Discovering the Law without a Coherent Legal Theory: The Case of the Council of Islamic Ideology

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In the post-colonial world, scholars – Muslim and non-Muslim – have generally found it better to mix up the views of the jurists belonging to various schools of Islamic law under – the presumption that the various schools of Islamic law followed a 'common legal theory' and differed in minor details only. This paper highlights the problems in the methodology of modern scholars, and for this purpose focuses on the Council of Islamic Ideology, the constitutional body for making recommendations to the Parliament for the purpose of Islamization of laws. It shows that while criticizing the works of the Muslim jurists on Islamic criminal law, the Council has not been able to develop a comprehensive and internally coherent legal theory, and has instead relied on a mix of principles of various schools joined haphazardly without resolving internal inconsistencies. It concludes that the modern critics of Islamic criminal law, by breaking their links with valid legal sources, are left with reason as their sole guide in addressing legal problems – an extremely pure form of naturalism that deems reason as a complete source of law and accords too much room to discretion and 'independent' reasoning.

Introduction

The first significant constitutional document passed by Pakistan's first Constituent Assembly in March 1949 was titled the Objectives Resolution. This Resolution determined that Pakistan was going to be an Islamic State. The Constitution of 1956 retained the Objectives Resolution as its preamble and promised to bring the existing laws into conformity with the 'injunctions of Islam as laid down in the Holy Qur'an and [the] Sunnah.'[1] For this purpose, the Constitution envisaged a Commission,[2] but the Commission could not start its functioning before the Constitution was abrogated in 1958.

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[1] Constitution of the Islamic Republic of Pakistan 1956, art. 198.

[2] Ibid.

The Constitution of 1962 reiterated the promise of Islamizing the laws[3] and established the 'Advisory Council of Islamic Ideology' for this purpose.[4] The Constitution of 1973 retained this scheme of the things but renamed the Council as the Council of Islamic Ideology.[5] It also fixed the time period of seven years for the Council to prepare the final report about the Islamicity of the existing Pakistani laws.[6] The Council was also to prepare interim reports annually till the preparation of the final report.[7] However, the Council started playing an active role only after the 1977 coup when the Martial Law regime re-constituted the Council so that it would help the regime in pursuing its agenda of Islamization of laws and economy. Since then, the Council has been preparing annual reports, but these reports have been kept 'confidential' and are only submitted to the concerned officials and departments.

Perhaps for the first time the Council deviated from this norm of confidentiality in 2006, when it first uploaded on its website its Interim Report and then the Final Report on reforms in the *hudud*[8] laws. In this Report, the Council gave some details about its methodology for deriving and extending the rules of Islamic law. Some significant aspects of this methodology are examined in this paper.

The Council of Islamic Ideology and Issues of Legal Theory

The Council has been formed for the purpose of examining the existing laws for repugnancy with the 'injunctions of Islam as laid down in the Holy Quran and [the] Sunnah.' The question is: how does the Council perform this function? Moreover, did the Council develop a legal theory of its own? In other words, has the Council identified the 'sources' of law which it consults

[3] Constitution of the Islamic Republic of Pakistan 1962, art. 198.
[4] Ibid, art. 199-207.
[5] Constitution of the Islamic Republic of Pakistan 1973, art. 228. The Council prepares annual reports of its recommendations and places them before the Parliament which seldom gives any importance to these reports. In 2006, the Council first prepared an interim report before the Parliament passed the Protection of Women (Criminal Laws Amendment) Act and that report bears the names of Muhammad Khalid Masud and Inam-ur-Rahman. Later, after the said Act was passed, it prepared its Final Report which now only bears the name of Muhammad Khalid Masud. It is available on the website of the Council: www.cii.gov.pk/publications/h.report.pdf (last visited: 17 August 2014). All references in this paper are from this Final Report.
[6] Constitution of the Islamic Republic of Pakistan 1973, art. 230(4).
[7] Ibid.
[8] As per the generally accepted norms of transliteration, the word 'hudood' should be properly transliterated as '*hudud*'. Hence, the present paper generally follows the norms of transliteration, except where other sources have been quoted which use the spelling 'hudood', such as the 'Hudood Ordinances' or the CII Report.

for deriving a rule of Islamic law? Has it determined the order of priority of these sources and their mutual relationship? Has it developed some 'principles of interpretation'? These are some of the significant questions for any legal theory as far as Islamic law is concerned. This section examines these questions.

Defining the 'Injunctions of Islam'

First of all, it remains to be settled what exactly is meant by the term 'injunctions of Islam'. The Constitution does not define this phrase and no superior court has ever considered defining this term. The Council, while commenting in its Annual Report of 1986 on the 'Shari'at Bill' passed by the Senate, defined *shari'at* as: 'S*hari'at* means the injunctions of Islam as laid down in the Holy Quran and Sunnah'.[9] Still, the Report does not offer any definition of the 'injunctions of Islam'. It, however, adds an explanation to the definition of '*shari'at*':

The following sources may be referred to for the exposition of the injunctions of Islam*:*

a) The Sunnah of the Rightly Guided Caliphs;
b) The Acts of the Companions of the Prophet;
c) The consensus of Muslim; and
d) The expositions and opinions of the jurists.[10]

Another question to be considered is whether the Council is bound by its own previous decisions? In other words, does the Council consider its previous reports as legally binding precedents? The answer to this question is surely in the negative. This is supported by the fact that Council has many a times changed its recommendations on the same issue. For instance, in 2006 it prepared a report for amending or repealing the Hodood Ordinances, even though the draft of these Ordinances was prepared by the Council itself in 1978. Such being the case, it becomes all the more essential that a definition

[9] *Annual Report, 1986-87* (Islamabad: The Council of Islamic Ideology, August 1991) 46.

