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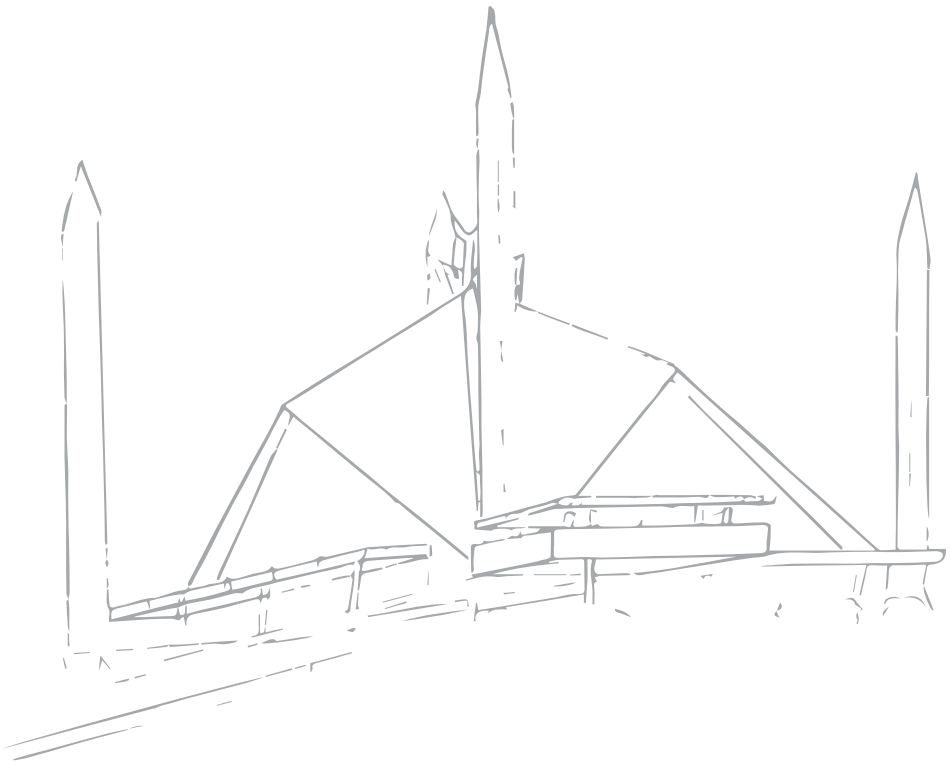

The significance of theories of adjudication for Islamization of Laws

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Abstract

Islamic law is contained in the Qur'ān *and the* Sunnah. *The legal content of these two sources has been derived by the various schools of law and is recorded in their authentic manuals. The law in these sources is converted into statutes written in English, which may then be translated into Urdu, but the official version remains in English. To interpret these texts and to deal with occasional "hard cases" there is a need for trained judges and lawyers who will finally apply these laws. Realizing this need, a number of educational institutions were set up. The first of these is the Faculty of* Shari'ah *and Law within the International Islamic University. Another institution, also within this University; the* Shari'ah *Academy*[1]*, deals with the specific needs of judges and lawyers. The idea underlying these institutions, along with other courses all over the country, is that the country should have a trained manpower with the ability to settle disputes in the light of Islamic law. In short, true Islamization can take place only when the laws are applied and enforced through judicial decisions; merely changing the laws here and there is not likely to have the proper impact. Instead of referring to principles of the English common law, which the judges at present apply in order to interpret the statutes, the judges will gradually have to apply the Islamic principles. The major reason that has prevented judges from applying the Islamic principles so far is lack of knowledge about how adjudication takes place within the Islamic system. As the judges are trained in the English common Law, as applied in Pakistan, they exhibit a certain hesitation in applying the Islamic principles. This is not due to some legal restriction, but is primarily due to a lack of knowledge about the Islamic methodology. The lack of such knowledge is seen in the superficial*

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[1] The Shariah Academy provides training in Islamic Law to judges, police officers and lawyers. It is a constituent of the International Islamic University, Islamabad. It was originally established as the Institute of Training in Shariah and Legal Profession on 17th October, 1981, following the promulgation of the Islamic University Ordinance of 01 Muharram 1401 A.H. i.e. l0th November, 1980, and was later elevated as an Academy after the conferment of international status upon the Islamic University in 1985. For details see the *Nifāz-e-Shari'at* issue of FIKR-O-NAẒAR published by the Islamic Research Institute, IIUI, Islamabad.

manner in which some Islamic principles are discussed in judgments when the judges do choose to refer to Islamic law. Consequently, there is a dire need to show that essentially the two types of methodology, Islamic and Western, are quite similar. It is only the legal materials employed in the legal system that creates a difference. This study is intended to fill this knowledge gap about the methodology and techniques employed, especially the techniques pertaining to the use of analogy, values and the resolution of conflict in principles.

