ISLAMABAD LAW REVIEW

Vol: II Nos. 1&2
Spring & Summer 2018

Special Issue on Islamization of Laws in Pakistan

Published as part of the project
Legal Education Support Program in Pakistan
in collaboration with Sandra Day O'Connor College of Law
Arizona State University, Phoenix, AZ

A Journal of the Faculty of Shariah and Law
International Islamic University, Islamabad

An Appraisal of Methodology for Islamization of Laws in Pakistan

GHAZALA GHALIB KHAN*

Abstract

This research argues that Islamization of Laws is inevitably an ijtihād-based notion; however, its analysis in Pakistani legislative system reveals that the institutions entrusted with this mission are not equipped with the protocols as required by principles of Islamic jurisprudence. The process of Islamization involves borrowing or adopting the laws from other nations or civilizations; when they are approved through the test of stringent Islamic legal methodologies and principles. Pakistan being a colonial state, after its independence, had to adopt the Common Law of Britain that ultimately required their Islamization. The Constitution of Pakistan, 1973 (the Constitution) has entrusted this noble task to Council of Islamic Ideology (CII) at one hand; and Federal Shariat Court (FSC) on the other. Both institutions are empowered to analyze the existing laws to test their conformity with Islamic injunctions. The CII in its recommendatory and advisory jurisdiction has power to propose Islamization of laws to the Legislature. Likewise, FSC is given power to adjudicate upon the Islamic status of existing laws, which if not appealed against would hold the force of law and the legislature is bound to amend the same accordingly. For cases in which reference is made to Supreme Court, the Judgement of its Shariat Appellate Bench is dealt alike. The given constitutional set up for Islamization of laws arises some crucial questions. The foremost to be analyzed through Islamic legal tradition, to see, if there is any defined set of legal rules and methodologies that may be followed to Islamize the laws? Moreover, whether there are any criteria for persons involved in such an ijtihād-based process? Whether, the given constitutional institutions follow any methodology while exercising their respective powers to Islamize the laws? Finally, if the appointment criterion for members of CII and judges of FSC is in line with the criteria set out for exercise of this noble task? The study involves qualitative and analytical research methods through the source materials on principles of Islamic Jurisprudence, related provisions of the Constitution; selective case law and existing literature on Islamization of Laws in Pakistan.

Keywords

Methodology, *ijtihād*-based, CII, FSC, Islamic Legal Rules

Introduction

Pakistan got independence from British Rule, upon an ideology to establish an Islamic state, "wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by

* *Lecturer, Faculty of Shariah & Law, International Islamic University, Islamabad, Email: ghazala.ghalib@iiu.edu.pk*

Islam shall be fully observed."[1] After independence, being a colonial state, Pakistan had to adopt the Common Law of Britain that ultimately required their Islamization. However, till date, even after 71 years of independence, Pakistan has a pluralistic legal system, wherein both Common Law and Islamic Law go side in side. For the purpose of Islamization, under all the three constitutions of Pakistan, various constitutional bodies were designated the mandate to recommend necessary measures to the parliament, for bringing existing laws into conformity with the injunctions of Islam.[2] Currently two constitutional institutions are functional for the said purpose. The CII in its recommendatory and advisory jurisdiction has power to propose Islamization of laws to the Legislature. Likewise, FSC is given power to adjudicate upon the Islamic status of existing laws, which if not appealed against would hold the force of law and the legislature is bound to amend the same accordingly. For cases in which reference is made to Supreme Court, the Judgement of its *Shariat* Appellate Bench is dealt alike.

The given constitutional set up portrays that Pakistan has adopted a system of 'institutionalized Islamization', which aims at gradually transforming existing legal system into an entirely Islamic one.[3] Nevertheless, it must be assured that this process follows the rules provided by Islamic legal theory in letter and spirit, which meticulously elaborates the rules to make new laws, and the same may be utilized for Islamization of Laws. Therefore, it is inevitably an *ijtihād*-based notion; however, its analysis in the present legislative system of Pakistan reveals that the above stated institutions entrusted with this noble mission are not equipped with the protocols, as required by Islamic legal theory. Eventually, till date Pakistan is not much successful in thoroughly Islamizing the entire legal system. In order to explore the shortcomings of this process some crucial questions need attention. Whether there is any defined set of legal rules and methodologies that may be followed to Islamize the laws? Moreover, whether there are any criteria for persons involved in such an *ijtihād*-based process?

[1] "The Constitution of the Islamic Republic of Pakistan" (1973), para. Preamble, http://www.na.gov.pk/uploads/documents/1528789763_684.pdf.

[2] Initially, a Commission was appointed under Article 198 (3) of The Constitution of Pakistan, 1956. The Commission failed to perform the designated task due to the abrogation of that Constitution in 1958. However, a new body was established under Article 199 of the Constitution of 1962, named as Advisory Council of Islamic Ideology, which was reconstituted under the present 1973 Constitution of Pakistan, under its Article 230.

[3] Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden: Martinus Nijhoff Publishers, 2006), 5.

Whether, the given constitutional institutions follow any methodology while exercising their respective powers to Islamize the laws? Finally, if the appointment criteria for members of CII, and judges of FSC is in line with the criteria set out for exercise of this noble task?

Henceforth, the study is divided into three sections. The first section presents the legal framework of methodologies presented by Muslim jurists for legislation, with a view to develop a theory that the same may be utilized in the process of Islamization of laws. Next section explores the approach or strategy for Islamization undertaken in Pakistan as it is and as it ought to be. The last segment presents working methodology of constitutional institutions designated for the subject task, that is, CII and FSC.

