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A Value Oriented Legal Theory for  
Muslim Countries in the 21st Century: A  
Comparative Study of Both Islamic Law  
and Common Law Systems

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**A VALUE ORIENTED LEGAL THEORY FOR MUSLIM COUNTRIES IN  
THE 21<sup>ST</sup> CENTURY. A COMPARATIVE STUDY OF BOTH ISLAMIC  
LAW AND COMMON LAW SYSTEMS.**

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## INTRODUCTION:

A legal tradition is not the same thing as a legal system, although the legal system inevitably forms part of the legal tradition and vice versa, a legal system may be used to refer to an operational set of rules, procedures and institutions.<sup>1</sup> This paper will take a critical look at the legal sources used in both the Islamic Law and Common law systems as well the methodologies interpreting these sources. The pluralistic nature of many of the extant legal systems, calls for an analysis of the interpretation of law and the related sciences. Whereas the spread of globalization in the form of Western technology, open markets and human rights is well documented, a less obvious form of that phenomenon is of greater relevance for this discussion and that is Islamization. <sup>2</sup> This study will therefore examine the growing phenomenon of Islamization, its origins and how it has affected Pakistan's legal system. I use case law and statutory law to demonstrate that Islamization has been nothing more than a tool used by the political elite in this Pakistan country( bringing nothing but injustice and oppression to the masses, with women bearing the biggest brunt of these changes in law. Pakistan is uniquely placed to offer interesting insights into this phenomenon given its controversial legal system that attempts to follow an inherited Anglo-Saxon tradition, while maintaining its Islamic identity.

In this paper, I argue against the direct transposition of one legal system onto another, a practice that only complicates the interpretation of the laws and breeds injustice. Instead, I take the view that laws need to be interpreted to suit current realities. Indeed, this logic does not contradict the intellectual heritage of Islamic law with which a country like Pakistan readily identifies.

Maslaha which I propose should be used by the legal scholars and jurists has been present in Islamic classical legal texts, having been used as a source by jurists of the past. Ghazali one of the highly acclaimed legal philosophers of Islamic law sets out the boundaries by which we can apply this source. Reason is permitted as long as it remains within the confines of revelation

The purposes which these laws seek to protect are discussed in this paper, with clear examples of how in Islamic law these purposes are fixed. The Maqasid u Shariah or the purpose of the Shariah are intrinsically tied to the texts and is discussed in some detail in this paper. There is a

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<sup>1</sup> Decruz Peter, Comparative law in a changing world, pg 99 herein known as changing world

<sup>2</sup> Werner and Menski, Comparative law in a Global context legal systems of Asia and Africa, pg 282 herein known as Global legal systems

complex , highly intrically woven set of rights and obligations all secured in the understanding of Shariah and haphazardly implementing the law to gain popularity is cause for a judicial disaster. All these factors would lead us perhaps in creating a value oriented approach in the interpretation of law. As the world moves into the 21<sup>st</sup> century, Muslim countries must become proactive in revamping their legal systems to keep up with all the recent changes as a duty their people and as a member of the world community.

### **Sources in Islamic Law:**

Muslim Jurists have divided the sources into two groups namely; agreed upon and disputed sources:

#### **A. Agreed Upon Sources:**

- i) Quran**
- ii) Sunnah**
- iii) Ijma(Consensus)**
- iv) Qiyas (Analogy)**

#### **b) Disputed Sources:**

- i) Istihsan(Juristic Preference)**
- ii) Qawl As Sahabi(Opinion of a Companion of the Prophet)**
- iii) Istishab –Ul-Hal(Presumption of continuity)**
- iv) Maslaha Mursalah(Jurisprudential interest)**
- v) Urf (Custom)**

### **TERMS AND DEFINITIONS**

1. Quran- Professor Irshad Abdul Haqq former director of the Council on Legal Education Opportunity explains this book as one which is “recited, read and or studied and refers to the book embodying the revelation of Allah to Muhammad (peace be upon him).It serves as the cornerstone upon which the Islamic Law is based-the primary source for the

principles.<sup>3</sup> Professor Weiss states that all major Muslim scholars agree that it contains the essence of law but is not the law itself.<sup>4</sup> Professor Wael Hallaq an Islamic law expert from McGill University explains that the “Quran originated during the lifetime of the Prophet and that it reflected events and ideas that occurred then.”<sup>5</sup>

2. Sunnah/Traditions of Muhammad- With respect to the Sunnah it has always been more historically problematic as far as Western scholars of Islamic law are concerned. Ignaz Goldizher, Joseph Schacht and Juynoball all leading Islamic legal historians have argued that these reports were fabricated and projected back to the Prophet as mentioned by Hallaq.<sup>6</sup> Professor Irshad refutes this claim by stating that “Muhammad himself in his own words said “I have bequeathed two things if you hold fast to them you will never go astray, the Quran and my Sunnah”.<sup>7</sup>
3. Ijma (Consensus) - Where the Quran and Sunnah do not provide specific guidance on an issue, the Muslim community is directed to exert reasoning to deduce the law.<sup>8</sup> Professor Imran Nyazee of the Shariah Academy of Pakistan explains that Ijma is an “agreement upon a matter. It is said “the people agreed upon such and such a matter”.<sup>9</sup> He also likens it to the concept of *stare decisis* used in the English common law where a rule or principle is upheld collectively by the highest forum in the land to be followed by those subordinate to this forum.<sup>10</sup>
4. Qiyas (Analogy) - Professor Nyazee explains the literal meaning of Qiyas as the “measuring and estimating of one thing in terms of another.”<sup>11</sup> Another Islamic law expert Professor Hashim Kamali of the International Islamic University of Malaysia calls

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<sup>3</sup> Abdul Haqq Irshad , an Overview of the Origins of Islamic law, pg 20 herein know as the Origins

<sup>4</sup> Global legal systems, pg 286

<sup>5</sup> Hallaq, Wael Legal theories, pg 2

<sup>6</sup> Ibid , pg 2

<sup>7</sup> Abdul Haqq, Origins, pg 30

<sup>8</sup> Ibid, pg 30

<sup>9</sup> Nyazee Imran, Jurisprudence pg 85

<sup>10</sup> Ibid pg 85

<sup>11</sup> Ibid pg 85

it analogical deduction. He states that “Qiyas is a means of discovery and perhaps developing the law, the existing law”.<sup>12</sup> Nyazee gives us the technical definition as “the assignment of the hukm/rule of an existing case found in the texts of the Quran, Sunnah and Ijma whose rule is not found in these sources on the basis of the common underlying attribute called the illah/cause of the hukm.”<sup>13</sup>

5. Istihsan (Juristic preference or public interest) - Professor Irshad states it as “as the process of selecting one acceptable alternative solution over another because the former appears more suitable for the situation at hand”.<sup>14</sup> Kamali draws a parallel between equity and Istihsan for the “two are not identical although they bear close a similarity to one another.