Key Words: Adjudication, Hard cases, Islamization, Shari'ah, Jurisprudence

2. Thesis of the Paper:

The main task of this paper is to show that theories of adjudication have assumed great significance in Pakistan after the general consensus that most of the codified laws of the country have been Islamized through efforts of the Council of Islamic Ideology and the Federal Shariat Court, and the remaining laws have not been found repugnant to the Qur'an and the Sunnah, therefore, the burden of further Islamization has shifted to adjudication by the judiciary. The first task this paper must address is to identify the methods of Islamization that have been used in Pakistan and those that should be used. This is to be followed by an elaboration of the result of the efforts of the Council of Islamic Ideology and of the Federal Shariat Court. The third task is to show how Islamization will be undertaken through adjudication in the courts. It will also be examined whether adjudication is carried out by the judiciary alone or other players are also involved. Finally, it will be indicated how Islamization should be undertaken through this method in a planned manner.

3. An Overview of the Constitutional and Political History of Pakistan

The constitutional history of Pakistan and the creation of the country in 1947 have a detailed history that is well known.[2] Our purpose is not to go into these details. India was given its first comprehensive constitution in the form of the Government of

[2] This history is recorded in many documents and has been discussed and analyzed by writers in many ways. For a comprehensive study see Hamid Khan, *Constitutional and Political History of Pakistan* (Oxford University Press, 2001).

India Act, 1935. It created a federal structure and provided for an elaborate system of legislatures and courts. It was a complete written constituion.[3] The demand for the creation of Pakistan was finally expressed in the form of the Pakistan (Lahore) Resolution, 1940 (March 23) passed by the All India Muslim League. The Resolution stated that:

> "No Constitutional Plan would be workable in this country or acceptable to Muslims, unless it is designed on the following basic principle, namely, the geographically contiguous units are demarcated into regions which should be so constituted, with such territorial adjustments as may be necessary, that the areas in which Muslims are in a majority as in the North Western and Eastern Zones of India, should be grouped to constitute "independent states," in which the constituent units shall be autonomous and sovereign."[4]

What followed is history and Pakistan was created in 1947 through the Independence Act, 1947. The Act also created fully sovereign legislatures for the two countries, Pakistan and India, and these constituent assemblies were granted full power to create constitutions for their respective countries. The Act also provided that during the interim period, until constitutions were created, the two countries would continue to be governed by adapting the Government of India Act, 1935. The Pakistan (Provisional Constitution) Order, 1947 established the Federation of Pakistan.

The first step towards framing the constitution was taken by the Constituent Assembly in March 1949. It passed the "Aims and Objects of the Constitution" resolution, which is popularly known as the "Objectives Resolution." One of the statements in the Resolution stated: "Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Quran and the *Sunnah.*"[5] The first draft Constitution, prepared by the Basic Principles Committee, was presented to the

[3] The Act was a comprehensive statute running into 321 sections and two schedules.

[4] See the Pakistan (Lahore) Resolution,1940.

[5] See *Objectives Resolution*, which is now part of the present Constitution.

country in 1950. Among other things, it proposed that the Objectives Resolution be made part of the Constitution. A host of controversies ensued including the question of provincial autonomy, Bengal as one unit instead of several provinces, national language issue, fundamental rights and securing the rights of minorities.[6] The draft was sent back to the Assembly for reconsideration. The second draft was presented in 1952. This was followed by the problem of the Ahmadi sect.

Pakistan was plunged into a constitutional crisis in 1954 when the Governor General (Ghulam Muhammad) dissolved the Constituent Assembly as he did not agree to the proposed constitution. This first major subversion of the constitutional process was challenged before the Federal Court, which validated the dissolution of the assembly in the Maulvi Tamizuddin case (1955).[7] After further legal battles and wrangles that shook the administrative structure down to its foundations, the second constituent assembly adopted the first Constitution in 1956 (29th February). Twenty-three days later, Pakistan was declared an "Islamic Republic." The Constitution became effective on March 23, 1956 proclaiming Pakistan as an Islamic Republic. The Constitution contained 234 articles divided into 13 parts. It had 13 schedules. The Constitution dealt at length with the Islamic character of the state in its provisions.

