The “immature democracies”¹³ of Asia, as Jennings termed them, nonetheless sought his counsel and he became, from Punjab to Penang, an Asian transnational

DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE 173-94 (2016) (for an introduction on Jennings’ life and this aspect of his career).

8. See generally H. KUMARASINGHAM, CONSTITUTION-MAKING IN ASIA – DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE 1-35 (2016).

9. H. KUMARASINGHAM, THE ROAD TO TEMPLE TREES: SIR IVOR JENNINGS AND THE CONSTITUTIONAL DEVELOPMENT OF CEYLON: SELECTED WRITINGS 10 (2015).

10. *Id.* at 16.

11. *Id.* at xxvi-xxvii

12. KUMARASINGHAM, *supra* note 9, at xxvi-xxvii.

13. IVOR JENNINGS, THE APPROACH TO SELF-GOVERNMENT 32 (1956).

constitution-maker and adviser. Jennings was well regarded and employed for three main reasons. First, he had the reputation as the preeminent expert on Commonwealth constitutions with several of his major (and best) publications completed before the Second World War. Second, he had substantial experience in Asia as Ceylon's Vice-Chancellor 1941-55 and university business across the region. He was also known to some of the leaders and leading lawyers of the region in an era that was flush with Oxbridge men. Finally, he was very hardworking and had form in getting things done quickly, however thorny the situation. His ability and versatility to draw upon the constitutional wealth of British and Imperial precedents was legendary. This pleased the elites who dominated the upper echelons of Asian states and who employed Jennings to give a solution with the imprimatur of a British academic who was not in the pocket of Her Majesty's Government.

The constitutional form the Westminster model afforded enabled multifarious versions and styles to sprout globally. Westminster consciously avoided rigid constitutional and institutional forms and instead nurtured convention and context to provide the constitutional order.¹⁴ While not *the* determining political factor in the crises that will be detailed below in Pakistan, Westminster-style government was nonetheless a regime-type, with its deliberate ambiguity and tacit assumptions, that greatly assisted the actions and objectives of the Pakistani elite in retarding democracy and for Ivor Jennings to creatively give legal cover for them. Transnational legal expertise was critically deployed for narrow national political ends. Jennings was able to draw on common law and Commonwealth political history to service the needs of the Pakistani establishment, despite the unlikely and unsuitable transferability of much of his advice for the major political crises that confronted the young state.

The Indian Independence Act of 1947, which crafted the Pakistani state, facilitated a Constituent Assembly to sit and create a constitution for the Dominion. As Alan Gledhill put it, while "India succeeded to the capital, the instrumentalities, and the accommodation of the central government, Pakistan had to improvise."¹⁵ An example of this was when M.A. Jinnah, who was the unquestionable founder of Pakistan, became, without precedent, both Governor-General and President of the Assembly. Pakistani politicians and the population accepted and often revered Jinnah as the Quaid-i-Azam, the great leader, and did not question this concentration of power and influence. In contrast to every other part of the Commonwealth at that time, and with no other twentieth century example, the Crown in Pakistan and its representative were endowed with critical political power. This power was supplemented by the ambiguous conventions surrounding the office, giving ample ground to interpret awesome authority unheard of in any other Westminster style state. Pakistan was no dictatorship in 1947, however, and it was believed that its exceptional creation allowed for exceptional actions from its creator

14. Kumarasingham, *supra* note 4.

15. ALAN GLEDHILL, *PAKISTAN – THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* 65 (1957).

to cement the foundations and interests of the state. This context allowed extraordinary political power in the hands of the Governor-General. Jinnah chaired and directed Cabinet, instructed provincial governors, and gave orders to the civil and military services. This was not meant to carry on after Jinnah's death in September 1948—just over a year after independence.¹⁶ Nonetheless precedents and personalities existed for the dramas of 1954.

Constitution-making in Pakistan was a very lackluster affair compared to constitution-making in India.¹⁷ The Assembly hardly concerned itself with its constitution-making task. In the first fourteen of its sixteen sessions, it only managed to clock up fifty-seven days between 1947 and 1953.¹⁸ Instead, much of the real political activity occurred beyond the legislature at the desks of the bureaucracy, canteens of the officers' mess and the Governor-General's residence. Political parties were largely incidental. The Muslim League, once the great minority party of undivided India, began to crack under the pressures and fissions of the new Pakistan's ethnic and linguistic diversity and struggle with the factionalism and impatience that political leaders had for party democracy. As Andrew Harding has argued, the two-party system was meant to be part of the Westminster export model, but was rarely found anywhere, especially in Asia.¹⁹ Into the breach were old institutions of the Raj now largely manned by local elites. Viceregalism was in vogue, evoking the "oriental despotism" of India's viceroys, and colonial era practices not only continued, but were often accentuated. Even viceroys during the Colonial era were restrained by the India Office and Parliament in London. Evidence of accentuation and the non-party executive constellation that ruled the country can be seen with the former Indian Civil Servant Ghulam Mohammed, Governor-General since 1951, openly sacking the Muslim League party Prime Minister, Khwaja Nazimuddin, due to policy and personal differences in April 1953 without advice and without reference to the legislature where the Prime Minister claimed a majority. Nazimuddin, himself a former Governor-General, was replaced by a non-politician, Mohammed Ali Bogra, who was then serving as Ambassador to Washington, and was expected to carry out the wishes of the bureaucratic-military axis, which he largely did. The Governor-General instructed the Law Minister to issue a statement to quell constitutional mutterings attaching "undue emphasis on certain conventions as they are known to the British constitutional practice."²⁰ Most, however, were very pleased with the action since the government had grown unpopular and had lost control of East Pakistan. The American Ambassador reported to Washington that the Governor-General's action against Nazimuddin

16. See Ayesha Jalal, *Inheriting the Raj: Jinnah and the Governor-Generalship Issue*, 19 MOD. ASIAN STUD. 29 (1985).

17. See H. KUMARASINGHAM, A POLITICAL LEGACY OF THE BRITISH EMPIRE 25-45 (2013).

18. KEITH CALLARD, PAKISTAN: A POLITICAL STUDY 80 (1957).

19. Andrew Harding, *The Westminster Model Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States*, 4 OXFORD U. COMMONWEALTH L. J. 160 (2004).

20. ALLEN MCGRATH, THE DESTRUCTION OF PAKISTAN'S DEMOCRACY 98 (Oxford Univ. Press 1996).

was “one of the most popular coups in history.”²¹ A coup nonetheless, and one that breached not the law, but convention.

Sir Ivor Jennings noted of the dismissal that “on all British precedents, this action was completely unjustifiable”²² Nonetheless the Cambridge-educated public law scholar had been selected in July 1954 to advise the Constituent Assembly. His name had been discussed since the idea of Pakistan became a reality.²³ Despite not having explicit expertise on Pakistan, he was selected. Indeed he confessed to the Secretary of the Ministry of Law and fellow Englishman, Sir Edward Snelson, after receiving a request to help advise the Governor-General, that he was not “sufficiently familiar with the law of Pakistan to advise what legal form proceedings should take.”²⁴ Jennings prided himself, however, on his adaptability: “[c]learly one cannot sit in the Constituent Assembly Building in Murree or Karachi and draft a Constitution for the Gold Coast. There are, however, common elements which make it possible to at least define the problem.”²⁵ The new Prime Minister expressed to the population in a broadcast on April 1, 1954, that Pakistan was “being advised by Sir Ivor Jennings, one the greatest constitutional authorities in the world.”²⁶ Providing advice on constitutional matters, as he had already done around the world, could have been a rather *normal* role for Jennings. However, in Pakistan it was not his role as constitutional adviser to the Assembly which draws the focus of this article, but instead his highly secretive and crafty role in advising the Governor-General and bureaucracy on the dissolution of the constituent assembly and the subsequent political and legal justifications of a power most scholars and lawyers believed the Crown no longer possessed and did not exist in Pakistan.²⁷ This role, therefore, compelled Jennings to find defenses, precedents, and prevarications that only someone of his immense transnational and comparative knowledge of constitutional practices across the world could bring to the rescue of what even he thought unlawful.