[10] Ibid. It is worth noting that almost the same definition and explanation has been reproduced in the Enforcement of the Shariat Act, 1991. Thus, explanation to Section 2 of the Enforcement of the Shariat (Act X of 1991) Act 1991, says: 'While interpreting and explaining the Shari'ah the recognized principles of interpretation and explanation of the Holy Qur'an and Sunnah shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration'. Significantly, the same Act was re-legislated by the Provincial Assembly of NWFP [now KP] in 2003 when the alliance of the religious parties Muttahida Majlis-e-Amal (MMA) was in power.

for the term 'Injunctions of Islam' be put forward. It is suggested here that the standard definition of the *hukm shar'i*[11] given by the jurists may be used for this purpose.

Ambiguity on the meaning of the 'injunctions of Islam' has resulted in the Council's (as well as the Courts') arguing directly from the Qur'an and the Sunnah and trying to reinvent the wheel.[12] For instance, in *Hazoor Bakhsh v The State*,[13] the Federal Shariat Court embarked on demolishing the whole edifice of criminal law as developed by the jurists and tried to lay its foundations on an altogether different basis. This attempt has also resulted in creating laws that face serious problems of analytical inconsistency. Thus, in *Rashida Patel v The Federation of Pakistan*,[14] even though the Federal Shariat Court declared that *zina bil jabr* (rape) was a form of *hirabah*, not *zina*, yet it did not settle the question of punishment for this offence. It is for this reason that Ghazali asserts that the first source of law which the *mujtahid* should consult is *ijma'* because if the issue is already settled by consensus of the jurists there is no room for re-opening it.[15]

Salient Features of the Council's 'Legal Theory'

A student of Islamic legal theory will be eager to find answers to some significaqnt questions, such as: what stance has the Council taken on issues such as the interrelation of the Qur'an and the *Sunnah*,[16] the authenticity and

[11] *Hukm:* Rule; injunction; prescription. The word *hukm* has a wider meaning than that implied by most of the words of English deemed its equivalent. Technically, it means a communication from Allah, the Exalted, related to the acts of the subjects through a demand or option, or through a declaration. According to this definition, the word *hukm*includes obligation-creating laws, declaratory laws, and even those that may be based upon positive decrees or on custom. Thus, the meaning is much wider than the "command of the sovereign" contemplated by John Austin for positive law. See: Sadr al- Shari'ah 'Ubaydullah b. Mas'ud al-Bukhari, *al-Tawdih fi Hall Ghawamid al-Tanqih* (Dar al-Kutub al-'Ilmiyyah, n.d.) 2:122; Abu Hafs Sami b. al-'Arabi (ed), *Irshad al-Fuhul ila Tahqiq al-Haqq min 'Ilm al-Usul* (Dar al-Fadilah, 1421/2000) 1:71-77.

[12] An example of this in the context of family law is the creation of the device of "judicial *khula*" which is neither divorce nor dissolution in the sense the two terms are used by the Muslim jurists. For a detailed criticism on this device see: Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law* (Advanced Legal Studies Institute, 2012) 94-97.

[13] *Hazoor Bakhsh v The State* PLD 1983 FSC 1.

[14] *Rashida Patel v The Federation of Pakistan* PLD 1989 FSC 95.

[15] Abu Hamid Muhammad b. Muhammad al-Ghazali, *al-Mustasfa min 'Ilm al-Usul* (Dar Ihya' al-Turath al-'Arabi, n. d.) 2:205.

[16] For instance, does the *Sunnah* abrogate the Qur'an or not? Can a *khabar wahid* (individual narration about a saying, act or approval of the Prophet) restrict the implications of the general word of the Qur'an? What is meant by abrogation and restriction?

use of *khabar wahid*, the meaning and scope of *naskh* (abrogation), restricting a general word (*takhsis al-'amm*),[17] or construing the absolute word as conditional one (*taqyid al-mutlaq*)[18] and so forth? If the Council wants to avoid the problem of analytical inconsistency, which mars many of its recommendations in almost every one of its reports, the most crucial task for it, after it has decided on a definition of the injunctions of Islam, is to formulate principles both for the extraction of these injunctions from the Qur'an and the *Sunnah*, and for deciding how the conflicts between these injunctions and positive laws are to be resolved.

The Council, in its interim report, has elaborated some features of its legal theory in the following words:

> S*hari'ah* foundations means the Qur'an and *Sunnah*, which are the sources for finding the laws. The methods of *qiyas* and *ijtihad* are employed to find a law in the light of these sources when a law is not given in the Qur'an and *Sunnah*. The legal position of a law deduced on the basis of *qiyas* and *ijtihad* varies, depending on whether they agree or differ on the validity of a deduced law. The weakness and the strength of this validity are categorized accordingly into *fard, wajib* and *Sunnah*.[19]

This exposition has several serious problems. First of all, the use of *ijtihad* is not limited to cases where the rule is not found in the texts of the Qur'an and the Sunnah; *ijtihad* is also used for interpreting and elaborating the rules found in the texts.[20] Secondly, how can one have recourse to *ijtihad* or *qiyas* in case the rule is not found in the Qur'an and the Sunnah, when the Council has already declared that only these two constitute the sources for Islamic laws? The meaning of *ijtihad* as the use of 'personal opinion' by the

[17] The Hanafi theory requires that the restricting evidence must be definitive like the general word, while the Shafi`i theory deems the general word probable and thus allow its restriction through a probable evidence. See for details: Abu 'l-Wafa' al-Afghani (ed), *Tamhid al-Fusul fi 'l-Usul* (hereinafter, *Usul al-Sarakhsi*) (Dar al-Kutub al-'Ilmiyyah, 1414/1993), 1:132-151.