The Constitution lasted only two years until the first President of Pakistan, Major-General Iskander Mirza, abrogated the Constitution, dissolved the national and provincial legislatures and imposed Martial Law, appointing General Ayub Khan as the Chief Martial Law Administrator. In the Dosso case (1958),[8] the Supreme Court of Pakistan validated once again the extra-constitutional actions of the executive and enunciated the doctrine of "revolutionary legality," relying for its decision in part on Hans Kelsen's statements. After passing a new Constitution in 1962 that empowered an autocratic executive, General Ayub Khan ruled until 1969. He was forced to hand over the reins of power to

[6] During this period Liaquat Ali Khan, the Prime Minister was assassinated (1951).

[7] *Federation of Pakistan v. Maulvi Tamizuddin Khan*, PLD 1955 F.C. 240.

[8] *The State v. Dosso*, PLD 1958 S.C. 533.

General Yahya Khan after widespread student protests led by Zulfiqar Ali Bhutto and his newly-founded Pakistan Peoples' Party (PPP). General Yahya Khan presided over a disastrous military campaign in East Pakistan, Pakistan's loss to India in the war of 1971, and ultimately the secession of East Pakistan to form Bangladesh. In 1973 Pakistan adopted its current constitution after thorough deliberation and consensus of all the political parties. This Constitution has seen many ups and downs including several martial laws. It was amended several times. The last amendment was the 18th Amendment (followed by minor amendments in the 19th Amendment).

The underlying idea among the Muslims, although documents like the Pakistan Resolution do not affirm this, while the Objectives Resolution clearly does, was that Pakistan is to be created so that the Muslims could have a separate homeland where they could practice their own way of life. Practising their own way of life essentially meant that an Islamic state was to be created where matters would be settled according to Islamic law.

The Objectives Resolution of 1949 was supposed to be made part of the Constitution according to the first draft presented in 1950. Later developments prevented this, especially the martial law imposed by Ayub Khan, but the 1956 Constitution of Pakistan provided a specific mechanism for the Islamization of laws. The powers of bringing the laws of the land into conformity with Islamic law were granted to the Parliament and an advisory body was created to provide suitable suggestions. The Constitution of 1973 preserved this approach to Islamization. Nevertheless, it was Gen. Zia-ul-Haqq who incorporated the Objectives Resolution as a substantive provision, Art. 2-A, thus placing a permanent stamp of Islamization on the Constitution. Many other Islamic provisions were also incorporated in the Constitution. These were ratified by later parliaments and even the latest amendment to the Constitution (18th), unanimously adopted in 2010, has not altered any of these provisions.

As far as the laws are concerned, the process of Islamization gathered impetus during the period of Zulfiqar Ali Bhutto, who

under pressure from an opposition alliance that included the religious political parties, announced measures such as prohibition on the consumption of alcohol and declaration of Ahmadis to be non-Muslims. It was, however, under the regime of General Zia ul Haq that the landscape changed dramatically and the enforcement of *sharīʻah* became a popular demand. The *ḥudūd* and *zakāt* laws were enforced.

A Federal Shariʻat Court was set up with limited jurisdiction to strike down all those laws that were repugnant to the injunctions of the *sharīʻah*. The jurisdiction of the Court was later widened. Since then the Court has examined many laws and has directed changes in some laws, some of which have been gradually implemented. It is only the case of *ribā*, usury and bank interest that is still pending. In addition to this, the Council of Islamic Ideology has also examined most of the laws and suggested some changes in individual laws. The *ḥudūd* laws have come under severe criticism, both at home and abroad, leading to some amendments during the Musharraf era. The most notable amendment has been in the law of rape.[9]

It has to be acknowledged that occasional voices are raised against the very concept of merging religion and state, but the people of Pakistan, most of whom are poor religious people, will never permit the removal of the Islamic provisions from the law. No parliament, or even dictator, has had the courage to alter these provisions. The only way they can be altered is by referring the matter to the people of Pakistan through a referendum. Such a referendum is not likely to take place. In short, the Islamic provisions are there to stay and the demand for further Islamization can increase any time, depending on the political atmosphere in the country.