The study involves qualitative and analytical research methods. Accordingly, the literature reviewed was source materials on principles of Islamic Jurisprudence which set out norms and principles to derive legal rules in novel issues and to Islamize the laws. Moreover, the study analyzed 'related provisions of the Constitution'[4] to explore the gaps that hinder the process of Islamization amidst given protocols. Selective case law and existing literature, on Islamization of Laws in Pakistan, is also reviewed thoroughly.

1. *Legal Rules and Methodologies to Islamize Laws*

The process of Islamization involves adoption of various laws that might have been originated from other nations or civilizations; however, such an adoption may only take place, when they are approved through the test of stringent Islamic legal methodologies and principles.[5] Upon this very principle, the present paper is an effort to explore the methodology for Islamization of Laws from the principles and theories of Islamic Jurisprudence.

Islamic legal discourse offers the ethics and methodologies for making new laws through its institution of *fatwa*. The same institution may serve the phenomenon of Islamization of laws which is indeed a legality test of existing laws, thus requiring the involvement of *fatwa* procedures, to test the *sharī'ah* status of

[4] The related provisions include 1) Part VII: Chapter 3-A about constitution of functioning of Federal Shariat Court; and Part XI on Islamic Provisions, that relates to setting up of Council of Islamic Ideology.

[5] Imran Ahsan Khan Nyazee, *The Lex Islamica: Islamic Law for the New Millennium*, First (Pakistan: Federal Law House, 2018), 12.

aforesaid laws. In its literal sense, *fatwa* means 'response to any question', while technically speaking it signifies an edict or a response to an Islamic legal question by a *mufti* (Muslim Cleric). Thus, it is defined as, "a formal and legal opinion/ruling (*al-hukm al-shara'ī*), expounded by a Muslim jurist (*mufti*) in response to the quarry of a questioner"[6]. The treatises on principles and theories of Islamic jurisprudence have discussed at length the protocols for this esteemed institution. However, for the purposes of present study, only two significant dimensions of this institution are taken into consideration. Thus, at one hand the qualifications of persons involved in this commission are expounded; while on the other the ethics and protocols of Islamic legal interpretation are detailed.

1.1 *Qualifications & Status of a Mufti*

As stated earlier the task of adjudging and approving the validity of any existing legal system, within the four corners of *sharī'ah* is in the hands of *muftis,* who are required to hold the qualifications of a *mujtahid*. Ibn-e-Humām postulates, qualification standard for a *mufti*, to be a *mujtahid*.[7] As far as a non-*mujtahid* is concerned, who has memorized the legal opinions of a *mujtahid* and who reproduces them before a questioner of legal issues, he is not deemed as a *mujtahid* rather he is merely transmitting the views of *mujtahid Imam*.[8] Thus we may assume that a jurist involved in the process of Islamization, would be either a "qualified *mujtahid"* with his own independent methods of *ijtihād;* or he may be a "*muqallid* (follower)" who has ample knowledge with a juristic approach to transmit the views of *mujtahid*, whom he follows, in response to the quarries of his clients (*mujtahid fi al-madhab*).

The status of a *mufti* is also explicated by great Islamic legal philosophers and jurists like al-Shātbi. Accordingly, a *mufti* is said to be a legislator in either of the two ways- first, when he transmits the divine law (found in the Holy Qur'ān and Sunnah), he actually assumes the capacity of an emissary (*muballigh*); secondly when he infers the law through the interpretation of divine sources or already transmitted law, here he acts on behalf of the Lawgiver, for the authority to legislate belongs to Him

[6] Muhammad Rawās Qala'jī and Dr. Hāmid Sādiq Qanībī, eds., in *Mu'jam Lughat'l-Fuqahā'* (Bairūt: Dār'l Nafā's, 1988), s.v. Al-Fatwa.

[7] Kamāl al-Dīn Ibn-al-Hamām, *Fath Al-Qadīr*, vol. 7 (Bairūt: Dār al-Kutub al-Ilmiyyah, 2003), 235.; Mohammad Amīn Al-Hanafī Amīr Bādshāh, *Taysīr Al-Tahrīr*, vol. 4 (Bairūt: Dār al- Fikr, 1996), 248.

[8] Ibn-al-Hamām, *Fath Al-Qadīr*, 7:235.

alone.[9] Thus, a *mufti* is actually a deputy legislator in either of the two ways. First, when he transmits the divine verdict, he assumes the capacity of an emissary to transmit the words of divinely authorized Lawmaker (Prophet Mohammad (SAW) who got this prerogative either due to revelation upon him or due to his *ijtihādi* verdicts.). Secondly when he derives/extracts or even interprets the law through already transmitted law, he is a legislator acting on behalf of the Lawmaker, therefore it is obligatory to follow him and to act upon his verdict. In the nutshell the *mufti* is a delegate of the Prophet (SAW) or the messenger of Allah (SWT), just like Prophets. That is why they are called أُوْلِي الْأَمْرِ,[10] means, those who have authority (to legislate) and obeying them is contextualized with obedience of Allah (SWT) and His Prophet (SAW) in the given words of Almighty Allah.

يَا أَيُّهَا الَّذِينَ آمَنُوا أَطِيعُوا اللَّهَ وَأَطِيعُوا الرَّسُولَ وَأُوْلِي الْأَمْرِ مِنْكُمْ...