[18] As the absolute (*mutlaq*) and the restricted (*muqayyad*) both are forms of the specific (*khass*) evidence, the Hanafi theory disallows construing the absolute as restricted, unless definitely proved so. As opposed to this, the Shafi'i theory presumes that the absolute shall be construed in the light of the restricted, unless proved otherwise. See for the arguments of both sides: *Usul al-Sarakhsi*, 1:266-270 and Ghazali, *al-Mustasfa*, 2:70-72.

[19] CII, *Final Report on Reforms in the Hudood Laws*, 14.

[20] In the parlance of Islamic law, this is called *bayan*. See *Usul al-Sarkhasi*, 2:26-53; Ghazali, *al-Mustasfa*, 1:238-244.

mujtahid would not be acceptable, for it would amount to giving him the status of the lawgiver.[21] Thirdly, the strength or weakness of a rule derived on the basis of *qiyas* does not depend on the agreement or disagreement of the *mujtahidin* but on the strength of the two premises on which a *qiyas* is based: the first premise pertains to the *ratio* or active cause (*'illah*) of the rule and the second one is concerned whether the same *ratio* is found in the new case. Hence, if the two premises are definitive (*qat'i*), the *qiyas* will also be definitive; and if any one of these premises is probable (*zanni*), the *qiyas* will also be probable.[22] Finally, the categorization of the obligation-creating rules (*hukm taklifi*) into *fard, wajib or Sunnah,* is not brought about by the weakness or strength of the *qiyas* or *ijtihad* which is used to derive the rule, but on the definitive or probable nature of the authority (*dalil*) and the binding or non-binding nature of the command. Moreover, this categorization is not limited to laws derived by *qiyas* and *ijtihad* only, but applies to laws clearly given in the texts as well.[23]

Conflation or Choosing Principles from Various Schools

Following the general trend of the modern Muslim scholars, the Council has generally accepted the proposition of 'common legal theory', it has generally preferred to pick and choose from the various schools those principles which suited the call for 'reason' and 'discretion'. Here, four important principles of the legal theory of the Council – if it can be called a legal theory – are analyzed, namely, *al-ibahah al-asliyyah* (the presumption of permissibility), *qiyas* (analogy), *istihsan* (generally equated with 'equity') and *maslahah* (generally translated as 'public interest).[24] The purpose is to show that these principles are of little help in creating room for discretion. Hence, these critics are compelled to abandon even these principles and instead rely on naturalist argument of the use of discretion based on reason.

The Presumption of Permissibility

[21] On Lawgiver (*al-Shari'*), see: Shawkani, *Irshad al-Fuhul*, 1:78-83. It was to avoid this error that the jurists decided, as a principle, that for exercising analogy, an exact match must be found in the texts called the *maqis 'alayh* (that with which the analogy is being made). Similarly, it has been decided, as a principle, that for all the different modes of *ijtihad*, the basis must also be present in the Qur'an and the *Sunnah*. Ghazali, *al-Mustasfa*, 2:149.

[22] Shawkani, *Irshad al-Fuhul*,1:71-77.

[23] See for more detailed criticism: Muhammad Mushtaq Ahmad: *Hudud Qawanin: Islami Nazriyati Konsil ki Uburi Report ka Tanqidi Ja'izah* (Midrar al-'Ulum, 2006) 12-39.

[24] See the discussion on on 'source material' used by the Council: *Final Report on Reforms in the Hudood Laws*, 14.

The general practice of the courts as well as of the Council, as candidly shown in its Report, has been to treat everything permissible if no explicit text of the Qur'an or the *Sunnah* is found prohibiting it.[25] The fact remains that something may not be against the explicit text, yet it may be conflicting with the general principles and the purposes (*maqasid*) of Islamic law. The presumption of permissibility – expressed by the jurists as 'the original rule for all things is permissibility'[26] – does not have enough strength for becoming the basis of new legislation, or for changing the structure of the established norms of Islamic law.

First, this presumption is not widely accepted by the jurists. The celebrated Shafi'i jurist Jalal al-Din al-Suyuti asserts that the Hanafis apply the presumption of prohibition, instead of permissibility.[27] The reason for this is that the Hanafis resort to the general principles of law when they come across something about which the texts are apparently silent. Still when they do mention this presumption as a hypothetical possibility, they consider it as having been derived from the following verse: 'It is He Who hath created for you all things that are on earth'.[28]

Second, the large number of exceptions to this presumption renders it impossible to consider it as a general principle. Thus, the jurists unanimously agree that the presumption about rituals is of prohibition.[29] The same is true of forming sexual relationship with a woman,[30] taking of a human life[31] and eating the meat of a slaughtered animal.[32] Similarly, many other prohibitions have greatly limited the scope of this presumption of permissibility.