[9] The law of rape had been made part of the *ḥudūd* laws. There had been severe criticism right from the start that this was leading to complications in the criminal justice system. Instead of being provided relief the victims of rape were facing severe hardship at the hands of a corrupt police. In 2006, the law of rape was removed from the *Zinā* Ordinance, through an amendment, and the original provisions of rape in the Pakistan Penal Code were restored. A new provision of fornication was also created by repealing the provision relating to *zina* liable to *Taʻzīr*.

4. Adjudication and Corrective Justice

The noblest of all tasks in human affairs is the adjudication of rights. Adjudication means "the legal process of resolving a dispute; the process of judicially deciding a case."[10] Imam al-Sarakhī says: "Know that adjudication based upon justice is one of the strongest of obligations, after belief in Allah (*īmān billāhi*), and is the noblest of all acts of worship. It is because of this that Allah, the Exalted, has called Adam a caliph (vicegerent). Allah, the Majestic, said, 'I am going to appoint a vicegerent upon earth' "[11] After quoting the verse, "*Judge thou between them by what Allah hath revealed, and follow not their vain desires, but beware of them lest they beguile thee from any of that (teaching) which Allah hath sent down to thee*,"[12] he says that the reason for its importance is that a judgment based on truth is indeed the manifestation of justice, and it is through justice that "heavens and earth are maintained and injustice is removed."[13] Justice, he adds, calls out to the reason of every reasonable man: for the seeking of fairness for the victim of injustice from the oppressor; the securing of the right of one to whom the right belongs; and for the commanding of the good and condemnation of reprehensible.[14] Finally, he asserts that it is for justice that Allah sent His Messengers, and it is with justice that the *Khulafā' Rāshidūn* were occupied.[15] The letter of second caliph Umar (May Allah be Pleased with him) also called "The Directive on Administration of Justice, written to Abu Musa Al- Ash'ri, is basis for recommended Judicial conduct.

The human mind has been occupied with justice from the earliest times, and famous quotations and discussions dating as far as back as 600 B.C. have been recorded. For example, Aristotle (384 B.C.–322 B.C.) maintained throughout his works that it is in justice that the ordering of society is centered. Thus, he said, "But

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[10] *Black's Law Dictionary* 47 (9th ed. 2009), s.v. "Adjudication."

[11] *Al- Sarakhsi, Al Mabsut* (Beirut ed., 2001) [hereinafter referred *Al-Sarakhsi , Al Mabsut*. The verse of the Qur'ān referred to is 2 : 30.

[12] Al -Quran: 49.

[13] *Al –Sarakhsi, Al- Mabsut , supra* note.

[14] *Id.*

[15] *Id.*

justice is the bond of men in states, for the administration of justice, which is the determination of what is just, is the principle of order in political society."[16] Aristotle discussed different categories of justice including distributive and corrective.[17]

To these noble words we may add that it is through adjudication that justice is delivered, it is adjudication through which the legal system operates, and it is adjudication through which all jurisprudence is applied and tested. Adjudication has, therefore, received a special place in every legal system. Each legal system has developed "theories of adjudication" to assess how the process of resolving disputes really works, how the judge decides cases and how the techniques of jurists are employed by him. Legal philosophers and jurists in every legal system have been occupied with the process of adjudication, either directly or through its association with justice.

5. Adjudication and the Judicial Process

Adjudication and theories of adjudication have always occupied a central position in jurisprudence. In fact, as Roscoe Pound explains, in France the very term "jurisprudence" was applied to mean the "course of decisions in courts."[18] This is also identified by Lloyd, who maintained that the word "jurisprudence" is not generally used in other languages in the English sense. Thus, in French it refers to something like English "case-law."[19] As compared to this, in England the term jurisprudence was applied to mean analytical jurisprudence in its different senses. Roscoe Pound said:

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[16] *Aristotle Politics* (Benjamin Jowett, trans.) in *Aristotle- Works* (W. D. Ross ed.), at 2792 (Available at http://classics.mit.edu/Browse/browse-Aristotle.html).

[17] *See generally*,Aristotle ,*Nicomeacean Ethics* (Roger Crisp trans., 2004). About corrective or rectificatory justice, he says, "This is why, when people are in dispute, they turn to a judge. To appeal to a judge is to appeal to what is just, because a judge is meant to be, as it were, justice personified. They seek the judge also as an intermediary, and some people even call them mediators, on the basis that if they are awarded what is intermediate, they will be awarded what is just. What is just, then, is intermediate, since the judge is so. The judge restores equality."