There appears to be some disagreements with other scholars such as Nyazee who states that “Istihsan is not equity but rather a breach of analogy”.<sup>15</sup> A few examples to show how historically this source was used by Muslim jurists, we are told Umar b. Al-Khattab in his ruling “did not enforce the hadd (penal) penalty of amputating the hand for theft during a wide spread famine. Kamali tells us “that Umar set aside the well established rule in these cases on grounds of public interest, equity and justice”.<sup>16</sup>

## **IS ISTIHSAN A CONCEPT THAT IS ACCEPTED BY ALL LEGAL SCHOOLS IN ISLAM?**

“The jurists of the various schools gave this one concept different names and higher and lesser degrees of importance. *Istihsan* is the label the Hanafi jurists have adopted. The Hanbali school of thought calls its Istislah (equity or public interest), while the Malikis call it Masalih Mursalah (departure from the strict adherence to the texts for the public welfare).”<sup>17</sup> Imam Shafi who was the founder of the Shafi School did not recognize the concept. “According to Shafi, Istihsan

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<sup>12</sup> Kamali Hashim *Principles of Islamic Jurisprudence*, Petaling Jaya, 1989

<sup>13</sup> Nyazee Imran *Theories of Islamic Law: The Methodology of Ijtihad*. Islamabad: International Institute of Islamic Thought & Islamic Research Institute, 1994

<sup>14</sup> Abdul Haqq, *Origins*, pg 32

<sup>15</sup> Nyazee, *Islamic Jurisprudence*, Islamabad: International Institute of Islamic Thought & Islamic Research Institute 2000

<sup>16</sup> *Ibid* pg 311

<sup>17</sup> Abdul Haqq *Origins*, pg 32

could not exist as an independent source of Islamic law as Islamic legal theory would not permit it”.<sup>18</sup> “Istihsan is thus a method for choosing between two possible legal solutions to a particular case.”<sup>19</sup>

The classical jurists found a place for this rational source in deriving rules and principles for complex commercial cases like the Mudaraba contract (where you have a more skilled person investing on your behalf), tayamum<sup>20</sup> (ablution whereby the person preparing for prayer uses earth/soil as substitute, as the water that is available is for drinking or if there is shortage of water) etc.

“Ibn Tayimiyah called Istihsan the limitation of the cause either with its modification or with its nullification.”<sup>21</sup> Equity and Istihsan resemble in certain aspects both concepts incorporate the idea for a search for the good. The motivation for using either concept may stem initially from a mere feeling that an existing rule of law is not right.”<sup>22</sup>

## **Disputed Sources**

1. Istishab ul Hal(Presumption of Continuity)- This device is more a rule of evidence than a method of process and is well know in Western law an example to elaborate would be the assumption of person being innocent until proven guilty or a missing person until he is found to be dead.<sup>23</sup>

Professor John Makdisi warns us that Istishab does not permit custom to make law. It merely establishes the presumption that no legal obligations arise except those prescribed by the accepted sources of law.”<sup>24</sup>

2. Urf (Custom) - Prevailing customs may be given recognition only when they do not contravene any Islamic Principles.<sup>25</sup>

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<sup>18</sup> Makdisi John Legal logic and Equity in Islamic Law , The American Journal of Comparative Law 33, 120(1985) , hereinafter known as Legal logic, pg 120

<sup>19</sup> Ibid pg 120

<sup>20</sup> Ibid pg 133

<sup>21</sup> Ibid pg 138

<sup>22</sup> Ibid pg 150

<sup>23</sup> Abdul Haqq Origins, pg 32

<sup>24</sup> Makidisi John , Legal logic, pg 120

3. Sadd al-Dhariah (blocking the lawful means to an unlawful end)-The word dharai is the plural of Dhariah (means to an end).*Sad al Dhariah* however means “blocking the lawful means to an unlawful end”.<sup>26</sup> As a rational source of law it could be used to uphold Maslaha (interest) and has to be approached with caution so to speak.<sup>27</sup> Muslim Jurists have laid down strict guide lines as to what kind of acts would fall under this category.
  - a) Those that rarely lead to harmful results. E.g. growing grapes doesn’t necessarily lead to owning of wineries and such like which would be forbidden in Islam.
  - b) Those that usually lead to harmful results.
  - c) Those in which there is an equal probability of harm and benefit. An excellent example would be that of marrying a woman with the intention of divorce so as to enable her to remarry her previous husband.
4. Maslaha Mursalah (juristic analogy or public interest)-Professor Bagby defines it as utility. Dr. Said Ramadan Al-Buti Head of the beliefs and Religions department, Faculty of Islamic law, Damascus University states that, Maslaha can serve as a basis for new rulings if supported by some legal proof such as Qiyas according to Bagby. Professor Nyazee is of the opinion that Maslaha is the most important comprehensive instrument that can be used in judicial reasoning or Ijtihad for modern times.<sup>28</sup>

Haider ala Hamoudi Professor of Islamic law at the University of Pittsburg School of law disagrees with Nyazee’s hypothesis on Maslaha when he explains that “Classical legal doctrine (Maslaha falls under this category of Islamic sources) cannot be the source of modern rules in any meaningful capacity other than rhetorical.”<sup>29</sup>

Professor Bagby who is of the opinion that Maslaha is the same concept as utility found in the Common law explains that,

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<sup>25</sup> Abdul Haqq Origins, pg 32

<sup>26</sup> Nyazee, Imran Ahsan Khan Islamic Jurisprudence, 248

<sup>27</sup> Ibid pg 248

<sup>28</sup> Ibid pg 248

<sup>29</sup> Haider Ala Hamoudi, American Journal of Comparative Law, 2(2008)

- a) The happiness sought here is dependent upon human desires or reason. The pursuit of such happiness may or may not coincide with the form of benefit/manfa'ah intended by the Shariah.
- b) Emphasis in this form of happiness will always be on the collective utility.
- c) Pursuit of pure utility may ultimately lead to the economic analysis of law which may or may not suit the goals of the Shariah.<sup>30</sup>

Nyazee quotes Al-Ghazali's a classical Muslim jurist of the 11<sup>th</sup> Century, who is credited for his substantial work in the Islamic sciences as saying "Maslahah is essentially an expression for the acquisition of manfa'ah (benefit) or the repulsion of madarraah (harm). He goes on to explain that acquisition of manfa'ah and the repulsion of madarraah represent human goals, but Maslahah however the preservation of the ends of the Shariah is.<sup>31</sup> Bagby goes on to analyze Ghazali's statement, which we will see is very different from the understanding of utility/ benefit as laid out by Bentham.

