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Islamization of Laws: Various Determinants, Modern State and Codification

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Abstract

Islamization is vast terminology to understand and comprehend in a nut shell. Before implementing the idea of Islamization it is mandatory to define the entire concept. While applying this legal norm and analyzing its prospects, consequences and ground realities, an absolute idea from the early Fiqh i concept would be helpful. It should be defined whether "Islamization " means to codify the Sharia rules into state legislation or a mere tailoring of any existing law or statute will be included in Islamization. There arises another question that if a law has been legislated on some defined political and legal agenda, whether mere insertion of some clauses will be adequate to serve the purpose. For instance "Sharia Guarantee Clauses" in the constitution can be considered exhaustive in terms of Islamization of laws or not. This research aims to explore the historical evidences from Islamic legal history where Islamization of state law, whether borrowed or originally legislated, has taken place. In this regard, we find some fiqh manuals having resemblance with the modern codes to guide the judicial officers and court proceedings. There are several Fatawa and codes prepared for guiding the judges in Ottoman and Mughal Empire. While consulting these manuals to devise a new Islamized code, the methodology and principles followed to design and prepare "Majallah Al Ahkam Al Adliyah and others will be studied. This study intends to inquire another valid and relevant question that what will be the qualities of the law makers for the said task? If we say that a code will be a mere compilation of opinions of early jurists, it won't be adequate and efficient with modern day needs of the subjects of law. This study aims to focus on the issue if some substantive and procedural codes are undergoing the Islamization process, then how the Islamization can be termed appropriate without a set criteria or standard to check? In light of modern day state system how a state can be given the task to Islamize a law while state cannot be given the status of a Shar'? This research will also try to find out Who (the Islamization institute or Legislation) will be given the preference if there is a conflict between legislature and the said institution? In this context the status of legislature will also be discussed. Another issue to be discussed is the effect of Islamization of different Schools of thought? Whether the whole legal system be brought under one methodology or the current state of merger between different schools on different issues will be applied?

Keywords:

State, Islamization, *Ijtihad,* Codification, Islamic Law, Legislation

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Introduction

This study tends to explore the relation between modern state, codification and Islamization. Islamization is a vast terminology which embeds several different areas. The important research questions have been already mentioned in the abstract. Modern nation state as a sovereign entity and Islamization both are new phenomena. Islamization is to some extent an outcome of this modern state. Modern state was introduced in Islamic territories due to colonization. The same became the cause of abrogation of Islamic legal system. The end of colonial period left behind the sovereign state and codified laws. This situation subsequently called for Islamization of laws. This article has been divided into three sections. The first section deals with the concept of state in western as well as Islamic law. The second section addresses some basic questions regarding codification, its relation within Islamic legal system and others. The third and last part deals with notion of Islamization, some important factors and its Pakistan experience leading to the conclusion of this research.

Modern State

The nation state is a modern phenomenon of 18th-19th century. It emerged in Europe and gradually took over rest of the world[1]. The state has been given the status of an autonomous person. Therefore the power to legislate is beyond limitation. Paley[2] describes the powers of state "may be termed absolute, omnipotent, uncontrollable, arbitrary, despotic, and is alike so in all countries[3]." State is a legal person with rights, duties and liabilities. French anarchist Joseph Proudhon has been quoted[4] to describe the modern state authority as follows:

To be governed is to be at every operation, at every transaction, noted, registered, enrolled, taxed, stamped, measured,

[1] Some historians' state trace it back to the 16th century religious struggle movement. Anderson, J. (ed.) The Rise of the Modern State. (Brighton: Wheatsheaf, 1986).

[2] William Paley is known as one of the early Enlightenment moralists, a proponent of utilitarianism and one of the pioneers of classical liberalism. He associated himself with Latitudinarians and has been a Cambridge instructor for a very long period.

[3] William Paley, The Principles of Moral and Political Philosophy, (Indianapolis: Liberty Fund, 2002).. Available at https://oll.libertyfund.org/titles/703. Last Accessed January.2019

[4] Christopher Pierson, *The Modern State* (Cambridge: Cambridge University Press, 2004), 67. Available at https://socialsciences.mcmaster.ca/econ/ugcm/3ll3/laski/authority.pdf. Last Accessed January, 2019.

numbered, assessed, licensed, authorized, admonished, forbidden, reformed, corrected, punished. It is, under pretext of public utility and in the name of the general interest, to be placed under contribution, trained, ransomed, exploited, monopolized, extorted, squeezed, mystified, robbed; then, at the slightest resistance, the first word of complaint, to be repressed, fined, despised, harassed, tracked, abused, clubbed, disarmed, choked, imprisoned, judged, condemned, shot, deported, sacrificed, sold, betrayed; and, to crown all, mocked, ridiculed, outraged, dishonored. This is government; that is its justice; that is its morality.[5]

The modern state is termed and known as a sovereign entity[6]. The legislation and legitimization powers are all vested in the state. The central government of state coins the law, grants rights and takes them away[7]. State is treated as a legal or fictitious person. This concept of state is not compatible with Islamic law. The role and position of state is entirely different than in western jurisprudence. The concept of fictitious person[8] is itself debatable in Islamic law.[9] The legal personality of corporations, companies and state could get absolute affirmation from Muslim jurists.[10]

1. Concept of State in Classical Islamic Literature

The legitimacy of state, ruler, rights of the ruler, qualifications of ruler, obedience and the authority granted to him are vast and gigantic issues. *Siyasah Sharia*[11]' is another significant subject to clarify the matter here. However to be precise and focused on the topic, only one perspective of state, implementation of law is being discussed here briefly. The traditional state in Islam has never been a sovereign as the modern state. The ruler has been the vicegerent of God to govern the subjects in light of Sharia'. He was

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[5] Proudent cited in Christopher pierson, http://psi424.cankaya.edu.tr/uploads/files/Pierson,%20The%20Modern%20State,%202nd%20ed.PDF.

[6] *See* further, R.M.Maclvor, *The Modern State*(London :Oxford University Press,1955),6-8.

[7] Ibid.

[8] Muhammad Amin Ibn `Abidin al-Shami, Radd al-Muhtar `ala al-Durr alMukhtar (Cairo: Matba`at Mustafa al-Babi, n.d.), 3: 192.

[9] Imran Ahsan Khan Nyazee, *Islamic Law of Business Organization: Partnerships*(Islamabad: Islamic Research Institute, 2000)78.

[10] See Imran Ahsan Khan Nyazee, Islamic Jurisprudence (Islamabad: Islamic Research Institute, 2000), 132.