[18] *Roseco Pound, Jurisprudence*, 7 (St. Paul, MN, 1958).

[19] *Dennis Lloyd, Introduction to Jurisprudence* , 1, fn. 1 (4th ed., 1979).

> "In America the word "jurisprudence" has been used to some extent in the French sense. Thus the phrase "equity jurisprudence," meaning the course of decision in Anglo-American courts of equity, has been fixed in good usage by the classical work of judge Story."[20]

This meaning of jurisprudence throws some light on the nature of American jurisprudence with its emphasis on the nature of the judicial process and theories of adjudication. Law itself has been equated with what the judges do. Accordingly, Oliver Wendell Holmes Jr., one the greatest judges in America, said, "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[21]

The emphasis on judicial decisions and the belief that the law was what judges said it was carried to an extreme by the Realist movement in the United States, and even in Scandinavian countries. These views were held by writers like Karl N. Llwellyn (1893–1962) and Jerome Frank (1889–1957) in the United states and Axel Hägerstöm (1868–1939), Vilhelm Lundstedt (1882–1955), Karl Olivecrona, and Alf Ross from the Scandanavian countries. The views have very ably been summarized by Edgar Bodenheimer.[22] Llwellyn, for example, said that research should shift from rules to what the judges do. "What these officials do about disputes is, to my mind, the law itself."[23] Jerome Frank said,

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[20]*Pound, Jurisprudence*

[21] Oliver Wendell Holmes, "The Path of the Law," in 10 Harv. L.R. 457 (1897). The complete statement is as follows: "The confusion with which I am dealing besets confessedly legal conceptions. Take the fundamental question, what constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what the Massachusetts or English courts are likely to do in fact. I am much of this mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Id.*

[22]*Edgar Bodenheimer , Jurisprudence*: The Philosophy and method of Law124–33 (2nd ed., 1974) [hereinafter *Bodenheimer, Jurisprudence*].

[23]Lwellyn,The Bramble Bush 3 (New York, 1930)

"No one knows the law about any case or with respect to any given situation, transaction, or event, unless there has been a specific decision (judgment, order, or decree) with regard thereto."[24] These views indicate the importance given to adjudication within American jurisprudence.

The success or truth of everything that is written in jurisprudence depends upon whether the courts actually use those concepts, ideas and theories in this way or whether the practice of the courts is different. Judicial decisions are, therefore, the ultimate test of jurisprudence. This applies irrespective of the discussion being about rights, property, titles, procedure or some other theory. Thus, when the American writer Hohfeld presented his detailed analysis about the nature of rights, writers on jurisprudence raised the issue whether courts actually use the term "right" in this meaning.[25] In fact, jurisprudence is expected to mirror and record what the judges have said. Jurisprudence provides a record of the prophecies about the behaviour of judges, as Holmes indicated. He said, "It is to make the prophecies easier to be remembered and to be understood that the teachings of the decisions of the past are put into general propositions and gathered into textbooks, or that statutes are passed in a general form. The primary rights and duties with which jurisprudence busies itself again are nothing but prophecies."[26] Accordingly, almost every topic in jurisprudence—theories, legal concepts, especially rights, the sources of law and so on—ultimately come to rest on the question of how the judge will employ these tools for rendering decision. The central place accorded to adjudication within jurisprudence is, therefore, natural.

In more recent times, the debate about theories of adjudication has been exported to Britain, first through the Hart-Fuller debates and then by Hart-Dworkin debates. Dworkin criticized the model of "the concept of law" presented by Hart and judged it through the theories of adjudication. His well-known books and articles include *Taking Rights Seriously* (1997) and *Law's Empire* (1986). He

[24] Jerome Frank, "Are Judges Human? " 80 U. PA. L. REV. 17, 233 (1931)

[25] *See generally*,*R.W.M . Dias, Jurisprudence* , Ch. on rights (1985).