3 things are obvious from Ghazali's statement.

- a) Pursuit of human goals and the principle of utility based on human reason is not what is meant by maslahah
- b) Maslahah is the securing of goals or values that the law-giver has determined in the Shariah.
- c) Goals determined for the Shariah by the law-giver may or may not coincide with values of human reason.

In Islamic law the law of retaliation (an eye for an eye or a life for a life) is mentioned in the Quran with verses that read "a life for a life", *O you who believe! Al-Qisâs (the Law of Equality in punishment) is prescribed for you in case of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives,*

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<sup>30</sup> Bagby Ihsan Utility in classical Islamic Law: The concept of , Maslaha in Usul Fiqh, 34 (1986)(Ph.D Dissertation. U of Michigan, Dept of Near Eastern Studies

<sup>31</sup> Ibid35

etc.) of the killed against blood money then adhering to it with fairness and payment of the blood money, to the heir should be made in fairness<sup>32</sup>. This is a clear verse in the Quran which we have seen is a primary source yet we have in the Sunnah which is the second primary source that fathers who killed their sons are exempted from this law. Explanations given by Scholars of Quranic exegesis is that a father could not wrong his son and if he did, there was a “justifiable” reason as to why he did so and did not deserve to be killed.

Here we see two fascinating issues arising. One is a lower source comes in to expand the meaning of a verse given in a higher source of law. Secondly, from a rational perspective and our understanding of universal notions of justice this does not make sense as the boy is still a human being and no one should be an exception to this rule. Point c given above explains “that the goals determined for the Shariah by the law-giver may or may not coincide with values of human reason.

The Quranic verse that warns against the horrific crime of female infanticide says “*Those who bury the girl child alive will be questioned on the day of judgment.*” (81:9) *unfortunately the practice is still there in many parts of the worlds such as India*<sup>33</sup>. This verse gave value to female child, despite the cultural norm which allowed such action to take place in society. The Arabs believed the female child was a disgrace to her family by the mere fact of being born. This is a practice that is still very prevalent in the world today with South Asia, India (and here I add Pakistan from my own personal experiences) still practice female infanticide or gender discrimination as it is now called. UNICEF has put out some very alarming statistics as far as this question goes with “the low sex ratio remains one of the most disquieting features of India’s population growth. There were 933 women per 1,000 men according to last 2001 Census – only a marginal improvement for the 1991 figure of 927.”<sup>34</sup>

In Africa the male child is still considered an asset to the family mainly because the male child is seen as being able carry the honor of the family and manage the finances better.

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<sup>32</sup> Quran Chapter 2 verse 177(my own translation from Arabic to English)

<sup>33</sup> Institute of Islamic Studies and Center for study of society and secularism article by Asghar Ali Engineer, <http://ecumene.org/IIS/csss52.htm>... last visited on the 12/27/08

<sup>34</sup> [www.unicef.com](http://www.unicef.com) an article titled” tackling the challenges to India’s Demographic dividend by Yogash Vajpeyi last checked on 26/8/08

I will not go into a deep analysis of Maslaha/Interest as a source of Islamic law in this chapter as I will do that in my?? three where I discuss a value oriented theory for Muslim countries in the 21st century, as a better approach to interpreting of laws

## **Part two: Schools of Islamic legal theory/Madhabs**

“After Muhammad’s death Muslims were confronted with many challenges questions and problems as Islam spread to new lands and confronted new cultures that were not addressed by the Quran and Sunnah. Over a period of three hundred years there developed over nineteen schools of jurisprudential thought or in Arabic Madhabs which literally means ways of going.”<sup>35</sup>

So a quick look at these schools of legal thought reveals that the only surviving schools are the Hanafi, Maliki Shafi and Hanbali School and Jaffaris Madhabs. According to Professor Abdal Haqq says these schools are still present today “not because of official government support but rather they continue in spite of the government because there are rooted in tradition of the societies in which their prevalent.”<sup>36</sup>

Sunnis and Shiites constitute the two major branches of Islam. Sunni form the vast majority about 90% of the Muslims in the world today. It reflects the particular importance they attach to the Sunnah.<sup>37</sup> Some of the differences between the two groups are the fact that Sunni’s “revere the first four rightly guided caliphs who were the companions and immediate successors of the Prophet as the legitimate leaders of Islam.”<sup>38</sup>

Kalimeyer and Janin explain that “rightly guided” means “that these men are held to have governed in accordance with the principles established by Muhammed. These four are Abu Bakr (r.632-634), Umar ibn Khattab (634-644), Uthman ibn Affan (r.644-656) and Ali ibn Talib (656-661). Despite these historical underpinnings, today, the main differences between the two groups, are largely political. In the area of lea an Imam is simply the leader of the religious community e.g. any philosophical, reflective and even mystical elements of Islam whereas?? Sunni thought

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<sup>35</sup> Abdul Haqq ,Origins pg 68

<sup>36</sup> Ibid pg 69

<sup>37</sup> Andre Kahlmyer and Hunt Janin , Shariah from Muhammad’s time to the Present, pg 24 and 25

<sup>38</sup> ibid

imposes textual and legalistic limitations on such speculation. Muhammad died without designating a successor.

Shiites derive their name from the Arabic phrase Shiat Ali (the party or faction of Ali). They claim that Muhammad wanted his only male blood relative Ali ibn Abi Talib to be his successor. They therefore revere Ali as the first Imam (leader of the community) of the Islamic community.”<sup>39</sup>

Professor Irshad Abdal Haqq reiterates this fact by saying “the principle difference is two. First the Shia’s principally in Iran, Iraq, Syria and Lebanon believe that the leadership of the Muslims community, the caliph must be a man descendent from Muhammad. They await the emergence of a Muslim leader from the line of the Prophet who will embody the wisdom and spiritual powers of the hidden or twelfth Imam, who went into hiding at the age of four in 873 C.E. In the absence of the Twelfth Imam, his representatives, Ayatollah’s provide interim leadership.”<sup>40</sup>

“Sunni’s on the other hand, impose no precondition of physical lineage to be considered for the position of the Khalif.”<sup>41</sup>

“The second significant difference is that Shia’s continue to recognize individual reasoning (Ijtihad) as a legitimate source of Islamic law, while the Sunni Madhabs forbid the current use of Ijtihad.”<sup>42</sup> This is however not completely true as some scholars believe that Ijtihad as used by classical jurists is very close to the western methods of interpretation. Nyazee in his book Islamic Jurisprudence gives three modes of Ijtihad. First one is the “plain meaning rule where the jurist stays as close as he can to the texts. The second mode the jurists use is “syllogism which is called Qiyas. And this mode is confined to strict types of analogies and is also confined to the extension of the law from individual texts. The third mode relies on all the texts considered collectively. This means that the legal reasoning is undertaken more in line with the spirit of the law and its purposes rather than the confines of individual texts.”<sup>43</sup>

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<sup>39</sup> Andre Kahlmyer and Hunt Janin , Shariah from Muhammad’s time to the Present pg 25

<sup>40</sup> ibid, pg 42

<sup>41</sup> Ibid pg 42 Andre Kahlmyer and Hunt Janin , Shariah from Muhammad’s time to the Present pg 25 ▪ \$\$

<sup>42</sup> Ibid 62

<sup>43</sup> Nyazee, Islamic jurisprudence pg 268

Thus a jurist, scholar or researcher would first look at the Quran for clearly articulated injunctions and principles of law. Such an exercise could involve extensive study and the application of highly refined interpretative skills. The subordinate primary source of guidance would be the Sunnah of Muhammad as compiled in the hadith.