[11] Abdul Wahab Khallaf, *AL Siyasat ul Shariah,Muassah ul Risalah* (Beirut: Dar al Fikar,1975), 73.

responsible to Allah and to the community or citizens of state[12]. The ruler is attributed as collective Divine authority and *Khalifat Rasul Allah*[13]. The rulers have been given an exclusive but limited prerogative under *Siyasah sharīah*. These can be summarized as follows:

1. Rulers in Shurá [14] can order to implement the *Sharīah* rules. Rulers as well as members of Shurá have "deliberative and executive" functions not legislative.
2. Ruler and *Shurá* has been given the authority under Sadd al Dariah and Fath al Dariah.This prerogative itself is supervised by sharīah principles.
3. Ruler and *Shurá* can issue an order on the basis of *Radd al Fasad* to be governed by *sharīah* principles[15].

These are the scopes and limitations on the power and authority of state and rulers in Islamic law. Thus we cannot claim that there has been any legislation in Islamic legal tradition. Historical account shows that the early rulers and the members of *Shurá* had been well versed in law and attained the status of mujtahid. The process of discovering the law has been consistently a task of jurists, academicians and scholars[16]. The implementation of these discovered rules was the job of the qadī or judge. There has been no instance of legislation prior to *Majjallah.* It can be said rightly that an Islamic state has never been a law giver Shar'.

Hence a significant question arises whether the state has the authority to legislate, codify or Islamize the law? The confusion about Islamic law, its legal system and its implementation is due to a large gap and discontinuity from its early tradition. This gap or discontinuity was brought by the colonial period. Islamic law is often attributed as the Jurist's law but this law suddenly changed into statute law[17]. Hallaq [18]attributes jurists as "the gatekeepers"

[12] Mahmood Ahmed Ghazi, State and Legislation in Islam, (Islamabad: Sharīah Academy, 2006), 103-106.

[13] Shah Wali Allah Dehlawi, Izalah al khafa 'an Khilafat al- khulafa (Karachi: 1982) 28-38.

[14] Shura is defined by Ibn Al Arbi" It is the assembly to consider matters so that the participants should consult each other and bring out their views." Abu Bakar Ibn al Arbi, *Ahkam al Quran*, Vol: I,297.

[15] Ghazi, State and Legislation in Islam

[16] Abu al-Maali abd al malik ibn abd Allah al Juuwaymi, *Ghiyas al Umam Fi Tiyas al Zulam*(Tunis:1988).

[17] Rudolph Peters, "From Jurists Law to Statute Law what Happens When Shariah is Codified", *Mediterranean Politics* 7:3(2002). Available at http://faculty.washington.edu/aosanloo/510/Peters.pdf. Last Accessed January ,2019.

of civil society. They safeguarded its liberty and independence from being law- less and from over doing the law through state authority[19].

All of this was changed after the colonial era. This sudden change has some underlying causes which cannot be detached from historical facts. Islam posed as a threat to European colonialism due to its provision of local and original legal tradition. Further, if Islam would have prevailed as a legal norm and administrative tool it would have given rise to new movements and protests. As a fact a number of resistance and freedom movements were mobilized and inspired by Islamic roots. Thus it was inferred that a change in this system would provide a smooth administrative circumstances. So this gave rise to a deliberate attempt to reduce the sphere and authority of Islamic law as much as possible[20].

With the end of colonial period, we observe the advent of new nation state system globally including modern Islamic States. Accordingly the Islamic law has two distinguished aspects in its current status[21]. These are: first the significance given to sources of *fiqh* and *fiqh* treatises and the other is the pluralistic approach of state authority. Islamic law now a days is not the governing authority or decisive authority rather one among several legal traditions functioning in a single state system[22].

This limitation of Sharia jurisdiction was not a swift and abrupt change rather it was systemized. As in case of subcontinent the *Qadī* and Mufti designations were removed along with the *Fiqh* texts from adjudication and administration of Justice. The administration of justice was handed over to European officials with their foreign jurisprudence and legal tradition. Further, a number of statutes were also formulated to deal with the local

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[18] Wael b. Hallaq is a renowned scholar of Islamic law and Legal history currently serving as a professor in the Humanities at Columbia University.

[19] Wael B. Hallaq, *The Origins and Evolution Of Islamic Law*(, New York: Cambridge University Press, 2005), 57.

[20] Tarek Elgawhary, "Codification of Law", *the Oxford Encyclopedia of Islam and Law*. Oxford Studies Online, http://www.oxfordislamicstudies.com/article/opr/t349/e0033 (Last accessed January, 2019).

[21] Jan Michiel Otto, *Sharia Incorporated A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present,* (UK: Leiden University Press, 2010), 20.

[22] Wael B. Hallaq, "Muslim Rage and Islamic Law*", Hashtlings Law* Journal(2003) 1705-1706.

needs. Only the family law of Muslims was left intact after great struggle from the subjects[23].

Same trend can be observed in Ottoman Empire which was substituted by the Secular Turkish nation state. A gradual reduction in authority and scope of Islamic law is far from obvious in Turkey, Egypt and some other jurisdictions. The end of colonial period gave birth to modern nation states around the globe and consequently Muslim nation states came into being. The discontinuity as mentioned above has been obvious and the needs of the modern states are different than that of the traditional states before colonization. The question arises whether this new system is compatible with the *Sharīah* or not[24]. What is the status of this modern state in Islamic legal system? A closer look reveals that these so called Islamic states incorporate Islamic law in "piecemeal fashion". Often the promulgated codes depict a borrowing, modifying and tailoring of foreign legislations. All the matters including procedure, commercial, criminal, constitutional and to some extent personal laws are just tailored product of these imported legislations.

It is evident that the current status of modern state as being the law giver is a patch work from common law system. As a matter of fact the nation state system cannot be abolished at once. The Muslim states are required to adopt a methodology to cope up with this problem through revival of institution of *Ijtihad* and role of *mujtahid*.

Lama Abu-Odeh has outspokenly argued that to understand Islamic law in the modern day, one need not concern oneself with the premodern period at all. Islamic law today is immersed within a complex, bureaucratic state system, in which Islamic law is a partial source, if even that, for legal systems that are primarily based on European models of civil law and governance."[25]It can be rightly said that "first there was God who begot the law who begot the Muslims". It can be said that the notion of "Codification" in Islamic law is different than that in western law. In later code means a "statute or enactment which is enforced by the state" and in former codification means "uniformity of law".

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[23] John L. Esposito and Dalia Mogahed, *Who speaks for Islam? : What a billion Muslims really think* (New York, NY: Gallup Press, 2007), 35.