O you who believe! Obey Allah and obey the Messenger (Muhammad SAW), and those of you (Muslims) who are in authority…[11]

A *mujtahid* is required to have embraced numerous diversified faculties or qualifications, including; 1) Knowledge and understanding of Qur'ān (almost 500 verses of *ahkam*) from legal perspective. Thus, he must know (without even memorizing them) the entire corpus of Qur'ānic verses relating to law, the abrogating and the abrogated verses, the general rules of interpretation of the text, like inference based on absolute and restricted meanings of words, general and special words, and likewise the context of such verses; 2) Proficiency in the knowledge of Sunnah, including his awareness about law making Sunnah. Moreover, he is required to have knowledge about its various categories such as, accurate and weak *ahadīth* ; 3) Knowledge of *Ijmā'* (Juristic Consensus) and the points of disagreements relating to juristically interpreted and derived rules of Islamic Law, so that he may not interpret the law in derogation of juristic consensus; 4) Arabic linguistic skills in thorough; 5) An applied knowledge of principles of Islamic Jurisprudence, meaning thereby he must have an ability to analyze and interpret the legal issues in the light of Islamic legal theories. Juristic approach to analyze the issues in question and the ability to

[9] Abu Ishāq Al-Shātbi, *Al-Muwāfqāt Fi Usūl 'l Sharī'ah* (Beirut, Lebnon: Dār 'l Kutub Al-Ilmiyyah, 2004), 867–68.

[10] Al-Shātbi, *Al-Muwāfqāt Fi Usūl 'l Sharī'ah*, 867–68.

[11] Dr. Muhammad Taqi-ud-Din Al-Hilali and Dr. Muhammad Muhsin Khan, trans., "4- Surah an-Nisa'," in *The Nobel Qur'ān*, Online Edition (Darussalam Publications, n.d.), http://noblequran.com/translation/.

derive laws from sources and general principles of Islamic law; 6) Adeptness in the theory of objectives of *sharī'ah*, so as to be able to indoctrinate them in his *ijtihād*; 7) Ability to derive the laws from the texts of early jurists, thus essentially, he must know the points of differences of the jurists, regarding legal issues; 8) Acquainted with the sufficient knowledge of issue at hand in its relevant context, along with ancillary circumstances affecting it; 9) The qualities of a competent, trustworthy Muslim, who not only utterly avoids major sins but also abandons persistence of minor sins. The afore-mentioned qualifications are generally mentioned by Muslim jurists in their texts of *usūl al-fiqh*.[12]

Worthwhile mentioning here that besides above-stated criteria, Muslim jurists have also discussed the possibility of *ijtihād* through experts (*'alims*) who are proficient in issuing *fatwa* in any one or more subjects of Islamic law without having such adeptness in others.[13] Thus, Islamic legal theory endorses *muftis* for specialized areas of *fiqh* too, such as, *mufti* in Family Laws or Commercial Laws and so on.

The above stated qualification criteria seem challenging in current eras, as we may rarely find such squarely qualified persons. Moreover, one may even argue to revise the given criteria in the contemporary world, wherein the virtual world has made access to knowledge databases through one-touch technologies, thus making the research far easier than it was when such criteria were voiced. Conceding to the given arguments, it seems that even due to necessity it would be quite crucial to somehow relax the given requisites of qualification. Further, if such relaxation is not warranted, then non-existence of qualified persons would lead to a serious consequence, that there would not be experts to guide the Muslims in necessary cases.[14] Eventually, the legal interpretation of Islamic law would either be extinct in toto; or be left in the hands of impostors. However, such relaxation in the qualification of a *mufti* should never be at the cost of departure from legal theories maintained for interpretation/derivation of Islamic Law from its sources. Therefore, without negating the need of given criteria for

[12] See for instance, Hāmid Muhammad ibn Muhammad Al-Ghazalī, *Al-Mustsfā min 'Ilm Al Usūl by Abū*, vol. 2 (Būlāq, Miṣr: Al-Maktabah al-Amīriyyāh, 1925), 350–53.

[13] Ibid., 2:353.

[14] Imran Ahsan Khan Nyazee, *Nyazee on the Secrets of Usūl Al-Fiqh Following a Madhhab and Rules for Issuing Fatwās*, Course Module VI (Advanced Legal Studies Institute, 2014), 58, SSRN: https://ssrn.com/abstract=2407183.

conducting *ijtihād*, we may consider two working options for the persons involved in the process of Islamization of laws in Pakistan:

A. Specialist *muftis* be appointed for revising specific areas of law, like a *mufti* in Criminal Laws must be designated the task of reviewing and Islamizing the relevant laws. Moreover, in order to meet the qualification criterion number 8 stated above, such *muftis* must also be required to be well qualified in English Law as well.
B. In the alternative a diverse collaborative group of persons be formed, with expertise in specific areas of knowledge, required for the said purpose, to perform this revered task. Such as a combination group of experts in *tafsīr*, *hadīth*, *fiqh* and *usūl*; who may deliberate upon hard cases while complementing each other's in a collective effort to review existing or proposed laws.