## **CHAPTER TWO: SOURCES OF LAW IN THE COMMON LAW LEGAL SYSTEM.**

Unlike countries of the Romano-Germanic legal family where the principle source of law is a law introduced into operation, in countries of Anglo-Saxon legal family the norm is formulated by judges and expressed in judicial precedent.<sup>44</sup> English law is based on or acquired a troika structure where common law is the basic source, the law of Equity augmenting and adjusting the basic source and statutory law written law of parliamentary origin.<sup>45</sup>

Roscoe Pound says in his five volume book on Jurisprudence that “for a long time there was much confusion in the use of the legal term “source of law”.<sup>46</sup> Austin he tells us was the first to call attention to the ambiguity of the phrase “sources of law” and to insist on clearness.”<sup>47</sup>

A look at how the United States legal system functions we can??? this by the evolution of the sources of law of the US and their relationships among themselves.<sup>48</sup> They have judicial precedent, legislation, normative legal acts of executive power and the law of equity.<sup>49</sup>

John Chipman Gray an influential American Jurist has mentioned a few sources of how we can derive the law for the common law legal system.

- a) Acts of Judicial organs-
- b) Judicial precedents-The American legal system by reason of its roots comes from the English system of common (precedential) law. The fundamental principle thereof is the principle of following judicial precedent.

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<sup>44</sup> A.kh Saidov, Comparative law, pg 99

<sup>45</sup> Ibid, pg 99

<sup>46</sup> Roscoe Pound, Jurisprudence volume 3 pg 380.

<sup>47</sup> Ibid pg 380

<sup>48</sup> Saidov, pg 120

<sup>49</sup> Ibid, pg 120

- c) Customs-Is of a secondary significance and does not bear comparison with the principal sources of American law although it has played a large role in the origin and evolution of the legal system of the US.<sup>50</sup>
- d) Principles of morality(including the axioms of public policy)

Other writers cite:

- a) Constitutions- And in the US it is the supreme law of the land and the highest authority.<sup>51</sup>
- b) Administrative Norm- where the creation of agencies of executive power and is constantly growing in importance in American law.<sup>52</sup>

Roscoe Pound puts the sources at six he says “the legal factors which legal precepts owe their content, the agencies that develop them and formulate them as something behind which the law making and law administering authorities may put the state power at six”.<sup>53</sup>

- a) **Usage:** Legislatures or courts may take up a matter of usage and give authority of law to a rule or principle or standard which has been worked out and formulated by usage.
- b) **Religion:** In modern law, the influence of the cannon law as to pacts upon the continental law as to contracts may be noted.
- c) **Moral and philosophical ideas, especially in equity and natural law:** The moral and philosophical tenets of the time not only affect old precepts; they shape or help shape new ones. But they are active direct sources chiefly in the stage of equity and natural law.
- d) **Adjudication:** giving rise to a custom or tradition of judicial action as usage is a custom of popular action.
- e) **Scientific discussion:** That is discussions by text writers and commentators, to which courts and legislators may give formal authority by embodying them or their results in decisions or in statutes.<sup>54</sup>

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<sup>50</sup> Saidov, pg 120

<sup>51</sup> Ibid, pg 120

<sup>52</sup> Ibid , pg 125

<sup>53</sup> Pound Roscoe , Jurisprudence , Vol 3 ,pg 383

**f) Legislation: the formulation of precepts directly and immediately by the lawmaking organ of the state.** Thus legislation may be a source of law and statutes a form. An example he cites is “custom as a source of law-customary law, it has been urged that legislation, the product, is a form of law, so custom is both source and form.”<sup>55</sup>

Professor Bodenheimer author of the book *Jurisprudence: The Philosophy and method of law*, divides the sources of law into two categories, formal and non-formal sources.<sup>56</sup> Formal sources are available in an articulated textual formulation embodied in an authoritative legal document.”<sup>57</sup>

Those countries which operate under a written constitution deemed to have the force of law recognize a particular high-level form of legislation which is superior to other ordinary forms of legislation. A constitution is viewed as the fundamental law of the state or country. The highest court of the US has held that guarantees of this character must not be construed as mere moral exhortations addressed to the congress but that they form binding and obligatory norms of law. The constitution is then elevated to a source of law superior to ordinary legislation.<sup>58</sup>

Bodenheimer explains that the “ prevailing opinion of the Anglo-American world that a decision of a court of law especially of a court of last resort which explicitly or implicitly lays down a proposition constitutes a general and formal source of law.”<sup>59</sup> Although this is not conclusive as the jurists are divided upon this idea.

Treaties and other Consensual Agreements-Under this source we have a difference of opinion amongst the jurists, with some holding that only law making treaties maybe referred to as representing a source of law. “Hans Kelsen is one of those who believe that it is the essential function of any treaty to make law.”<sup>60</sup>

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<sup>54</sup> Ibid , pg 386

<sup>55</sup> Ibid 387

<sup>56</sup> Bodenheimer Edgar *Jurisprudence The Philosophy and method of the law*, pg 27

<sup>57</sup> Ibid 27

<sup>58</sup> Ibid , pg 276

<sup>59</sup> Ibid , pg 280

<sup>60</sup> ibid, pg 281

Non- formal sources such as reason and standards of justice Bodenheimer states are “considerations of justice often blended with the supporting arguments resting on other informal sources of law such as public policies, social trends, customs and accepted moral standards.”<sup>61</sup>

This is where common law and Islamic law would differ greatly. Where you??? laws in the common law system are adaptable to customs and accepted moral standards, in Islamic law these would have to be in consonant with a Quranic view. In an interesting case called the *Grant v Southwest Trains LTD* ECJ where *Privilege tickets are granted for one common law opposite sex spouse of staff ... subject to a statutory declaration being made that a meaningful relationship has existed for a period of two years or more.* The Industrial tribunal decided that this was unlawful as decided on an earlier case where *the judgment of the Court of Justice in Case C-13/94 P v S and Cornwall County Council* [1996] ECR I-2143 was, on the other hand, 'persuasive authority for the proposition that discrimination on the ground of sexual orientation [was] unlawful'.<sup>62</sup> This would be unheard of in Muslim countries where it's not only considered immoral but a criminal offence as well. Furthermore it shows how justice in the Islamic legal understanding is left only to reason or good judgment, as these have to be regulated or controlled by the primary sources. However countries in the West following the common law system and having these sources in place should make laws that encompasses all.