21. *Id.* at 97.

22. *See* KUMARASINGHAM, *supra* note 8, at 136.

23. His name for example was mentioned for the role as early as 4 July 1947. *See* 3 QUID-I-AZAM MOHAMMAD ALI JINNAH, Z. H. ZAIDI, JINNAH PAPERS: ON THE THRESHOLD OF PAKISTAN 85 (Islamabad: Government of Pakistan 1996) (correspondence from H. L. Ismay to Liaquat Ali Khan, 4 July 1947, F. 2/175).

24. *See* Sir Ivor Jennings Papers, Institute of Commonwealth Studies, University of London, Jennings to Snelson, at ICS 125/BXV/4 (10 Nov. 1954).

25. IVOR JENNINGS, THE APPROACH TO SELF-GOVERNMENT 11 (1956).

26. S.S. PIRZADA, DISSOLUTION OF CONSTITUENT ASSEMBLY OF PAKISTAN AND THE LEGAL BATTLES OF MOULVI TAMIZUDDIN KHAN 42 (Asia L. House 1995). Sir Kenneth Roberts-Wray, Legal Adviser to the Colonial Office and later author of COMMONWEALTH AND COLONIAL LAW (1966) for one did not have a high opinion of Jennings and considered his draft constitution for Ceylon “quite useless” – an opinion he repeated in 1956 when Jennings was about to go to Malaya as part of the Reid Commission. *See* KUMARASINGHAM, *supra* note 8, at 9; A.W. BRIAN SIMPSON, HUMAN RIGHTS AND THE END OF EMPIRE: BRITAIN AND THE GENESIS OF THE EUROPEAN CONVENTION 859 (Oxford Univ. Press 2001); *See also* KUMARASINGHAM, *supra* note 9.

27. *See* McGRATH, *supra* note 20.

There is . . . no power in GOI [Government of India] Act to dissolve the Federal Legislature. It was in GOI Act s. 19, but was removed in 1947. Nor is there power to dissolve CA in I.I. [India Independence] Act. In other words, this is a revolutionary act . . . This illustrates the general principle that an act of illegality compels other acts of illegality.²⁸

However, this did not perturb Jennings, who afterwards would even admire his own legal finesse: “[t]here is no provision in the Government of India Act for the dissolution of the Constituent Assembly. The action taken was therefore both unconstitutional and illegal. This raised certain problems, which seem to have been solved at least temporarily with considerable success.”²⁹ As Paula Newberg argues, these years where Jennings operated showed a period that “took refuge in the presumed impartiality of inherited constitutional instruments without recognizing their deficiencies and structural partialities” with disastrous consequences for future constitution-making.³⁰ Jennings was no creature of the Pakistani elite; he knew what he was doing and the local elite knew whom they were employing. This was not a neo-colonial plot to destabilize a non-western state, though there were political gains for Pakistan’s Anglo-Saxon allies, but instead an example of internal political machinations given extra fuel from external actors like Jennings. Arguably the crises and its immediate outcome legitimized both Jennings and the Pakistani establishment that directed him. The Queen, on the advice of her Pakistani ministers, even felt emboldened to make Jennings a Knight Commander of the Most Excellent Order of the British Empire at the end of his mission in the country, and he would go on to collect further academic and national honors with his advice sought from Nigeria to New Zealand.³¹ Pakistan’s rulers no doubt congratulated themselves that their coup against parliamentary democracy was not only defended by Jennings but lauded in the international press. In London the oldest journal of international affairs, *The Round Table*, congratulated the governor-general from “stopping the rot” by dissolving the “irresponsible” Constituent Assembly and concluded that the “common man and the country have suffered long; and if we now have people at the helm of affairs who we know are clear in their visions and have honesty of purpose we are inclined to wish them god-speed and forget everything else.”³²

Looking at the crisis and the context surrounding the dissolution, it is evident how much the Westminster system was being used and interpreted in different ways to suit the Pakistani elites’ purposes. The Westminster model became, as Woodrow Wilson predicted, the “world’s fashion,” especially after 1945.³³ However, as A.F.

28. See *supra* note 24, *Revolution in Pakistan*, at ICS 125/B/15/6 (25 Oct. 1954).

29. Kumarasingham, *supra* note 4, at 132.

30. PAULA R. NEWBERG, *JUDGING THE STATE: COURTS AND CONSTITUTIONAL POLITICS IN PAKISTAN* 65 (Cambridge Univ. Press 2002).

31. KUMARASINGHAM, *supra* note 9, at 3.

32. *The Crisis in Pakistan*, 44 *ROUND TABLE* 50 (1954).

33. Pippa Norris, *The Twilight of Westminster? Electoral Reform and its Consequences*, 49 *POL. STUD.*, no. 4, at 877 (2000); H. Kumarasingham, *Eastminster – Decolonisation and State-Building in British Asia*, in

Madden reminds us, countless British colonial reports, statesmen, and officials counselled strongly against the suitability of Westminster as transnational regime type.³⁴ Most in Whitehall till the twentieth century shared the view of the redoubtable senior nineteenth century Colonial Office mandarin, James Stephen, that to create “miniature” British constitutions across the world, especially for places with substantial non-European populations, was “the grossest of absurdities.”³⁵ The 1930 Simon Report into Indian constitutional reform perceived the experiment in introducing Westminster to the East as dangerous. “The introduction into an oriental country, with a long history of autocracy, of methods of self-government evolved during centuries of experiments by a Western nation for its own conditions and people was a momentous and even hazardous enterprise.”³⁶

Nonetheless, for much of the twentieth century, the Westminster model travelled far and wide, not as an imposed form of constitution-making, but instead as one that both British and indigenous politicians desired in order to achieve ambitions of geopolitical connection, a belief that this system was the best and most understood, and local intentions to wrest away the awesome power of the colonial state into their waiting hands.³⁷ As De Smith argues, another characteristic which critically made this all possible and enabled the system’s export to far corners of the globe of improbable suitability was that “uniformity is neither sought nor achieved.”³⁸ Conventions were critical therefore, but this still meant that for those across the world that chose Westminster style government the “dichotomy of law and convention was preserved, and most of the really important conventions were left to the interpolator.”³⁹

Ivor Jennings was, and remains, one of the most critical sources on British and Commonwealth conventions and in some cases was not just advising or read on the subject, but became its “interpolator” himself, critically so in the case of Pakistan. Famously he opined that in the Westminster system conventions were “the flesh which clothes the dry bones of the law.”⁴⁰ Transnational constitution-making in such a style of government was far from a rigid and mechanical transferal. Instead, conventions for one constitution were anathema for others—despite having comparable institutions and origins. The conventions that surrounded the Crown

CONSTITUTION-MAKING IN ASIA: DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE 9, 10-11 (H. Kumarasingham ed., 2016).