1.2 *Protocols for Issuance of Fatwa*

In the contemporary world, two forms of *ijtihād* are in vogue, that is, Independent and Collective or Group *Ijtihād*.[15] The former being performed by a *mujtahid* through either his own deductive methodology; or by way of following the methodology of any *mujtahid imām*. The later, form of *ijtihād* is seemed to have been inspired by the notion of *ijma'* to formulate Islamic legal rules. Thus, it is undertaken as group assignments by the jurists, and the questions of law are resolved by way of consultation, eventually agreeing upon a single solution.[16] In either of the two forms the qualifications as discussed earlier, as well as, working methodology remains of prime concern.

A *mufti*, be either in the capacity of independent *mujtahid*; or a follower of any *mujtahid* when faced with a question of law would have to exhaust the efforts to arrive the intent of Lawgiver. The rules for interpretation of texts need to be defined in either case, as they are defined by various school of Islamic legal thought and termed as their *usūl*. They actually provide a set of interpretive principles formulized to comprehend the texts of Qur'ān and Sunnah, meant for deriving the law in hard cases. The *mujtahid* or body of *mujtahids* involved in the process of Islamization would not only declare the status of legality or illegality of said law in Islamic legal paradigm, rather he would give legal reasoning or

[15] Ali Hasab-Ullah, *Usūl Al-Tashrī' Al-Islāmi*, 5th. (Egypt: Dār al- Ma'ārif, 1976), 115–16.
[16] Ibid.

rules for said interpretation as well. The reasoning must mention his principles of adoption or rejection both. The above-stated qualification standard elaborates even framework required for conducting *ijtihād*. This is the spirit of *ijtihād* in Islamic legal system that a jurist must wield exhaustive efforts to understand or derive the legal rulings from their primary and secondary sources in the light of legal principles of interpretation while keeping intact the objectives of *sharī'ah*.

In the light of above analysis, the working methodology for Islamization of laws may be charted here. Thus, in this process the exercise of *ijtihād* would take any one of the three forms depending upon the qualifications of the *muftis*.

A. In case of squarely qualified *mujtahid*, he would be called an 'independent *mufti*', who need not follow the interpretive methodology of any school of Muslim legal thought or any other *mujtahid*. It is supposed that he would have devised his own principles of interpretation of the Divine Text, in the light of which he would analyze the legality of existing or proposed laws. However, this is only possible when such a *mufti* perfectly meets the qualification criteria stated above, otherwise we need to opt for rest of the possibilities in this regard.
B. In case of non-availability of first class of *muftis*, still it is possible to look for *mujtahid muqallids*, who can find legal solutions through following interpretive methodology of any single school of Muslim legal thought. In this case the state is bound to declare which school of thought shall be followed in the process of legislation, in order to avoid inconsistent interpretations of Islamic law.
C. Another option is still there if first two categories are hard to find. Thus, the process may be conducted as group assignments, that is, collective *ijtihād.* Contemporary institutionalized *ijtihād* may be performed as collective *ijtihād,* requiring qualified scholars as specialist *muftis*. Such institutions are bound to adopt the methodology of qualified *muftis*, in the process of Islamization of laws. However, in case of necessity when required qualified *mujtahids* are not available, then as stated previously a diverse collaborative group of experts complementing each other's, may be designated the job of law-making or reviewing.

Present-day institutionalized *ijtihād* calls for last mentioned option. Thus, such institutions need to adopt the methodology of

interpreting the laws, so that it must be clear, which legal principles may be followed to derive the law, when the evidences are not found in primary sources. Moreover, mere random and haphazard mixing of various schools of Muslim thought, and that too by persons who do not qualify to be *muftis*, is prohibited in Islamic legal theory (*Talfiq haram*).[17] Indeed it amounts to function under reason where only the principle of 'ease' of individuals or society remains the prime concern of legislator. Such form of *ijtihād* are required to be discouraged, in order to improve the institution of *ijtihād* to its true spirit, which is meant to arrive the true intent of Lawgiver, instead of satisfying the whims and wishes of individuals or society at large.

2. *Contemporary Approaches towards Islamization of Laws*

There is likelihood of two broad approaches in the process of Islamization, that is, either to adopt the basic governing rule of permissibility; or the basic governing rule of prohibition.[18] The first mentioned approach emerges through a legal maxim mandating *al-ibāhah al-asaliyyah* or permissibility of every law that does not contradict any of the prohibitions proscribed by *sharī'ah*. In Mohammad Riaz etc. v. Federal Government, the Court in its dictum highlighted the features of Islamization approach adopted in Pakistan. The court presented the basic presumption that Islamic Law and inherited law from British are not complete opposites that could never be adapted in legal framework of Islamic Republic. Rather, as the common law is also based on egalitarian principles of justice, equity and good conscience, thus it corresponds Islamic legal principles like public good (*maslehah mursila*) as propounded by Imam Malik; or *istihsān* (juristic preference) as theorized by Imam Abu Hanifah for law-making. The court observed this apprehension too that sometimes the statute law would not be consistent with the laws of Qur'ān, however that would be in rare cases.[19] Thus, in other words, the Court defined the strategy for Islamization to be based on the presumption that every existing law would be deemed permissible unless it may be shown to contradict the express injunctions of *sharī'ah*.

---

[17] Ghazala Ghalib Khan, "Application of *Talfiq* in Modern Islamic Commercial Contracts," *Policy Perspectives* 10, no. 2 (2013): 154.

[18] Imran Ahsan Khan Nyazee, *Theories of Islamic Law* (Pakistan: Federal Law House, 2007), 267.

[19] Mohammad Riaz etc. v. The Federal Government of Pakistan, PLD 1 (Federal Shariat Court 1980).