### **CHAPTER THREE: PURPOSES OF THE LAW/MAQASID-U-SHARIAH, IN BOTH THE ISLAMIC LAW AND COMMON LAW.**

Islamic Law scholars have divided up the purposes of law into two portions. The *Dini*/religious purposes and *Dunyawi*/worldly purposes .Some scholars such as Professor Nyazee further sub-divides it into five other categories which are a preservation of religion, life, progeny, intellect and wealth in that respective order and are seen as the ultimate purposes of the law. How are these purposes determined? Have Muslim scholars always agreed upon these five purposes and the method used to seek them? No, this has not always been the case, as scholars have differed and debated the concept of the *maqasid—shariah* in Islamic law for centuries with some arguing that reason alone should be the determining factor. While others settling for both reason and revelation to understand the purpose and spirit of the law. According to most jurists Nyazee tells

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<sup>61</sup> Bodenheimer Edgar Jurisprudence ,The Philosophy and method of the law pg 303

<sup>62</sup> [http:// www.emplaw.co.uk](http://www.emplaw.co.uk) last visited 03/21/09

us “the primary goal of the Shariah is to free man from his own whims and fancy, so that he may be the servant of Allah by choice, just as he is one without it”.<sup>63</sup>

Rushd known as Averroes in the West and one of the greatest Muslim legal thinkers, shows in his writings how good and bad really could be determined without the provisions of law which was a very rationalistic method to use.<sup>64</sup> We have contemporary scholars who went further with this idea that reason should reign supreme over revelation is Rashid Rida. He is credited for being one of the scholars who laid the foundations of modern day Egypt. Some of his ideas were implemented as law in Egypt like in the Muslim Family Code, where he interpreted the Quranic verse allowing a Muslim man to marry up to four wives to be that “Maslaha/interests of the community render this practice detrimental in the present day”.<sup>65</sup>

Professor Anver Evon explains that Abdu had two principles “the first principle is that rational thought (al nazar al-aqli) is the means for the attainment of true faith (wasilat al-Iman al-salih), the second principle is that where revelation and reason are in conflict, reason should take priority (taqdim al-aql ala al-shar).<sup>66</sup> Another Islamic law expert Wael Hallaq in his view states that “Rashid Rida argues that in the absence of textual evidence, necessity alone should suffice as a legal source to justify the process of deduction known as *tashri* by which he means the state legislation”.<sup>67</sup>

These two views though very interesting are also very isolated and drowned by the more popular and majority view which are the purposes in Islamic law are known by both reason and revelation. Ghazali and Shatibi, with the latter being credited for having successfully elaborated the purposes of Islamic legal though states that, purposes of law have been determined from the texts, through the process of induction (*istiqla*) rather than through deduction, this is why the *Maqasid* are considered *qati*/definitive.”<sup>68</sup> Hallaq tells us that “the uniqueness of Shatibi’s theory some scholars have argued stems from the fact that Shatibi’s realizing the failure of law in meeting the challenges of socio-economic changes in the 8<sup>th</sup>/14<sup>th</sup> C.E Andalusia tried in his theory to answer the particular need of his time by showing

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<sup>63</sup> Nyazee Jurisprudence, pg 203

<sup>64</sup> Ibid ,pg 235

<sup>65</sup> Anver M. Evon Natural and Natural Rights in Islamic Law , Journal of Law and Religion , 15(2004-2005)

<sup>66</sup> Ibid pg 15

<sup>67</sup> Wael Hallaq A history of Islamic legal theories pg 218

<sup>68</sup> Nyazee Imran Ahsan Khan , Theories of Islamic law pg 242

how it was possible to adapt the law to the new social conditions.”.<sup>69</sup> Muslim legislators and experts could borrow a leaf from this classical scholar, who had a forward thinking approach to tackling legal problems of his society.

#### **CHAPTER FOUR: A VALUE ORIENTED LEGAL THEORY FOR MUSLIM COUNTRIES IN THE 21<sup>ST</sup> CENTURY.**

Maslaha has already been covered under the rational sources, but we look at it as a separate entity, to explore the possibility of using this source as a tool for revamping the current legal systems. Reason plays a special role in determining this source. Muslim classical jurists have debated at length, the role reason plays in the determination of what’s good and bad.

Professor Sherman Jackson quotes Ghazali’s in his article, where he puts in clear terms that, when arguing with *Mutazilite/Rationalists* that “reason must be able to identify good and evil prior to revelation, Ghazali’s tells them “you have erred in stating that reason (al-aql) is a motivator(da’in) Nay, reason is only a guide(*had in*) while impulses and motives (al-bawa ith wa ad dawai) issue from the self(*an-nafs*) based on information provided by reason.”<sup>70</sup>

Jackson explains that Razi who was a masterful logician that “revelation tells us nothing about what is *hasan*(good) and what is *qabih* in terms of the essence of things .What revelation imparts is simply a knowledge of which human actions will be met in the hereafter with reward and which with punishment. It is this capacity to conceive reward and punishment as possible consequences for our actions that we possess prior to revelation. It is in this sense only that scripture can be said to be a repository of moral values, in as much as it provides the incentive to perform or eschew certain acts.”<sup>71</sup>

Professor Hallaq explains in his book a History of Islamic legal theories that Shatibi’s a jurist in the Mali kite school of law and the one credited for elaborating the Maqasid-u-Shariah in his works is said to be talking to an interlocutor who asserts that “the law was not revealed in vain (*abathan*), but rather for a reason dictated by divine wisdom (*hikma*).This reason is the promotion and protection of public good (*maslaha*) a good that is either predicted of God or his

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<sup>69</sup> Wael Hallaq A History of legal theories, pg 162

<sup>70</sup> Jackson Sherman, The Alchemy of Domination? Some Asharite responses to Mutazilite response, The International Journal of Middle East Studies no 31(1999) pg 190

<sup>71</sup> Ibid pg 193

subjects. And since God is omnipotent and entire self-sufficient, it follows and this is established in the science of kalam (Islamic philosophy of dialectic) that only his subjects are in need of Maslaha hence the Shariah came to guarantee Maslaha.”<sup>72</sup>