Third, one may argue further that since Adam, peace be upon him, in addition to being the Father of all mankind, was a prophet, human beings have had recourse to revelation ever since the very beginning. It follows that

[25] The Federal Shariat Court in *Ansar Burney v The Government of Pakistan* PLD 1983 FSC 73, declared on the basis of the presumption of permissibility that a woman could become a judge in all cases. The Court did not even bother to consider the question that eligibility for a post requires positive evidence from the law and it cannot be decided on the absence of negative evidence.

[26] Jalal al-din al-Suyuti, *al-Ashbah wa 'l-Naza'ir* (Dar Ihya' al-Kutb al-'Arabiyyah, 1959) 66.

[27] Ibid.

[28] Qur'an 2:29.

[29] Suyuti, *al-Ashbah wa 'l-Naza'ir*, 66.

[30] Ibid.

[31] Muhammad b. Abi Bakr Ibn Qayyim Al-Jawziyah, *Ahkam Ahl al-Dhimmah* (Dar al-Kutub, al-'Ilmiyyah, 2002) 1:25.

[32] Ibid.

some things must necessarily have been prohibited from the very start.[33] Hence, the presumption that in the absence of any text everything is permissible is not tenable.

If one still insists on accepting this presumption as a general principle, the question remains as to whether it is a good tool for Islamizing Pakistani law?[34]

Qiyas (Analogy)

Critiques on the *hudud* laws have been accompanied by suggestions coming forward from some 'experts' of the need for *qiyas* and personal opinion. Some commentators, for example, have declared that the *nisab*[35] for the *hadd* of *sariqah* (theft) is very meager and that the amount should be raised.[36] Then there are those who have tried to fit in rules from other areas of law into the *hudud*.[37] Many such examples are found even in the *CII Final Report*.[38] Hence, it may not be out of place to discuss the position of the Muslim jurists on the use of analogy in cases of *hudud*.

As a starting point, the Hanafi jurists do not apply *qiyas* to each and every legal issue. For instance, the number of *sijdah* (kneeling prostration) in every unit (*rak'ah*) of prayer being two, this fact cannot be subjected to *qiyas* so that the number of *ruku'* (standing prostration) should be made two as well. Like these rituals, the *hudud* concern what are called the rights of God (*huquq Allah*)[39] which are not to be subjected to personal opinion or *qiyas*.

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[33] *Usul al-Sarakhsi*, 2:20.

[34] Some 'legal experts' are of the view that only 5% of the laws in Pakistan need to be Islamized and there is nothing un-Islamic about the rest. This is, again, equating non-repugnancy with conformity. Is that really the case? See for a criticism on this view: Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamic Research Institute, 1994), 293-30; *idem*, *Islamic Jurisprudence* (Islamic Research Institute, 2000) 239-240, 325-353.

[35] *Nisab*: 'The minimum scale provided for an area of the law'. For *zakah* and theft, for example, it is a minimum amount of wealth that imposes liability.

[36] Muhammad Tufail Hashmi, *Islami Ta'limat ki Roshni men Hudud Ordinance ka Ik Ja'izah* (Peshawar: National Research and Development Foundation, 2005).

[37] Ibid, 111-115.

[38] CII, *Final Report on Reforms in the Hudood Laws*, 14.

[39] The concept of the Right of God signifies the immutable sphere of Islamic law. (See for details: *Usul al-Sarakhsi*, 2:289-90.) At times, the concept is also used for 'God-given' rights to individuals because they are also 'inalienable'. (Nyazee, *Theories of Islamic Law*, 115-116. See for more details: Imran Ahsan Khan Nyazee, 'Islamic Law and Human Rights' (2003) *Islamabad Law Review* 13-63.) However, in the context of *hudud* and *ta'zir*, this concept primarily signifies that no human authority can suspend this punishment. There are

Thus, the Companions of the Prophet (peace be on him) disagreed among themselves regarding the punishment for sodomy. Abu Hanifah inferred from this difference of opinion that the Companions did not hold sodomy as *zina* for if they regarded it as *zina*, they would not have differed concerning its punishment. Sarakhsi explains the principle of Abu Hanifah in the following manner:

> The Companions agreed that this act [sodomy] is not *zina* as they were cognizant of the text for *zina* and yet they disagreed as to what punishment this act made the perpetrator liable to. It is established that they would not practice *ijtihad* in the presence of a text. This proves their agreement on sodomy not being *zina* and inapplicability of the *hadd* of *zina* to it. Hence, this act is a crime which does not have a prescribed punishment in the *shari'ah*. However, it is certain that it does call for punishment. The question as to what should be the punishment falls within the ambit of *siyasah* which is to be left to the discretion of the ruler. If he holds an opinion regarding this matter, he is entitled by the *shari'ah* to implement it.[40]

Similarly, punishments cannot be established by *qiyas* alone; there has to be a text, as creating an offence on the basis of analogy in the absence of a text amounts to *ex post facto* creation of the offence.[41] Neither may rules be gleaned from the other areas of law and superimposed on the *hudud* using *qiyas*. Sarakhsi has given some important principles here:

> Punishment cannot be established by *qiyas*; there has to be a text.[42]

> There is no place for *qiyas* in determining the amounts in *hudud.* Nothing can be added by *qiyas* to [what is given in] the text.[43]

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other important legal consequences related to this concept. See for details: Nyazee, *General Principles of Criminal Law: Islamic and Western* (Advanced Legal Studies Institute, 1998).

[40] Abu Bakr Muhammad b. Abi Sahl al-Sarkhasi, *al-Mabsut*, ed. Hasan Isma'il al-Shafi'i (Dar al-Kutub al-'Ilmiyyah, 1421/2001), 9:91.