34. A.F. Madden, *Not for Export: The Westminster Model of Government and British Colonial Practice*, 8 J. Imperial & Commonwealth Hist. 19 (1979).

35. *Id.*

36. INDIAN STATUTORY COMMISSION, REPORT OF THE INDIAN STATUTORY COMMISSION VOLUME II—RECOMMENDATIONS CMD. 3569, THE GENERAL PRINCIPLES OF OUR PROPOSALS 4 (1930).

37. S.A. De Smith, *Westminster’s Export Models: The Legal Framework of Responsible Government*, J. COMMONWEALTH POL. STUD. 4 (1961).

38. *Id.*

39. *Id.*

40. IVOR JENNINGS, THE LAW AND THE CONSTITUTION 81 (5th ed. 1959).

were a bone of contention in Pakistan throughout the 1947-1956 period when it was a Dominion with a Governor-General representing the monarch in Buckingham Palace. The Westminster model often experienced “dyarchical malfunctions” in Asia.⁴¹ The critical position of Head of State in Asia was rarely ceremonial and apolitical as Westminster convention dictates; instead, the Eastminsters of Asia took on a major “deviation” from the settler cases.⁴² Asian heads of state routinely interfered in politics, wielded significant executive power, frustrated policy, and had a very different definition of the Westminster maxim of “responsible advice.”⁴³

This central element of Westminster government faced problematic transnational translation; it forms the crux of the crisis and where Ivor Jennings, constitution-maker par excellence, played a formidable role in bringing down the constitutional order of Pakistan. As W.J.M. Mackenzie observed on the task of constitution-making, “[a] lawyer’s constitution is dead until it strikes roots in the political soil.”⁴⁴ Elkins, Ginsburg, and Melton argue in their wide-ranging survey on the content of authoritarian constitutions that not only are there “few systematic differences across the formal constitutions of democracies and dictatorships,” but instead the “most important determinants of constitutional form are the era and the region in which the constitution was written and the set of institutions chosen for the first constitution in the country’s history.”⁴⁵ A difficulty of transnationalism in a legal framework is, as Jothic Rajah argues, that it risks homogenising and can perpetuate “notions of nation as the unproblematic vehicle of sovereign equality.”⁴⁶ This is especially problematic when there are nations and states subsequent to the “Westphalian moment,” namely the post-colonial variety.⁴⁷ Pakistan was about to cultivate its democratic constitution for one more resembling dictatorship thanks to the ambiguity of the Westminster model and the ingenuity of Ivor Jennings.

Since July 1954, Jennings had been advising the Constituent Assembly to devise a new constitution. Since the tabling of Basic Principles in 1949 by then-Prime Minister Liaquat Ali Khan, Pakistan had the aim of becoming a republic with Islamic character.⁴⁸ As mentioned above, the Assembly, as a constitution-making body, was very desultory. The activity increased in its last two sessions when the Assembly was finally framing a new constitution. The total days spent as a

41. Harding, *supra* note 19, at 159.

42. See Kumarasingham, *supra* note 33, at 16-19.

43. *Id.*

44. W.J.M. MACKENZIE, *Constitution Making*, in EXPLORATIONS IN GOVERNMENT – COLLECTED PAPERS 1951-1968, 252, 260 (Palgrave Macmillan 1975).

45. ZACHARY ELKINS ET AL., *The Content of Authoritarian Constitutions*, in CONSTITUTIONS IN AUTHORITARIAN REGIMES 141, 162 (Tom Ginsburg & Alberto Simpser eds., Cambridge Univ. Press 2013).

46. Jothic Rajah, ‘Rule of Law’ as Transnational Legal Order, in TRANSNATIONAL LEGAL ORDERS 340, 346-47 (Terence C. Halliday & Gregory Shaffer eds., Cambridge Univ. Press 2015).

47. *Id.*

48. See G.W. CHOUDHURY, CONSTITUTIONAL DEVELOPMENT IN PAKISTAN 35-58 (2d ed., Longman 1970).

constitution-making body before its dissolution in October 1954 during these last two sessions was more than the previous fourteen sessions put together—though still just fifty-nine days.⁴⁹ Though there were key American constitutional ideas concerning executive accountability, Jennings observed a preference for English constitutional practices, many Pakistani legislators resembled the Barons at Merton in 1236 pronouncing “*nolumus leges Angliae mutare*”—“we do not want to change the laws of England.”⁵⁰ Critically, though, the new constitution explicitly aimed to curb the powers of the head of state and make legally conspicuous the need for the head of state to follow advice.⁵¹ The dismissal of Nazimuddin the previous year was clearly on the minds of those in the Assembly. The influential paper *Dawn* approvingly carried the headline “Parliament Made Supreme Body.”⁵² In essence much of what the Assembly approved on September 21, 1954 was the codifying of conventions, which would close off opportunities for the Governor-General to act except on advice of his ministers and the assertion of the supremacy of parliament. The draft constitution was submitted to Jennings, who made “extensive but minor changes” and was sent to the Government Printers on October 15, 1954 with the aim that the country would have a new constitution based on a more stable form of parliamentary democracy.⁵³ As Geoffrey Marshall argued of Pakistan, “the lawful seat of sovereignty was in dispute for more than seven years after the Independence Act of 1947.”⁵⁴ The Assembly was attempting to clear the constitutional confusion.

Meanwhile Ghulam Muhammad was not impressed and unlikely to accept a recalibration of his powers that would compel him to act as a traditional Westminster head of state. Mohammed, Karl Newman contends, “was not only active, ambitious and somewhat given to intrigue but he was also the product of the Indian Civil Service with all its traditions of vigorous executive action, especially in times of crisis or failures of political leadership,” and therefore in the crisis that he saw in Pakistan felt legitimately emboldened and “left the path of constitutional government.”⁵⁵ Pakistan’s military and bureaucracy, including the Governor-General, were keen to cement financial and defense support from the Americans, who had been wary of the country’s political instability. While in Washington in September 1953 and afterwards, Ghulam Mohammed, with Ayub Khan and the backing of Iskander Mirza, both future military rulers, assured American officials in that critical Cold War climate that Pakistan would be its ally and that it would not become a “fanatical theocracy,” which apparently the constituent assembly promoted when recommending the Islamic influence over the constitution. Instead they would withstand political pressures of “religious zealots” and offered the

49. See KEITH CALLARD, *PAKISTAN – A POLITICAL STUDY* 80 (George Allen & Unwin 1958).

50. JENNINGS, *supra* note 13, at 12.

51. G.W. Choudhury, *The Constitution of Pakistan*, 29 PAC. AFF. 243, 248 (1956).

52. MCGRATH, *supra* note 20, at 124.

53. *Id.*

54. GEOFFREY MARSHALL, *PARLIAMENTARY SOVEREIGNTY AND THE COMMONWEALTH* 133 (Clarendon Press 1957).

55. Karl J. Newman, *Pakistan’s Preventative Autocracy and Its Causes*, 32 PAC. AFF. 18, 24-25 (1959).

prospect of a “constitutional dictatorship,” which envisioned the Governor-General at the helm with the support of the military and all provinces under Governor’s rule, except East Bengal, which the military would directly control—in addition, the Constituent Assembly would be dissolved.⁵⁶ This indeed was largely what happened on October 24, 1954. The passing in the Assembly of the draft constitution alerted Ghulam Muhammad to action. The Governor-General “scorned the idea of any parliamentary government in Pakistan.”⁵⁷ As Choudhury argues, “[t]hough he pretended to favour the American executive system, his real model was the vice-regal pattern of the British period.”⁵⁸ With the support of the military and civil service, and after brow beating the Prime Minister in the early hours, who was dramatically summoned from Washington, Ghulam Muhammad acted defiantly and issued a proclamation on October 24, 1954, which extinguished hopes for Pakistani parliamentary democracy. The defeated acquiescence of Muhammad Ali Bogra as Prime Minister enabled his puppet-master, Ghulam Mohammed, to produce someone to take political responsibility for actions the Prime Minister had no part of and to appease the radical reformation of the cabinet he supposedly headed.⁵⁹