[24] Joseph Schacht, "Problems of Modern Islamic Legislation", *Studia Islamica* 12(1960): 108.

[25] Abu-Odeh, "The Politics of (Mis) recognition: Islamic Law Pedagogy in American Academia", *Am. J. Comp. L52* (2004):789-824 Available at http://scholarship.law.georgetown.edu/facpub. Last Accessed January, 2019.

Thus the previous attempts of codification in Islamic law were based upon bringing uniformity to law and provision of ease to the subjects[26]. The early attempts of "bringing uniformity" can be attributed to the *mukhtasirs* and *Fatawa* compilations.

We find numerous fatawa compilations and *mukhtasirs*[27]. Some of these are *Fatawa bazaziyyah*[28], *Fatawa Qadī khan*[29], *Fatawa Tatar Khaniyah*[30] and *Fatāwā-i-'Alamgīri* or *Hindiyyah*[31]. Later in Ottoman Empire we find *Majjalah Al ahkam Aladliyah* in a more developed codified form to enunciate the law of the time.

2. Codification

Codification means creation of codes in a jurisdiction enunciating the law of land as governed by competent authority. A code usually has two features. First "it gathers together written rules of law and second it regulates different fields of law"[32]. Diderot and D'Alambert observed in their Encyclopédie, the word code "means a general presentation of laws; but this name is given to many sorts of presentations that are very different from one another"[33]. Codification in the Encyclopedia has been described as follows:

(1) Collections of Roman law (the Gregorian Code, the Theodosian Code, the Justinianian Code);

(2) Collections and anthologies of Roman ecclesiastical jurisprudence (the canons) and other Church rules and principles (the Codex canonicum, the Codex Gratianiis, etc.);

(3) collections of old and new laws, regulations, writs, edicts, constitutions, ordinances, etc., collected either in a single volume or in a single collection of volumes (the Code Néron, the Corpus Constitutionum Marchicarum, etc.);

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[26] Burhan al-Din Abu 'l-Hasan `Ali b. Abi Bakr al-Marghinani, al-Hidayah fi Sharh Bidayat al-Mubtadi (Beirut: Dar Ihya' al-Turath al-`Arabi, n.d.), 2: 339. See also, *Al Hidaya*,translation by Imran Ahsan Khan Nyazee, Introductory Note.

[27] For example *Mukhtasar Al Qudwi, Mukhtasar Al Tahavi* and several others.

[28] Imam Shihab al-Din al-Khawarzami al-Bazzazi (d.827 AH) Fatawa Al Bazaiziyah.

[29] Al-Hasan ibn Mansur al-Uzjandi al-Farghani Qadi khan, *Fatwa Qadi Khan,* Available at

[30] Alim bin 'Ala'yi Ansari al-Dahlawi, fatawa Tatar Khaniyah.

[31] Ibid.

[32] R.D. Encyclopaedia Universalis VI Codification as quoted in https://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5119&context=lalrev.

[33] (Diderot and D'Alambert 1779, III, 570).

(4) Collections of statutory provisions that govern an area of the law of the land (the Criminal Code, the Merchant Code, the Civil Code, etc.);

(5) treaties of law that include jurisprudential maxims, precedents, regulations, general provisions, principles and other sorts of rules that are relevant to the corresponding legal subject (the Code de cures, the Code des chasses, etc.)[34].

Codification can be described as a process to create a new legal world ex novo, either by abrogating the "old law" or succeeding a complete legal order. 18th century has viewed the most rapid and excessive codification in Europe specially and in rest of the world generally. The modern codes have curbed customary law and other pluralistic legal systems. Jeremy Bentham penned "a complete digest: such is the first rule. Whatever is not in the code of laws, ought not to be law. Nothing ought to be referred either to custom, or to foreign law, or to pretend natural law, or to pretended laws of nations" [35] it summarizes the codification and its purpose very well. Some goals of codification include simplification of law, mankind it intelligible for people and unification[36]. Jeremy Bentham and David Dudley Field supported the systematic codes maintaining that it will simplify the law and so they become handier to the subjects[37].

Some famous codes of Europe are the Napoleonic Code, the 1833 Svod Zakonov, the 1734 Swedish Code (Sveriges Rikes Lag) and the1683 Danish Code[38]. It may be said that the codification is collection of legislation imposed by state authority in an organized form. Codes may have volumes, sections and other classification to provide a systematic approach[39].

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[34] Retrieved from https://illinoislawreview.org/wp-content/ilr-content/articles/2014/4/Stevenson.pdf. Last accessed January, 2019.

[35]Jeremy Bentham, *General View of a Complete Code of Laws*, ed. John Bowring(Edinburgh: 1839), 205.

[36] https://www.unipv-lawtech.eu/files/a156_Vocation-Codification-2014.pdf.

[37] Benthem, General View of a complete Code.

[38] Bellomo, Mario, *The Common Legal Past of Europe 1000–1800*,trans. Lydia G. Cochrane.(Washington: CUA Press1995), 32–33

[39] See further https://illinoislawreview.org/wp-content/ilr-content/articles/2014/4/Stevenson.pdfCOSTS OF CODIFICATION Dru Stevenson, Tradition, Codification and Unification https://www.unipv-lawtech.eu/files/a156_Vocation-Codification-2014.pdf.

Codification is termed as *Taqnin* in Arabic[40]. The Muslim Jurists are divided on the issue of codification of Islamic law. Hallaq has this to say about codification:

Codification is not an inherently neutral form of law-making, nor is it an innocent tool of legal practice, devoid of political or other goals. It is in fact a deliberate choice in the exercise of political and legal power, a means by which a conscious restriction is placed upon the interpretive freedom of jurists, judges and lawyers[41].

Codification was not the only structural change that was introduced. Another acute, if not traumatic, change was effected by the importation, under colonial pressure, of an endless variety of European codes, at times lock, stock, and barrel[42]. The first of these was the Ottoman Penal Code of 1858, closely modeled after the French Penal Code of 1810. In 1860, the Ottomans adopted as their own, without change or adaptation, the French Commercial Code of 1807 (cultural, social, and legal differences between the Middle Eastern Ottomans and the European French did not seem to matter!). In 1863 and 1880, the Ottomans also freely borrowed the French Maritime Law and the Law of Civil Procedure, respectively[43].

This wave of massive borrowings extended to other European sources, including the Swiss, German, English, and Italian codes of law. Later, with the emergence of the nation-states after World War I, there were attempts at synthesizing the Islamic and European laws, and in this process it was Egypt that led the way. By the 1970s, the Muslim world had been, legally speaking, dramatically westernized. It was only the law of personal status that continued to retain provisions from the traditional Islamic law, although this area too was codified[44].