[41] This is a necessary corollary of 'the principle of legality' – *nulla peona sine lege* (no punishment without law). See for a detailed discussion: Nyazee, *General Principles of Criminal Law*, 75-83.

[42] Sarakhsi, *al-Mabsut*, 24:165.

[43] Ibid, 16:132.

> Obligatory amounts cannot be determined by personal opinion. As there is no text available to us [here], the best course to follow is to relegate the matter to the *ijtihad* of the ruler.[44]

Similarly, the *nisab* also cannot be determined by personal opinion or *qiyas* but has to be based on the text. However, where no text is present, the ruler may determine it.[45] In the same way, no condition may be added to or retracted from the *hudud* on the strength of one's personal opinion.

Istihsan (Juristic Preference)

The term *Istihsan* in Islamic law should not be confused with 'equity' of English jurisprudence.[46] Historically, English 'common law' was based on traditional customs and, as it was not made to change in order to meet the demands of newer ages, it stagnated and was unable to satisfy the public demand for justice. People increasingly felt that the law was inadequate for their needs.[47] People began petitioning the king. The king, being the 'Fountain of Justice,' would redress the grievance using his own 'discretionary sense of justice.' As more people turned to the king for justice, he delegated the authority of the use of discretion to the Lord Chancellor who would administer justice on the king's behalf. As the burden mounted still further, special courts had to be constituted in different regions of the realm. These came to be known as 'Chancery Courts', and later 'Equity Courts'. The continual practices of these courts led to the development of their own special principles which were referred to as 'principles of equity'. These included many novel principles and ways of doing things. The important fact to keep in mind here is that the reason for the formation of these courts was the periodic stagnation of common law.

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[44] Ibid, 10:60.

[45] Ibid, 2:189.

[46] See, for instance: Muhammad Hashim Kamali, *Equity and Fairness in Islam* (Islamic Texts Society, 2005). As meticulous a research scholar as the worthy Mahmood Ahmad Ghazi has considered *Istihsan* to be synonymous to equity, even though he mentions differences between the two concepts. *Muhadarat-e-Fiqh* (Lahore: al-Faisal Publishers, 2005) 102. The Council also preferred to use the phrase 'the laws of justice and fairness' for this purpose. CII, *Final Report on Reforms in the Hudood Laws*, 161.

[47] In many cases they would claim a right but the law would not recognize it and where it did recognize it, no adequate remedy was available to avail the right. Sometimes, where the law did furnish some remedy, it would not be to the satisfaction of the claimants. The law had simply ceased to be in touch with the times and made it appear increasingly unjust to the people. See for details: Graham Virgo, *Principles of Equity and Trusts* (Oxford University Press, 2012).

Islamic law, on the other hand, never faced such problems. Equating *qiyas* with common law and *Istihsan* with equity implies that the jurists deviated from the established rule of Islamic law, thinking it was too stringent, and instead came up with a 'better', more just rule, using the principles of natural justice; and that this process was called *Istihsan* because it was an improvement upon the original rule. If this is true, then Shafi'i jurists were right to condemn it and assert: 'Whoever practices *Istihsan* assumes the role of the Lawgiver'.[48]

The Hanafis, who accept *Istihsan* as a valid means of extracting legal rules, consider it a mechanism for ensuring harmony and analytical consistency within the law. If something appears prohibited in the light of the general principles of law, but has been explicitly permitted by one of the texts, the Hanafis take the position that it is permissible as an exception to the general principle. They use the formula: 'prohibited under *qiyas* but permissible under *istihsan*' for this purpose. Exceptions to the general principles are made on the basis of the text, consensus, necessity or some other 'concealed principle' (*qiyas khafiyy*). Sarkhasi is worth quoting here:

> This [*istihsan*] is the evidence coming in conflict with that apparent principle (*qiyas zahiri*) which comes into view without one's having looked deep into the matter. Upon a closer inspection of the rule and the resembling principles, it becomes clear that the evidence that is conflicting with this apparent principle is stronger and it is obligatory to follow it. The one choosing the stronger of the two evidences cannot be said to be following his own personal caprices.[49]

Another important point made by Sarakhsi is that when the jurist uses *istihsan* and prefers the stronger rule, he *abandons* the weaker one and as such it is not permissible for him or his followers to follow the latter.[50] He goes on to explain that when *Istihsan* is carried out on the basis of a concealed principle (*qiyas khafiyy*), the established rule does not amount to an exception but becomes a general principle in itself.[51]

[48] Ghazali, *al-Mustasfa*, 1:213.
[49] *Usul al Sarkhasi*, 2:200-202.
[50] Ibid.
[51] Ibid, 206.