The second approach, on the other, is quite opposite, requiring examination of the laws through the prism of basic prohibition of every existing law unless evidences are there entreating its legality from *sharī'ah* perspective. Thus, it requires examination of every existing law and provides its legal reasons for approval or disapproval.[20] The core of Islamization requires that this treatment of examination or testing should be mandated to the whole bulk of existing laws, otherwise it may lead to some serious repercussions discussed ahead.

In fact, there seems an inherent problem in the legal system of Pakistan that must be seen from two perspectives. First the codified law is a mixture of Islamic Law, Islamized Law and the adopted English Law. Secondly, in general the judges' qualification has no requisite of proficiency in Islamic Law, except for the judges of FSC or Shariat Appellate Bench of SC. Given this scenario the judges are faced with the technical problem of interpretation of statutes in line with the *sharī'ah*, since as per the Enforcement of Shariat Act, 1991 (Shariat Act), they are required to adopt an interpretation based on Islamic Law.[21] The apex Court of Pakistan has pointed towards vagueness of the nature of legal system in Pakistan. Thus, the courts are always faced with a perplexing question, whether our legal system is based on common law, Islamic law, or a hybrid of both systems?[22] The judges of apex court in Pakistan seem to be over careful (and rightly so)[23], in dealing with interpretations that involve Islamic Law. They have time and again pointed towards the issue of interpretations faced by them, where they feel obligated to decide the cases in accordance with the law of the land as it exists, and not in accordance with what the law ought to be in its Islamic version. Thus, in *Malik Muhammad Mumtaz Qadri* v. The State, the Court observed that

[20] Nyazee, *Theories of Islamic Law*, 268.

[21] The said Act categorically declares the supremacy of *sharī'ah* in the legal system of Pakistan. Moreover, it has also defined the rules of interpretation for statutory law, that, "… if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court". "Enforcement of Shariat Act," § 4 (1991).

[22] Kamran Adil, "The Jurisprudence of the Codified Islamic Law: Determining the Nature of the Legal System in Pakistan," *LUMS Law Journal* 2 (2015): 90.

[23] Due to non-mandatory requirements of proficiency in Islamic law, mostly the judges are only well-versed in English Law, without having any proficiency in Islamic law and its jurisprudence. Thus, preventing them to venture in Islamic legal interpretations.

Article 203G of the Constitution of the Islamic Republic of Pakistan, 1973 categorically ousts the jurisdiction of this Court in matters of interpretation of the Injunctions of Islam as laid down in the Holy Qur'ān and the Sunnah of the Holy Prophet Muhammad (peace be upon him) falling within the exclusive domain, power and jurisdiction of the Federal Shariat Court and the Shariat Appellate Bench of this Court and essentially this Court's jurisdiction in such matters is limited to application of the principles where they are settled. Apart from that, by virtue of the provisions of Article 230 of the Constitution, it is one of the functions of the Council of Islamic Ideology to interpret the Injunctions of Islam with reference to an existing or proposed law and we would not like to usurp that function either.[24]

Herein the question arises when the judges have got the jurisdiction to decide the cases involving *sharī'ah* based interpretations, should they restrict themselves to stick to codified law on the pretext of having no jurisdiction "to test repugnancy of any law"[25]? In fact, such cases must be decided in accordance with *sharī'ah,* and must be sent to FSC, where the judges are supposed to be well-qualified in interpreting Islamic law. On the contrary, sometimes quite innovative judgements were also handed down by the courts, whereby they have acted upon the mandate given to them under the Shariat Act, hence ventured into interpretation of the law through *fiqh* sources and even going beyond the traditional *fiqhi* interpretations.[26] Thus, it depends more upon the approach of judges as to how they construe the authority given to them under the Shariat Act, while at the same time there are constitutional restriction upon that authority. Here the underpinning issue leads us to the problem of complex legal system of Pakistan, wherein bulks of Islamic laws are not being legislated and the process of Islamization is not all-inclusive.

---

[24] Malik Muhammad Mumtaz Qadri v. The State, PLD 17 (Supreme Court 2016).

[25] See for instance another observation of the court that "by virtue of Article 203G of the Constitution, the courts have no jurisdiction to test repugnancy or contrariety of any existing law or legal provision to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah and such jurisdiction vests exclusively in the Federal Shariat Court and the Shariat Appellate Bench of Supreme Court".(Zahid Rehman v. The State, PLD 77 (Supreme Court 2015).)

[26] See for instance, the remarks of the Lahore High Court in interpreting the mother's right of custody of her minor children and rejected the plea of petitioner Imtiaz Begum that injunctions of Islam are contained in Quran and Sunnah alone while *fiqh* is not considered as injunction of Islam. Moreover, the *amal* of companions and *ijma* of *ummah* is also regarded as injunction of Islam. In that case the court after discussing its mandate given under Shariat Act, interpreted the custody law even beyond the traditional *fiqhi* doctrines. (Mst. Imtiaz Begum v. Tariq Mehmood and another, CLC 800 (Lahore 1995).)

Instead it is quite selective process and very few laws are thoroughly Islamized.[27]

This entire situation reflects demerits of adopting first-mentioned approach, that is, permissibility of existing laws unless proved otherwise. The provisions of existing laws that are left intact, without giving Islamic legal reasons behind their approval, can only be interpreted in the light of English Common Law. Thus, in hard cases the judges would opt to consult the English legal principles that are easily accessible from decisions of their Law courts. On the other hand, if the judges would try to interpret the hard cases in terms of Islamic law, they would need special efforts to research the matter. However, if every law is already been approved based on Islamic legal principles, then it would be easier for him to extract the law even for hard cases too.[28]

Thus, in the light of above discussion it may be said that the process of Islamization needs an inclusive approach and every single law must be tested and redefined or reinterpreted in terms of its Islamic foundations. In an ideal situation, the judges are also required to be sufficiently qualified, at least to interpret the laws in accordance with Islamic law.