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40 Muhammad Zaki Abdul Bar, *Taqnin al Fiqh al Islami al mabada wa al manhaj wa al tatbiq*,(Qatar: Idara' ahyah' al 'uloom al islami, 1986). Available at https://ia800203.us.archive.org/20/items/waq7059/7059.pdf. Last Accessed January, 2019.

41 Wael B Hallaq, *Authority, Continuity, And Change In Islamic Law*, (Cambridge University Press;2004)

42 Ibid.

43 Ibid.

44 Tarek A. Elgawhary, *Restructuring Islamic Law: The Opinions of The 'Ulamā' Towards Codification Of Personal Status Law In Egypt*, Phd Diss. Princeton University 2004. Available at https://dataspace.princeton.edu/jspui/bitstream/88435/dsp01dn39x377h/1/Elgawhary_princeton_0181D_11135.pdf. Last Accessed January, 2019.

Codification of law has been a contemporary debate though there are subtle historical evidences of this concept in Islamic legal history. Among the contemporaries Muhammad Almin Al shinqaiti, Bakar Abu Zaid and Abdullah bin Abdulrahman Al Bassam oppose the concept of *Taqnin*[45]. Some of the arguments they present are being presented here. According to them Codification is assumed to restrict the scope of *qadīs* oppose to the space granted to them by Sharia'[46]. They argue that there is consensus of opinion that one interpretation is not binding upon every one. Another apprehension against *Taqnin* is possible stagnation in Ijtihad and its vulnerability of replacing Sharia' by other legal philosophies. Further, they reason evidence of *Taqnin* from prophet (SAW) and companions are not available[47]. On the other hand there are several jurists who propagate the need of codification some of them are Muhammad Abu Zahra, Ahmed Shakir, Muhamad Abduhu, Wahbah Zuhaili, Mustafa Al Zarqa, Muhammad Bin AL Hasan Alhajvi and Yusuf Al qardawi[48].

Some of their arguments include that *Taqnin* is an old concept, following a school of thought in a certain jurisdiction is a form of *Taqnin*[49]. Moreover the principle "*Taa' wali al amar*" (طاعة ولي الأمر) validates the codification. Further, they contend that the judges now a days don't possess the qualification of mujtahid, it is in public interest to bring certainty to the law[50].

Another view regarding codification is held by Ghazi and Nyazee[51]. Ghazai maintains that legislation in western sense was not part of Islamic legal system not even Ottoman laws and *majjalah* rather it was rephrasing or redrafting of already prevalent laws[52].As Nyazee contends the codification if attributed to Islamic law would not be same as in Western law "enforcement of statute by state authority". Rather it would mean compilation and uniformity of law.

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[45]Muhammad Zaki Abdul Bar, *Taqnin al Fiqh al Islami al mabada wa al manhaj wa al tatbiq*, (Qatar: Idara' ahyah' al 'uloom al islami, 1986). Available at https://ia800203.us.archive.org/20/items/waq7059/7059.pdf. Last Accessed January, 2019.

[46] Ibid.

[47]Abdul Rahman Al jara;i, "*Taqnin* al Shariah Bain al ma'anin wa al mujizin", Retrieved at https://www.cia.gov/library/abbottabad-compound/68/683. Last Accessed January, 2019.

[48] Ibid.

[49] Ibid.

[50] Ibid.

[51] Hidaya,trans, Nyazee, Introductory note

[52] Ghazi, *State and Legislation in Islam, 10.*

4.1 *Previous Attempts of Codification in Islamic Law*

As described earlier the notion of codification is different in Islamic law the "codification' as in common or civil law system won't be suitable here. Thus for the Islamization of law we may need to devise a set criteria in light of previous methodologies. For this research a brief overview of methodology followed in two significant treatise of Islamic law (namely, *Fatāwā-i-'Alamgīri* and *Al Majjalah)* will be discussed here.

4.1.1 *Ibn Al Muaqffa's Proposal al-Risālah alYatīmah*[53]

Ibn al-Muqaffa'[54] is reported to be the first who inculcated the idea of state authority law in the Islamic legal tradition. His time was the peak of legal pluralism within Islamic law. He showed his concern about diverse interpretation of the Text[55]. He highlighted numerous political and legal issues to the caliph and one of the solution he suggested was codification of law. He did not reject the correlation of multiple interpretation of law its validity. Rather he argued for uniformity brought upon by the ruler[56].

According to him "the caliph's sole prerogative to enact and promulgate legal decisions and doctrines in the form of a uniform, binding code; and he alone must define what normative *sunna* should mean or consist of at any given time."[57] Interestingly he has proposed a methodology for acquiring this uniformity. "The process by which these controversial and conflicting matters should be settled, according to Ibn al Muqaffa', is for each group to present their opinion alongside their ratio legis, in order to prove that these interpretations in fact have a basis and are valid, and for the *Imām* to choose one of these valid positions to enact.

It is important to note that Ibn al-Muqaffa'specifically stated that the *Imām* should strive to arrive and enact "one *ḥukum*"

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[53] Risālat al-Ṣaḥābah fī Ṭaʿat al-Sulṭān" (Message of Companions in the Obedience of the Sulṭān) as it could not get any reponse thus named "al-Risālah alYatīmah" (The Orphan Message).

[54] (d. 142/759) an 'Abbāsid statesman

[55] Abu ̄al-Fida ̄ al-Ḥafiz ibn Kathīr al-Dimashqī, *Nihayat al-bidayat-wal-nihayat fe-el fitan-wal-malahem, (*al-*Riyaḍ : Maktabat al-Naṣr al-Ḥadīthah, 1968). 59.*

[56] Najmaldeen K. Kareem Zanki, "Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars", *International Journal of Humanities and Social Science*, 4, 9(1) J2014. Available at http://www.ijhssnet.com/journals/Vol_4_No_9_1_July_2014/15.pdf. Last Accessed January, 2018.

[57] Abd Allah Al-Muqaffa', *Āthār Ibn al-Muqaffa'*(Beirut: Dār al-Kutub al-'Ilmiyya, 1989), 312.

and does not say that there needs to be "one *Sharī'a*" or one interpretation of the subject of Islamic law. In other words Ibn alMuqaffa'acknowledged that plurality of interpretation is part and parcel of Islamic law, but with regards to application by the state, there needs to be uniformity."[58] It is said that this methodology is followed by jurists in their *fiqh* manuals. Though there exists no record about any positive response from caliph to Al Muqaffa.