The Governor-General having considered the political crisis with which the country is faced, has with deep regret come to the conclusion that the constitutional machinery has broken down. He therefore has decided to declare a state of emergency throughout Pakistan. The Constituent Assembly as at present constituted has lost confidence of the people and can no longer function. The ultimate authority vests in the people who will decide all issues including constitutional issues through their representatives who are to be elected; fresh elections will be held as early as possible.⁶⁰

The Prime Minister, who had only days earlier praised the Assembly for completing its principal constitution-making task, now felt compelled to announce to the world: “Constitution-making by the present Constituent Assembly has

56. See AYESHA JALAL, *THE STATE OF MARTIAL RULE: THE ORIGINS OF PAKISTAN’S POLITICAL ECONOMY OF DEFENCE 185-87* (Cambridge Univ. Press 1990).

57. *Id.*

58. CHOUDHURY, *supra* note 48, at 32.

59. See *supra* note 24, at ICS 125/BXV/6 (10 Nov. 1954) (Jennings recorded in his diary ‘When PM Ali arrived in London on 22/10, he was met by Ispaham (H.C.) and Iskander Mirza. They had arranged for him to leave immediately by RAF Hastings for Cyprus, where a second Hastings was waiting. For some reason unknown he refused the services of the RAF and, after a delay of four hours, chartered a BOAC plane. He arrived in Karachi on the night of the 23/11. Two government Hare cars were waiting, + with them the C. in C. Ali was invited to get into one of the cars, which he did, sitting between the two generals. When Mrs. Ali tried to follow, she was politely requested to get into the other car. Ali was whisked off to GH and Mrs. Ali to the PM’s house. Ali was asked to wait downstairs while the generals talked to GG. He was then sent for + told what GG wanted. He refused to agree. He was again asked to wait while a further discussion took place. This went on until 2.30 a.m., when he finally agreed. The impression I got, though I did not exactly say so, was that Ali was given a choice between agreement and arrest. Next morning the Secretaries were sent for + the Proclamations issued. The new Ministers were sworn in that night (24/10). From then on, GG and PM have worked together.’)

60. *Federation of Pakistan v. Moulvi T. Khan*, (1955) 240 PLD (SC) (Pak.).

resulted in developments which threaten to imperil our national unity. It has provoked personal, sectional and provincial rivalries and suspicions. These have to be curbed, and Pakistan's interests must be put above everything else. This is what the Governor-General's action envisages."⁶¹

It was reported that Muhammad Ali Bogra's acceptance of Ghulam Muhammad's invitation to re-form the government meant he was in agreement with the dramatic actions taken by the Governor-General in his absence abroad.⁶² The *Times* correspondent speculated a day later that:

Pakistan would not be true to herself if not every lawyer was busily re-reading constitutional law to define the legality of the action taken by the Governor-General last Sunday. It is not unlikely that the legal argument will continue for months, but a recently arrived observer, bemused by seemingly contradictory acts, sections and clauses, can quickly come to one conclusion: whatever the Opposition lawyers may have to say – and it seems it will be unending – Karachi at least has accepted Mr. Ghulam Muhammad's intervention calmly and perhaps with relief.⁶³

Time magazine called Ghulam Muhammad the "Reluctant Dictator."⁶⁴ The President of the Constituent Assembly, Moulvi Tamizuddin Khan, disagreed with the "reluctance" and challenged the dissolution in the Courts.⁶⁵ Into this context Ivor Jennings was summoned back. The constitution-maker was to be the constitution-breaker.

Though the crisis is well known to Pakistani historians and legal scholars (less so outside of Pakistan), the role of Jennings has never been substantially addressed or exposed through his papers. The preeminent and most well-known historical and political account of Pakistan's road to military rule, Ayesha Jalal's *State of Martial Law*, for example, has no mention of Jennings's role.⁶⁶ Similarly, the best legal study of Pakistan's courts, Paula R. Newberg's *Judging the State: Courts and Constitutional Politics in Pakistan*, while astutely getting to the heart of the legal-political quagmire of the dissolution, finds no place for Jennings's substantial influence on the crisis.⁶⁷ Jennings did publish his own account of the events in Pakistan in *Constitutional Problems in Pakistan*, but this emphasized the constitutional soundness of dissolution and minimized his own effect, giving little attention to critical or alternative views of the dissolution.⁶⁸ Perhaps for this reason the book is uncharacteristically sober, and without the usual flourish and mordant words that can be found in most of his work, with the majority of it reproducing memoranda and judgements. Allen McGrath's *Destruction of Pakistan's Democracy* has been one of the few works that have

61. *Emergency Rule for Pakistan*, THE TIMES, Oct. 25, 1954, at 6.

62. *Id.*

63. *Karachi Scene Unchanged*, THE TIMES, Oct. 27, 1954, at 6.

64. *Reluctant Dictator*, TIME MAGAZINE, Apr. 11 1955, at 36.

65. *Pakistan v. Khan*, *supra* note 60.

66. *See* JALAL, *supra* note 56, at 185-87.

67. *See* NEWBERG, *supra* note 30.

68. *See* JENNINGS, *supra* note 3.

given an important place to Jennings in the 1954 crisis as a “scholar-turned-advocate” who provided “constitutional ideas which were used to legitimize autocracy in Pakistan.”⁶⁹ This article utilises material from the Jennings archive that has never been used before, and in so doing gives crucial insight into one of the most destructive forms of post-war constitutional advise, which flowed from Jennings’s scholarly experience and transnational authority.

After the dissolution, the Governor-General reformed *his* Cabinet and invited the Commander-in-Chief of the Army, General Ayub Khan, to join as Defense Minister.⁷⁰ The open inclusion of a serving officer set a grievous precedent and opened the door to what Tayyab Mahmud terms praetorianism that would usher in military rule over the country, becoming its dominant governance style.⁷¹ *Dawn* captured that time a few years later when military rule was soon unveiled:

There have indeed been times – such as that October night in 1954 – when with a General to the right of him and a General to the left of him, a half-mad Governor-General imposed upon a captured Prime Minister the dissolution of the Constituent Assembly and the virtual setting up of a semi-dictatorial Executive.⁷²

Just days after the dissolution, Sir Edward Snelson, Secretary to the Ministry of Law, sent a telegram on November 1, 1954 to Jennings stating, for cover, that he was to be on “holiday” in Ceylon, but, nonetheless, wanted to see Jennings, where he was Vice-Chancellor, urgently on November 3, 1954.⁷³ Jennings sent a car for Snelson to bring him straight to Peradeniya and from there they saw Ceylon’s Governor-General, Sir Oliver Goonetilleke (no stranger to vice-regal and political intrigue), on the fifth for almost two hours, evidently to discuss the political and constitutional machinations in Pakistan. Snelson and Jennings then flew to Karachi that same day.⁷⁴ Jennings had already heard rumors that the Governor-General would dissolve the Assembly while still in Pakistan. Jennings confided to his diary on the day of the dissolution:

Once you start on illegality you can never stop. This is not 1688: in England everybody tried to keep as close to the law as possible and there was no party conflict. Even so the non-juror movement was quite substantial. Before I left Karachi I pointed out . . . how fine was the line between law and anarchy. There is, of course, an alternative to anarchy, dictatorship. At the moment that seems to be where Pakistan is heading . . . Further consideration brings out another point. CA was to have met on the 27th, and I think PM Ali was to have returned that day. The Draft Constn. was

69. See MCGRATH, *supra* note 20.

70. Newman, *supra* note 55, at 26.

71. Tayyab Mahmud, *Praetorianism and Common Law in Post-Colonial Settings: Judicial Responses to Constitutional Breakdowns in Pakistan*, 1993 UTAH L. REV. 1225, 1234 (1993).