Maslahah (Protecting the Objectives of the Law)

Contemporary scholars, including those who prepared the draft of the CII Report,[52] have generally equated *maslahah* with the principle of 'utility' expounded by Jeremy Bentham (d. 1832),[53] apparently because literally *maslahah* means 'acquiring benefit or repelling harm (*jalb al-manfa'ah aw daf' al-madarrah*)'.[54] The technical meaning of *maslahah* by virtue of which it becomes an accepted principle of Islamic law has been explained by Ghazali in the following words:

> As for *maslahah*, it is essentially an expression for acquiring benefit or repelling harm, but that is not what we mean by it because acquiring benefit or repelling harm represents human goals, that is, the welfare of human beings through the attainment of these goals. What we mean by *maslahah*, however, is *the preservation of the objective of the law* (*al-muhafazah 'ala maqsud al-shar'*).[55]

Although Ghazali is considered the foremost expositor of the principle of *maslahah*, yet it may surprise many that he places *maslahah* in the category of *al-usul al-mawhumah,* that is, 'uncertain principles'. He gives reasons for doing this:

> This is among the uncertain principles and whoever considers it as a fifth source is mistaken. This is because we linked *maslahah* to the objectives of the law (*maqasid al-shari'ah*), which are known by the Book [Qur'an], the *Sunnah* and consensus. Thus, a *maslahah* which cannot be linked to an objective derived from the Qur'an, the Sunnah or consensus, and is of those alien interests (*al-masalih al-gharibah*) which are not compatible with the propositions of the law (*tasarrufat al-shar'*), is void and abominable. Whoever uses such interests assumes the position of the Lawmaker, just as whoever presumes a rule on the basis of his personal

[52] See, for instance, *Final Report on Reforms in the Hudood Laws*, 147.
[53] Bentham's *Of Laws in General* greatly influenced his student John Austin and other legal philosophers. See for a detailed critical analysis of his views and particularly the way he uses the principle of utility in criminal law: H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press, 1982).
[54] Ghazali, *al-Mustasfa*, 1:216.
[55] Ibid, 1:216-217.

> preference (*istihsan*)[56] assumes the position of the Lawmaker.[57]

Thus, from the perspective of compatibility with the objectives of Islamic law, *maslahah* may be divided into three categories:[58] the one proved compatible (*maslahah mu'tabarah*), the one proved incompatible (*maslahah mulghah*),[59] and the one which is neither proved compatible nor incompatible (*maslahah gharibah*).[60]

The first of these, the 'compatible interests', are acknowledged by Islamic law either at the level of a specie (*naw'*) or at the level of a genus (*jins*).[61] Ghazali explains that *qiyas* is nothing but extending the law to a new case on the basis of an interest acknowledged at the level of specie.[62] He further explains that the law can be extended to some new cases on the basis of an interest acknowledged at the level of genus, calling it *maslahah mursalah*, provided three conditions are fulfilled:

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[56] Shafi'i rejected the principle of *Istihsan* considering it to be a way of following personal whims. As already explained above, the Hanafi principle of *istihsan* is absolutely different from this. Ghazali also acknowledges that the explanation of *istihsan* by the great Hanafi jurist Karkhi is acceptable to him asserting that if this is what is meant by *istihsan* he could only object to its title! (*al-Mustasfa*, 1:215-16.) Sarakhsi explains that even the title *istihsan* is not objectionable. (*Usul al-Sarakhsi*, 2:199-200)

[57] Ghazali, *al-Mustasfa*, 1:222.

[58] Ibid, 1:216.

[59] The example given by Ghazali is that of the *fatwa* (legal verdict) given by a jurist to a rich person who had intentionally broken his fast and had sought the verdict about expiation. The jurist had told him that he was supposed to keep fast for sixty consecutive days, although the text of the tradition about expiation puts it on the third number in the priority list: manumission of a slave; feeding sixty needy people; fasting for sixty days. The argument forwarded by this jurist was that the purpose of expiation was to deter the lawbreaker from breaking it again and as the person was rich the first two forms of expiation could not achieve the purpose! Ghazali and other jurists deem this line of reasoning flawed and consider this presumed "*Maslahah*" as *mulghah* because it goes against the text (Ibid.). In other words, the *Maslahah* determined by God cannot be defeated by the *Maslahah* presumed by human beings.

[60] Ghazali says that the example of this kind of *Maslahah* is difficult to find. Hence, he came up with the hypothetical example of a situation of war in which *all* Muslims were facing a definite death if they would not kill the *few* Muslims whom the invading enemy had taken as shields (Ibid, 1:218). It must be noted here that the choice is not between saving a few Muslims on the one hand or more Muslims on the other; rather, it is between saving a few Muslims or saving *all*. Thus, the choice was between *juz'* (part) and *kull* (whole), not between *qalil* (few) and *kathir* (more). That is why Ghazali goes into great details in order to find out the *Maslahah* upheld by the Lawgiver in this situation (Ibid.).

[61] Ghazali, *al-Mustasfa*, 1:222.

[62] Ibid.

That the new principle does not conflict with any text (*nass*) or modifies its implications;

> That the new principle does not conflict with the general propositions of the law, i.e., the existing principles and rules of the system; and
> That the new principle is not alien (*gharib*) to the system,[63] i.e., it finds a basis in the system.[64]

An alien principle cannot be accommodated in the legal system, unless it fulfills three further conditions:[65]

> It is related to any of the five primary objectives of the law (*darurat*), i.e., it must aim at preserving and protecting religion, life, progeny, intellect or wealth;
> It is definitive (*qat'i*), i.e., it must certainly lead to the preservation and protection of the above-mentioned objectives; and
> It is absolute (*kulli*) i.e. it must concern the *whole* of the Muslim *ummah* and not be limited to a certain group or individual.

Hence, it is impossible to pick at will concepts and principles from other legal systems and 'transplant' them in the Islamic legal system. The compatibility test is necessary.

These conditions clearly show the limits of personal opinion and discretion in Islamic law. This issue also leads us to examine in a little detail the approach of those advocating reason untied to legal text, a pure form of naturalism manifest in the work of many of the contemporary Muslim scholars, including those who drafted the Report of the Council.