4.1.2 *Mawatta Imām Malik*

Though Abbasid Caliph *Abū Ja'far al-Manṣūr* refused the proposal of *Ibn Al Muqffa* but when he went to pilgrimage he asked *Imām Mālik b. Anas* to prepare a draft of Islamic law. He said

Take the subject of Islamic jurisprudence in your own hands, and do compile it in the form of different chapters. Avoiding the strictness of ʿAbdullāh b. ʿUmar the liberalism of ʿAbdullāh b. ʻAbbās, and the individualism of ʻAbdullāh b. Masʿūd compile a code which should reflect the maxim: (the best of affairs is the middle course) and which should be a collection of the legal decisions and verdicts given by the Imāms and Companions of Prophet (P. B. U. H). If you complete the job, we shall bring about a consensus of the Muslims on your school of jurisprudence and enforce it throughout our realm with a decree that contravention thereof be strictly avoided[59].

Imām Malik is reported to politely refuse the task maintaining that people should be able to disagree. Although *Imām* Malik compiled *Muwaṭṭa*' he held his view as stated earlier. It is also reported[60] that, both Al-Mahdī and Harūn al-Rashīd also requested Mālik to prepare a draft code but he disproved[61].

4.1.3 *The Fatāwā-i-'Alamgīri*[62]

The Fatāwā-i-'Alamgīri is also known as *Fatawa Hindiyyah*. It was compiled by a panel of several Scholars. These scholars worked in

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[58]Ibid.

[59] Ibid.

[60] Muhammad bin Jarir Bin Yazid Bin Kathir Bin Ghalib Alamli Abu Jafar Al tibri(Beirut,Muassa'ah Al a'lmi lil Matbua'at, n.d)., Muhammad bin Muhammad, al matun al fiqhiyah wa silatiha Bi *Taqnin* al fiqh,(Jaddah:Dar al bilad litaba'ah wa al nashar).

[61] *Supra note*, 57.

[62]Ftawa Alamgiriyah, Available at:
https://ia800406.us.archive.org/18/items/FatawaAalamgeeri Volume2 Urdu/FatawaAalamgeeri-volume1-Urdu.pdf, Last Accessed January,2019.

a hierarchy. This panel was led by Shaykh Nizam. The compilation was divided into different sections. Every section was compiled by a chief editor and his assistants. One chief editor was assigned 10 assistants so it can be estimated that there were almost 40-50 scholars involved in this task[63].

The Fatāwā-i-'Alamgīri followed the pattern of Al Hidayah. The major works from *Ḥanafī* School cited include the major works of *Ḥanafī* jurisprudence from the contemporaries of Murghanani and others, *Fatāwá-i Ghiyāthiyyah* ,*Fatāwá-i Qarā Khānī*, *Fatāwá-i Tātār Khānī* of and the *Fatāwá-i Barhāniyyah.* The Fatāwā-i-'Alamgīri is four times extensive in volume as compared to *Hidayah.* Ftawa Hindiyah sometimes merged two separate sections of *Hidayah* or renamed the sections. All the sources used for a case, its opinion, its reason, the evidence relied on and the difference of opinion is mentioned[64].

There are almost 5 new sections introduced in the *Fatawa*. These sections mainly deal with judicial proceedings and decrees (*muḥāḍir wa al-sijillāt*), legal forms (*shurūṭ*), legal devices (*ḥiyal*), and rules of inheritance. A unique feature of these chapters is their due focus on rule determining principles and their application[65]. It can be said that the references, cross references are provided as well. If there are two conflicting opinions and one is superior both are mentioned[66]. It can be said that Fatāwā-i-'Alamgīri provided a comprehensive compilation of *Ḥanafī Fiqh* and followed a distinct methodology to collect the juristic opinions.

4.1.4 Al Majjallah

Majjallah Al Ahkam Al Adliyah is supposed to be the first "formal and official" codification of law in Islamic legal history. The Ottoman Empire used Islamic Law in its full form to govern the administration of Justice. The sources of law were well known and the various diverse interpretations existed simultaneously. Mostly the legal history of Ottoman Empire is divided into two different Eras[67]. These eras are the Classical period and the Reform period. The classical period is the period of traditional *Qadī* courts, the

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[63] Anwar Ahmad Qadri. "The Fatāwā-i-'Alamgīri," *Journal of the Pakistan Historical Society* 14 pt. 3 (July 1966): 188-199.

[64] Niel B. E. Baillie, *The Moohummudan Law of Sale according to the Huneefeea Code: from the Futawa Alumgeeree, a Digest of the Whole Law, and Prepared by Command of the Emperor Aurungzebe Alumgeer* (1850, Delhi: Delhi Law House).

[65] Harington, 245-55.

[66] *Supra note* 64..

[67] Sherif Arif Mardin, "Some Explanatory Notes on the Origins of the 'Mecelle'" in the Muslim World 51:4, 1961: 275.

division of law fall into Tazir, Jinayat, Siyasah and other actors of justice system known in Islamic history[68].

The Reform period contains a number of new adaptation in terms of codes and laws. Another name of this era is *Tanzimat* era. The beginning of these reforms is 1839 the first *Hatt-i Hümāyun* (Imperial Decree) which sought to elucidate the adjudication between Muslims and Non -Muslim subjects of the empire. These reforms were result of international political pressure. Though the purpose could not be served and the state of affairs deteriorated adversely. A number of laws including first ottoman Constitution, first Penal Reform. The French civil code was also translated to be enacted. In 1851, a complete new criminal was promulgated known as "*Kanun-u Cedid*". Meanwhile for the first law school was built in Istanbul to train the judges and lawyers to implement new laws.

Amid these reforms the grand Vazir Ali Pasha suggested the translation of Code Napoleon for legal reform as done by Egypt[69]. This scenario called for an immediate response which would solve the problem of clarity and keep the Sharia' system intact. Thus with the advice was to be requested from Shaykh ul Islam who appointed Ahmed Cevdet Paşa a scholar to grasp the issue[70].

This was time of great confusion regarding adoption of new foreign codes, the preservation of sharia' system and codification of new Islamic codes. The discussion about this confused state, political and social debates is out of the scope of thus research thus the *Majjallah* itself is being discussed here. This code is translated as "Islamic Code" at times which contains 1851 articles as a whole. The drafting committee consisted of 07 scholars of high eminent headed by Cevdat Pasha. Out of 1851 articles one is an introductory article and 99 enumerate the general principles of Islamic law or may be called Islamic legal maxims[71].