### **Maslaha and its classification:**

Professor Nyazee gives the example of alcohol and he classifies it at its lowest level as being an intoxicant but at a higher level its prohibition is there in order to protect the intellect. Prohibiting intoxication is therefore the repelling of harm or the securing of an interest protected by the law/Maslaha.<sup>73</sup>

Professor Anver Emon explains how Ghazali was successful in merging the concept of Maslaha into the scriptures by saying “ through adopting the Maslaha as basis for legislation al-Ghazali’s fused on the empiricism of nature and the good with a scripturally justified normativity that could serve as the foundation for discretion based obligation .He based the normative value of Masalih(sing: of Maslaha)on the foundation of scripture and demanded a rational nexus between Maslaha and the basic aims of the law.”<sup>74</sup>

Emon in his article gives examples of Ghazali’s elaboration of his theory of Maslaha in connection with the Maqasid/ purposes of law where he says “punishing a heretic who spreads his heresy upholds and protects the value of religion. Value of life is upheld by the punishment of execution for murders and retribution for physical injury (e.g. qisas). The Punishment for consuming alcohol upholds the virtue of having a sound mind while the punishment for fornication and adultery protects the integrity of family and lineage. And finally the punishment for theft and usurpation maintains the basic aim of upholding property interests.”<sup>75</sup>

Professor Mohamed al Fadl discussed this at length, arguing that “while Muslim theologians and jurists have not been able to overturn orthodox doctrine on the treatment of apostates, many leading twentieth century Islamic modernist scholars, including prominent figures such as Selim el-Awa—have rejected the traditional criminalization of apostasy arguing that it is fundamentally

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<sup>72</sup> Hallaq Wael , A history of Islamic legal theories pg 182

<sup>73</sup> Nyazee , Islamic Jurisprudence, PG198

<sup>74</sup> Emon M. Anver Natural Law and Natural Rights in Islamic Law J. Of Law and Religion , 9(2004-2005)

<sup>75</sup> Ibid pg 10

inconsistent with Islam's commitment to free acceptance of religious truth based on rational conviction."<sup>76</sup>

Professor Kamali explains that the “ nascent Muslim community of madinah during the time of the Prophet was engaged in continuous war with the pagans of Arabia that led to no less than 80 military engagements and the Prophet personally engaged in 27 of those. There were no neutral grounds under those conditions, hence a person renouncing Islam would flee Madinah and defect to the Quraysh of Makkah and fight the Muslims. Historical accounts indicate that several individuals renounced Islam in Madinah and virtually??? Meaning? ”.<sup>77</sup> He continues on the same note, saying “that apostasy as such combined high treason and active hostility in the Muslim community. It follows then that apostasy which is not espoused with the hostility and treason and one that emanates in conviction will always be seen as patently misguided and blame worthy , but it's nevertheless not a criminal offence.”<sup>78</sup> If this interpretation is put into consideration by Muslim governments, e.g. Malaysia then cases like the Lina Joy<sup>79</sup> a high profile case of a young Malay women who had become Christian and wanted to marry her Christian boyfriend, would be treated differently. The civil courts ruled against her. However jurists do need to turn to interpreting the Islamic laws in existence using Maslaha.

Professor Mohamed Fadhil Islamic law Professor at the University of Toronto explains that “a principled resolution of the issue of apostasy under Islamic law would also lead to the resolution of a host of other rules within pre modern Islamic law that restrict freedom of thought and thereby also reduce the conflict between Islamic law and human rights norms protecting the freedom of thought.”<sup>80</sup> This would bring us back to the point made earlier regarding the Maqasid u Shariah .All laws derived from the texts are governed by the goals of the Shariah and these have been pre determined as Ghazali's said by the scripture and not reason alone.

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<sup>76</sup> AL Fadhil Mohamed , The case of Islamic law and International Law : Public Reason as a strategy for principled reconciliation: The Case of Islamic Law and International Human Rights Law, Chicago Journal of International Law,9(2007)

<sup>77</sup> Kamali, Mohamed ,Hashim , Principles of Islamic Jurisprudence 216

<sup>78</sup> Ibid pg 216

<sup>79</sup> Neoh Joshua , Islamic State and the Common Law in Malaysia: A case study of Lina Joy, Global Jurist: Vol 8 Iss 2 (Advances), Article 4. Available at [http:// www.bepress.com/gi/vol8/iss2/art4](http://www.bepress.com/gi/vol8/iss2/art4)

<sup>80</sup> AL Fadhil Mohamed , The case of Islamic law and International Law : Public Reason as a strategy for principled reconciliation: The Case of Islamic Law and International Human Rights Law, Chicago Journal of International Law,9(2007)

The question that comes to mind is how can the Maqasid be used in legal analysis? Is it used without any restrictions or are reservations put in place? Moreover have these been determined and if yes how so? We turn to Ghazali who elaborates this point for us, through the use of hypotheticals. His example illustrates that before any Maslaha can constitute a basis for a rule of conduct it must satisfy three conditions. First condition is the necessary interest (*darer*) that presents a tight nexus between the goals of society and the legal system. Second condition is there must be certainty (*qati'yya*) that the interest at stake in a given situation can be satisfied by the proposed course of conduct and lastly the interest served must be for the benefit and perfection of society at large and not for a defined group of people or special interest group (*kulliya*).<sup>81</sup>.

**Do we find a concept of interest in common law? Is it an agreed upon source of law? What's its role in the derivation of laws in the common law legal theory?**

Professor Bodenheimer explains that “undoubtedly the question of whether certain factual differences between men and things warrant a differentiating treatment by the law has received adverse and inconsistent answers in history. Such divergences of opinion lend apparent strength to the argument that the notion of justice is not amenable to a rational cognition and even if not totally subjective represents at best a social convention resting on a majority conviction(emphasis added) or at worst a forcible imposition of standards of equality and inequality by a ruling class.”<sup>82</sup>

## **CHAPTER FIVE: PAKISTAN AND ISLAMIZATION OF ITS LAWS**

The rationale for Pakistan as a homeland for South Asian Muslims included the aim to cleanse Muslim law of the impurities of colonial domination and pervasive Hindu cultural influences, important aspects of Pakistani Islamisation.<sup>83</sup>

Islamization also involves anti-western and anti-secular messages, proud assertions of Islamic values in explicit anti-globalization opposition to Western value systems. Landmarks of the Pakistan process of Islamization include the Objectives Resolution of 1949, according to which

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<sup>81</sup> Emon. M. Anvers Emon M. Anver Natural Law and Natural Rights in Islamic Law J. Of Law and Religion ,12 (2004-2005)

<sup>82</sup> Bodenheimer Edgar , Jurisprudence A Philosophy and method of Law pg 197