72. KHALID B. SAYEED, *POLITICS IN PAKISTAN: THE NATURE AND DIRECTION OF CHANGE* 35 (Praeger 1980).

73. See *supra* note 24, *Note*, at ICS 125, BXV/6 (10 Nov. 1954).

74. *Id.*

to have been reported on the same day. It seems, therefore, that GG recalled Ali in order to get the coup d'état effected before the CA members returned from their Provinces. They will not even be provided with their travelling expenses. The question is whether Nazimuddin and Nishtar will acquiesce or whether they will organise an opposition. If they do, they will probably be arrested under GOI rules, or the rules succeeding them. Note that Nehru is in China. In his absence, nobody is likely to order the Indian Army into East Bengal. What a chance he has missed! West Pakistan could then become a small unitary State.⁷⁵

Jennings added that he was worried he would not get paid for the consultative work he did for the Assembly, though Snelson assured him he would!⁷⁶ Following the intensive discussions in Ceylon, Jennings was happy to help but wanted formal instructions. After even more discussions about fees, housing, allowances and currency preferences, Jennings was asked informally and then formally to answer the following questions at the request of the Governor-General and Law Ministry:

1. Did the Governor-General act constitutionally in (a) dissolving the Constituent Assembly and (b) inviting the Prime Minister to 're-form' the Cabinet
2. Was the reconstituting of the Ministry by the Governor-General and Prime Minister unconstitutional?
3. On what grounds could a challenge be brought into the Courts as to the legality or constitutionality of (a) the dissolution (b) the re-forming of the Ministry and what would be the issues?
4. How should any challenge be met?
5. If Courts accept the 'challenge' from Tazimuddin what should be done to meet the resulting situation?⁷⁷

The challenge came swiftly. Just days after Jennings arrived back in Pakistan, a petition was delivered to the Sindh High Court. As Ginsburg, Elkins, and Blount argue, the use of international actors in constitutional design can have critical effect. One major potential effect being where external participation "may lead drafters to adopt suboptimal or inappropriate provisions designed for the needs of others."⁷⁸ Extrapolating this for Pakistan, Jennings had been brought in to solve Ghulam Mohammed's dilemma of how to constitutionally and politically justify his actions in a context of ambiguous constitutional status. Jennings may have succeeded in creatively fulfilling his "brief" to the governor-general, but it is no large step to see this more importantly as having "suboptimal" effects for Pakistani democracy. For one Pakistani academic, the action utilized relied on powers available in all Westminster democracies; it was only evoked to "nourish" democracy.

75. *See supra* note 24, *Revolution in Pakistan*, at ICS 125/B/XV/6 (25 Oct. 1954).

76. *See id.*

77. *See id.*

78. Tom Ginsburg et al., *Does the Process of Constitution-Making Matter?*, 5 ANN. REV. L. SOC. SCI. 201, 214 (2009).

All this should cause no surprise or alarm to students of constitutional history. The plant of parliamentary government is delicate and sensitive. It needs care and nourishment . . . The Governor-General had to step in and act as the guardian of the Constitution. The reserve powers that he used are available to executives in nearly all democratic constitutions.⁷⁹

The situation was full of farce and risk (as recounted over forty years later by S.S. Pirzada, one of the Assembly President's counsel—who unlike Jennings took the case gratis).

[Tamizuddin] left his house through the back door disguised as a burqa-clad woman and in a rickshaw reached the Court through the side gate. The main gates of the Court were watched by Intelligence personnel. I drove to the Court in a diplomat's car which had dark glasses and was able to enter without being noticed. My junior Homi Nicholwala scaled a side wall and received minor injuries.⁸⁰

The petition to the Sindh High Court was made on the night of November 7, 1954, and the affidavit was signed by Manzar-i-Alam as the identifying advocate.⁸¹ When Manzar-i-Alam duly turned up in his own car at the main gates of the Court to present the petition, he was taken into protective custody and only when the Sindh Chief Justice, Sir George Constantine, ordered the police to release him or face contempt was Manzar-i-Alam allowed to join the others.⁸² An alleged unsuccessful attempt was also made on the life of Pirzada on November 11, 1954, by the government security officers.⁸³

As the government's adviser, Jennings, in the opening session, was questioned by the Court due to his constitutional experience. However, the Assembly's legal team then, understandably, wanted to cross-examine him, which convinced Jennings to refrain from speaking in court and instead allow his arguments to pervade through instructions.⁸⁴ D.N. Pritt Q.C., with his remarkable political and legal career, was called urgently to represent Tamizuddin. Waiving most of his fee and keeping with the dark comedy of the situation, Pritt pretended to be a surgeon in all cables to Pakistan "who might be required for a difficult operation in Karachi." Like the opposing side, Pritt met in clandestine circumstances in Ceylon to discuss the case, flew to Pakistan, and then took an omnibus to avoid attention.⁸⁵ Pritt argued "that a somewhat remarkable feature of the proclamation was that it did not give any legal authority to support it: it was just an announcement of intentions. It made no attempt to rely on prerogatives or statutory provisions' and did not even

79. Khalid B. Sayeed, *The Governor-General of Pakistan*, 8 PAK. HORIZON, no. 2, 330, 338-39 (1955).

80. PIRZADA, *supra* note 26, at 54-55.

81. *Id.*

82. *Id.*

83. *Id.*

84. MCGRATH, *supra* note 20, at 168.

85. D.N. PRITT, *THE AUTOBIOGRAPHY OF D.N. PRITT*, PART III 48 (Lawrence & Wishart 1966).

mention the word ‘dissolution.’”⁸⁶ Pritt also countered the government’s reliance on the royal prerogative by asking “whether it was right to destroy the Constituent Assembly on the basis of a prerogative right which existed 250 years ago” by a governor-general who is not part of the constitution-making body in a way that the Queen is part of the U.K. legislature.⁸⁷ Despite such unpropitious circumstances, the Sindh High Court found in favor of the Tamizuddin, holding that the Governor-General did not have the authority to dissolve the Assembly since this was not part of the India Independence Act.⁸⁸ The Chief Justice found:

There is no case throughout the Commonwealth outside England where dissolution of a Legislature takes place except by express provision in the Constitution, whether granted by statute or order in council. The prerogative of dissolution in my opinion extends only to the parliament of the United Kingdom: elsewhere dissolution is dependent upon statute or order in council . . . It follows, therefore, that the Constituent Assembly’s purported dissolution is a nullity in law, and that both it and the office of its President are still existent . . . I would therefore issue a writ of mandamus restraining the respondents from preventing the petitioner from performing the functions of his office of President of the Constituent Assembly.⁸⁹

The drama then moved to the federal court because there was no chance the Governor-General could admit wrong in this high-stakes performance. Even a compromise formula, which would have saved face for both sides and maintained the dissolution, was ruled out by Ghulam Mohammed for fear it would unravel the legitimacy of his past actions.⁹⁰ Politics was at the fore, which demoted law to a position of expedience. As a study of British legal thought contends, Jennings was “primarily concerned with the architecture of power” over doctrine and procedure.⁹¹ A.W. Brian Simpson notes Jennings was “a firm believer in the right of states to protect themselves against subversion.”⁹² In Pakistan, an English don was behind the subversion of the constitution from above. Jennings recorded that:

There is thus initial dictatorship. It seems very unlikely that either the Governor-General or the Prime Minister would wish to perpetuate this position: but, now that there has been departure from strict legal principles, there is no great practical difficulty about going further. So long as the Army and the police support the Governor-General, anything whatever may happen.⁹³

86. PIRZADA, *supra* note 26, at 106-09.

87. *Id.*

88. *See id.*; *see also* Indian Independence Act, 1947, 10 & 11 Geo. 6, c. 30.