3. *Methodology of Constitutional Institutions for Islamization*

The Constitution of 1973 in Pakistan has entrusted the noble task of Islamization to Council of Islamic Ideology (CII) at one hand; and Federal Shariat Court (FSC) on the other. Both institutions are empowered to analyze the existing laws to test their conformity with Islamic injunctions. Here the composition and methodology of these institutions is briefly analyzed, to see the nature and course of institutionalized *ijtihād* mandated by the supreme law of Pakistan and eventually undertaken by them.

[27] Imran Ahsan Khan Nyazee, *Introduction to Law (For Pakistan)*, First (Pakistan: Federal Law House, 2016), 28.
[28] Nyazee, *Theories of Islamic Law*, 369.

3.1 *Council of Islamic Ideology*

The provisions relating Council of Islamic Ideology are incorporated in Part IX of the Constitution of Pakistan, 1973. Thus, it was constituted under Article 228 (1) with following mandate:

(a) 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'ān and Sunnah; (b) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether proposed law is or is not repugnant to the Injunctions of Islam; (c) 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 (d) 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.[29]

The same Article provides rest of the protocols regarding composition, appointing authority and qualification criteria of its members. Accordingly, sub clause (2) fixes the minimum number of its members to be eight while the maximum number should not exceed twenty. The authority to appoint the members of the Council is in the hands of President of Pakistan, who would exercise the said authority after due satisfaction that, a) the prospective members have "knowledge of the principles and philosophy of Islam as enunciated in the Holy Qur'ān and Sunnah"[30], or; b) "understanding of the economic, political, legal or administrative problems of Pakistan"[31]. The members make a diverse group as per constitutional requirements given in sub-clause (3). Thus, it necessitates at least two of the appointed members to be from judges of either Supreme Court or of High Court. Further, at least one third members are required to be from amongst Islamic researchers/instructors, having at least fifteen years' experience in their respective fields. Finally, at least one member must be a woman.[32] Moreover, keeping in view the practicability of the matter, the President is required to ensure the representation of various schools of Muslims thought is

[29] "The Constitution of the Islamic Republic of Pakistan" (1973), art. 230
[30] "The Constitution of the Islamic Republic of Pakistan" (1973), art. 228 (2)
[31] Ibid.
[32] "The Constitution of the Islamic Republic of Pakistan" (1973), art. 228 (3).

represented in the Council.[33] Hence, the above-stated article of the Constitution has laid down not only the qualifications of the members of this *ijtihādi* institution of Pakistan, rather it also sheds light on the composition of its members and even nature of *ijtihād* expected from it. In the following lines this article and related rules are critically analyzed to propose some recommendations to improve methodology of Islamization in the light of Islamic framework established in the first part of this study.

First, the procedural rules reveal that the decisions of the Council are made on the principle of majority votes.[34] The given criteria, on the other hand, mandate two kinds of persons to be eligible for the membership of this institution. Either they must be Muslim scholars,[35] or experts in various social sciences (economists, political scientists, legal fraternity or administrative experts). Further, the composition of the Council shows that Muslim scholars are required in minority (only one third) than in majority. In the given combination of members, the principle of finality of decision through majority vote of Members present at the meeting may prove a hinderance in the process of Islamization. Hence, it requires that finality of opinion of the Council must be in the hands of qualified Muslim scholars, who should make decision in the light of recommendations of experts of specific fields.

Secondly, the criteria for Muslim scholars do not meticulously define, whether it means the persons eligible for issuing *fatwa* as required by the theories of Islamic law (discussed in the first part of this study), or it simply mean Muslim scholars with certain educational qualification or experience in any discipline of Islamic Studies? Thus, it seems an umbrella term, inclusive of every person with formal degree in the disciplines of Islamic Studies, or even without holding any formal degree. Here it is humbly pleaded that the given qualification criteria may be revised in a way either to make the qualifications of a *mufti* as requisite for every member, or to define eligibility criteria in terms of various classes of experts in diverse disciplines of Islamic Studies for a collaborative group, as discussed earlier.

Thirdly, the principle of representation of various schools of Muslim thought in the Council seems to grant an open discretion

[33] "The Constitution of the Islamic Republic of Pakistan" (1973), art. 228 (3) (a).
[34] "The Council of Islamic Ideology (Procedure) Rules" (1974), sec. 6 (3).
[35] Well-acquainted with the principles and philosophy of Islam as articulated in the Holy Quran and Sunnah of the Prophet (SAW).

to the Council, to adopt the methodology of any school of Muslim thought, while exerting on the Islamization of existing laws. Moreover, such an *ijtihādi* process may even be carried out through mixing the opinions or even methodologies of various schools of thought. In other words, it results in making the subject body, a hybrid institution of Muslim legal thought, where legal interpretations by all the schools of thought may be rendered as common legal heritage. It also depicts the intension of framers of Constitution that the Council would work on the principle of contemporary form of *ijtihād*, known as collective *ijtihād*. However, it is required that the Council must define a coherent theory of principles to be used for conducting *ijtihād*, and never should there be any room for inconsistent legal interpretations with the spirit of Islamic law.[36] In the absence of such coherent legal theory, there is always a possibility to define the law in terms of contemporary trends, rather than in accordance with the spirit of Islamic law.