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[68] Dora Glidwell Nadalski, "Ottoman and Secular Law", *International Journal of Middle East Studies* 8(4) 1977, 522;

[69] "Ottoman officials had noticed that their counterparts in Egypt had taken aspects of the Napoleonic Code and enacted them as a means to deal with mixed interests in commercial cases, the same mixed interest problem they were facing in the Sublime Porte".

[70] Richard L. Chambers, "The Education of a Nineteenth-Century Ottoman Alim, Ahmed Cevdet Pasa", in International Journal of Middle East Studies 4(1973): 440-464

[71] Gülnihal Bozkur, Review of the Ottoman Legal System, Available at http://dergiler.ankara.edu.tr/dergiler/19/835/10563.pdf. Last Accessed January, 2019.

The introductory note provides an insight into the *Majjallah* and its approach in unifying the law. The legal validity was derived from avenue of Siyasha *Sharīah*. It was mentioned that the committee followed the *Ḥanafī* School and mostly the Fatawa *Qadī* khan was consulted for juristic opinions. But as mentioned above there are certain occasions where the opinions from outside the school were imported. In 1920 and 1921 a committee was formed to make amendments to the *Majjallah*. The committee went beyond the *Ḥanafī* School but these changes could never be enacted due to abolition of *khilafa* and declaration of secular Turkey[72].

This introduction contains the definition of *Fiqh,* distinction between fix and flexible rules of sharia' in context of time and custom. The illustration provided is about *Ḥanafī* ruling of sale of houses. Early rule suggested that if a similar house has been seen by the buyer the sale will be permitted. Later *Ḥanafī* jurists opinion obligated the exact house must be inspected. The inference derived is that the opinion adopted will be based on changed *Maslaha* and 'Urf of the time[73].

The note draws a distinction between rulings that do not change and those that do change based on time and custom. The example given in the explanatory note is that amongst earlier Ḥanafī jurists, sales of homes were permitted if the buyer simply saw similar homes to the one being purchased, and did not necessitate that the buyer see the exact house being purchased. Later Ḥanafī jurists, however, stipulated that the buyer actually see the exact house being purchased. The note explains this discrepancy in that the custom of housing changed and necessitated that the exact house be seen since variation in building structures did not exist at the time of the earlier jurists[74].

Article 1801of *Mahjjalah* stated that "if an official command emanated from the *Sulṭān* to utilize a juristic opinion of a certain Mujtahid in a particular legal question because it was deemed more suitable to the contemporary age and more respondent to everyday life of people, the judge should be bound by it and not utilize the reverse opinions. If such conduct happens, the verdict given will be out of validity and shall not take place to application

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[72] Ibid.

[73] Najmaldeen K. Kareem Zank, "Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars".

[74] Majjalha Al Ahkam ALadliyah, English translation available at: http://legal.pipa.ps/files/server/ENG%20Ottoman%20Majalle%20(Civil%20Law).pdf. Last Accessed January,2019

with the executive personnel, 'If an order has come from the *Sulṭān*, that as regards some special matter the opinion of one of the founders of the Law should be acted on, on the ground that it is more convenient for the business of the time and for people, in that matter the judge cannot act by the opinion of another founder of the Law and contrary to the opinion of that one. If he does, his judgment is not executed (*Nafiz*)"[75].

The Drafting committee stated that "Finally, as most of the Articles written in this *Mejelle* refrain from going outside the *Ḥanafī* doctrine, and are in force and acted upon in the *Fetvā Khanī* at the present time, there seems no necessity for a discussion about them. Because it is necessary to act according to whatever opinion his Majesty, the leader of the Muslims orders that people should act, the report is laid before the Grand Vizier also, in order that he may order it to be decorated with the Imperial writing of his Majesty the *Sulṭān*, if on trial the enclosed *Mejelle* is approved by him."[76]

It can be observed here that the codification of Islamic law is not legislation of Islamic law rather it is redrafting and rephrasing of prevailing laws, rules and principles. Islamic law can never be compiled in an exhaustive code as part of it will always have the tendency to change and develop. Hence it can be said that the earlier codification attempts were a compilation an enunciation of fatwa of that time. The presence of general principles of law and maxims in these treatises just emphasizes the statement that the door of ijtihad will remain open for the flexible part of Islamic law to be developed and explored by Mujtahid and adopted by community and implemented state where necessary.

4.1.5 Islamization of Law

The need of Islamization of law is a consequence of enslavement of the Muslim states and colonization. Though there exists no agreed upon definition of Islamization from Muslim Jurists but there are certain features considered to be Islamization of law. For instance a common definition of Islamization is "The process of bringing someone or something under the influence of Islam or under Islamic rule"[77]. We may describe Islamization as a process to bring laws in conformity with injunctions of Islam. As we use

[75]Ibid.

[76] Najmaldeen K. Kareem Zank, "Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars".

[77] Retrieved from https://en.oxforddictionaries.com/definition/islamization. Last Accessed January,2019.

the term injunctions of Islam, the question arises what are these injunctions? For this purpose we need to recourse to the *Usul ul Fiqh* or the jurisprudence of Islamic law. Thus it may be said Islamization of law is an approach where methodology of Islamic jurisprudence is followed to enact a law.

Islamic law has two broad categories: one is the text and the second is where the law has to be derived from text[78]. So the text may need further elaboration, generalization or restriction but it cannot be rejected except if abrogated[79]. On the other hand vast areas of issues fall into the category where derivation of law is required. Here jurists have two approaches as follows

1. Everything is permitted unless prohibited (The presumption of permissibility)[80]
2. Everything is prohibited unless permitted (The presumption of prohibition)[81]

Thus any law to be Islamize would need to go through certain set criteria. This criteria can be devised by equalizing the *Hukam Al Shari'* and law. All the rules for a *hukam* must be applied to a law. Then the distinction of discretion of ruler (*Siyasah Shari'ah*) will be applicable as well.

Islamic law in a nutshell is set of broad general principles and some fixed rules. The area which falls under these fixed rules (as per Text) has no scope of interpretation but the applicability and relevant issues. The issues which are new and require interpretation would be dealt according to the general principles[82].