89. *Id.* at 126-27 (containing all Pakistan legal decisions, PLD 1955, Sind 96).

90. McGrath, *supra* note 20.

91. JANET MCLEAN, *SEARCHING FOR THE STATE IN BRITISH LEGAL THOUGHT* 234 (Cambridge Univ. Press 2012).

92. A.W. BRIAN SIMPSON, *HUMAN RIGHTS AND THE END OF EMPIRE* 860 n.178 (2004).

93. KUMARASINGHAM, *supra* note 8, at 133.

With such thinking in mind, Jennings efficiently prepared not only a new creative defense, but also plans to suspend the constitution and enable emergency rule should the federal court uphold the lower court's ruling. Proficient as ever, Jennings gave four options for the Cabinet to legitimize the actions of the Governor-General as well as four immediate steps to make this easier (including the suspension of habeas corpus).⁹⁴ In a very matter-of-fact way, Jennings drafted an order to transfer all legislative powers to the Governor-General "excluding the jurisdiction of the Courts. I have explained that this cannot be legally justified, but that it is easy enough for the Govt. to refuse to give effect to judicial decisions."⁹⁵ In this dangerous legal situation was an even more dangerous political one; few wanted to challenge the Governor-General as democrats wilted:

HM [Honourable Minister] Law gave me a copy of a telephone message from A.G. at lunch, + after lunch HM Interior joined us in conference. They wanted a Proclamation assuring a dictatorship, which I drafted after lunch + had ready for a Cabinet at PM's house. The Cabinet decided nothing but moved to GG's house at 6 p.m., where also nothing was decided. HM Law and Interior were alone in their anxiety for dictatorship, though HM Communications spoke up for them at the GGs. PM was obviously disturbed at the suggestion, but had no views of his own. The others also lacked decision of any kind.⁹⁶

Jennings, of course, was the major source of Westminster constitutional practice and his published works seemed to contradict his arguments in Pakistan. For example, Jennings noted in his *Manual of Cabinet Government* that the monarch cannot "secure a dissolution without 'advice'" without bringing conspicuous damage to the Crown.⁹⁷ Interestingly, in the third and final edition of the volume published in 1959, Jennings inserts a bare footnote that in Pakistan the Queen's Representative did in fact dissolve the legislature without advice, but only because Pakistan "did not import British constitutional practice."⁹⁸ Indeed Jennings, while in Pakistan, had met the Chief Justice, Muhammad Munir, "off the record," as had the Governor-General. The Chief Justice recommended "that GG must take over Government under 'natural law' powers."⁹⁹ After getting a Royal Pakistan Air Force flight to Lahore, Jennings rushed to Munir's residence (Snelson "backed out" from this utterly improper conclave) and discussed in great detail the arguments and "suggested amended sections" which indicated emergency powers the "C.J. had not

94. See *supra* note 24, *Note for Cabinet*, at B/XV/3/1.

95. See *supra* note 24, *Diary 31*, at B/XV/8 (Mar. 1955).

96. See *supra* note 24, *Diary 13*, at B/XV/8 (Apr. 1955).

97. IVOR JENNINGS, *CABINET GOVERNMENT* 412-13 (3rd ed., Cambridge Univ. Press 1959) (saying that Queen Victoria made "vague suggestions" about it in regard to the political dynamite that was Gladstone's Irish Home Rule. She was dissuaded from doing so by all her advisers, with even Gladstone's archrival, Lord Salisbury, believing it would "injure the authority" of the sovereign).

98. See *supra* note 97, at 412 n.1. (noting that the Sovereign would be justified in refusing assent to a policy "which subverted the democratic basis of the Constitution." Arguably in the 1954 it was the Crown, not any other institution, which was subverting the democratic principles of the Constitution).

99. See *supra* note 24, *Diary 28*, at B/XV/8 (Mar. 1955).

noticed”. Jennings was then given substantial insights into the Chief Justice’s thinking in justifying the dissolution.¹⁰⁰ Returning to Karachi, “Snelson then carried me off to GG’s house for a Cabinet meeting . . . the GG, with applause, made a little speech which was obviously a speech of thanks to me.”¹⁰¹

Perhaps not entirely in jest due to the consequences, Jennings added “but as I understood not one word it might have been an order for my immediate arrest!”¹⁰² The refrain “Would Sir Ivor Jennings be good enough to draft notes and the Order accordingly?”¹⁰³ became a common one.

Nonetheless, in court, Munir did not give an easy ride as his collusion might point. The Advocate-General, Fayaz Ali, for example as seen in the exchange below, had clearly not read his Jennings for a master class in expedient precedents. This selection of exchanges in court between the Chief Justice and Advocate-General gives a flavor:

AG: My first proposition is that the right of dissolving the legislative body in England is the prerogative right of the Crown.

CJ: Do you mean to suggest that the King of England has got the right to dissolve the Constituent Assembly of Pakistan?

CJ: Had the prerogative been exercised by any of the Dominion[s] independently of the Statutes? Can you give us an instance where this prerogative of dissolution was exercised by any one on behalf of [the] Dominion independently of the authority given to that functionary by the Act?

AG: I must say I have not been able to find a parallel but the principle is there. . . .

CJ: Can you give us an instance where this right of prerogative was exercised in any Dominion by His Majesty the King independently of any Statute?

AG: Unfortunately, My Lords, there was no instance in which there was not a provision made for it. . . .

CJ: Why should that obvious thing be missing from our Constitution?

CJ: But we are in Pakistan. Do not talk of English ideas or English institutions.¹⁰⁴

Future Law Lord Kenneth Diplock Q.C., was brought in to defend the dissolution. Unlike the Advocate-General, Diplock was well prepared and “quoted authorities to ‘make it clear that the power of the Crown to dissolve and convene representative Assemblies was extended to overseas colonies.’”¹⁰⁵ No stretch of imagination is required to discern which “authority” he was getting these

100. See *supra* note 24, *Diary 28*, at B/XV/8 (Mar. 1955).

101. See *supra* note 24, *Diary 28*, at B/XV/8 (Mar. 1955).

102. See *supra* note 24, *Diary 28*, at B/XV/8 (Mar. 1955).

103. See *supra* note 24, *Diary 28*, at B/XV/8 (Mar. 1955).

104. See PIRZADA, *supra* note 26, at 154-58.

105. *Id.* at 263.