[26] O. W. Holmes, "The Path of the Law" *supra* note , at 461.

replaced Hart at Oxford and that led to a further discussion of his theories. In his more recent book *Justice in Robes* (2006), he summarizes his views and responds to his critics.[27]

From a more practical perspective, it is essential to point out two important points raised by Melvin Eisenberg.[28] The first point concerns the exact scope of theories of adjudication. He says, "An important question in framing a theory of adjudication is whether the same set of principles governs the interpretation of constitutions, the interpretation of statutes, and the establishment of common law rules. The position taken in this book is that the answer to this question is no."[29] He adds, "In the long run greater understanding will be gained if common law, statutory, and constitutional adjudication are analyzed separately."[30] The second point raised by Eisenberg concerns the significance of theories of adjudication within the system from the perspective of the lawyer. Thus, when we talk about judges in Pakistan, what we mean is that this study is equally important for lawyers. He indicates this importance through the discussion of the principle of "replicability." He indicates first that the bulk of the law, by necessity, is settled by lawyers and not judges:

> "In a complex society in which many legal rules are established in judicial opinions, the law is not readily determinable by laymen. Thus in a vast majority of cases where law becomes important to private actors, as a practical matter the institution that determines the law is not the courts, but the legal profession."[31]

This is true, but the issue is how lawyers determine what the law is when we have been saying that the law is contained in judicial pronouncements. This is where the principle of replicability comes in, and Eisenberg says:

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[27] *Ronald Dworkin , Justice in Robes* (2006).

[28] *See*, Melvin Eisenberg. The Nature of the common Law.(Harvard ed.1988)

[29] *Id.*

[30] *Id.*

[31] *Id.* at 10.

> "Granted that it is desirable for lawyers as well as judges to be able to determine the law, it becomes critical that lawyers should be able to replicate the process of judicial reasoning and, therefore, that the courts utilize a process of reasoning that is replicable by lawyers."[32]

6. Methods of Islamization of Laws

Theories of adjudication, or how the judge decides cases, lie at the core of discussions in modern jurisprudence. The standards that control the judge's legal reasoning, and the methods he adopts, are considered the most complex and difficult area of this discipline. Irrespective of the system, Islamic or Western, jurisprudence comes into action in the mind of the judge when he is deciding cases; the way the mind of the judge works during adjudication to give meanings to the interpreted statutes is then the core issue. The term "adjudication" means "the legal process of resolving a dispute; the process of judicially deciding a case." The word "theory" means an explanation or picture of the process. "Theory of Adjudication" is, therefore, an explanation of how judges decide cases, that is, an explanation of the legal process of deciding cases. In technical terms, a theory of adjudication is supposed to deal with two sub-theories: a theory of jurisdiction and a theory of controversy. The theory of controversy contains standards that judges use to decide cases in which the rules are not clear. It is this theory of controversy and the standards judges use, as well as the meanings they assign to statutes by the use of such standards; we are concerned with for purposes of Islamization of laws in Pakistan. There are two methods of Islamization that are to be followed by any modern Islamic state. The first has been followed in Muslim states to some extent, while the second has not been adopted in any conscious manner.

The first method is obvious and visible with the changes it causes being concrete and noticeable, while the other is silent and invisible, noticed only by the specialist. This method is that of legislation and codification. The method of legislation is visible and organized; it is undertaken at the level of the state as well as at the level of civil society usually under the name of codification.

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[32] *Id.* at 10.

The method at the level of the citizen or civil society, or at the non-state level, is undertaken through private efforts. It has been undertaken in the Muslim world under the title of codification of Islamic law. Here we will not delve into the distinctions drawn by Scholars; however, one may be quoted to indicate what the scholars mean. Enver Emon says: "Codification is a complex term that can denote an entire legal system—as in the civilian legal tradition—or a technique of developing law (i.e. codes of law). It is related to, but distinct, from statutes and legislation, as the latter are often piece-meal and not meant to enact a systematic legal enterprise. There is often slippage in how these terms are used in the literature reviewed below—a slippage that is reflected and addressed in the analysis below."[33]

Suffice it to say that some scholars have opposed codification on the grounds that it is an innovation and is not compatible with the idea of state that has a monopoly on lawmaking.[34] Nevertheless, attempts have been made to codify Islamic law. The *Majallah* may be said to be the first such effort. Major efforts have been made in Egypt during the time of Nasser and also in some other Middle Eastern countries. Suggestions have been made in the resolutions of the Organization of Islamic Conference (OIC), but these have focused on the codification of legal maxims. A few brilliant individuals like the famous Dr. Abd al-Razzaq al-Sanhuri[35] have worked on their own towards such objectives. In general, such codification efforts have had partial or little success.