<sup>83</sup> Ibid, pg 197

the nations business should be conducted. This Objectives Resolution then became the preamble to all Pakistani Constitutions , first in 1956, then in 1962 and finally in 1973.<sup>84</sup> In the constitution of 1973, Article 8 states “*law’s inconsistent with or in derogation of fundamental rights to be void.* And Article 8:1 states that “*any law or custom or usage having the force of law in so far as it is inconsistent with the rights conferred by this Chapter, shall, to the extent of such inconsistency, be void.*”<sup>85</sup> And then we have Art : 227 which runs like this “All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.”<sup>86</sup>

Art 7 of the UN charter states “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Now this would mean accordingly that men and women have the same rights as stipulated in this charter which would be in direct conflict with Art 227: that all laws must be brought in conformity with the injunctions of Islam”. Islam does not accord rights and obligations as laid out in the Anglo-American legal system. Herein in lays the clash between the two. Definitions of rights would have to be discussed and analyzed and discrimination as understood by both systems would have to be debated by experts. Instances exist when either gender has more rights than the other or to equalize them in this regard would disrupt the inner workings of the Islamic legal system. This paper does not tackle rights; rather it examines the impact of Pakistan’s attempt to implement the two legal systems in one country.

Turning to case law in Pakistan we take a look at interesting judgments handed down by the Federal Shariat court. The Safia Bibi Case was one such case that shot to prominence in the mid 80’s Safia Bibi. v. State<sup>87</sup> where Ms Safia Bibi a 20 year old woman who was almost blind carried out domestic work in the house of Maqsood Ahmad, her co accused .She was taken to the house to work by his grandmother. There she claimed he committed “*zina bil jabr*” (forced intercourse) with her, that is raped her. The term that was used for rape is an anomaly in and within itself and has been severely criticized by modern day Muslim scholars. Mushtaq Ahmad

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<sup>84</sup> *ibid*

<sup>85</sup> Constitution of Pakistan 1973, can be found at [www. Pakistani.org](http://www.Pakistani.org) , last checked 29/8/08

<sup>86</sup> *Ibid* Last updated 21 July 2008

<sup>87</sup> 20. PLD 1985 Federal Shariat Court 120

an associate professor of Islamic criminal law and evidence at the International Islamic University Islamabad Pakistan, in his paper addresses the Women's rights bill 2006 argues for the women that rape is not a crime punishable under the Hudood Ordinance of 1979 (which is the Islamic Penal code) as the conditions necessary for this cannot be upheld. In Safia's case "when she accused the men of having raped her, the case was dismissed for lack of evidence, as she was the only witness. Safia, however, being unmarried and pregnant, was charged with *zina* (adultery) and convicted on this evidence."<sup>88</sup>

Much earlier, Islamic criminal law had been abrogated by the Indian penal code of 1860, promulgated from 1862. The Islamic law of evidence was superseded by? The Indian Evidence Act of 1872. The recent Islamization of laws in Pakistan has reintroduced certain provisions of Islamic criminal law which were abolished during the nineteenth century by these early British Acts.<sup>89</sup>

Professor Asifa Quraishi in her article, *her honor: An Islamic critique of the Rape Laws of Pakistan from a woman-sensitive perspective*, argues that the Pakistani Zina (adultery) ordinance subsumes rape as zina-bil-jabr under the general zina law of unlawful sexual relations. She quotes several verses from the Quran (where I will summarize the content which includes that the adulterer and adulteress should be flogged a hundred lashes and four witnesses have to have seen the act or else they get punished with eighty lashes after which she concludes) "following this definition of the offense are extremely strict evidentiary rules for the proof of such a crime".<sup>90</sup>

Quraishi in her analysis addresses drafting problems in the zina ordinance by asking "why rape is a form of zina (adultery)? This is because the Quranic verses regarding zina do not address the concept of consensual sex as it is there to establish a crime of public sexual indecency. However

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<sup>88</sup> Ibid, pg 8

<sup>89</sup> Werner, Menski, Comparative Law in a global context of legal systems in Asia and Africa, pg 8

<sup>90</sup> Ibid, pg 8

the Zina Ordinance is written exactly counter to this Qur'anic omission and it includes zina-bil-jabr (zina by force) as a subcategory of the crime of zina.”<sup>91</sup>

This explains how transplantation of a different legal system or its understanding thereof creates problems in the set-up of the law. Asifa Quraishi in her article asks a pertinent question in that “did the Pakistani legislators, in writing the Zina-bil-jabr, simply relabel the old secular law of rape under the Muslim heading of zina(as zina by force—jabr) and re-enact it as part of the Hudood’s ,Islamization of Pakistani’s laws? Safia’s sentence was overturned after a huge outcry by the International community. This was a partial victory as her co accuser also walked away scots free as there was no “clear” evidence to convict him.

After many years of suffering similar injustices Pakistani women now, had a new law introduced in 2006 called the Women’s Rights Protection bill, causing uproar in the country. These sections will be analyzed in detail to determine whether any lasting changes or additions were introduced.

Some law professors and legal researchers in Pakistan are of the opinion that this new bill would create additional offences, rather than solve the problems brought about by the ones that were transplanted and misinterpreted by legislatures .Muhammed Mushtaq a professor at the International Islamic University Islamabad is one such scholar who holds this view and has this to say,” *Section 5 of the Act inserts the provisions about the offence of rape in section 375 and 376 of the Pakistan Penal Code,*”(which is the criminal law inherited from the common law legal system of Britain, with Islamic penal laws inserted in some parts). “Previously these provisions were there in Section 6(Zina bil Jabr liable to Taazir) Hudood Zina Ordinance of 1979.These sections have been deleted by virtue of S: 13 of the Act. Resultantly rape has become a taazir offence. In the opinion of most critics (of this bill) this is the most objectionable part of the newly passed Act”.<sup>92</sup>He goes on to ask “the first question here is whether rape is a kind of Zina or not? If it is considered a sub-set of zina then there will be the same standard of proof and the same punishment.<sup>93</sup> The problem here is even the definition of the offence has been disputed by scholars and so lumping rape together with zina (adultery) before defining what it is and the

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<sup>91</sup> Ibid pg 8

<sup>92</sup> Mohamed Mushtaq , Section wise analysis of the Women’s Rights Protection Act of 2006, unpublished a paper presented at a seminar at the International Islamic University Islamabad December 2006, pg 5

<sup>93</sup> Ibid pg 6

characteristics of the offence and its punishment, is an injustice to those who get penalized under this law, because the law is ambiguous and it is also unjust since it targets one group of society, which are women.