The Naturalist Argument

The analysis in the previous Section establishes that modern Muslim scholars, including the drafters of the Council's Report, have not followed

[63] Ibid, 1:217.
[64] Ibid, 1:218.
[65] Ibid, 1:222. Ghazali then discusses various hypothetical examples to explain these three conditions. In each of these examples one of the conditions is missing. These examples are not only illustrative of the genius of that great jurist-cum-philosopher but also of the simplistic approach which many modern scholars have adopted towards this issue.

the legal theory of a particular school, nor have they come up with a coherent theory of their own. They have, instead, chosen those principles from various schools which they consider helpful in giving more room to discretion. This section explains how this approach, directed at Islamic criminal law, draws from the 'naturalist' argument. It calls for considering 'reason and nature' (*'aql-o-fitrat*) as the basis for *ijtihad* and, thus, wants to get rid of the stringent conditions laid down by the jurists.[66] If accepted, this approach will demolish the whole edifice of the legal system developed by centuries of legal scholarship and will leave everything to the unbridled discretion of the modern 'sovereign' state.

Commonsense, Nature and *Ijtihad*

Those calling for reforms in Islamic law generally, and critics of Islamic criminal law particularly, come up with the 'naturalist' argument when they talk of *ijtihad*.[67] The call for the use of 'commonsense', 'reason' and 'natural instincts' for discovering the rules of Islamic law or for extending the law to the new cases is, in fact, based on the concept of natural law. Javed Ahmad Ghamidi (b. 1951), an exponent of this approach who headed the Council's legal committee when it deliberated on reforming the *hudud* laws, [68] writes:

> The *shari'ah* concerns itself only where reason has erred or is liable to err; such as the few laws relating to economics, politics, society and etiquettes. There are only five crimes of *hudud* and *ta'zir* for which a fixed penalty has been determined. Everything else has been left to human reason.[69]

Defining the scope of *ijtihad*, Ghamidi says: 'This [*ijtihad*] means that where the Qur'an and the *Sunnah* are silent, *reason and nature* (*'aql-o-fitrat*) should be consulted. This is what is really meant by *ijtihad*'.[70] Amin Ahsan

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[66] See for the 'themes' of the 'International Consultative Workshop' conducted by the Council for the purpose of suggesting reforms in the *hudud* laws: CII, *Final Report on Reforms in the Hudood Laws*, 125-26. One of the themes of the Workshop was: 'public interest, public reason'. Ibid, 126.

[67] Effects of this approach are found in the CII Report too. The concept of 'natural law' is summarized by H. L. A. Hart (d. 1992), well-known legal positivist, in these words: "there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid." *The Concept of Law* (Clarendon Press, 1961) 186.

[68] CII, *Final Report on Reforms in the Hudood Laws*, 160.

[69] Javed Ahmad Ghamidi, Ijtihad Ki Zarurat awr Ahmiyyat (August 2000) *Monthly 'Ishraq' Lahore* 44-45.

[70] Ibid, 44 (Emphasis added).

Islahi (d 1997), teacher of Ghamidi, better known for his peculiar thesis of coherence in the Qur'an (*nazm-i-Qur'an*),[71] explaining his position that 'the most obvious realities of nature' (*badihiyyat-i-fitrat*) are part of the Divine law, says:

> [The verse of the Qur'an] 'You may approach them [your wives] in the manner as Allah commanded you' (Al-Quran 2:222), makes it clear that all the most obvious realities of nature fall within the commands of Allah and form part of the *shari'ah*, even though these have not been expressly stated. For example, we have not been ordered to take our food through our mouths and neither through our noses or eyes, but this is something that has been decreed by Allah as He has fashioned us in such a way. One going against this [not expressly stated] ordinance, goes against Allah's clear, or rather most manifest, law and will be liable to His punishment. We have called it as 'most manifest' because Allah has *left such matters solely to our nature*, which is needless of any guidance respecting them.[72]

This is exactly how the 'religious' naturalists approach this issue.[73]

Religious Naturalists and the 'Neo-Mu'tazilah'

John Austin (d. 1859), the famous English jurist of the nineteenth century, sums up the thesis of the proponents of this view:

> Of the divine laws, or the laws of God, some are revealed or proclaimed, and others are unrevealed. Such of the laws of God as are unrevealed are not infrequently denoted by following names and phrases: 'the law of nature' 'Natural Law'; 'the law manifested to man by the light of nature or reason'… Paley and other divines have proved it beyond a

[71] See for details about this theory: Mustansir Mir, *The Coherence in the Qur'an: A Study of Islahi's Concept of Nazm in Tadabbur-i-Qur'an* (The American Trust Publications, 1987). See for an overview of the life and work of Islahi: Akhtar Husayn `Azmi, *Mawlana Amin Ahsan Islahi: Hayat-o-Khidmat* (Nashriyyat, 2009).

[72] Amin Ahsan Islahi, *Tadabbur-i-Qur'an* (Faran Foundation, 2001), 1:526 (Emphasis added).

[73] For detailed analysis of the views of the famous Christian theologian Thomas Aquinas (d. 1274) about natural law being part of the Divine law, see: N. Kretzmann and E. Stump (eds.), *The Cambridge Companion to Aquinas* (Cambridge University Press, 1993).