The description of general principles in detail is out of the scope of this research thus only the most relevant issues are being discussed here. Any matter presented before sharia' is governed according to the "*Maqasid Al Sharīah*" and *Maslaha*[83] . The priority order of *Maqasid Al Sharīah"* cannot be ignored and the principle

78 Ibn Nujaym. AL ashbah wa al Naza'ir(Beirut: dar al Fikar 1986), 66.
79 Ibid.
80 Fakhar al Din ibn Muhamad al Razi, Al- Mahsul fi Ilm Usul al-Fiqh, Ed. Taha Jabir Fayyad al Awani,(Riyad:Lujnat al Buhth wa al Tarjamah wa al Nashr, 1979) 200.
81 Abu Bakr Muhammad b. Abi Sahl alSarakhsi, Tamhid al-Fusul fi 'l-Usul (Lahore: Maktabah Madaniyyah, 1981), 2: 53–86 (hereinafter Usul al-Sarakhsi).
82 Abu Bakr Ahmad b. `Ali al-Jassas al-Razi, Mukhtasar Ikhtilaf al-`Ulama', ed. `Abdullah Nadhir Ahmad (Beirut: Dar al-Basha'ir alIslamiyyah, 1995), 3: 277-280
83 AbuHamid Muhammad b. Muhammad al-Ghazali, al-Mustasfa min `Ilm al-Usul (Beirut: Dar Ihya' alTurath al-`Arabi, n. d.), 1: 107–128.

of permission or prohibition must be considered before coining a legal device[84].

If we discuss the methodology to be adopted for Islamization it may have 2 approaches to follow. First describe each minor detail from sources of law, their priority order, rules for acceptance of Hadith, Legal maxims (*Qawid Fiqhiyyah*), Abrogation, Techniques of Interpretation, *Tarjih, Talfiq* and rest of these. Keeping in mind "the fatwa changes with changing times" (*taghayyur al-fatwA bi-taghayyur al-azman*)[85].

Second is to adopt the preexisting norms and rules as devised by one of the major schools of thought. The second approach seems more workable, practical and logical. It is assumed here that in case of Pakistan the second approach is adopted and *Ḥanafī* School is adopted to Islamize the laws. Now will all the existing laws be abrogated and new codification will come into existence? This takes us back to the above discussion about advent of modern nation state and codification in colonial era. The codification of Islamic law in colonial period took place with some motives and intentions. Those motives and intentions were not "uniformity of Law" rather regulating the subjects with convenience and reducing the authority of Islamic law. Hence a statute promulgated with such intention can be Islamized, by tailoring here and there or not, is a crucial question.

Another important factor to be discussed here is the scope of legislation. To what extent legislation can go? The simple answer is that a state is not sovereign itself to legalize, grant or snatch rights thus it has a limited scope in legislation. Consequently these concepts fall under the category of *Siyasah Sharīah* and a brief discussion on state as a law giver has been provided above.

It has been established that Islamization is not legislation or formation of a new unique piece of law rather its interpretation and compilation of the existing legal rulings. Previously this task was assigned to the Jurist but now this has to be done by the state legislator[86]. So a loose analogy between the jurist and modern day legislator can be drawn for the ease of understanding here. Thus who will be eligible to Islamize the law? The legislator or the people's representative should be assigned the task. But it obviously is neither easy nor feasible in current state of affairs.

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[84] Ibid.

[85] Qadi khan, Fatawa, I, 2–3, Available at https://archive.org/details/Fatawaqazikhan. Last Accessed January, 2019.

[86] Ghazi, State and Legislation in Islam.

Consequently institutions are assigned the responsibility to accomplish this massive task. In light of *fiqh literature* some of the qualities of *mujtahid* are being mentioned here which must be equally applicable to the said person(s)[87]. The details on the qualifications of a mufti and *mujtahid* can be found in works of early jurists[88].

1. Arabic Language Proficiency
2. Knowledge of Quran: It will encompass every detail about rules, *naskh, asbab al nuzul, khas, mushtarak aam* and other principles.
3. Knowledge of Sunnah: Sunnah is the explanation of law thus it is mandatory to have expertise on it even to be able to understand the law. To interpret the law a much higher status is required. A person must be well versed in classification (mashhur, mutwatar, khabr wahid) and acceptance criteria of *Ahadith* by the jurists.
4. Acquaintance of *Ijma*: A *mujtahid* must be well aware of *Ijma* because if Ijma has taken place then this issue cannot be re interpreted. This is the basic rule.
5. Proficiency on *Maqasid Al Sharīah*
6. Aptitude for *Ijtihad*[89]

5.1 Qualifications of Mujtahid and Legislators

The current political set up of Muslim states follows a federal, presidential or nominal monarch system. All of the laws and orders are passed by the assemblies or *Shurá*. As described earlier state cannot be the law giver so law making would be done by legislators. So if they are and given the task to Islamize would they be even eligible. It's a fact that the legislators throughout the Muslim world are not eligible to fulfill the said criteria. They come from a diverse professional, educational and theoretical background which negates any possibility of individual ijtihad.

On the other hand the jurist of modern day does not have the status of past. His opinion is equal to a mufti at the highest level. Because the legislation has become the prerogative of state and Jurists are given only" advisory opinion" authority.

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[87] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence,*(Federal Law House, Islamabad 2013):300-304.

[88] al-Ghazali, *al-Mustasfa min `llm al-Usul* See also: Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*.

[89] Usul al Sarkhasi. `Ala' al-Din, Abu Bakr b. Mas`ud al-Kasani, Bada'i` al-Sana'i` fi Tartib al-Shara'i`, eds. `Ali alMu`awwad and `Adil `Abd al-Mawjud (Beirut: Dar al-Kutub al-`Ilmiyyah, 2003). See also Shaybai's Mawafaqat Volume 5.

So the question arises who will be assigned the task. The answer is collective ijtihad and institutions like *Fiqh* Academy of OIC at international level and Federal Shariat Court and shariat Appellate Bench of Supreme Court at national level[90]. The legislature of Muslim countries is supposed to perform the collective function of Ijtihad.

5.2 Sharīah Guarantee Clause

Islamization of law or codification of Islamic cannot be restricted to a single dimension of law (for instance *Huddod* Ordinance, only Personal laws) rather it has to encompass the whole legal system. As we talk about whole legal system, another important issue arises whether the modern state system is compatible with Islamic law or not. This particular matter will be discussed below separately.

Any state which claims to be Islamic would adopt the Islamic law in any of the two above mentioned forms. So, what is an Islamic state? The state which is named Islamic state or the one which has an Islamic legal system? How can the Islamic law be incorporated in a legal system? A complete codification of Islamic law is the pre requisite of the Islamic legal system or mere inclusion of a sharīah Guarantee Clause will be sufficient.

Even after inclusion the methodology of legal system or exemplification of some norms of *Sharīah* will suffice the Islamic legal System requirement. Thus if we search these answers in the classical literature we find that the concept of state has been entirely different along with the powers, rights and duties granted to it. There is no concept of all powerful absolute sovereign state in Islamic law.