Commonwealth facts from as well as his line of argument. Nothing was off limits. Jennings, through Diplock, successfully questioned the validity of the Constituent Assembly on the grounds that it had failed in its functions of representing the people and presenting a constitution.¹⁰⁶ Jennings also in turn questioned the independence of Pakistan by arguing that the Queen's prerogatives still functioned despite not being used in Britain since the seventeenth century.¹⁰⁷ The Chief Justice agreed, and had stated previously that the Constituent Assembly "lived in a fool's paradise" if it thought it was the sovereign body of the state.¹⁰⁸ Instead the Court was convinced by Jennings's argument that "there can never be a lacuna in the Constitution of an independent country under the Crown."¹⁰⁹ Jennings added mischievously that "the margin the powers of the Crown are deliciously vague, the draftsman's dream of the blanket clause that covers everything he has forgotten or cannot foresee."¹¹⁰ Into this vacuum marched the Governor-General as the sole "properly constituted" authority in the land.¹¹¹ *Salus Populi Suprema Lex* was added in, as the Chief Justice had secretly advised, to give further argument to the Governor-General taking on extraordinary powers in the absence of responsible advice or explicit statutory provision. Jennings's legal bravado consequently meant that all the laws of Assembly were invalid since they did not have the royal assent, which the Assembly never believed it needed since it did not see the Governor-General as part of the Assembly.

If this was not enough, Diplock argued that "the statement of His Majesty's Government by which the Constituent Assembly was set up [sic] a particular manner, had no force of law nor the previous statements made by the Prime Minister of England about the Independence of India" and stated that the Constituent Assembly's claim to be a sovereign body and "perpetual" was nonsense and "the very negation of all democratic institutions."¹¹² The very legality of Pakistan was thus put on trial. However, quick drafting from Jennings enabled his boss, the Governor-General, to re-validate the majority under emergency ordinance.¹¹³ Such dexterity did not disguise authoritarianism. Nonetheless, without shame, Jennings pronounced in his published account that "the British tradition for the Rule of Law has been firmly established in Pakistan. In the long run, clearly, it was to Pakistan's advantage to follow the straight and narrow path of legal rectitude, rather than the broad and attractive highway that might, in the end, reach a dictatorship."¹¹⁴ Pritt had many skirmishes with the Chief Justice, including later

106. Federation of Pakistan v. Moulvi T. Khan, (1955) 240 PLD (SC) (Pak.).

107. *Id.*

108. *Id.*

109. JENNINGS, *supra* note 3, at 72.

110. *Id.*

111. *Id.*

112. See PIRZADA, *supra* note 26, at 259-61.

113. See MCGRATH, *supra* note 20.

114. JENNINGS, *supra* note 3, at 51.

where Munir alluded reproachfully to Pritt's political sympathies toward the Soviet Union.¹¹⁵ Pritt sought to puncture the deception of using law to cover political acts.

[I]t [is] difficult to import the notion of prerogatives and the common law in the area of a Government and no amount of Latin phrases could justify the introduction of these principles in this context . . . the argument of "*salus populi*" in the case of a lacuna was put forth only to give a legal force to a political conception.¹¹⁶

As Pritt argued, the fact that the Prime Minister, just nights before the Assembly was dissolved, felt emboldened to state that it would have a new constitution ready by Jinnah's birth anniversary, December 25, 1954, was hardly to be stated if it was not functioning properly. Instead the Assembly was tarred as "broken down" by the Governor-General's ordinance.¹¹⁷ This argument was also used by the sole dissenting Justice A.R. Cornelius.¹¹⁸ Fellow counsel I.I. Chundrigar added that the Assembly "could commit suicide but could not be murdered."¹¹⁹ The federal court disagreed and found in favor of the Governor-General. Justice Cornelius dissented and, in contrast to his fellow federal justices, saw no justification from the Commonwealth for the dissolution or value in the "lacuna" argument in the constitution for the use of the "royal prerogative."¹²⁰

The situation was taken further when the Governor-General and Law Minister, perhaps pushing for further advantage, asked for guidance on the constitutional position and whether further executive, legislative, and emergency powers could be usurped by the Crown over the state. Starkly the Chief Justice explained:

[t]he situation . . . is that after experimenting for more than seven years with a constitution which was imposed on this country, with the consent of its leaders, by a statute of the Parliament of the United Kingdom, called the Indian Independence Act, 1947, we have come to the brink of a chasm with only three alternatives before us: (i) to turn back the way we came by; (ii) to cross the gap by a legal bridge; (iii) to hurtle into the chasm beyond any hope of rescue.¹²¹

Munir then proceeded to try and respect alternative (ii), but in fact followed alternative (iii). Drawing on the heavy transnational constitutional knowledge which common law judges then possessed he called upon several precedents from across South Africa, Southern Rhodesia, Colonial America, and the Australian states of Victoria and South Australia to justify the Crown power to force dissolution.¹²²

115. PIRZADA, *supra* note 26, at 278.

116. *Id.* at 272, 275.

117. *Id.* at 281.

118. *Id.* at 361.

119. *Id.* at 283.

120. *Federation of Pakistan v. Moulvi T. Khan*, (1955) 240 PLD (SC) 506-07 (Pak.).

121. REPORT ON THE SPECIAL REFERENCE MADE BY HIS EXCELLENCY THE GOVERNOR-GENERAL OF PAKISTAN (1955).

122. *Id.*

However, the most lasting legacy to Pakistan's constitutional life was Munir's evocation of the Law of Necessity.

Having anxiously reflected over this problem I have come to the conclusion that the situation presented . . . is governed by rules which are part of the common law of all civilised States and which every written constitution of civilised people takes for granted. This branch of law is, in the words of Lord Mansfield, the law of civil or State necessity.¹²³

The Chief Justice then treated the court to an array of English worthies for transnational consumption. Legal luminaries including Bracton, Broom, Darling, Reading, Dicey, Hood, Phillips, and Maitland were joined in company of rulers Cromwell, Charles II, William, Mary, and James II to impress upon Pakistan the essential need and legitimacy of powers used by Ghulam Muhammad—despite such powers being unknown in Britain itself for almost 300 years.¹²⁴

It is worth quoting at length the argument of Jennings's successor at Cambridge as the Downing Professor of the Laws of England, S.A. de Smith, who while never mentioning his near contemporary clearly has Jennings in mind when demeaning the position taken in Pakistan.

What respectable legal arguments can be advanced for justifying the validity of conduct which appears manifestly unlawful? Ask the constitutional lawyer and the legal theorist. He will find the arguments. Into the dustbin with *Entick v. Carrington*. Into the law reports with Bracton, Grotius, Kelsen, the American civil war, *salus populi suprema lex*. Clubs shall be trumps, might right, and judges philosophers if not kings.

. . . .

In short, it was very important for the court not to come to a conclusion adverse to the Governor-General on the main issues. Fortunately it was possible for the court to come to a favourable conclusion, and by using rules of public law found in the books, albeit unfashionable books. Nor did the court have to justify its decision by treating the Governor-General as a successful revolutionary; instead, it was able to discern legal continuity by invoking the doctrine of necessity to bridge the gap between the law and the facts of political life. In 1958, as we shall see, this option was closed and the court was faced with undisguised revolution claiming the accolade of legitimacy.