> doubt, that it was not the purpose of revelation to disclose the whole of these duties. Some we could not know, without the help of revelation; and these the revealed law has stated distinctly and precisely. The rest we may know, if we will, by the light of nature and reason; and these the revealed law supposes or assumes. It passes them over in silence, or with a brief and incidental notice.[74]

The Mu'tazilah in the early Islamic history approached Islamic law in a similar way, asserting that goodness or badness is an inherent quality of acts which can be discovered by reason.[75] The 'neo-Mu'tazilah', as they should be called, have the same view. Thus, Islahi asserts: 'It would be incorrect to think that difference between the good or evil of a thing is merely an acquired characteristic, and does not have any reasonable, ethical or natural grounds. To consider such is nothing less than sophism'.[76]

The vast majority of Muslim scholars, however, have historically supported the opposing view; that the good or evil of something is not to be determined by reason but through the dictates of the *shari'ah*; as reason is liable to err in recognizing good and evil, it cannot be taken as a standard. [77] Even if it is admitted that reason can identify the goodness or badness of an act, the question remains: how does a declaration of reason in a particular case acquire the status of law? To put it in the *shari'ah* terminology, how does it become a *hukm shar'i*. It is for this reason that jurists explicitly defined the *hukm shar'i* as the address of the Lawgiver.[78]

The same debate is found among Western legal philosophers. The positivists take the view that the 'positive law' is valid and binding irrespective of the moral considerations about its goodness or badness, while the naturalists take the view that an immoral law is no law as it violates the superior natural law.[79] For Oliver Wendell Holmes, the famous judge of the US Supreme Court, arguing on the basis of the dictates of nature is nothing but 'ominous brooding in the sky'.[80]

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[74] John Austin, *The Province of Jurisprudence Determined*, ed. Wilfrid E. Rumble (Cambridge University Press, 1995) 38-39.
[75] Ghazali, *al-Mustasfa*, 1:59-66; Shawkani, *Irshad al-Fahul*, 1:78-83.
[76] Islahi, *Taddabbur-i-Quran*, 3:194.
[77] Ghazali, *al-Mustasfa*, 1:59-66; Shawkani, *Irshad al-Fahul*, 1:78-83.
[78] Shawkani, *Irshad al-Fahul*, 1:71-77.
[79] Sean Coyle, *From Positivism to Idealism: A Study of the Moral Dimensions of Legality* (Ashgate, 2007).
[80] Nyazee, *Islamic Jurisprudence*, 87.

Where the Law is Silent

A question arises here: if the naturalist argument is rejected, how are the gaps in the law to be filled? How is the law extended to *novel* cases? Muslim jurists discuss an interesting aspect of this issue by framing the question: what was the rule for various acts *before* the advent of the revelation? Ghazali asserts that at that stage acts were *legally* neither permissible nor prohibited. This is because permissibility and prohibition both are forms of *hukm shar'i*, which requires the address from the Lawgiver.[81] Hence, the rule, according to Ghazali, was *tawaqquf*, i.e. waiting for revelation. After the advent of revelation, it alone is the standard for determining the goodness or badness of an act.[82] But what is to be done for matters where the *shari'ah* outwardly seems silent? Obviously, *tawaqquf* is no more the option.

Ronald Dworkin (d. 2014), the famous American jurist, calls such issues as *hard cases.* These are cases where the law is apparently silent or where the rule apparently violates an established principle of law.[83] Dworkin has shown, with considerable force, that for hard cases, the judge relies on *the general principles of law* rather than his own discretion.[84] The same is the approach of Hanafi jurists. Nyazee, explaining the position of Hanafi jurists, asserts: 'Once revelation has come, such laws may only be discovered in the light of revelation, because revelation does not pass them over in silence; *it indicates them through general principles*'.[85] For covering new cases, newer principles can be formulated, provided it is done in accordance with the standard procedure for ensuring the compatibility of the new principles with the existing legal norms. This is what the Hanafi methodology is all about.[86]

Conclusions

Critics of Islamic criminal law have generally relied on the naturalist argument presuming that human reason may singly be used as a source for

[81] Ghazali, *al-Mustasfa*, 1:66-67.
[82] Ibid, 67 and 76.
[83] Ronald Dworkin. 'Hard Cases' (1975) *Harvard Law Review* 1057-1109.
[84] The issue has implications for the debate whether the judges make the law or merely discover it. See for a detailed discussion: Muhammad Munir, Are Judges Makers or Discoverers of the Law: Theories of Adjudication and *Stare Decises* with Special Reference to Pakitan 11 (2013) *Annual Journal of the International Islamic University Islamabad* 7-39.
[85] Nyazee, *Islamic Jurisprudence*, 85 (Emphasis added).
[86] See for details about the methodology of Hanafi jurists: Nyazee, *Theories of Islamic Law*, 147-176 and 189-230.

judging the goodness or badness of an act. While this approach may have led to moral criticism of the positive laws in the West, it has certainly caused serious problems for those who believe in the divinity of Islamic law, as it results in a conflict between reason and revelation. Critics have also found it better to take help from some principles of the various schools of Islamic law which in their opinion created room for discretion. They have also been trying to distinguish between '*shari'ah*', which is Divine, and '*fiqh*' which is human effort, and then asserting that 'very few' issues have been touched by revelation, which has left the rest of the issues to reason. Thus marginalizing and undermining the rich legal heritage of fourteen hundred years, these critics have called for what amounts to demolishing the whole legal edifice of Islamic law. Serious students of Islamic law need to elaborate the approach of the jurists who negate the basic presumptions of the 'neo-Mu'tazilah'.