At the state level, legislation has been undertaken in Pakistan and Sudan, that is, in areas other than personal law. In

[33] Enver M. Emon, "Codification and Islamic Law: The Ideology Behind a Tragic Narrative," *Middle East Law and Governance* 8 (2016) 275-309

[34] Ibid., 277.

[35] **Sanhuri, Abd al-Razzaq al-(d. 1971), Egyptian jurist and legal scholar. French- and Egyptian-educated, al-Sanhuri proposed modernizing Islamic law based on the historical, social, and legal experience of the respective countries. He was involved in the construction of the civil codes of Iraq and Egypt. Legacy also lies in his extensive works on Islamic law.**

Pakistan, legislation has been undertaken through the efforts of the Council of Islamic Ideology (CII)[36] and the Federal Shariat Court (FSC)[37] in the form of amendments to existing legislation or comprehensive legislation dealing with entire statutes. The CII efforts have led to a number of new statutes.

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[36] As per Article 230 of the Constitution)

The functions of the Islamic Council shall be:

1.To make recommendations to Majlis-e-Shoora (Parliament) and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Qur'an and Sunnah;

a. To advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;

b. To make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect; and

c. To compile in a suitable form, for the guidance of Majlis-e-Shoora(Parliament) and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

2. Where, a House, a Provincial Assembly, the President or the Governor, as the case may be, considers that, in the public interest, the making of the proposed law in relation to which the question arose should not be postponed until the advice of the Islamic Council is furnished, the law may be made before the advice is furnished: Provided that, where a law is referred for advice to the Islamic Council and the Council advises that the law is repugnant to the Injunctions of Islam, the House or, as the case may be, the Provincial Assembly, the President or the Governor shall reconsider the law so made.

3. The Islamic Council shall submit its final report within seven years of its appointment, and shall submit an annual interim report.The report, whether interim or final, shall be laid for discussion before both Houses and each Provincial Assembly within six months of its receipt, and [Majlis-e-Shoora (Parliament)] and the Assembly, after considering the report, shall enact laws in respect thereof within a period of two years of the final report.

[37] The Federal Shariat Court (FSC) was established under the Presidential Order No.1 of 1980, incorporated as Chapter 3A of the Constitution of the Islamic Republic of Pakistan, 1973.

The foremost examples are the Qanun-e-Shahadat Order, 1984, the Law of Preemption, and the Qisas and Diyat Ordinance, later incorporated into the Pakistan Penal Code. The Hadood laws may also be said to be the result of such efforts. The CII has submitted its final report, after the examination of all the laws, to the parliament. This implies that all or most of the laws of Pakistan stand Islamized.

The Federal Shariat Court, on its part, has been striking down laws with directions for amendments[38]. The Court has also

[38] The Federal Shariat Court of Pakistan has the power to examine and determine whether the laws of the country comply with Islamic law. It consists of 8 Muslim judges appointed by the President of Pakistan after consulting the Chief Justice of this Court, from amongst the serving or retired judges of the Supreme Court or a High Court or from amongst persons possessing the qualifications of judges of a High Court. The judges hold office for a period of 3 years, which may eventually be extended by the President.

Appeal against its decisions lie to the *Shariah* Appellate Bench of the Supreme Court, consisting of 3 Muslim judges of the Supreme Court and two Ulema, appointed by the President. If any part of the law is declared to be against Islamic law, the government is required to take necessary steps to amend such law appropriately.

The court also exercises Revisional jurisdiction over the criminal courts. The decisions of the court are binding on the High Courts as well as subordinate judiciary. The court appoints its own staff and frames its own rules of procedure.

Some examples of guidelines formulated by the FSC for the scrutiny of laws:

- Existence of element of Riba in any form.
- Any restriction on the right of an aggrieved person to seek redress.
- Acquisition of property without free consent of the owner.
- Any violation of the Islamic law of inheritance.
- Infringement of human dignity or basic rights in detention or imprisonment.
- Denial of the right of appeal against any decision of Government/judgment; at least one right of appeal to be ensured.
- Discrimination in the implementation of law.
- Violation of the right of privacy.

undertaken the study of entire statutes, for example, the consideration of the Arbitration Act and 18 other Acts including the Contract Act. The Court continues to study provisions of existing Acts, like the provisions of the PPC for example, however, the most important issue of the prohibition of *riba* has been placed on the backburner for decades. Like the FSC, the Council too continues to take up occasional issues, although these are mostly from the branch of personal law.