It is clear, then, that the leading Pakistani decision in 1955 was a not very well disguised act of political judgment. By the normal canons of construction, what the Governor-General had done was null and void. But the judges steered between Scylla and Charybdis and chose what seemed to them the least of evils. I must add that by accepting the principle of necessity as a justification for otherwise unlawful conduct they did not give the Executive *carte blanche*; for example, the principle did not invest the

123. *Id.*

124. *Id.*

Governor-General with power to change the existing constitutional structure. Yet state necessity, civil necessity or what you will, is the unruliest of all horses, which can gallop away with constitutional law into the domain of political expediency.¹²⁵

Munir mournfully confessed on his retirement in 1960:

The mental anguish caused to the Judges by these cases . . . [is] beyond description . . . no judiciary elsewhere in the world had to pass through what may be described as a judicial torture At moments like these public law is not to be found in the books; it lies elsewhere, *viz*, in the events that have happened.¹²⁶

Ultimately he decided to side with the Governor-General since otherwise he was, “quite sure that there would have been chaos in the country.”¹²⁷ Anil Kalhan argues that the doctrine of necessity, derived from common law, when transplanted to places like Pakistan, can be, “used to validate extraconstitutional action, giving a judicial stamp of approval to . . . efforts to wrest control from democratic, legislative institutions.”¹²⁸ Kalhan continues that colonial era emergency powers were more often than not crafted not to “establish legality” nor to “preserve legality,” but instead to assert colonial executive power.¹²⁹ Pakistan (and India) “inherited these understandings” in their independent constitutional set up.¹³⁰ The crisis of 1954, as Anne Twomey argues, “opened the door . . . for the ‘doctrine of necessity,’ which was to prove critical in the subsequent history of Pakistan being relied upon as recently as 2007 by General Pervez Musharraf.¹³¹ The situation further deteriorated after Jennings’s time in Pakistan to a parlous state where, as Siddique argues in his legal analysis of martial law, the Courts were going “to fantastical extremes in order to validate illegal takeovers, adducing support from obscure and controversial jurisprudential sources.”¹³² Newberg’s study of judicial politics records the damaging consequences of this dramatic period in Pakistani history.

By giving the Governor-General wide berth and offering precedents to uphold executive intervention in constitutional and legislative activities, the immediate consequences of the Federal Court rulings were detrimental for Pakistan’s developing polity and particularly for legislative sovereignty. For

125. S.A. de Smith, *Constitutional Lawyers in Revolutionary Situations*, 7 W. ONT. L. REV. 93, 94, 98 (1968).

126. *Id.* at 98.

127. NAZIR HUSSAIN CHAUDHRI, CHIEF JUSTICE MUHAMMAD MUNIR: HIS LIFE, WRITINGS AND JUDGEMENTS 20 (Punjab Educ. Press 1973).

128. Anil Kalhan, *Constitutional and ‘Extraconstitution’: Colonial Emergency Regimes in Postcolonial India and Pakistan*, in EMERGENCY POWERS IN ASIA: EXPLORING THE LIMITS OF LEGALITY 89, 102-03 (Victor V. Ramraj & Arun K. Thiruvengadam eds., Cambridge Univ. Press 2010).

129. *Id.*

130. *Id.* at 118.

131. Anne Twomey, *Discretionary reserve powers of heads of state*, in CONSTITUTION-MAKING IN ASIA: DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE 55, 61 (H. Kumarasingham ed., Routledge, Taylor & Francis Group 2016).

132. Osama Siddique, *The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies Under the Pakistani Constitution and its Discontents*, 23 ARIZ. J. INT’L & COMP. L. 622, 627 (2006).

the longer term, the court established a practice of striking unspoken bargains with those in power so that its rulings would be obeyed and those in power would not feel defied. For a higher purpose—stability, perhaps democracy—the illusion of judicial independence would overtake the reality of its partial domination by those it sought to restrain or influence. At a crucial time in Pakistan’s history, the judiciary molded this interpretation of prudence into a precedent from which it would later find it hard to depart.¹³³

As Tahir Kamran argues, Jennings “came and rescued those whose exit would have done Pakistan a world of good.”¹³⁴ A.G. Noorani, for one, excoriates Jennings in the strongest terms for breaches in confidentiality, impropriety, legal cherry-picking, giving “shocking” advice, and commanding fees seven times greater than those paid to the Federal Chief Justice.¹³⁵ Jennings’s role in the events following the dissolution of Pakistan’s legislature are that of “a learned lawyer’s gross misconduct.”¹³⁶ As Pakistan’s leading legal historian concluded, the “echoes” from the controversies and calamities of the constitutional and political crisis that Jennings was directly involved in “can still be heard in current constitutional developments in Pakistan.”¹³⁷ Ghulam Muhammad, ill and dying, was reluctantly pushed out of Government House not long after his “victory” in August 1955.¹³⁸ The new Cabinet had I.I. Chundrigar as Law Minister—the same who had been defending the case of the Constituent Assembly in the federal court. Jennings records in his diary that the new Minister “politely sacked” him on September 8: “I should be glad to be out of it . . . I have done all the interesting work, + the rest will be . . . unpleasant . . .”¹³⁹ The last entry for his Pakistan diary contains the following words, “everybody must be heartily sick of Constitution-making.”¹⁴⁰ Looking at his actions from a transnational legal order framework Jennings was decisively able as a legal-political actor to adopt Westminster legal forms and draw on the transnational body of common law and royal powers to selectively bring “order” to the “problem” of avoiding democracy in Pakistan.¹⁴¹

133. NEWBERG, *supra* note 30, at 68.

134. See Tahir Kamran, *Pakistan’s First Decade: Democracy and Constitution — A Historical Appraisal of Centralisation*, in CONSTITUTION-MAKING IN ASIA: DECOLONISATION AND STATE-BUILDING IN THE AFTERMATH OF THE BRITISH EMPIRE 96 (H. Kumarasingham ed., Routledge, Taylor & Francis Group 2016).

135. A.G. Noorani, *Court Martial: The Great Betrayal-II*, DAWN, Nov. 01, 2008, <http://www.dawn.com/news/881663/court-martial-the-great-betrayal>.

136. *Id.*

137. HAMID KHAN, CONSTITUTIONAL AND POLITICAL HISTORY OF PAKISTAN 136 (Oxford Univ. Press 2001).

138. He died in Sept. 1956.

139. See *supra* note 24, *Diary 8*, at ICS 125, BXV/8 (Sept. 1955).

140. See *supra* note 24, *Diary 9*, at ICS 125 B/XV/8 (Jan. 1956)

141. See Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 475-76 (Terence C. Halliday & Gregory Shaffer eds., Cambridge Univ. Press 2015).

Jennings considered “Pakistan Formula” might prove useful, however, to other Westminster states engaged in state-building. To this end he provided it to the UK’s Commonwealth Relations Office.

Dear Sir Ivor, thank you very much. It is most kind of you to offer me a copy of your memorandum about the position in Pakistan and I should indeed be grateful if you would let me have it. It would be of the greatest interest to me personally, and I know that those at the top of the Commonwealth Relations Office in London would be equally interested in seeing the views of an acknowledged expert. I can assure you that we will all respect your confidence and see that no word about it gets back to the Government of Pakistan.¹⁴²

Jennings’s job was over in Pakistan, but his legacy remains. Ivor Jennings’s role in Pakistan shows the dangers that constitution-making can have and how transnational practice can easily be harnessed to lend legitimacy to actions beyond the original meaning. The Westminster style of government and the conventions that add “flesh” to it were particularly malleable to such habits. He directly and covertly helped establish precedents and principles to justify non-democratic actions and therefore sowed the seeds for detrimental constitutional practices that have congested the soil of Pakistan ever since.

142. *See supra* note 24, Sir Cecil Syers to Jennings, at ICS 125, BXV/6 (6 Nov. 1954).