“According to the now repealed provisions of the Hudood zina ordinance there was only one difference between zina and rape: that the former involved consent from both sides, while the latter involved one party.”<sup>94</sup> This would be untrue because zina and rape are very different, not only in definition and in characteristic but also the conditions necessary for both to be considered an offence liable to similar punishment under Islamic law. Professor Asifa Quraishi asks “why would there be so many evidentiary restrictions on a criminal offense prescribed by God? Islamic scholars posit that it is precisely to prevent carrying out the punishment for this offense. By limiting conviction to only those cases where four individuals actually saw sexual penetration take place, the crimes realistically only be punishable if the two parties are committing the act in public, in the nude. The crime is really one of indecency rather than private sexual conduct”<sup>95</sup>. An offense that is difficult to prove in the end.

Mushtaq explains to us Section 7 of the women’s *rights Act where it creates a new offence of zina and that of fornication*.<sup>96</sup> Thus an anomaly has been created by this new piece of legislation. One and the same offence has been placed in two different laws under two different titles, with two different procedures and altogether different legal consequences”.<sup>97</sup> This, I believe, powerfully sums up the main point of my hypothesis which is , two legal systems ,each turning to different legal sources and as a result arriving at very different conclusions, that are not related at all, are a recipe for a legal disaster. Zina as understood by Muslim scholars is both pre-marital and extra-marital complete sexual relations between people who are not in a legal relationship , generally interpreted to be marriage .The primary source of Islamic law, the Quran, has addressed the male adulterer/fornicator as “*Zani*” and the female adulteress and fornicatress as “*zaniya*” and provides that both should be flogged 100 strips. The traditions go further to require

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<sup>94</sup> Ibid pg 6

<sup>95</sup> Asifa Quraishi Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman sensitive Perspective, Michigan Journal of International Law, pg 22

<sup>96</sup> Mohamed Mushtaq , Section wise analysis of the Women’s Rights Protection Act of 2006, unpublished a paper presented at a seminar at the International Islamic University Islamabad December 2006, pg 7

<sup>97</sup> Ibid pg 7

that the adulterer be stoned. And to raise this complaint in front of judge stringent evidentiary rules discussed above will have to be followed. Whereas rape cannot be termed as forceful zina, this is not only a contradiction in meaning, but also an anomaly in the definition of the two different terms.

The foregoing illustrates the difficulty facing Muslim countries in their attempt to integrate two legal systems that are quite dissimilar. Safia Bibi's case was not an isolated incident. Shamim a 21 year old mother of two charged that she was kidnapped and raped by three men in Karachi. When a rape complaint was lodged against the perpetrators, the police instead arrested Shamir and charged her with zina when her family could not post the money for her release."<sup>98</sup>

If we turn to Islamic classical sources we find that an incident is mentioned in the traditions called "*waqiah fajr/incident at dawn* where a woman was walking back from the mosque after the dawn prayer and a man attacked and raped her. The Prophet went on to convict him based on the sole testimony of this woman. Rape was seen as a separate offence and not a sub-set of zina as has been implemented in Pakistan. The pertinent question here is why the Prophet would take such an action. Well, Mushtaq gives some insight through an exposition of the concept of rights which he argues was divided by classical Islamic jurists into 3 categories,

- Rights of Man
- Rights of Allah
- Rights of the community/siyasah shariah, which rape falls under.

A Muslim ruler has the authority to enact laws if the crime is a violation of an individual's right and also a crime against society (*fasad-fil-arad*). The ruler can hand down a death punishment under the doctrine of siyasah.<sup>99</sup> If he has the authority to set the punishment, then, procedure matters can also be said to fall in his ambit of power. The Prophet acted in his capacity as a legislator and decided the case in favor of the woman who had been raped.

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<sup>98</sup> Mushtaq Mohamed , Section wise analysis of the Women's Rights Protection Act of 2006, unpublished a paper presented at a seminar at the International Islamic University Islamabad December 2006, pg 7

<sup>99</sup> Ibid pg 7

The laws of Qisas (retaliation) which allows a victim to seek compensation from the culprit and his family either for Diyat (Blood money compensation) or an eye for eye. These laws have been implemented in Pakistan although it could be said to clash with modern understandings of justice and fairness. N.J Coulson a respected Islamic legal historian identified a major problem with human law-making in Pakistan. He observed that the legal reformer was not even properly paying attention to accepted methods of Ijtihad to create a new Islamic norm system. Professor De Cruzes criticizes Coulsen for not being forthright and instead points out that the Islamization process in Pakistan have been influenced by political considerations.<sup>100</sup>

Other instances of Islamization in Pakistan are the use of the Dissolution of Muslim Marriages Act of 1939, designed to improve the position of Muslim women, giving them the right to ask a court for a divorce.<sup>101</sup>

## CONCLUSIONS

Modern Turkey is a secular republic with the overwhelming majority of its citizens as Muslims.<sup>102</sup> Has this unique phenomenon in the world's legal history is protected by article 174 of the Turkish Constitution status, full membership has been denied so far because Turkey is still not trusted.<sup>103</sup> Some scholars put forward the argument that Islamization is some form of globalization as it means to spread Islam across the world and the growth in great numbers.<sup>104</sup>

In Pakistan Allama Muhammad Iqbal's famous study on Reconstruction of religious thought in Islam (1989:121), asserted his belief that "we too one day, like the Turks will have to re-evaluate our intellectual inheritance."<sup>105</sup> Attempts to cleanse the inherited Anglo-Indian legal system of unacceptable elements, including any Hindu heritage masks shameless political use of Islamization as a concept and strategy.<sup>106</sup>

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<sup>100</sup> Cruz de Peter, Comparative Law in a changing world, pg 99

<sup>101</sup> *ibid*, pg 99

<sup>102</sup> *Ibid*, pg 99

<sup>103</sup> Global legal systems pg 368

<sup>104</sup> *ibid* , pg 368

<sup>105</sup> Changing world, Pg 365

<sup>106</sup> *Ibid* pg 365

Pakistani leaders initially tempted to follow the route of positivist law –making, they realized that they could not secularize their legal system in the same way without being grossly misunderstood by their own people.<sup>107</sup> My proposition is if Muslim countries want to bring their laws and legal system in conformity with Islam, then a systematic methodology is needed. As we have seen stated clearly , blind transplantation of one legal system over another is problematic. Legal scholars and jurists must come together to explore sources and methods they can sue to make laws relevant for their time and their need. It’s been pointed out that historically this was not a foreign phenomenon for Muslim jurists as we have seen the likes of Shatibi who expounded on Ghazali’s idea of Maqasid-u-shariah and gave it new meaning relevant to his time. Or Muslim countries have a choice to take the path that Turkey has chosen for itself, where they have dissociated themselves from the Islamic legal tradition and have implanted the Swiss code and adapted for their use. A choice has to be made, for as we can see the attempt to merge the two legal systems has not proven successful in many Muslim countries speaking of Pakistan in particular and grave injustices must be remedied soon.

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<sup>107</sup> Ibid, pg 365

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