Fourthly, the Council's recommendations or more appropriately to be viewed as *ijtihādi* efforts are peculiar in their nature, as they are non-binding on the House. In Abdul Razzaq Amir v. the Federal Government, the Court discussed the nature of the Council's functions. It was observed that the Council "provides technical assistance/ recommendations to the Parliament/ Provincial Assemblies before finalizing legislation…[it] appears to be an adjunct of the Parliament/ Provincial Assemblies/ President/ Governor…"[37]. However, the House has got the discretion either to review the law per recommendations; or may even proceed with legislation without waiting for said recommendations.[38] Under Article 230 (3), if any proposed law is sent to the Council, for the purpose of examination of its Islamic character, the House considering public interest, may proceed with legislation even before the report of CII is received. This practice may also lead to legislation beyond Islamic dictates. Thus, there is need to review the role of the Council and made more effective constitutionally, while recommendations are sought for legislating on arising issues.

---

[36] Muhammad Mushtaq Ahmed, "Discovering the Law without a Coherent Legal Theory: The Case of the Council of Islamic Ideology," *LUMS Law Journal* 1, no. 4 (2017): 54.

[37] Abdur Razzaq Aamir v. Federal Government of Islamic Republic of Pakistan, PLD 1 (Federal Shariat Court 2011).

[38] Imran Ahsan Khan Nyazee, *Legal System of Pakistan*, First (Pakistan: Federal Law House, 2016), 248.

Finally, the selective approach of the Council during the process of Islamization, rather than an inclusive one. So far, the Council has examined a large number of laws, but has found problems with only a few of these laws. The presumption then is that all laws to which there is no objection stand Islamized.[39] Unfortunately, the ground reality is quite opposite to this presumption. As mentioned earlier[40], the existing laws have their roots in English Common Law which could not be interpreted by the judges in true Islamic spirit unless methodically tested and eventually qualified to be labelled as Islamized. Thus, the function of the Council is far momentous than declaring things like, nothing found to be un-Islamic in the given law, thus Islamized. The Council is also required to adopt the inclusive approach to Islamize the laws, thus testing every law and giving certification of Islamization only after providing the *sharī'ah* principles that certify it to be Islamic.

3.2 *Methodology of Federal Shariat Court for Islamization*

The Federal *Shariat* Court of Pakistan (the Court) was established in 1980, through a presidential order,[41] as a constitutional institution and its powers, jurisdiction, constitution and other related rules of procedure were incorporated in Part VII (Chapter 3-A) of the Constitution, 1973.[42]

Article 203C of the Constitution elaborates the composition and qualification criteria of its judges. Eventually, it is required that the maximum number of judges should not exceed eight Muslim judges including its chief justice. Of the Judges, at maximum four must be qualified to be judges of a High Court, and not more than three are required to be *ulema,* having at least fifteen years' experience in Islamic law, research or instruction. As a constitutional requirement the court maintains a list of jurisconsults comprising of prominent *ulema* of the country who represent various schools of thought.[43] Under article 203E (5), the jurisconsults is also required to be an *'alim* about whom the Court is satisfied that he is "well-versed in *Shariat"*. Here the qualification criteria are given in generic terms, that need articulation of the term "*ulema*" as the persons eligible for doing

[39] Ibid.
[40] See Note 27.
[41] "President's Order," No. 1 § (1980).
[42] "The Constitution of the Islamic Republic of Pakistan" (1973), chaps. 3-A.
[43] Nyazee, *Legal System of Pakistan*, 246.

ijtihād, who meet the criteria of *mufti* as stated in first part of this study.

The Court in its original jurisdiction gets a mandate for "judicial Islamization"[44], that is, to examine and decide if any 'Law'[45] is repugnant to the injunctions of Islam or not. However, the "…Court is not part of the legislative wing of the State, but it has the potential to provide relief to any person who is aggrieved of or is critical of any legislative measure"[46]. Eventually the Court is authorized to strike down any law/provision of law after declaring it null and void on the pretext of its repugnancy to Islamic injunctions. However, in case the Court decides some amendments in the impugned law, the judgement would have no effect unless such amendment is done by the legislature.[47] Thus judicial Islamization should not be construed as giving widespread authority to this very body, even to the extent of legislating amendments after declaring repugnancy of any law.

The said jurisdiction may be exercised by the Court in a *suo moto* action; or upon a Shariat Petition filed by any Petitioner, who may be either a citizen of Pakistan, or the Federal or any of the Provincial Governments.[48] The procedure for filing the Shariat Petition has been provided in Article 203E of the subject Constitution, as well as, in the Procedural Rules of FSC. Thus, every petition is required to mention thorough details about the Court, the Petitioner and the Law which is claimed as against the injunctions of Islam.[49] It further requires that the Petition must,

(e) state the number of Article, section, clause, paragraph, provision or provisions of a law which is or are considered to be repugnant to the Injunctions of Islam; (f) set forth concisely, consecutively numbered and under distinct heads of the grounds for such repugnancy; (g) state, in support of such grounds, the relevant verse or verses of the Holy Qur'ān and Sunnah of the Holy Prophet (S.A.W) with reference to the relevant Ahadis; (h) contain a list of the books specified the pages to be cited; and (i) be

---

[44] Lau, *The Role of Islam in the Legal System of Pakistan*, 144.