The efforts of these two institutions have led to the general conclusion that most of the laws of Pakistan have been Islamized, and as far as the statutory law is concerned Pakistan may be said to be an Islamic state. Apparently, it was in this sense that the new Information Minister, in response to a question asked by a reporter in the last week of 2018 said that the laws of Pakistan are all Islamic. For those, then, who think that there is only one method of Islamization of laws, the process of Islamization is more or less complete and very little more needs to be done.

Professor Nyazee, however, has indicated that true Islamization does not come by altering or drafting statutes, but through the judgements of the Superior Courts when they

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- Indemnification of actions on the part of the officials.

Some Important Bills/Draft Laws Prepared by, or on Behest of, the Council

- The Law of Pre-emption.
- The Law of Qisas and Diyat (Sections 229 - 338, P.P.C.).
- The Law of Evidence Order, 1984.
- The Blasphemy Law (Section 295 (C) P.P.C).
- The Offences against Property (Enforcement of Hudood) Ordinance, 1979.
- The Offence of Zina (Enforcement of Hudood) Ordinance, 1979.
- The Offence of Qazf (Enforcement of Hadd) Ordinance, 1979.
- The Prohibition (Enforcement of Hadd) Order 1979.
- The Ihtiram-e- Ramdan Ordinance.
- The Zakat and Ushr Ordinance, 1980.

Two other publications comprising comprehensive reviews (observations and proposed amendments) on the Criminal Procedure Code 1898 were published in May 2000.

interpret statutes[39]. He has written two articles to show how the Constitution will be considered truly Islamic through such interpretation and what type of interpretation of statutes is needed for the process of Islamization. This is the second method of Islamization, and in our view the more important of the two methods. The second method is gradual and deals with the underlying principles and the rationale of the statutes rather than the text of the statutes alone. The second method is the method of adjudication and requires from us to examine the method in a little more detail.

In his article called, "Is Our Constitution Islamic?" Professor Nyazee shows that the Constitution can never be Islamic unless its provisions are interpreted in the light of the principles of Islamic law, especially those that emerge directly from the Qur'an and the Sunnah.[40] In a related article called, "It is the Shari`ah of the Courts, Your Honour"[41], he quotes Justice Cardozo to show that each statute is accompanied by gaps, doubts and ambiguities that need to be taken care of by the judges. In fact, there is a law in Pakistan that requires this. He says: "The law that appears to govern this area, but is somehow not followed, is laid down in section 4 of the Shari`ah Enforcement Act, 1991. The section states the following:

> "Laws to be interpreted in the light of Shari`ah: For the purpose of this Act, (a) while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and (b) where two or more interpretations are equally possible the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court."[42]

After quoting this law, he concludes:

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[39] "Is Our Constitution Islamic, Your Honour?" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409086

[40] Ibid.

[41] "It is the Shari`ah of the Courts, Your Honour" https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2409105.

[42] Ibid.

> "If statute-law is interpreted in the light of the *Shariah* as required by this Act, the entire law in the country will acquire a flavor that is based on the Islamic form of justice and fairness, and this will take place in a matter of four or five years."[43]

These statements are sufficient for explaining the nature of the second method of Islamization. To this we may add that theories of adjudication do not require efforts only on the part of the judges; there are two more players in this process. The first are lawyers who assist the Superior Courts in interpreting the Constitution as well as the statutes. The Ulama may also be considered in the same category, because they can discuss the meaning of the statutes from the perspective of Islamic principles and rationales before such statutes land up in the Courts. The second are the citizens who should start claiming relief on the basis of the Islamic meanings of the statutes.

7. Conclusion

The process of adjudication is, therefore, completed by the efforts of all these players or stakeholders. If it is undertaken in a planned and conscious way, there is no way that the process of Islamization cannot be completed within a decade or even less. In addition to this, it may be pointed out that Islamization carried out through the process of adjudication will be more thorough and refined as compared to the method of legislation alone. All that is needed in the will to do so on the part of the judges, lawyers, lawmakers, *ulama* and the citizens. The burden of this paper was to point out that efforts must shift towards adjudication of regular cases on the basis of Islamic law in addition to the process of Islamization through legislation.

[43] Ibid