5.3 The preference in case of Conflict

If Islamization has to take place then it will be required to decide some basic concepts. These include a hypothetical question that if an institution has been established to Islamize the laws and perform Ijtihad then whose opinion will be given preference? The said institute? The legislature? Or any other conflicting person (natural /legal). The answer should be the institute because it has

[90] Imran Ahsan Khan Nyazee, *Islamic Jurisprudence*,(Islamabad :Federal Law House, 2013)300-304.

been assigned the status of *Mujtahid.* As the *Muqalid* is supposed to follow the ruling of a *Mujtahid*[91].

5.4 The Different Schools of Thought

The Islamization process will deal with several new legal issues. It cannot be assumed that all the answers will be available from existing *fiqh literature*. So if a new issue has to be dealt with then the *Usul* of single school must be followed to avoid any inconsistencies of law.

5.5 The Methodology to Be Declared

As the institution would be given the task to Islamization of laws which requires Ijtihad hence a methodology should be devised. This should declare the sources of law, the method of interpretation, the order of preference and the mechanism to legislate on the similar lines. The legislation mechanism is vital in order to incorporate the law discovered and interpreted by Ijtihad in the modern set up.

Islamization in Pakistan

Bulk of literature on "Islamization of Pakistan" is available which deals with its need, significance, history[92], impediments contribution[93] but no methodology or standard of Islamization is available. If it is assumed that the definition of Islamization is pre conceived even then some basic elements must be enumerated to this pre-determined notion for the purpose of implementation. The 1973 Constitution of Pakistan contains article 2- A also known as objective resolution. This article makes it obligatory on the state of Pakistan to implement the Islamic injunctions in full.

Though there have been several attempts towards Islamization of Laws but the mechanism provided to the institution to whom the task was assigned, never let it happen completely. Federal Shariat Court has been given the limited exclusive jurisdiction with subordination to Shariat Appellate bench of Supreme Court. Islamic Ideology Council has a puppet advisory role to play under the authority of executive. Thus it can be said that the

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[91] Muhammad ibn Ali al Shawkani, *Irshad al Fuhu*l (Cairo:1327 AH)250. See also, Al Ghazali, *al mustasfa min Ilm al Usul*.

[92] The Islamization of Pakistan, (The Middle East Institute Viewpoints: 1979-2009) Available at www.mei.edu. Last Accessed January, 2019.

[93], Rubya Mehdi, The *Islamization of Laws in Pakistan Richmond*, (Surrey: Curzon, 1994).

Islamization phenomenon has been political bait rather than legal and academic concern.

No methodology of interpretation has been mentioned by IIC. There have been several reports, analysis and research projects by this constitutional council yet no methodology to Islamize the law has been devised[94]. There is a famous compilation of laws by Justice Tanzil ur Rehman[95]. This book has several volumes, following the pattern of classical *Fatawa* compilations. Interestingly this book has given its methodology to interpret the law. Further a comparative analysis of the issues in light of different schools of thought has been provided[96]. The methodology is as follows:

1. For every issue a verse from the Quran has to be referred to
2. If Quranic Text rules down a principle explicitly with any contradictory evidence, it will be accepted as at is
3. If the meaning from Quran is not explicit or there is a difference of juristic opinion then a valid Hadith will be used to decide the matter.
4. In case no rule is available in Quran then Hadith text will be consulted
5. If there are conflicting opinions in different texts of hadith then the preference will be applied.
6. In case both Quran and Hadith do not provide a guiding principle in a matter then the opinion of companions and jurists will be adopted.
7. If there exists a difference of opinion among the companions and early jurists then in light of methodological principles the opinions will be examined to prefer one over the others.
8. If the past practice is not compatible with modern day public interest the opinion will be preferred from different schools on the basis of *Maslaha.* The preference will be given to the best practice in modern day circumstances based on
9. If neither text is available nor the juristic opinion of any school can be followed due to public interest then necessary interpretation (Ijtihad) will be provided.

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[94] Muhammad Mushtaq Ahmad, "Discovering the Law without a Coherent Legal Theory: The Case of the Council of Islamic Ideology", *Lums Law Journal, Available at* https://sahsol.lums.edu.pk/law-journal/discovering-law-without-coherent-legal-theory-case-council-islamic-ideology. Last Accessed January, 2019.

[95] Tanzil Ur Rehman, *Majmua e Qawaneen e Islami,(Islamabad:* Idara e Tehqiqat e Islami, 2013*)* Available at http://s595909773.online-home.ca/KB/Majmua-e-Qawanin-e-Islam%201/WQ.pdf. Last Accessed January, 2019.

[96] Ibid.

10. While conducting Ijtihad Quran, Sunnah and legal evidence will be followed[97].

This is an individual or non-governmental effort thus having no force of law. Unfortunately, the institution assigned the task could not devise a proper methodology or it could get the binding authority as required.

Conclusion and Suggestions

The questions raised here include the status of codification in Islamic legal tradition, the compatibility of modern state with Islamic legal system and the nature of law making. The state in Islamic law has never been a sovereign and was never given the status of law maker. One of the aims of this research was to explore the methodology of Islamization of law. The need of Islamization of law is a consequence of enslavement of the Muslim states and colonization. There exists enormous data on Islamization of law, its urgency, necessity and other aspects but no methodology, requirements elements and essentials of Islamization have been drafted yet.

Further, the concept of codification is alien to Islamic legal system. There are no examples of legislation in Islamic history though attempts to compilations and uniformity do exist. The process of discovering the law has been consistently a task of jurists, academicians and scholars. The implementation of these discovered rules was the job of the *Qadī* or judge. There has been no instance of legislation prior to *Majjallah*. It can said rightly that an Islamic state has never been a law giver Shar' (law giver). The institute of state cannot be omitted in a blink of an eye or by a mere change of regime. It is the reality of today's Muslim world that all Muslim states exist in nation state system. They have rights and duties towards international community. The real-world solution to the current scenario seems Uniformity of law through interpretation. This will not include legislation (as a product of Ijtihad or compilation) on existing and new questions of law.

The Islamization can be achieved by institutionalize Ijtihad with set rules adopted to govern the entire process as explained above. The institution like Islamic Ideology council must be given the status of *Mujtahid* to Islamize or interpret and draft the law. This institute can work as a drafting body given the binding authority or can be incorporated in state legislature (in case of

[97] The text of this methodology is provided in Appendix.

Pakistan the law drafting committees in Senate) directly. Every Muslim state should reserve some seats for scholars well versed in Islamic law in the Parliament. This will provide a comprehensive and ample analysis of the issue subject to legislation at the initial stage.

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