[45] 'Law' includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law and any law relating to the procedure of any court or tribunal.

[46] PLD 1 (Federal Shariat Court 2011).

[47] PLD 1 (Federal Shariat Court 1980).

[48] The Constitution of the Islamic Republic of Pakistan, art. 203-D.

[49] "Federal Shariat Court (Procedure) Rules, 1981," § 7 (1) (1981).

placed in a folder/specified by an order made by the Chief Justice in this behalf.[50]

These sub-clauses of the said Rule require significant research on the part of the Petitioner too, so as to enable the Court to decide the status of impugned law on the touchstone of injunctions of Islam. The phrase "injunctions of Islam" is described in Article 203D, as those injunctions, "as laid down in the Holy Qur'ān and the Sunnah of the Holy Prophet…". Thus, it seems that the given phrase "injunctions of Islam" may strictly be construed within the limitations given in the same clause, that is, such injunctions that are provided in the two primary sources of Islamic Law- The Holy Book of Qur'ān and the Sunnah of the Prophet (SAW). However, a generic interpretation of the given phrase may be inferred, that the phrase 'injunctions of Islam' not only includes the express ordainments of Qur'ān and Sunnah rather anything which is consistent with the intent of these sources should include in the scope of this phrase.[51] It is due to the reason that not every injunction of Islam is expressly given in these two sources alone, thus in hard cases, there would always be a need to look beyond these sources. Here the rules of interpreting the Text for the sake of finding legal solutions, would maintain the integrity of Islamic law within the bounds prescribed by these Texts.

Here it is worthwhile mentioning that after its formation, the Court itself brought into its consideration some policy issues, including the questions regarding the framework of methodology for this judicial Islamization. Likewise, the crucial question, as to decide which school of Islamic Legal Thought would be followed during the said course?[52] Thus, in its very first case, the Court discussed these policy issues and concluded certain guidelines for the said process. It elaborated methodology for removing inconsistencies of laws with the holy Qur'ān and Sunnah. The Qur'ān and Sunnah were to be held as touchstones to test the repugnance of any existing law. However, the said provision was not deemed as necessitating the Court to adhere to any specific school of Islamic legal thought or sect. The Court was required "[t]o ascertain the opinions and views adopted by all jurists of renown on that matter and to examine their reasoning in order to

[50] Ibid.

[51] Shahbaz Ahmed Cheema, "The Federal Shariat Court's Role to Determine the Scope of 'Injunctions of Islam' and Its Implications," *Journal of Islamic State Practices in International Law* 09, no. 02 (2013): 95.

[52] Lau, *The Role of Islam in the Legal System of Pakistan*, 144.

determine their harmony with the present-day requirements, or if possible to modulate them to the demands of the modern age"[53]. The opinions of various jurists/schools of thought were regarded as of persuasive authority. It is noteworthy that after having decided such a course, the judges of the Court have avowed their right to *ijtihād* and have indeed resorted to it in several cases.[54] Their *ijtihādi* efforts are prospective in the process of Islamization. However, generically declaring the opinions of various schools of thought as having persuasive authority, may lead to inconsistent application of Islamic legal principles. For this reason, FSC needs to elaborate its thorough principles of interpretation, in the light of Islamic legal theories of interpretation.

Conclusion

The present day institutionalized Islamization calls for collective bodies of *ijtihād* who must define their legal theory to interpret the law through its sources. Islamic treatises on *usūl al-fiqh* are elaborative of this theory in terms of defined protocols for *ijtihād* and qualifications of *mufti* for conducting *ijtihād*. One may criticize the concept as being non-practical as the criteria given are too strict. However, instead of facing a situation where the legal interpretation of Islamic law would either be extinct in toto; or be left in the hands of impostors, there is need, to re-define such standards. We may think of a diverse group of persons to perform the task of *ijtihād*, with expertise in specific spheres of knowledge required for the said purpose, such as experts in *tafsīr*, *hadīth*, *fiqh* or *usūl*. Such a group would deliberate upon hard cases, in a collective capacity to discover the Islamic legal rules. The process of Islamization needs an inclusive approach and every law must be reinterpreted in terms of its Islamic foundations. The criteria for Muslim scholars in both constitutional institutions, does not meticulously define, whether it means the persons eligible for issuing *fatwa* as required by the theories of Islamic law, or it may mean anybody with certain educational qualification in any discipline of Islamic Studies. The given qualification criteria may be revised to make the qualifications of a *mufti* as requisite for the Muslim scholar members of CII and *ulema* judges of FSC. Alternatively, a body of various classes of experts in Islamic Studies may be designated the task of performing *ijtihād*. Such as, the members of CII and judges of FSC including *tafsīr* experts, *hadīth* experts, *fiqh* experts and relevant subject experts, who

[53] PLD 1 (Federal Shariat Court 1980).

[54] Ihsan Yilmaz, "Pakistan Federal Shariat Court's Collective Ijtihād on Gender Equality, Women's Rights and the Right to Family Life," *Islam and Christian–Muslim Relations* 25, no. 2 (2014): 181–92, doi:10.1080/09596410.2014.883200.

would derive and interpret the law in collaborative capacity. Moreover, both institutions need to define their principles to interpret and derive the laws, in the light of Islamic legal theory, in order to arrive the true intent of Lawgiver.

***